

**CITY OF EL PASO, TEXAS
AGENDA ITEM
DEPARTMENT HEAD'S SUMMARY FORM**

DEPARTMENT: Office of the Comptroller

AGENDA DATE: August 23, 2016

CONTACT PERSON/PHONE: Pat Degman, CGFM - Comptroller, (915) 212-1170

DISTRICT(S) AFFECTED: All

STRATEGIC GOAL: Set the Standard for Sound Governance and Fiscal Management

SUBJECT:

Adoption of Resolution to update the Debt Management Policy for the City of El Paso, August 2016.

BACKGROUND / DISCUSSION:

The Debt Management Policy establishes the limit on debt that may be used to fund capital improvement projects. Minor clerical changes have been made to section 5.2 Certificates of Obligation. In compliance with the policy, these changes are to be reviewed and adopted by the City Council. The Finance & Audit Oversight Committee voted to accept the changes as proposed on August 17, 2016.

PRIOR COUNCIL ACTION:

The City's Debt Management Policy was last amended on June 16, 2015.

AMOUNT AND SOURCE OF FUNDING:

N/A

BOARD / COMMISSION ACTION:

N/A

*****REQUIRED AUTHORIZATION*****

DEPARTMENT HEAD: _____

(If Department Head Summary Form is initiated by Purchasing, client department should sign also.)

RESOLUTION

WHEREAS, on November 25, 2005, the City of El Paso (“the City”) adopted a Debt Management Policy that set forth the parameters for issuing new debt as well as managing the outstanding debt portfolio, identifies the types and amounts of permissible debt, and ensures that the City maintains a solid bond rating in order to minimize borrowing costs and preserving access to credit;

WHEREAS, the City has reviewed its Debt Management Policy at least bi-annually, in accordance with the provisions of the Policy; and

WHEREAS, in accordance with the provisions of the Policy, the revised Debt Management Policy is presented to the City Council for review, and

WHEREAS, the City last reviewed and amended the City’s Debt Management Policy on June 16, 2015; and

WHEREAS, the City now desires to further amend the City’s Debt Management Policy to incorporate minor clerical changes related to section 5.2 Certificates of Obligation.

NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

THAT the City hereby amends the City of El Paso Debt Management Policy to incorporate minor clerical changes related to section 5.2 Certificates of Obligation. All other terms of the City of El Paso Debt Management Policy are unchanged and remain in full force and effect.

ADOPTED THIS _____ day of August, 2016.


THE CITY OF EL PASO

Oscar Leaser,
Mayor

ATTEST:

Richarda D. Momsen,
City Clerk

APPROVED AS TO FORM:

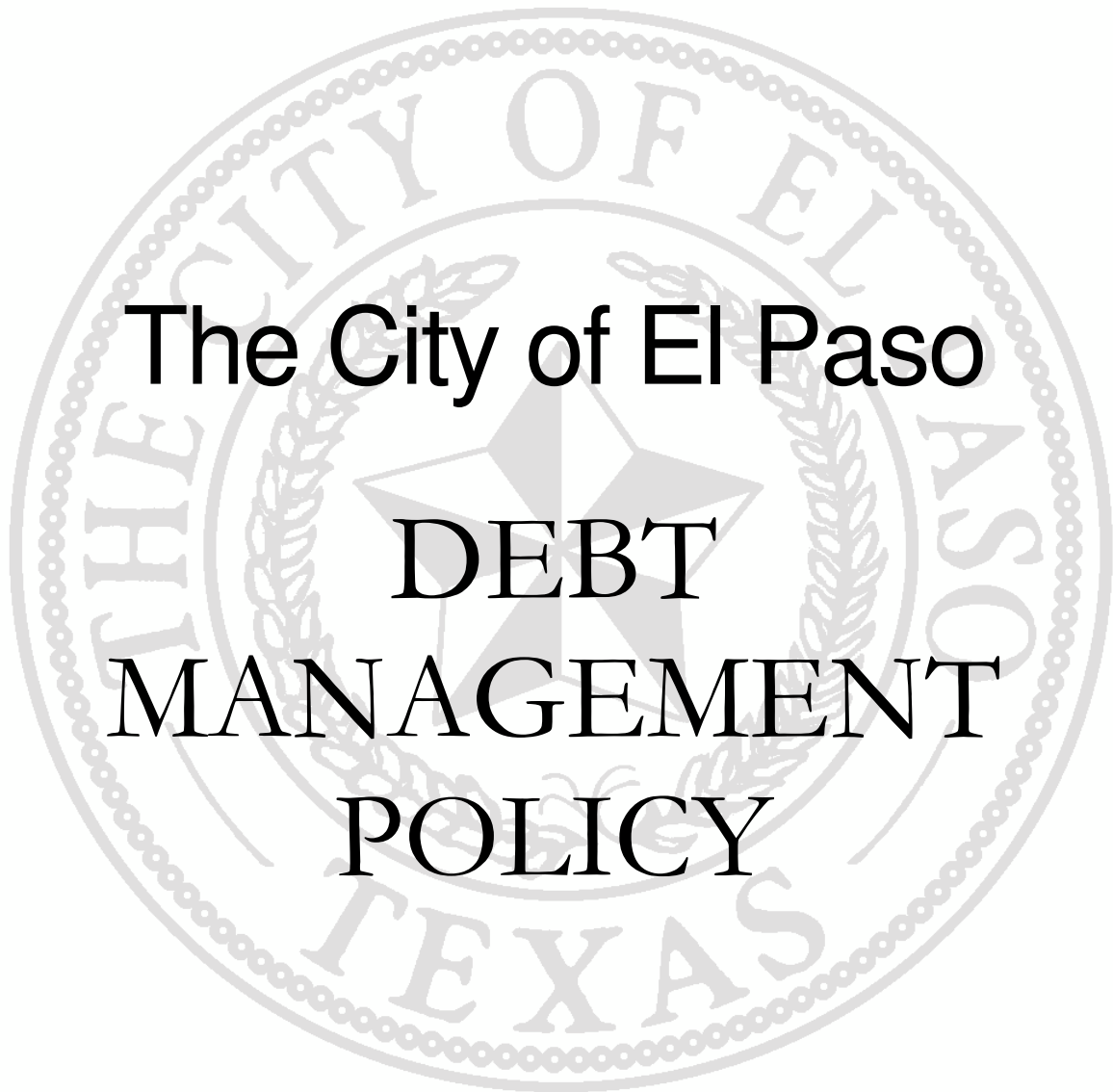


Don W. Minton
City Attorney’s Office

APPROVED AS TO CONTENT:



Dr. Mark Sutter
Chief Financial Officer



The City of El Paso

DEBT MANAGEMENT POLICY

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The City of El Paso

Debt Management Policy

1.0 POLICY

It is the policy of the City of El Paso (“City”) to develop and maintain a sound debt management program. This policy sets forth the parameters for issuing new debt as well as managing the outstanding debt portfolio, identifying the types and amounts of permissible debt, and maintaining the current bond rating in order to minimize borrowing costs and preserving access to credit. It is the intent of the City to establish this policy to provide guidance to staff to:

- Ensure high quality debt management decisions;
- Ensure that debt management decisions are viewed positively by rating agencies, investment community and citizenry-at-large;
- Ensure support for debt issuances both internally and externally;
- Demonstrate a commitment to long-term financial planning.

2.0 SCOPE

The City of El Paso Debt Management Policy (this “Policy”) applies to all debt instruments issued by the City regardless of the funding source. Funding sources can be derived from ad valorem taxes, general City revenues, enterprise fund revenues or any other identifiable source of revenue that may be identified for appropriate pledging for bonded indebtedness.

3.0 OBJECTIVES

The primary objective of this Policy is to ensure that the City establishes and maintains a solid position with respect to its debt service fund. It is intended to demonstrate that proceeds from long-term debt will not be used for current operations but rather for capital improvements and other long-term assets.

Other objectives include: i) bonds will be paid back within a period not to exceed, and preferably sooner than, the expected useful life of the capital project; ii) decisions will be made based on a number of factors and will be evaluated against long-term goals rather than a short-term fix.; and iii) debt service funds will be managed and invested in accordance with all federal, state and local laws.

4.0 STRUCTURE OF DEBT

Debt service will be structured, to the greatest extent possible, to match projected cash flows, minimize the impact of future property tax levies, and maintain a relatively rapid payment of principal. The term of the debt issuance should equal the lesser of the useful life of the asset being financed or the maximum maturity permitted by State law for the obligations issued to finance the acquisition and construction of the asset.

