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**New Jersey Educational Facilities Authority**  
**Post-Issuance Tax Compliance Policies and Procedures For Bonds Issued Pursuant to the**  
**Within Defined State-Backed Programs**

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## **Purpose**

These Post-Issuance Compliance Policies and Procedures (the “Policy” or “Procedures”) apply to tax-advantaged bonds (the “Bonds”) issued by the New Jersey Educational Facilities Authority (the “Authority”) pursuant to the Higher Education Fund Capital Improvement Fund Act, N.J.S.A. 18A:72A-72 *et seq.* (“CIF”); the Higher Education Equipment Leasing Fund Act, N.J.S.A.18A: 72A-40 *et seq.* (“ELF”); the Higher Education Technology Infrastructure Fund Act, N.J.S.A.18A:72A-59 *et seq.* (“HETI”); and the Higher Education Facilities Trust Fund Act, N.J.S.A. 18A: 72A- 49 *et seq.* (“HEFT” and together with CIF, ELF and HETI, the “State-Backed Programs”). Bonds are issued by the Authority pursuant to the State-Backed Programs to provide grants (“Grants”) to the State of New Jersey’s (“State”) public and private institutions of higher education (the “Institutions”) to fund educational projects or to finance the acquisition by the Institutions by lease of educational equipment (collectively, the “Bond-Financed Property”). The Policy is designed to monitor compliance of the Bonds with applicable provisions of the Internal Revenue Code of 1986 as amended (the “Code”) and regulations promulgated thereunder (“Treasury Regulations”).

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 these Procedures 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, the State Treasurer and the State Attorney General and the Authority reserves the right to change these policies and procedures from time to time.

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## **Financing Program**

Pursuant to the State-Backed Programs, Grants are provided to Institutions for projects approved by the New Jersey Secretary of Higher Education (the “Secretary”) and reviewed by the New Jersey State Legislature (the “State Legislature”). The Bonds issued by the Authority are the source of funding for the Grants approved by the Secretary pursuant to the State-Backed Programs. Bonds issued pursuant to CIF, ELF, and HETI are secured by a contract with the State Treasurer to pay the principal of, and interest on, such bonds subject to appropriations being made, from time to time, by the State Legislature. Bonds issued pursuant to HEFT are secured by a pledge and lien on the Higher Educational Facilities Trust Fund, subject to appropriations being made to the Higher Education Facilities Trust Fund, from time to time, by the State Legislature.

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## **Policy Statement**

After the Bonds are issued, the compliance process focuses on use and investment of proceeds of the Bonds and includes:

- Tracking Bond proceeds spending for qualified and nonqualified purposes;
  - Maintaining detailed records of expenditures and investments;
  - Ensuring that Bond-Financed Properties are used in a manner consistent with legal and federal tax law requirements under the Bond documents; and if not, implementing proper remedial actions in order to maintain federal tax law compliance; and
  - Ensuring compliance with record retention requirements of the Code.
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## **Policy Sections**

### **I. Organizational Responsibility**

The Executive Director of the Authority has overall responsibility for post-issuance compliance of the Bonds and may delegate such responsibilities to the Authority’s Director of Finance and/or the Director of Compliance Management (each a “Tax Compliance Officer”). The Compliance Officer will have primary responsibility for post-issuance compliance to ensure and monitor post-issuance matters with respect to the Bonds. The Authority, in consultation with Bond Counsel, will supplement and update these procedures as appropriate to provide a continuing source of guidance on these requirements. The Tax 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.

The Authority’s Finance Department shall review requisitions received from Institutions: (a) to assure that proceeds of the Bonds are expended on projects authorized by the Secretary as reflected in the Secretary’s certification and in the applicable Bond documents, (b) to assure that reimbursement of pre-issuance costs are permissible, and (c) to determine when projects are

completed and/or placed in service. Where required by Bond documents, the Finance Department shall also direct investment of proceeds, review monthly bank statements from trustees or custodians, engage an Arbitrage Rebate Service Provider for each issue of Bonds, and provide copies of written reports, as requested, to the State Treasurer and the Secretary or either of their designees, and to Institutions to the extent the Institutions need such information for reporting or compliance at the institutional level.

The general responsibilities of the Tax Compliance Officer 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-exempt status of the Bonds. The Compliance Officer(s) shall also interact with the Institutions and provide information about opportunities for training related to developing and implementing post-issuance compliance policies and procedures, tracking expenditures, allocating sources of funding between Bond 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 as required in accordance with the terms of the grant or lease agreement for the Bond-Financed Properties.

