

THE CALIFORNIA DEBT LIMIT ALLOCATION COMMITTEE

January 26, 2011

Consideration of and Approval of Revised Proposed Permanent CDLAC Regulations for Submission to the Office of Administrative Law
(Agenda Item No. 5)

ACTION

Approve staff's recommended revisions to the proposed Permanent CDLAC Regulations for submission to the Office of Administrative Law (OAL) for a Certification of Compliance with the rulemaking process (Attachment A – revised pages only). Upon certification, the Committee's Regulations will be made permanent.

BACKGROUND

As a part of the rulemaking process to implement permanent regulations, on November 17, 2010, the Committee approved draft Permanent Regulations to be published in the public register for a forty-five (45) day public comment period. The approved draft included refinements derived in part from a 30 day pre-notice process and recommendations made by staff to ensure that all the minimum threshold requirements and evaluation criteria relating to the review of applications were consistent and clear.

On November 23, 2010, the approved draft Permanent Regulations were delivered to OAL for publication and the start of the forty-five (45) day period on December 3, 2010. During this period, the Committee received two written comments: one from the statewide issuer, the California Statewide Communities Development Authority (CSCDA), the other from Joyce Dillard.

The comments from CSCDA describe five (5) concerns related to Section 5066; specifically the below-investment grade and unrated issuance prohibition imposed on issuers in the event they experience three or more full bond defaults within a five year period. In summary, CSCDA is concerned that 1) bond defaults are unforeseen and outside of the control of an issuer; 2) the potentially-imposed limitation on further below-investment grade and unrated issuances will not prevent further bond defaults; and 3) a fixed default threshold is unfair to issuers with large portfolios and imposition of the limitation could negatively impact the reputation of an issuer. These comments were very similar to their comments and testimony proffered during the 30 day pre-notice hearing and the November 17, 2010 CDLAC Meeting. At that time, CDLAC staff did make some changes to the initial draft Permanent Regulations to address some of these concerns, and thoroughly discussed with CSCDA representatives the reasons for not including the other changes they sought. Given this, no additional changes have been incorporated into this proposed set of revisions.

The comments received from Joyce Dillard focus on public benefits; specifically the definition, enforcement, and potential recourses available to the Committee if non-compliance occurs. The Regulations address the matter of public benefits by way of the minimum thresholds and/or points required in each of the program pools. The provisions for enforcement of a project's declared public benefits and recourse are addressed in the Regulations, by the certifications required from the issuer and sponsor in the applications, and in the Committee's resolution awarding a portion of the volume cap. In addition, the resolution's requirements are incorporated into all documents related to the bonds. This includes the regulatory agreement which details the Project's compliance requirements as they relate to the Internal Revenue Code and the use of the tax exempt bond allocation. Given this, no additional changes have been incorporated into the proposed set of revisions.

Since the publication, staff has made some additional modifications to the initial draft Permanent Regulations. One modification relating to public disclosures was based on reconsideration of an earlier comment received during the 30 day pre-notice period, while the remaining were prompted by recent changes imposed by the IRS.

As required by OAL, the proposed revisions must now be noticed for a 15-day public comment period prior to submitting the final proposed Permanent Regulations package to OAL for approval.

DISCUSSION

As noted above, the revisions under consideration were brought about by recent changes set forth in IRS Notice 2010-81 that relate to the timing of issuing bonds pursuant to Section 103(c) of the Internal Revenue Code and in response to public comment concerning Senate Bill 99 as it relates to additional reporting and public disclosures by public entities that issue bonds. Upon Committee approval, these changes will be incorporated and presented for an additional 15 day public comment period. If there are no substantial revisions resulting from the pending 15-day public comment period, the approved draft Permanent Regulations will be delivered to OAL for final review and approval.