4.1 Fixed Interest versus Variable Interest

The City primarily issues fixed rate bonds to protect the City against interest rate risk. The City has the option to issue variable rate bonds and may, if market conditions warrant, consider such a structure. Commercial paper notes, due to their short term maturities (270 days or less), are treated as variable rate obligations.

4.2 Other considerations

Bonds are generally issued with an average life of 20 years or less for general obligation bonds, certificates of obligation and revenue bonds but may be greater for some projects such as landfills and major utility facilities whose lives are greater than 20 years. Typically, interest is paid in the first fiscal year after a bond sale, and principal is paid no later than the second fiscal year after the debt is issued. Call provisions for bond issues shall be made as short as possible consistent with the lowest interest cost to the City. The targeted maximum length to call is 10 years. However, the City may opt for a call date longer than 10 years in order to achieve the necessary goals of the particular issue.

5.0 FINANCING ALTERNATIVES

It is the City's intent to develop a level of cash and debt funded capital improvement projects that provide the citizens with the desired amount of City services at the lowest cost. The City may use both general obligation bonds and certificates of obligations as deemed appropriate by City staff and approved by Council.

5.1 General obligations bonds will be used if the following criteria are met:

- The size of the issuances is \$100 million or greater.
- Funds will be used for new and expanded facilities, major repair/renovations to existing facilities, quality-of-life projects, and economic development projects.
- Useful lives of assets acquired will be fifteen (15) years or more; or will extend the useful life of an asset for more than (15) years.
- Voter authorized debt

- 5.1.1 The total dollar amount of bond election propositions recommended to the voters shall not exceed the City's estimated ability to issue said bonds within a normal 10 year period.
- 5.1.2 The use of reimbursement resolutions may be used as a cash management tool for general obligation debt funded projects.
- 5.1.3 Commercial paper can be used as a source of long-term financing for projects that have received voter authorization if City staff has determined that such financing is prudent. It is the policy of the City that the amount of commercial paper outstanding should not exceed 120% of the total investment portfolio of the City. It is the policy of the City that the net amount (total commercial paper less the investment portfolio) of commercial paper outstanding not exceed 25% of the amount of fixed rate debt outstanding. Commercial paper will be converted to refunding bonds when dictated by economic and business conditions.
- 5.1.4 Quality-of-life projects are defined as projects such as but not limited to the City's parks, museums, zoo, libraries, non-public safety facilities, and entertainment, sports and amusement-type facilities.

5.2 Certificates of Obligation – For Issuances less than \$100 million

It is the City's priority to fund the majority of capital projects with voter-approved debt. However, on occasion, it becomes necessary to seek additional financing in order to make necessary infrastructure improvements, renovate existing facilities, and extend the useful life of an asset. Certificates of Obligation ("~~Cos~~CO's") will be issued for the following projects/acquisitions:

- Capital asset acquisitions (heavy equipment, vehicles, IT equipment, etc.)
- Rehabilitation and/or extension of the useful life of existing facilities, including existing quality-of-life facilities
- Street resurfacing
- Unpaved Rights of Way
- ADA retrofitting/rehabilitation projects
- Street lighting
- Infrastructure projects (street and draining work)
- Emergency city facilities rehabilitation (storm water draining, etc.)
- Major core service facilities (police, fire, streets, etc.)

Notwithstanding the policy set forth herein and in section 5.1, ~~certificates~~ Certificates of obligation ~~Obligation~~ or other long-term debt may be considered if the following criteria are met:

- The need for the project is urgent and immediate;

- The project(s) is necessary to prevent an economic loss to the City;
- Source of revenue is specific and can be expected to cover the additional debt;
- The expected debt is the most cost effective financing option available.

In addition, the average maturity of non-voter approved debt shall not exceed the average life of the project financed. Capital items financed with long-term debt shall have a value of at least \$5,000 and a life of at least four years.

Reimbursement resolutions may be used for projects funded through certificates of obligations.

5.3 Certificates of Obligations – Enterprise Fund

Certificates of obligation for an enterprise system will be limited to only those projects, which can demonstrate the capability to support the certificate debt either through its own revenues, or another pledged source other than ad valorem taxes and meet the same criteria as outlined in 4.2 above.

5.4 Revenue Bonds

Revenue bonds will be issued for projects that generate revenues that are sufficient to repay the debt. Except where otherwise required by State Statutes, revenue bonds may be issued without voter approval and only in accordance with the laws of Texas.