For Bonds issued after January 28, 2014 (the original date of this Policy), the Authority's Bond documents require the Institutions to monitor the application and use of Bond proceeds and Bond-Financed Properties on an ongoing basis, and at least annually inform the Authority of events relating to the use of Bond proceeds and Bond-Financed Properties which may result in private business use or other issues which must be analyzed for compliance with federal tax laws. The Bond documents also require the Institutions to cooperate with the Authority in seeking advice from bond counsel and tax remediation, if necessary.

The Authority will require the Institutions to review use and expenditure of Bond proceeds with the Authority at least once during a selected 12-month period as provided by the grant agreement between the Authority and the Institutions (the "Annual Compliance Period"). The Compliance Officer will work with the Institutions and Bond Counsel, if necessary, to assist in making a final allocation of expenditures for a Bond-Financed Project when required under the Code and applicable regulations. The Authority will send an annual certification, attached hereto as Exhibit A, to the Institutions during each Annual Compliance Period, asking for updated information about the use of the Bond-Financed Property and other appropriate matters.

### III. Private Activity Limitations

Federal tax law limits the permitted amount of private business use of tax-exempt Bond-Financed Properties by reference to a percentage of the total amount of proceeds of the tax-exempt bonds issued to finance such Bond-Financed Property (the “Private Activity Limitations”). In the case of private uses that are related to the governmental use of the facility, the limit is 10% of proceeds. In the case of private uses that are unrelated to the governmental use, or that are related but disproportionate to the governmental use, the limit is 5% of proceeds. Federal tax law also limits the amount of private loans financed with tax-exempt proceeds to the lesser of 5% of proceeds or \$5,000,000.

In order to demonstrate compliance with the Private Activity Limitations, the Tax Compliance Officer will implement or oversee the procedures described below under “Monitoring Procedures.” These procedures are designed to assist the Tax Compliance Officer in identifying the potential occurrence of any of the events set forth below (each, a “Tax Event”) with respect to any portion of the Bond-Financed Properties:

**Change of ownership of Bond-Financed Property** -- the ownership of any portion of the Bond-Financed Property is transferred to anyone other than a State or local governmental unit, prior to the earlier of the end of the expected economic life of the Bond-Financed Property or the latest maturity date of any bond of the issue financing (or refinancing) the Bond-Financed Property.

**Private business use (“PBU”)** -- refers to the use of Bond-Financed Property: (a) in a trade or business by any person other than a state or local governmental entity in the case where the Institution receiving financing through a State-Backed Program is a public college; and (b) in a trade or business by any person other than a state or local governmental entity or a 501(c)(3) entity or in an unrelated business of an 501(c)(3) entity in a case where the Institution receiving financing through a State-Backed Program is a 501(c)(3) entity.<sup>1</sup> The Bonds will be issued either as governmental bonds or as qualified 501(c)(3) bonds<sup>2</sup>. The Bonds may lose their tax advantaged status if more than a specified percentage<sup>3</sup> of the proceeds (in the case of governmental bonds) or net sale proceeds<sup>4</sup> (in the case of qualified 501(c)(3) bonds) of the bond issuance are used 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

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<sup>1</sup> Use of a bond financed facility by the federal government will always result in PBU.

<sup>2</sup> It is an additional requirement for qualified 501 (c) (3) bonds that the Bond-Financed Properties be owned by either a governmental entity or a 501 (c)(3) entity over the entire term of the issue.

<sup>3</sup> The specified percentage is in the case of governmental bonds, 10%, unless the private business use is unrelated or disproportionate to the governmental use, in which case the limit is reduced to 5%. In the case of qualified 501(c)(3) bonds, the percentage is 5%. These tests will be applied to each issue of Bonds as directed by bond counsel for that issue. Furthermore, the Authority will determine at the time of issuing a series of Bonds if the allowable percentage of private business use is available to each participating Institution or if a specific percentage of allowable private business use will be permitted only to certain Institutions that request private use of the bond-financed project.

<sup>4</sup> Under IRC section 150(a)(3), “net proceeds” means the proceeds of the issue (which generally means the sale proceeds plus investment proceeds less proceeds held in a reasonably required reserve fund).

finance bond issuance costs of 501(c)(3) entities as PBU, the allowable PBU percentage is reduced by the costs of issuance percentage<sup>5</sup>.