The following sections were either revised or added to accommodate the changes under consideration:

1. A new term was necessary in order to define the type bond issues targeted by IRS Notice 2010-81. The result is as follows:

Section 5000 Definitions. "Draw-down Bond Issuance" means a draw-down loan as defined for purposes of 26 U.S.C. sections 103 and 141 through 150 (generally, a Bond issue in which Bonds are delivered to the Bond purchaser intermittently as funds are needed by the Bond Issuer and the Bond Issuer only provides payments based on the amount of Bonds drawn-down).

2. In order to address the question of when filing fees for draw-down issues are due, the following section was modified:

Section 5054. Filing Fees. Each Applicant shall submit a filing fee in an amount equal to the product of the amount of Allocation actually used to issue Bonds, or Mortgage Credit Certificates multiplied by .00035. The payment of the fee shall be in two installments as follows:

(b) Second installment of filing fee. The second installment of the filing fee will be due within thirty (30) days after Bond issuance or issuance of the first Mortgage Credit Certificate. The Committee will issue an invoice in conjunction with the Committee Resolution transferring the Allocation to the Applicant. The amount of the second installment of the filing fee is the product of the amount of Allocation used to issue Bonds or convert to Bond to Mortgage Credit Certificate authority multiplied by .00035, less the fee paid pursuant to subdivision (a) of this section. For Draw-down Bond Issuances, the amount of the second installment of the filing fee is the product of the maximum principle amount (aggregate face amount) of the Bonds to be issued for the Project multiplied by .00035, less the fee paid pursuant to subdivision (a) of this section.

(c) If the second filing fee is not received within thirty (30) days, the Committee shall instruct the Applicant to remit the amount due from the performance deposit maintained by the Applicant specifically for the Project or program that was awarded Allocation pursuant to section 5050.

3. As required by IRS Bulletin 2010-81, bond issues with draw-down funds will no longer be considered as one issue. The result is that funds drawn-down beyond the initial calendar year will be considered separate issues. Unless the allocation awarded for this type of transaction is made on a carry-forward basis, the portion of funds drawn-down beyond the calendar year will no longer be considered a part of the State Ceiling. The following new section provides staff with the ability to recommend allocation on a carry forward basis:

Section 5133. Carry-Forward for Draw-down Bond Issuances. (a) Awards of Allocation for Projects in which Bond proceeds will be provided on a Draw-down Bond Issuance schedule will be made on a carry-forward basis. The initial Draw-down Bond Issuance must exceed the lesser of \$50,001 or 5% of the total Allocation awarded and occur in accordance with expiration dates provided in section 5100. Subsequent Draw-down Bond Issuances may be issued at any time thereafter but may not occur beyond the expiration of the State Ceiling allocated to the Project in accordance with 26 U.S.C. section 146(f)(3). Projects with

draw-down schedules that exceed a three (3) year period will be awarded replacement Allocation as follows:

(1) For Allocations that expire in an undersubscribed year, Staff will recommend a replacement award of Allocation and the Committee will prioritize such award of Allocation at the last meeting of the year prior to the expiration of the existing award of Allocation.

(2) For Allocations that expire in an oversubscribed year, Staff will recommend a replacement award of Allocation and the Committee will prioritize such award of Allocation at the first Allocation meeting of the following year.

(b) Projects awarded unused carry-forward Allocation which is set to expire prior to the final draw identified in its Application's initial draw-down schedule must submit a request to supplant expiring Allocation no sooner than sixty (60) days prior to the expiration of the Allocation.

(c) Projects unable to complete all Drawn-down Bond Issuances within the initial draw-down schedule's time-frame and require additional Allocation to supplant expiring Allocation will be required to submit a request for a hardship extension and Allocation replacement no sooner than sixty (60) days prior to the expiration date of the Allocation.

(d) The Committee will make every effort to provide replacement Allocation to Projects in which Bond proceeds will be provided on a Draw-down Bond Issuance basis. The Committee may delegate its authority to the Executive Director to approve an award of new Allocation or unused previous year carry-forward for replacement purposes.

