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## **New Jersey Educational Facilities Authority Post-Issuance Tax Compliance Policies and Procedures for Tax-Advantaged Bonds**

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<b>Policy Sections</b>	<b>Page</b>
I. Organizational Responsibility	3
II. Tracking Expenditures	3
III. Private Business Use	4
IV. Record Retention	4
V. Arbitrage Rebate	6
VI. Credit Enhancement or Other Agreements Relating to Bonds	6
VII. Disclosures and Filings	7
VIII. Continuity and Training	7
IX. Remedial Action	7

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### **Purpose**

These Post-Issuance Tax Compliance Policies and Procedures (the “Policy” or “Procedures”) establish the policies and procedures of the New Jersey Educational Facilities Authority (the “Authority”) in connection with tax-advantaged obligations issued by the Authority (the “Bonds”),<sup>1</sup> and are designed to ensure compliance with: (a) applicable provisions of the Internal Revenue Code of 1986 as amended (the "Code") and regulations promulgated thereunder (“Treasury Regulations”), (b) requirements of the U.S. Securities and Exchange Commission (the “SEC”) and the Municipal Securities Rulemaking Board (“MSRB”) under SEC Rule 15c-12 (the “Rule”) regarding secondary market disclosure filings relating to the Bonds, and (c) contractual agreements relating to the Bonds.

The Authority recognizes that compliance with applicable provisions of law is an ongoing process, necessary during the entire term of the Bonds. Accordingly, analysis of information and implementation of this Policy will require continual monitoring and likely, ongoing consultation with bond counsel. Further policies and procedures may be identified from time to time by Authority staff in consultation with bond counsel and the Authority reserves the right to change these policies and procedures.

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<sup>1</sup> For purposes of this Policy, Bonds include (a) obligations the interest on which is excludable from gross income for federal income tax purposes pursuant to the Code and Treasury Regulations, and (b) obligations the interest on which is not excludable from gross income for federal income tax purposes, but federal law otherwise requires such obligations to satisfy requirements of the Code and Treasury Regulations applicable to tax-exempt obligations.

## **Financing Program**

The New Jersey Educational Facilities Authority was created pursuant to Chapter 271 of the Public Laws of 1967, *N.J.S.A. 18A:72A-1 et seq.*, as amended and supplemented (the “Act”), to provide a means for New Jersey public and private colleges and universities (the “Institutions”) to construct facilities through the financial resources of a public authority empowered to issue taxable and tax-exempt bonds, notes and other obligations.

The Authority finances and refinances various types of educational facilities projects for the Institutions, including but not limited to: the acquisition and construction of residential, academic and auxiliary service facilities, and renovation and rehabilitation of existing educational facilities (“Bond-Financed Property”).

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## **Policy Statement**

This Policy focuses on use and investment of Bond proceeds and includes:

- Tracking expenditure of Bond proceeds for qualified and nonqualified purposes;
  - Maintaining detailed records of expenditures and investments;
  - Ensuring that the Bond-Financed Properties are used in a manner consistent with legal and federal tax requirements under the bond documents; and if not, proper remedial actions are utilized to maintain federal tax law compliance;
  - Providing necessary disclosure information regarding financial and operating status; and
  - Ensuring compliance with record retention requirements of the Code.
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## **Policy Sections**

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### **I. Organizational Responsibility**

The Executive Director of the Authority has overall responsibility for post-issuance compliance for Bonds issued by the Authority and may delegate such responsibilities to the Authority's Director of Finance, Director of Compliance Management, and Director of Project Management (each a "Compliance Officer"). The Compliance Officers will have certain responsibilities for post-issuance compliance to monitor post-issuance matters with respect to the Bonds. The Compliance Officer(s) and the Executive Director are responsible for assuring an adequate succession plan for transferring post-issuance compliance responsibility when changes in Authority staff occur.

In the case of Bonds for which the Authority must review and approve requisitions, the Finance Department, under the direction of the Authority's Director of Finance, shall review requisitions for assurance that the proceeds are expended on projects as authorized in the applicable bond documents and that reimbursement of pre-issuance costs are permissible.

Where required by the bond documents, the Finance Department, under the direction of the Director of Finance, shall also direct investment of proceeds, review monthly bank statements from trustees or custodians and engage an Arbitrage Rebate Service Provider, as necessary, for Bonds and provide copies of written reports to the Institution.

The general responsibilities of the Compliance Officer(s) with respect to tax compliance shall include, but not be limited to, confirming consistent application of these Procedures, monitoring completeness of documentation required by these Procedures, and requesting that the State Attorney General's Office engage nationally recognized bond counsel ("Bond Counsel") as necessary in the event that a potential issue arises with respect to the tax-advantaged status of the Bonds. The Compliance Officer(s) shall interact with the Institutions and provide information about opportunities for training related to developing and implementing post-issuance compliance policies, tracking expenditures, allocating sources of funding between proceeds and other funds, identifying and monitoring private business use and reviewing arbitrage rebate reports.