Special legal entitlements to property financed with Bonds can give rise to PBU. Special legal entitlements include, but are not limited to:

**Leases of Bond-Financed Property** -- any portion of the Bond-Financed Property is to be leased or otherwise subject to an agreement which gives possession of any portion of the Bond-Financed Property to anyone other than a State or local governmental unit.

**Management agreement or service agreement with respect to Bond-Financed Property** -- any portion of the Bond-Financed Property is to be used under a management contract or professional service contract (e.g., medical group), other than a contract for services that are solely incidental to the primary function of the Bond-Financed Property, such as janitorial services or office equipment repair.

**Sale of output from Bond-Financed Property** -- any output of the Bond-Financed Property is to be sold under a long-term contract to any person other than a State or local governmental unit.

**Naming rights agreements with respect to Bond-Financed Property** -- any portion of the Bond-Financed Property will become subject to a naming rights or a sponsorship agreement, other than a “brass plaque” dedication.

**Research using Bond-Financed Property** -- any portion of the Bond-Financed Property will be used for the conduct of research under the sponsorship, or for the benefit of, any organization other than a State or local governmental unit.

**Private Loan of proceeds of the Bonds** -- any portion of the proceeds of the Bonds (including any investment earnings thereon) is to be loaned by the Authority to any person other than a State or local governmental unit.

Typical examples of PBU in a college setting often include food service contracts, bookstore contracts, certain research agreements, and dorm or summer event use if they don’t meet certain safe-harbors which are set out in IRS Revenue Procedures 97-13 and 2007-47, as amended respectively. In addition, IRS regulations provide exceptions to PBU for certain short term and incidental use arrangements.

The Authority’s Bond documents require the Institutions to report and certify to the Authority annually about the use of the bond-financed facilities, any additions or changes that may have occurred, and to cooperate with the Authority in determining whether there is PBU that may adversely affect the tax-exempt status of the Bonds and take appropriate remedial action. The

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<sup>5</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.

Authority will seek the advice of bond counsel where appropriate regarding matters involving private business use, including any private business use reported by the Institutions in 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. The Bond documents require the Institutions to maintain all relevant records relating to the Bonds. The Authority will retain 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 and other pronouncements. All files must be maintained for the life of the Bonds plus three (3) years. See IRS FAQs on Record Retention.<sup>6</sup>

Basic records relating to the Bonds include the transcript and relevant IRS Form 8038, as well as documentation evidencing the:

- Actual expenditures and investment of the proceeds of the Bonds;
- Information and records regarding the continued use and ownership of Bond-Financed Properties; and
- 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.
- 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.

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## **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. The Bonds will 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

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<sup>6</sup> The FAQs, 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>

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 issue proceeds may not be invested at a yield in excess of the bond yield unless yield reduction payments can be made or, if yield reduction is unavailable, the temporary period/yield restriction rules shall apply; 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 periodically to the U.S. Department of Treasury, even if an exception to the yield restriction requirements applies.

The Tax Compliance Officer will establish a timeline for review of arbitrage-related issues. The Tax Compliance Officer 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 Bond documents.

The Tax Compliance Officer, on behalf of and as directed by the Authority, will maintain a contract with a third-party arbitrage consultant (“Arbitrage Rebate Service Provider”) for the purpose of providing arbitrage consulting services, including, but not limited to:

1. Annual analysis of all Bonds.
2. Arbitrage rebate calculations.
3. Yield restriction calculations.
4. Technical support on an ad-hoc basis.

The Arbitrage Rebate Service Provider will, on an annual basis, analyze the Bonds to review and identify potential arbitrage or rebate liability, issues regarding yield restriction compliance, and/or other arbitrage related issues and provide written reports to assist the Authority, the State Treasurer, the Secretary and the Institutions to the extent necessary for the Institutions to satisfy reporting or compliance requirements at the institutional level. The Finance Department will work with the Arbitrage Rebate Service Provider and to the extent necessary, each Institution, in order for the Arbitrage Rebate Service Provider to perform calculations and prepare its report accurately. The Tax Compliance Officer will review the arbitrage analysis and coordinate with the Arbitrage Rebate Service Provider to prepare any necessary filings and payments on a timely basis. The Tax Compliance Officer will timely file or cause to be filed with the IRS the appropriate IRS arbitrage rebate and yield restriction reports, Form 8038-F, along with any payments due with respect to the Bonds.