5.5 Other debt obligations

The use of other debt obligations, permitted by law, including but not limited to public property finance act contractual obligations, pension obligation bonds, tax notes, and lease purchase obligations, will be reviewed on a case-by-case basis. The findings in 5.2 above will be considered for the use of these obligations.

6.0 METHODS OF SALE

The City may use competitive sales, negotiated sales, or private placements. When considering the method of sale, the City will take the following conditions into consideration:

- a. Financial conditions;
- b. Market conditions;
- c. Transaction-specific conditions;
- d. City-related conditions; and
- e. Risks associated with each method.

Additionally, the City considers the following criteria when determining the appropriate method of sale for any debt issuance:

- a. Complexity of the Issue – Municipal securities with complex security features require greater marketing and buyer education efforts on the part of the underwriter, to improve the investors' willingness to purchase.

- b. Volatility of Bond Yields – If municipal markets are subject to abrupt changes in interest rates, there may be a need to have some flexibility in the timing of the sale to take advantage of positive market changes or to delay a sale in the face of negative market changes.
- c. Familiarity of Underwriters with the City’s Credit Quality – If underwriters are familiar with the City’s credit quality, a lower True Interest Cost (“TIC”) may be achieved. Awareness of the credit quality of the City has a direct impact on the TIC an underwriter will bid on an issue. Therefore, where additional information in the form of presale marketing benefits the interest rate, a negotiated sale may be recommended. The City strives to maintain an excellent bond rating. As a result, the Municipal Bond Market is generally familiar with the City’s credit quality.
- d. Size of the Issue - The City may choose to offer sizable issues as negotiated so that pre-marketing and buyer education efforts may be done to more effectively promote the bond sale.

6.1 Definitions of Methods of Sales

A **Competitive Sale** is when bonds are awarded in a sealed bid sale to an underwriter or syndicate of underwriters that provides the lowest TIC bid. TIC is defined as the rate, which will discount the aggregate amount of debt service payable over the life of the bond issue to its present value on the date of delivery. In today's market, bids primarily are submitted electronically through a secure website.

A **Negotiated sale** is when the City chooses an underwriter or underwriting syndicate, generally from the pool selected through its Request for Qualification (“RFQ”) process, that is interested in reoffering a particular series of bonds to investors. The terms of the sale including the size of the underwriter’s discount, date of sale, and other factors are negotiated between the two parties. Although the method of sale is termed negotiated, individual components of the sale may be competitively bid. The components are subject to a market analysis and reviewed prior to recommendation by staff. Negotiated sales are more advantageous when there needs to be some flexibility in the sale date or when less conventional bond structures are being sold. Negotiated sales are also often used when the issue is particularly large or if the sale of the debt issuance would be perceived to be more successful with pre-marketing efforts.

A **Private placement** is a sale of debt securities to a limited number of sophisticated investors. The City may engage a placement agent to identify likely investors. A private placement is beneficial when the issue size is small or when the security of the bonds is weak since the private placement permits issuers to sell more risky securities at a higher yield to investors that are familiar with the credit risk.

7.0 REFUNDING OF DEBT

- 7.1 Advance refunding and forward delivery refunding transactions for savings should be considered when the net present value savings as a percentage of the par amount of refunded bonds is at least 3%.
- 7.2 Current refunding transactions issued for savings should be considered when the net present value savings as a percentage of the par amount of refunded bonds is at least 2%.
- 7.3 From time to time, the City may also issue refunding debt for purposes of restructuring debt, changing covenants, and/or changing the repayment source of the bonds. Such purpose should be specifically recognized by City Council.

8.0 DEBT LIMITS

- 8.1 The total principal amount of general obligation bonds together with the principal amount of all other outstanding tax-supported indebtedness of the City shall not exceed ten percent of the total assessed valuation of the City's tax rolls.
- 8.2 Net direct debt service as a percent of Net Operating Revenues should not exceed 20%. (ICMA indicator 21)

9.0 MATURITY LEVELS

- 9.1 The term of debt shall not exceed the expected useful life of the capital asset being financed and in no case shall it exceed 30 years. The average (weighted) general obligation bond maturities shall be kept at or below 15 years.