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### **II. Tracking Expenditures and Use of Bond-Financed Properties**

The Authority's bond documents shall require the Institutions to maintain records regarding the use and allocation of bond proceeds and other sources of funding for Bond-Financed Properties. In cases where the Institution submits requisitions to the Authority, the Authority's Finance Department shall maintain copies of approved requisitions and copies of invoices. Requisitions

must be accompanied by copies of invoices if the invoice amount is over \$20,000, before being approved.

For Bonds issued after 2011, the Authority's bond documents will also require the Institution to monitor the application and use of proceeds on an ongoing basis and to inform the Authority of events relating to use of proceeds and Bond-Financed Properties which may result in private business use or other issues which must be analyzed for compliance with federal tax law. The documents will also require the Institutions to cooperate with the Authority in seeking advice from bond counsel and remediation, if necessary.

The Authority will send an annual questionnaire to the Institutions with outstanding Bonds, asking for updated information about use of Bond-Financed Properties, including private business use (as discussed below) and other appropriate matters.

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### **III. Private Business Use**

Private business use refers to the use of bond-financed property in a trade or business by any person other than a state or local government entity in the case of an Institution that is a state college or a 501(c)(3) entity or a state or local governmental entity, or by a 501(c)(3) entity in an unrelated trade or business entity in the case of an Institution that is a 501(c)(3) entity. The Authority's Bonds will lose their tax advantaged status if more than a specified percentage<sup>2</sup> of the proceeds (in the case of state colleges) or net sale proceeds<sup>3</sup> (in the case of 501(c)(3) institutions) of the bond issuance are issued for any private business use and are repayable or secured by "private business payments". Because the Internal Revenue Service ("IRS") considers the use of bond proceeds to finance bond issuance costs of 501(c)(3) entities as private business use, the allowable private business use percentage is reduced by the costs of issuance percentage.<sup>4</sup>

Special legal entitlements to property financed with Bonds include leases of financed property, management contracts, sponsored research agreements, naming rights, licenses of facilities for use by cell phone service providers, energy providers and the like, as set forth in bond documents and arbitrage and tax certificates. Typical examples of private business use in a college setting often include food service contracts, bookstore contracts, certain research agreements, and dorm or summer event use. Exceptions exist to private business use for certain short term and incidental use arrangements.

The Authority's bond documents will require the Institutions to consult with the Authority when contracts or arrangements that might involve private business use are entered into or modified, and to maintain copies of relevant contracts and arrangements. The Authority will seek the advice of

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<sup>2</sup> The specified percentage is in the case of state colleges, 10%, unless the private business use is unrelated or disproportionate to the governmental use, in which case the limit is reduced to 5% and in the case of 501(c)(3) entities, 5%.

<sup>3</sup> Under IRC section 150(a)(3), "net proceeds" means the proceeds of the issue (which under IRS Regulation 1.141-1 generally means the sale proceeds plus investment proceeds less proceeds held in a reserve fund.

<sup>4</sup> IRC Section 147(g) limits the amount of bond proceeds that may be applied to finance the costs associated with the issuance of qualified 501(c)(3) bonds to 2% of the proceeds of the bond issue.

Bond Counsel where appropriate with regard to matters involving private business use, including any private business use reported by Institutions during the annual review referred to in Section II above.

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## **IV. Record Retention**

The IRS has advised issuers of tax-exempt obligations that they have post-issuance recordkeeping responsibilities that are necessary to satisfy the IRS in the event of any future audit of the Bonds. Authority bond documents require the Institutions to maintain all relevant records relating to the Bonds. In addition, the Authority retains documents it receives directly from the Institutions or third parties. These documents include closing transcripts, investment and other agreements to which the Authority is a party, bank statements, arbitrage rebate reports and requisitions. Both the Institutions and the Authority shall maintain records for the length of time required to comply with IRS regulations. All files must be maintained for the life of the Bonds, plus three years per IRS regulations. See IRS FAQs on Record Retention.<sup>5</sup>

In addition to the above, basic records relating to Bonds include the transcript and relevant IRS Form 8038, as well as documentation evidencing the:

- Actual expenditures and investment of proceeds of the Bonds;
- Information and records regarding the continued use and ownership of Bond-Financed Property;
- Any use arrangement affecting the Bond-Financed Property, which result in private business use of any portion of the Bond-Financed Property;
- Copies of any leases, management contracts, service contracts or other written arrangements with persons other than a state or local governmental unit relating to the Bond-Financed Property; and
- Sources of payment or security for the Bonds.

The Authority will rely on the Institutions for specific records relating to application of Bond proceeds and possible private business use. The Authority will ensure that the Institution is provided with a Post-Issuance Compliance Checklist at the closing of each Bond issuance which will assist the Institution in identifying the specific department thereof with responsibility for aspects of post-issuance compliance monitoring and record keeping requirements. The Post-Issuance Compliance Checklist will identify classes or other sources of training and manners of record retention (whether physical or electronic). No employee of the Authority or an Institution shall discard or destroy any records during the period such records are required to be maintained.