4. In order to track and account the use of allocation by issuers, especially those issued on a draw-down basis, the following section was added:

Section 5144. Annual Notification of Bond Issuances. All Applicants shall transmit to the Committee, via the address provided in section 5140, an annual report on the use of all Allocation and which portion of the State Ceiling was used for each Project, no later than January 15 of the following calendar year. Applicants must identify all Draw-down Bond Issuances and the unused Allocation balance for each award.

5. The final revision addresses the need to confirm that each issuer/applicant is in compliance with all applicable state and federal regulations and laws that may impact their ability to issue bonds (such as the reporting and public disclosure requirements of public entities pursuant to SB 99):

Section 5032. Applicant Responsibilities. (a) Applications for an Allocation of the State Ceiling shall include the information prescribed by the Committee specific to the State Ceiling Pool or program to which the Application is addressed. All questions set forth in the applicable Application must be answered completely and accurately. Each Application must be accompanied by the required documentation proscribed therein. Only complete Applications bearing the original signatures of an officer of the Applicant and the Project Sponsor, if applicable, will be accepted.

(b) Every Applicant shall certify to the Committee that it is in compliance with all applicable statutes, laws, rules, and regulations necessary for the transaction of its business.

RECOMMENDATION

Staff recommends the approval of revisions to the Committee's proposed Permanent Regulations, and their submission to the Office of Administrative Law if there are no substantial revisions resulting from the pending 15-day public comment period.

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ATTACHMENT A

“Committee Resolution” means for any Allocation, the resolution duly adopted by the Committee that, among other things, memorializes the grant of the Allocation by the Committee to the Applicant.

“Competitive Application Process” means the procedure under which the Committee will evaluate an Application for an award of Allocation that is competitive based upon the number of points each Application is awarded. Applications submitted under this process will be awarded points only when the Project qualifies for such points and evidence supporting an award of points is documented in the Application when submitted. The Committee will not consider documentation for an award of points submitted after the Application deadline, nor will the Committee review an incomplete Application except to determine whether the Application is complete.

“Credit Enhancement” means the additional assurance provided by a third party pursuant to a payment guaranty, letter of credit, bond insurance or other similar vehicle with a marketable investment grade credit rating.

“Credit Enhancer” means the party providing Credit Enhancement.

“CTCAC” means the California Tax Credit Allocation Committee.

“Deemed Waived” means any designated Qualified Energy Conservation Bond and/or Recovery Zone Bond Allocation not issued or included in a Plan of Issuance by August 15, 2010 that may automatically be deemed returned to CDLAC for reallocation.

“Distressed Community” means a community that the Applicant demonstrates to be any one or more of the following:

- A community with an unemployment rate equal to or greater than 125% of the statewide average based on the California Employment Development Department’s most recent annual average for sub-county areas.
- A community with median family income of less than 80% of the statewide average based on the most recent census data available for cities or Census Designated Places. If no city or Census Designated Place level data is available, or if the Applicant chooses to identify a project benefit area that is smaller than a city or Census Designated Place, such as census tract or tracts, smaller areas will be used.
- A community with a poverty rate equal to or greater than 110% of the statewide average based on the most recent census data available for cities or Census Designated Places. If no city or Census Designated Place level data is available, or if the Applicant chooses to identify a project benefit area that is smaller than a city or Census Designated Place such as a census tract or tracts, smaller geographic areas will be used.
- A state designated Enterprise Zone (including a Manufacturing Enhancement Area or Targeted Tax Area).
- A federally designated Empowerment Zone, Enterprise Community or Renewal Community as defined in 26 U.S.C. section 1392.
- A redevelopment project area adopted pursuant to California Health and Safety Code sections 33000 et seq. where the Committee determines that the project area meets the definition of “blighted area” contained in California Health and Safety Code section 33030.