10.0 MANAGEMENT OF DEBT SERVICE FUND

- 10.1 Interest earnings from general obligation bonds and certificates of obligation shall be used solely to fund direct or related capital expenditures or to service current and future debt payments. Interest earnings will be allocated in accordance with the City's Investment Policy, adopted annually by Council.
- 10.2 Debt service reserves for tax-supported debt shall not exceed a three-month reserve of the current year total debt service expenditure budget (i.e. Total Annual Debt Service Budget/12 month x 3 months). If this reserve balance is exceeded during any given fiscal year, a plan should be adopted to reduce the size of the reserves as quickly as possible without causing large variances in the ad valorem property tax rate.
- 10.3 The minimum debt service fund balance should exceed the debt service portion of the largest taxpayer's tax levy for the ensuing fiscal year.

10.4 Debt service reserves for revenue bonds shall be maintained at levels required by controlling bond ordinances.

10.5 The City finances certain capital projects and debt refinancing through the issuance of tax-advantaged debt and it is the City's policy to comply with all applicable laws, regulations and contracts applicable to the debt.

Tax-advantaged bonds (tax-exempt, tax credit and direct pay) are obligations that receive preferential tax treatment under the Internal Revenue Code (the "Code"). Tax-advantaged status remains throughout the life of the debt, but this status may be lost if certain federal laws do not remain satisfied. Failure by the City to comply with these laws at any time during the life of the debt may result in the retroactive and prospective loss of the tax-advantaged status of the debt or the imposition of additional taxes or assessments on the City.

The Financial and Audit Oversight Committee (FAOC), was created by the City Council by Resolution dated August 21, 2012 (the "Committee") and is responsible for reviewing and making recommendations to the entire City Council regarding the financial affairs and policies of the City, including City compliance with post-issuance federal tax requirements for the City's tax-advantaged debt. The Chief Financial Officer ("CFO") has the primary operating responsibility for establishing and maintaining procedures and guidelines to support compliance and for monitoring compliance on an ongoing basis with post-issuance federal tax requirements for the tax-advantaged debt. The procedures and guidelines shall describe the processes used to ensure compliance with applicable laws, regulations and contracts, and identify the positions and individuals responsible for these processes. The procedures and guidelines should be consistent with those items referenced in Appendix 1 IRS Form 5091 Voluntary Compliance for Tax-Exempt and Tax Credit Bonds. To aid in ensuring compliance, staff will utilize the post issuance compliance checklist developed jointly by the National Association of Bond Lawyers ("NABL") and the Government Finance Officers Association ("GFOA") in Appendix 2. The CFO shall also consider options for voluntary corrections for failure to comply with post-issuance compliance requirements (such as remedial actions under Tax Exempt Bonds Voluntary Closing Agreement Program (TEB VCAP)) and shall take corrective action when necessary, and appropriate as referenced, in Appendix 1.

10.6 The City does not use derivatives in any debt or investment activities.

11.0 DEBT SERVICE TAX RATE

Council shall adopt the necessary debt service tax rate up to a maximum amount of thirty (30 ¢) per \$100 valuation in order to meet debt service principal, interest and fees payments, net of transfers, for each particular fiscal/budget year, subject to any reserve availability as outlined in 8.2 above.

12.0 RATINGS

- 12.1 The City will strive to maintain good relationships with bond rating agencies as well as disclose financial reports and information to these agencies and to the public.
- 12.2 The City will obtain a rating from at least one nationally recognized bond-rating agency on all issues being sold on the public market.
- 12.3 Timely disclosure of annual financial information including other information will be provided to the rating agencies. The Comprehensive Annual Financial Report (CAFR) will be prepared by management and attested to by an outside nationally recognized audit firm.
- 12.4 Timely disclosure of any pertinent financial information that could potentially affect the City's credit rating will also be presented to the ratings agencies required information repositories, bond insurance companies insuring City debt and commercial banks providing liquidity support for commercial paper programs.

13.0 SELECTION OF FINANCIAL ADVISORS

- 13.1 In order to obtain the best price, achieve a high level of quality service, promote fairness and objectivity, and allow the City to compare Financial Advisors, the City will prepare a RFQ to select a Financial Advisor at least once every five years. City staff should review ongoing contracts periodically to ensure that the selected Financial Advisor is performing at a satisfactory level.
- 13.2 The Financial Advisor selected will provide financial advisory services related to the authorization and issuance of debt instruments or other securities as well as debt management planning services as requested by the City.
- 13.3 Any RFQ developed should provide, at a minimum, a clear and concise description of the scope of work, specify the length of the contract and indicate whether joint proposals with other firms are acceptable; include objective selection criteria and explain how proposals will be evaluated; and require all fee structures to be presented in a standard and clear format. In addition, the RFQ should include questions that distinguish firms' qualifications and experience, including relevant experience of the firm and the particular individuals assigned to the issuer.