### ***Recordkeeping***

In order to satisfy the arbitrage recordkeeping requirements, the Tax Compliance Officer will create and maintain, or cause to be created and maintained, records (which records may include spreadsheets, bank statements, investment purchase confirmations, agreements, certificates, etc.) of:

1. Purchases or sales of investments made with the proceeds of the Bonds (including amounts treated as “gross proceeds” as a result of being part of a sinking fund or pledged fund or otherwise under section 148 of the Code, other than amounts that meet the exception for bona fide debt service funds) and receipts of earnings on those investments;
  2. The allocations, by date and amount, of the proceeds of the Bonds to expenditures;
  3. Information and records showing that investments made with unspent proceeds of the Bonds after the expiration of the applicable temporary period were not invested in higher-yielding investments;
  4. Information and records, including bank and earnings statements, that will be sufficient to demonstrate to the IRS, upon an audit of the Bonds, that the Authority has complied with one or more available spending exceptions to the arbitrage rebate requirement with respect to the Bonds;
  5. In the event that an exception to the arbitrage rebate requirement was not applicable, information and calculations that will be sufficient to demonstrate to the IRS, upon an audit of the Bonds, that the rebate amount, if any, that was payable to the United States of America with respect to investments made with gross proceeds of the Bonds was calculated and timely paid with Form 8038-T being timely filed with the IRS;
  6. Information and records demonstrating that all rebate calculations and reports prepared in connection with the Bonds were prepared in accordance with the requirements of the Tax Certificate and the Code;
  7. Information and records showing that investments held in yield-restricted advance refunding or defeasance escrows funded with the proceeds of the Bonds were not invested in higher-yielding investments; and
  8. The Tax Certificate.
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## **VI. Continuity and Training**

The Compliance Officer(s) will receive periodic training regarding post-issuance tax compliance and other requirements 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 tax compliance to applicable representatives of the Institutions.

To provide for continuity of compliance with post-issuance tax compliance requirements, the Authority will periodically review these Procedures to assure that it comports with current federal tax law.

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## **VII. Remedial Action**

Authority Bond documents require that the Institutions notify the Authority in a timely manner to ensure that there is no adverse effect on the tax status of the Bonds in the event of certain tax violations on the limits of use of the proceeds of the Bonds, the investment of proceeds of the Bond, 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 Tax Compliance Officer will contract Bond Counsel in a timely manner to ensure that there is no adverse effect on the tax 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 assets 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 the portion of the Bonds affected by the excessive private business use or using the disposition proceeds from the sale of the bond-financed assets for another qualified purpose. Other actions (or inaction) that potentially adversely affect the 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 Tax 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 compliance which could necessitate remedial action or a correction through the Voluntary Closing Agreement Program with the IRS.

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## **VIII. Post-Issuance Obligations of the Institutions.**

The Authority, in the Bond documents, requires each Institution to implement written post-issuance policies and procedures (each named an “Institution’s Policy”). Each Institution’s Policy must:

- Identify the compliance activities to be undertaken including:
  - Tracking and allocation of Grant<sup>7</sup> proceeds
  - Investment of Grant proceeds and computation of yield and rebate (to the extent required of the Institution in Bond documents)
  - Monitoring use of the bond-financed facilities
    - Identifying any use by “non-governmental parties”

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<sup>7</sup> Use of the term “Grants” also refers to “Leases” in the case of funding provided under ELF.

- Identifying any new contracts or arrangements or changes in existing arrangements
- Designate a central compliance officer responsible for coordinating all compliance activities within the Institution and between the Institution and the Authority, as well as the Secretary and the State Treasurer.
- Assign specific compliance tasks to individual officers and/or employees of the Institution.
- Require and describe training to be provided to the assigned individuals including, without limitation, training in identifying potential violations of federal tax rules applicable to the Bonds and possible avenues of remediation.
- Require completion of the compliance tasks at least once a year including allocation of bond proceeds and use of bond financed facilities (the “Compliance Review”).
- Require that the Institution’s central compliance officer report the results of the annually completed Compliance Review to the Authority and require that all individuals with compliance responsibilities cooperate with the Authority, the Secretary and the State Treasurer in analyzing any PBU or other tax issues and in deciding upon and effecting remediation.
- Require: (a) identification of all records relating to the Bonds necessary to substantiate compliance with all applicable federal tax rules, and (b) retention of all such records by the Institution for the period or periods required to be maintained - generally at least three (3) years after full payment of the Bonds or refunding Bonds.

The Authority’s Division of Compliance Management, under the direction of the Authority’s Director of Compliance Management, shall coordinate the annual Compliance Review with the Institutions and the Secretary.

The Authority will seek the advice of bond counsel where appropriate with regard to matters involving PBU, including any PBU reported by Institutions during the annual Compliance Review.