"Draw-down Bond Issuance" means a draw-down loan as defined for purposes of 26 U.S.C. sections 103 and 141 through 150 (generally, a Bond issue in which Bonds are delivered to the Bond purchaser intermittently as funds are needed by the Bond Issuer and the Bond Issuer only provides payments based on the amount of Bonds drawn-down).

“Eligible QECC Reallocation Applicant” means any city, county (acting directly or through an entity acting on behalf of the city or county pursuant to a joint powers agreement), state entity or Indian tribal government located in the State of California.

Section 5052. Forfeiture of Performance Deposit. (a) If less than 100% of the Allocation is used to issue Bonds or issue at least one (1) Mortgage Credit Certificate prior to the expiration date, a pro-rata portion of the deposit will be forfeited equal to the same percentage ratio as the amount of unused Allocation bears to the amount of awarded Allocation unless the Committee determines there is good cause to return all or part of the deposit. (b) If an Applicant issues or converts at least 80% of the Allocation awarded, the Committee shall consider revising the original award of Allocation at the next scheduled CDLAC meeting to reflect the amount issued. Applicants whose awards are amended to reflect the amount issued shall not be subject to any forfeiture of deposit as provided in subdivision (a) of this section. (c) Applicants bear the risk of forfeiting all or part of their performance deposit if the Allocation is not used in accordance with the conditions and/or timeframes set forth in the Committee Resolution. (d) The Applicant shall remit all forfeited performance deposits to the Committee within thirty (30) days of receipt of an invoice issued by the Committee.

Note: Authority cited: Section 8869.94, Government Code. Reference: Section 8869.84(c), 8869.84(e), and 8869.86(c)(3) Government Code.

Section 5053. Withdrawn or Denied Applications. If the Applicant withdraws an Application prior to consideration by the Committee or if a Project fails to receive an award of Allocation, the performance deposit shall be automatically refunded or released with and no written authorization from the Committee shall be necessary.

Note: Authority cited: Section 8869.94, Government Code. Reference: Section 8869.84(c) and 8869.84(e), Government Code.

Section 5054. Filing Fees. Each Applicant shall submit a filing fee in an amount equal to the product of the amount of Allocation actually used to issue Bonds, or Mortgage Credit Certificates multiplied by .00035. The payment of the fee shall be in two installments as follows:

(a) Initial filing fee. A check in the amount of \$600 payable to the California Debt Limit Allocation Committee shall accompany the filing of an Application to cover the Committee’s costs associated with reviewing Applications. This portion of the filing fee is not refundable under any circumstances but shall be credited against the total filing fee.

(b) Second installment of filing fee. The second installment of the filing fee will be due within thirty (30) days after Bond issuance or issuance of the first Mortgage Credit Certificate. The Committee will issue an invoice in conjunction with the Committee Resolution transferring the Allocation to the Applicant. The amount of the second installment of the filing fee is the product of the amount of Allocation used to issue Bonds or convert to Bond to Mortgage Credit Certificate authority multiplied by .00035, less the fee paid pursuant to subdivision (a) of this section. For Draw-down Bond Issuances, the amount of the second installment of the filing fee is the product of the maximum principle amount (aggregate face amount) of the Bonds to be issued for the Project multiplied by .00035, less the fee paid pursuant to subdivision (a) of this section.

(c) If the second filing fee is not received within thirty (30) days, the Committee shall instruct the Applicant to remit the amount due from the performance deposit maintained by the Applicant specifically for the Project or program that was awarded Allocation pursuant to section 5050.

Note: Authority cited: Section 8869.94, Government Code. Reference: Section 8869.84(c) and 8869.90, Government Code.

Section 5131. Granting of Carry-forward Allocations. The Committee may award Allocation on a carry-forward basis for the purpose of providing sufficient time for Applicants to issue Bonds under the current year's State Ceiling and/or to ensure all remaining portions of the State Ceiling is issued.

Note: Authority cited: Section 8869.94, Government Code. Reference: Section 8869.85(c) and 8869.86(a)(3), Government Code.