14.0 SELECTION OF UNDERWRITERS

- 14.1 In order to obtain the best price, achieve a high level of quality service, promote fairness and objectivity, and allow the City to compare underwriters, the City will prepare a RFQ to select underwriters at least once every five years. Although the City anticipates using this RFQ as the basis for selecting Underwriters for all future debt issuances for general obligation, contractual obligations, revenue bonds and other such type debt, the City may solicit underwriters for certain future debt instruments that it determines require additional consideration or specialty such as pension obligation debt issuances.
- 14.2 A list of selected underwriters will be developed from responses to the RFQ process, which shall be provided to Council for its approval. This list will be used on a rotation basis from which to select underwriters for a particular transaction. City staff should review ongoing contracts periodically to ensure that the selected underwriter(s) are performing at a satisfactory level.
- 14.3 Any RFQ developed should provide, at a minimum, a clear and concise description of the scope of work, specify the length of the contract and indicate whether joint proposals with other firms are acceptable; include objective selection criteria and explain how proposals will be evaluated; and require all fee structures to be presented in a standard and clear format. In addition, the RFQ should include questions related distinguish firms' qualifications and experience, including relevant experience of the firm and the particular individuals assigned to the issuer.

15.0 SELECTION OF BOND COUNSEL

- 15.1 The CFO shall coordinate with the City Attorney on the recommendation of bond counsel for debt issues. The recommendation will be submitted to the City Manager and upon approval by the City Manager, will then be forwarded to the City Council for final authorization and approval. Bond counsel will have comprehensive municipal debt knowledge and experience. When the bond counsel has been selected, they are responsible for providing an opinion to investors in two specific areas. The bond counsel must opine to investors that the securities are valid and legally binding obligations of the issuer. Then, the bond counsel will opine on whether the interest on the bonds is exempt from federal taxation.

The bond counsel also prepares all bond documents necessary to execute the bond issuance. The bond counsel is responsible for coordinating with the City Attorney's office, City Clerk's office, and the Chief Financial Officer's Portfolio, as well as the City's financial advisor, to ensure that all tasks associated with the bond issuance are completed within prescribed timeframes. To the extent required by State law, bond counsel is responsible for coordinating with the Office of the Attorney General and the Office of the Comptroller of Public Accounts of the State of Texas matters relating to the approval of City obligations. The City values continuity in maintaining a relationship with bond counsel due to the complexity of issues and laws related in issuing municipal bonds.

However, the City reserves the right to conduct a formal request for qualifications process.

16.0 DEBT MANAGEMENT POLICY REVIEW

This Debt Management Policy shall be reviewed at least bi-annually by the City Council and any modifications must be adopted by Council.

17.0 Appendix 1 – Voluntary Compliance for Tax-Exempt and Tax Credit Bonds

18.0 Post Issuance Compliance Checklist



Voluntary Compliance for Tax-Exempt and Tax-Credit Bonds

Part one of this publication is a summary of highlighted considerations to help issuers of tax-advantaged bonds comply with related federal tax law requirements. Part two is a summary of Tax-Exempt Bonds Voluntary Closing Agreement Program (TEB VCAP) provisions.

Tax-Advantaged Bonds Compliance

The IRS Mission

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.

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 the furtherance of governmental and qualified purposes. Detailed educational resources on post-issuance compliance and voluntary compliance (including TEB VCAP requirements) are available on TEB's website: www.irs.gov/Tax-Exempt-Bonds

Useful IRS Publications

- 1 Your Rights as a Taxpayer
- 4077 Tax-Exempt Bonds for 501(c)(3) Charitable Organizations
- 4078 Tax-Exempt Private Activity Bonds
- 4079 Tax-Exempt Governmental Bonds
- 5005 Your Responsibilities as a Conduit Issuer of Tax-Exempt Bonds

PART ONE: Introduction to Tax-Advantaged Bond Compliance

Tax-advantaged bonds (tax-exempt, tax credit and direct pay) are obligations that receive preferential tax treatment under the Internal Revenue Code (the "Code"). These bonds, issued by or on behalf of state and local governments, are subject to applicable federal tax requirements both at the time of issuance and as long as the bonds remain outstanding. An issuer, conduit borrower, or other party's failure to comply with any applicable federal tax requirements with respect to tax-advantaged bonds jeopardizes the preferential tax status of those bonds.