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<sup>5</sup> The FAQ, as from time to time are updated by the IRS, can be found at: <https://www.irs.gov/tax-exempt-bonds/tax-exempt-bond-faqs-regarding-record-retention-requirements#1>

## **V. Arbitrage Rebate**

The arbitrage restrictions imposed under the Code include restrictions on the investment of proceeds of the Bonds and the rebate of excess investment earnings to the federal government. Bonds lose their tax-advantaged status if they are classified as “arbitrage bonds.” In general, arbitrage is earned when the gross proceeds of a bond issue are used to acquire investments that earn a yield that is “materially higher” than the yield on the bonds issued. The Code contains two separate sets of requirements that must be complied with to ensure that Bonds are not arbitrage bonds. They are:

- Yield Restriction requirements, which generally provide that in the absence of an applicable exception, bond proceeds may not be invested at a yield in excess of the bond yield; and
- Rebate requirements, which generally provide that when arbitrage is earned on an issue in excess of permitted amounts, unless an exception is met, the excess earnings must be paid to the U.S. Department of Treasury, even if an exception to the yield restriction requirements applies.

The Compliance Officer(s) is responsible for maintaining or causing to be maintained records documenting the investment and allocation of proceeds of the Bonds. The Authority will invest bond proceeds in investments permitted under the Authority’s Investment Policy and the bond documents.

The Authority will engage the services of an Arbitrage Rebate Service Provider, as necessary, to provide written reports to assist the Authority and the Institutions in monitoring yield on investments and calculating any rebate that may be due. The Compliance Officer will work with the Finance Department to review the annual reports as prepared by the Arbitrage Rebate Service Provider for reasonableness. If the Arbitrage Rebate Service Provider provides a written report that rebate is due, the Institution will make any required payments to the IRS.

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## **VI. Credit Enhancement or Other Agreements Relating to Bonds**

Authority bond documents require the Institutions to notify the Authority of any extension or alteration of any credit enhancement relating to an Institution’s tax-exempt debt or of any changes to other agreements relating to the Bonds such as guaranteed investment contracts or derivative products. The Authority, in consultation with Bond Counsel as appropriate, will work with the Institutions for assurance that any changes meet post-issuance compliance requirements. The Project Management Department will also monitor information relating to the ratings of the Institutions and counterparties to such agreements for assurance that provisions of such agreements are fulfilled.

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## **VII. Disclosures and Filings**

For Bonds to which SEC Rule 15c-12 applies, the Authority requires each Institution to enter into a Continuing Disclosure Agreement with the trustee for the applicable Bonds. Pursuant to the Continuing Disclosure Agreement, the Institutions agree to comply with continuing disclosure requirements under SEC Rule 15c2-12. In addition, the Authority will require in bond documents, or will request, as applicable, copies of reports sent to credit providers and insurance companies and other parties to transactions, information about the condition and use of Bond-Financed Properties and compliance with covenants of the Institutions including financial covenants.

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## **VIII. Continuity and Training**

The Compliance Officer(s) will receive periodic training regarding post-issuance compliance and other responsibilities applicable to Bonds and provide periodic training to Authority staff involved with implementing these Procedures and any successor(s) thereto concerning their respective duties and responsibilities under these Procedures. The Compliance Officer(s) will also interact with and provide information about training opportunities regarding post-issuance compliance to representatives of the Institutions.

To provide for continuity of post-issuance compliance monitoring, the Authority will periodically review this Policy to ensure it comports with current law.

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## **IX. Remedial Action**

Authority bond documents require that the Institution notify the Authority in a timely manner to ensure that there is no adverse effect on the tax-exempt status of the Bonds in the event of certain tax violations on the limits of use of bond proceeds, the investment of bond proceeds, and the use of the Bond-Financed Properties.

In the event the use of the proceeds of the Bonds or Bond-Financed Properties or the nature or amount of private payments is different from the covenants and representations set forth in the Bond documents, the Compliance Officer will contact Bond Counsel in a timely manner to ensure that there is no adverse effect on the tax-exempt status of the Bonds. Various remedies are available in the event of certain violations. For example, a change in the use of the Bond-Financed Properties after the issuance of the Bonds that results in excessive private business use may be corrected through a “remedial action” that is described in the Treasury Regulations. Such remedial actions include a defeasance of all of the Bonds affected by the excessive private business use or using the disposition proceeds from the sale of the Bond-Financed Properties for another qualified purpose. Other actions (or inaction) that potentially adversely affect the tax-exempt status of the Bonds may be corrected through the Voluntary Closing Agreement Program described in IRS Notice 2008-31 and in Section 7.2.3 of the Internal Revenue Manual. The Compliance Officer(s), either directly or through workshops and conferences, will interact with the Institutions to inform them about private business use, changes in use and other events under the Code relating to tax

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compliance and which could necessitate remedial action or a correction through the Voluntary Closing Agreement Program with the IRS.