Section 5132. Expiration of Carry-Forward Allocations. The Committee will specify the expiration date of the carry-forward Allocation in the Committee Resolution memorializing the grant of the Allocation. If any amount of the carry-forward Allocation has not been used to issue Bonds or convert Bonds to Mortgage Credit Certificate authority on or before the expiration date, the performance deposit will be forfeited to the Committee and the Committee may require the Issuer to transfer the carry-forward Allocation to another approved Project by the same Issuer in accordance with section 5120. If the Committee does not require a transfer of the carry-forward Allocation, the expiration date may be extended with the approval of the Executive Director until the Allocation expires pursuant to 26 U.S.C. section 146(f)(3) or to each subsequent deadline for submitting Applications to the Committee. At that time, the Committee may require the Issuer to transfer the carry-forward Allocation to another approved Project by the same Issuer.

Note: Authority cited: Section 8869.94, Government Code. Reference: Section 8869.84(c), 8869.84(e), 8869.85(c), and 8869.86(a)(3), Government Code.

Section 5133. Carry-Forward for Draw-down Bond Issuances. (a) Awards of Allocation for Projects in which Bond proceeds will be provided on a Draw-down Bond Issuance schedule will be made on a carry-forward basis. The initial Draw-down Bond Issuance must exceed the lesser of \$50,001 or 5% of the total Allocation awarded and occur in accordance with expiration dates provided in section 5100. Subsequent Draw-down Bond Issuances may be issued at any time thereafter but may not occur beyond the expiration of the State Ceiling allocated to the Project in accordance with 26 U.S.C. section 146(f)(3). Projects with draw-down schedules that exceed a three (3) year period will be awarded replacement Allocation as follows:

(1) For Allocations that expire in an undersubscribed year, Staff will recommend a replacement award of Allocation and the Committee will prioritize such award of Allocation at the last meeting of the year prior to the expiration of the existing award of Allocation.

(2) For Allocations that expire in an oversubscribed year, Staff will recommend a replacement award of Allocation and the Committee will prioritize such award of Allocation at the first Allocation meeting of the following year.

(b) Projects awarded unused carry-forward Allocation which is set to expire prior to the final draw identified in its Application's initial draw-down schedule must submit a request to supplant expiring Allocation no sooner than sixty (60) days prior to the expiration of the Allocation.

(c) Projects that are unable to complete all Drawn-down Bond Issuances within the initial draw-down schedule's time-frame and require additional Allocation to supplant expiring Allocation will be required to submit a request for a hardship extension and Allocation replacement no sooner than sixty (60) days prior to the expiration date of the Allocation,

(d) The Committee will make every effort to provide replacement Allocation to Projects in which Bond proceeds will be provided on a Draw-down Bond Issuance basis. The Committee may delegate its authority to the Executive Director to approve an award of new Allocation or unused previous year carry-forward for replacement purposes.

Note: Authority cited: Section 8869.94, Government Code. Reference: Section 8869.84(c), 8869.84(e), 8869.85(c), and 8869.86(a)(3), Government Code.

Section 5031. Eligible Applicants. (a) Any state or local governmental agency, joint powers authority (JPA), special district, or nonprofit public benefit corporation that issues only student loan Bonds or any other public agency that is empowered to issue debt may file an Application. The Issuer of the Qualified Private Activity Bonds or Mortgage Credit Certificates must be the Applicant.

(b) Where the Applicant is administering a Single Family Housing Program on behalf of one or more jurisdictions, the Applicant must submit the Application to the Committee. The Applicant must also obtain, and provide to the Committee with its Application, publicly adopted resolution or cooperative agreement from each jurisdiction participating in the Applicant's program that explicitly grant authority to the Applicant to conduct the program in the participant's jurisdiction.

Note: Authority cited: Section 8869.94, Government Code. Reference: Section 8869.84(f), 8869.84(g), 8869.85(a), 8869.85(b), 8869.88, and 8869.89, Government Code.