Compliance at Time of Issuance

Compliance with certain applicable federal tax requirements at the time the bonds are issued include filing a Form 8038 series information return (e.g., 8038, 8038-G, 8038-GC, or 8038-TC) and reasonable expectations by the issuer that there will be ongoing post-issuance compliance. Additional issuance requirements might include a proper volume cap allocation and public approval of the bond issue.

Compliance Following Issuance

Post-issuance federal tax requirements generally fall into two categories: (1) qualified use, including use of the bond proceeds and the property financed by bond proceeds; and (2) arbitrage, including appropriate restrictions of investment yields and rebate of arbitrage from the investment of bond proceeds. Qualified use requirements require monitoring of the various direct and indirect uses of bond-financed property over the life of the bonds, determination of the sources of debt service payments and security for the debt, and calculations of the percentage of nonqualified uses within the project to be financed with the bond proceeds. Arbitrage requirements involve calculating and monitoring the yields on investments, determining appropriate restrictions on the investment yields, determining the amount of arbitrage on the investments, and calculating the amount and timing of arbitrage rebate payments that must be paid to the US Treasury.

There may be other post-issuance due diligence requirements. For example, some level of post-issuance monitoring may be required to determine compliance with issuance cost limitations applicable to qualified private activity bonds.

Importance of Post-Issuance Compliance

The ongoing nature of post-issuance federal tax requirements applicable to tax-advantaged bonds requires issuers to actively monitor compliance throughout the entire life of their bonds. This due diligence will significantly improve the issuer's ability to ensure the continued tax-advantaged status of its bonds by: (1) identifying noncompliance; (2) preventing violations from occurring; and (3) timely correcting identified violations (when prevention is not possible).

Role of Written Procedures in Post-Issuance Compliance

Issuers should adopt appropriate written procedures for their tax-advantaged bond issues that go beyond reliance on tax certificates provided at closing and bond documents. Sole reliance on tax certificates and bond documents may result in insufficiently detailed procedures or procedures not adequately incorporated into an issuer's operations. Appropriate written procedures may contain certain key characteristics including:

- (1) Due diligence review at regular intervals;
- (2) Identifying the official or employee responsible for review;
- (3) Training of responsible officials/employees;
- (4) Retention of adequate records to substantiate compliance (e.g., records relating to expenditure/investment of proceeds, use of debt financed property and related contracts);
- (5) Procedures reasonably expected to timely identify noncompliance; and
- (6) Procedures ensuring that the issuer will take steps to timely correct identified noncompliance.

Establishing and following written monitoring procedures helps issuers to preserve the preferential tax status of their tax-advantaged bonds. Generally, an issuer that has established and followed comprehensive written monitoring procedures to promote post-issuance compliance will be significantly less likely to violate the federal tax requirements related to its bonds than an issuer without such procedures.

Remedial Actions

An action that causes an issue to meet the private business tests or the private loan financing test is not treated as a deliberate action if the issuer takes a remedial action under the Treasury regulations. Application of an appropriate remedial action prevents the bonds from losing their tax-advantaged status. Some of the more common deliberate actions for which remedial action may be available include:

- (1) A management contract that causes private business use;
- (2) The sale of bond-financed property;
- (3) The lease of bond-financed property to a nongovernmental person; and
- (4) The failure to use 95% of net proceeds to provide an exempt facility.

An issuer that discovers it has taken a deliberate action that may result in a violation of any of the federal tax requirements applicable to its bonds should immediately ascertain if there are available remedial actions under the Income Tax Regulations (the "Treasury regulations") or other published guidance.

Record Retention Requirements

Various sections of the Code and Treasury regulations, including, but not limited to, sections 103, 141-150, and 6001 require

the retention of the records necessary to substantiate compliance with federal tax requirements applicable to tax-advantaged bonds. Generally, 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 issuer with respect to a tax-advantaged bond issue.