Section 5032. Applicant Responsibilities. (a) Applications for an Allocation of the State Ceiling shall include the information prescribed by the Committee specific to the State Ceiling Pool or program to which the Application is addressed. All questions set forth in the applicable Application must be answered completely and accurately. Each Application must be accompanied by the required documentation proscribed therein. Only complete Applications bearing the original signatures of an officer of the Applicant and the Project Sponsor, if applicable, will be accepted. **(b) Every Applicant shall certify to the Committee that it is in compliance with all applicable statutes, laws, rules, and regulations necessary for the transaction of its business.**

Note: Authority cited: Section 8869.94, Government Code. Reference: Section 8869.84(c), 8869.85(a) and (b), and 8869.87 Government Code.

Section 5033. Minimum Application Requirements. (a) Applications for an Allocation of the State Ceiling may be submitted to the Committee at its offices in Sacramento, California. An Applicant must submit all required information appropriate to the type of Bond for which the Applicant requests an Allocation. The Applicant shall submit a complete Application and supplemental material for each project or program for which the Applicant is requesting an Allocation. Only complete Applications bearing the original signatures of an officer of the Applicant and the Project Sponsor, if applicable, will be accepted.

(b) Unless specifically exempted, the following items must accompany all Applications:

(1) Performance Deposit Certification and evidence of the performance deposit as provided in section 5050(a).

(2) A non-refundable first installment of the filing fee of \$600 made payable to the California Debt Limit Allocation Committee as provided in section 5054(a).

(3) Proof of the Bond sale structure requirements pursuant to article 6 of this chapter, if applicable, (for all Applications other than Applications relating to a Mortgage Credit Certificate Program pursuant to chapter 3).

(4) An inducement resolution adopted by the governing body of the Applicant approving the project or program to be Bond financed and authorizing a senior officer, or in the case of a Student Loan Program, an officer of the sponsor of the Student Loan Program, to file the Application with the Committee, pay any fees required by the Committee, and certify the posting of the required performance deposit.

(5) For all Applications other than those relating to a Mortgage Credit Certificate Program pursuant to chapter 3, a TEFRA Resolution adopted by the governing body of the jurisdiction in which the proposed project or program will be located, or in the case of a Student Loan Program, a resolution adopted by the sponsor of the Student Loan Program, memorializing the public approval process as required by 26 U.S.C. section 147(f). The resolution shall clearly indicate that a public hearing was properly noticed and held with respect to the proposed issuance of Bonds. Such resolutions shall be accompanied by the approval of the Bonds for the specific project or program by the applicable elected representative as such term is defined in 26 U.S.C. section 147(f)(2)(E). A copy of the fully executed adopted resolution with the approval of the Bond issue must be provided to the Committee:

(A) No less than five (5) calendar days prior to the first public posting of Committee recommendations as provided in section 5036.

(B)(i) In the event that a copy of an adopted TEFRA Resolution cannot be provided within the timeframes set forth in subdivision (b)(5)(A) of this section, the Applicant shall provide written certification as to the date, time, location, and outcome of the public hearing, the approval of the issuance of Bonds by the applicable elected representative, and that the actions comply with the provisions of 26 U.S.C. section 147(f). The certification shall be accompanied by a copy of the notice announcing the public hearing. If the required documentation is not received within the timeframe specified above, the Application will not be considered for an Allocation.

(ii) In the event that a TEFRA Resolution for a proposed project or program is to be signed by a member of the Committee, the Applicant may submit only the minutes of the required public hearing and proof of publication of the notice announcing the public hearing no later than thirty (30) calendar days following the application deadline. Applicants shall submit the signed TEFRA Resolution no later than the date on which they submit a Report of Action Taken, as required by section 5141.

Note: Authority cited: Section 8869.94, Government Code. Reference: Section 8869.84(c), 8869.84(e), 8869.85(a), 8869.85(b), and 8869.90, Government Code.