PART TWO: TEB Voluntary Closing Agreement Program

Introduction

The Tax Exempt Bonds Voluntary Closing Agreement Program (TEB VCAP) is described in Notice 2008-31, 2008-11 I.R.B. 592, which provides information about TEB VCAP for tax-advantaged bonds. This program provides remedies for issuers who voluntarily come forward to resolve a violation which cannot be rectified 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. TEB VCAP operating procedures are in section 7.2.3 of the Internal Revenue Manual ("IRM").

Objective of TEB VCAP

TEB VCAP encourages issuers and other parties involved in tax-advantaged bond transactions to exercise due diligence in complying with the applicable federal tax requirements, and to provide a vehicle to correct violations as expeditiously as possible before they are discovered during an examination. An issuer submitting a TEB VCAP request can expect to settle the case on terms that are no less favorable, and generally on terms that are more favorable than the settlement terms that would be expected had the violation been discovered as a result of an examination.

Availability of TEB VCAP

TEB VCAP is available to issuers of tax-advantaged bonds who have discovered a violation of the federal tax requirements applicable to their bonds. TEB VCAP is not available for bonds under examination, or if the tax-advantaged status is at issue in a federal court or before the IRS Office of Appeals. TEB VCAP is generally not available, absent extraordinary circumstances, if the violation can be resolved under existing remedial action provisions or closing agreement programs contained in the Treasury regulations or other published guidance.

Submitting a TEB VCAP Request

A TEB VCAP request must include Form 14429 Tax-Exempt Bonds Voluntary Closing Agreement Program Request, available on TEB's website at www.irs.gov/Tax-Exempt-Bonds. Form 14429 must be signed under penalty of perjury and included at the beginning of the request. This form assists issuers in organizing their TEB VCAP requests and ensuring that their submissions are complete in accordance with the requirements under Notice 2008-31 and IRM section 7.2.3. Email requests with this required information to: TEBVCAP@irs.gov. Requests may also be mailed to: Internal Revenue Service, Attn. TEB VCAP, 1122 Town & Country Commons, Chesterfield, MO 63017.

TEB VCAP Resolution Standards

In order to standardize closing agreement terms (including settlement amounts) and to provide transparency to issuers and other parties to tax-advantaged bond transactions, TEB has described in IRM section 7.2.3 resolution standards that may be used to conclusively resolve certain violations. Methodologies relating to calculation of settlement amounts under these resolution standards are fully described in IRM section 4.81.6. If a violation does not fall within a specific resolution standard, TEB VCAP general resolution standards may be applied on such terms as are determined appropriate under the facts and circumstances. TEB frequently expands the resolution standards available under its IRM procedures in order to address additional violations.

Resolution Standards for Tax-Exempt Bonds

IRM section 7.2.3.4.2 describes resolution standards for specific violations of federal tax laws applicable to tax-exempt bonds. Examples of violations that these standards address include:

- (1) A final allocation of tax-exempt bond proceeds to nonqualified purposes that exceeds the defined percentage limits;
- (2) Property financed with proceeds of a qualified 501(c)(3) bond issue is owned by a person other than a 501(c)(3) organization or governmental unit;
- (3) A failure to successfully remediate nonqualified bonds through establishment of a defeasance escrow because some or all of the bonds are not callable within 10.5 years of the issue date;
- (4) On an allocation of proceeds to property, the average maturity of the bonds exceeds 120% of the average reasonably expected economic life of such property; and
- (5) A party to the escrow agreement fails to meet their obligations to timely reinvest proceeds of a refunding issue, upon maturity of the investments, as directed by the escrow instructions.

Resolution Standards for Direct-Pay Bonds

IRM section 7.2.3.4.3 describes resolution standards for specific violations of federal tax laws applicable to certain direct pay bonds. Examples of violations that these standards address include:

- (1) A deliberate action that causes build America bonds to be private activity bonds;
- (2) A final allocation of proceeds to an impermissible use; and
- (3) The acquisition by an issuer of its own debt instrument resulting in extinguishment.

Anonymous Request

A TEB VCAP request may be submitted on an anonymous basis to find the appropriate resolution method for a violation. This option is intended to assist issuers in evaluating appropriate resolution methods in instances where the violations are novel or in instances where there is significant uncertainty regarding the appropriate settlement terms. The anonymous request may only pertain to a general matter, question, or factual scenario. It may not be used to inquire as to appropriate resolution methods for violations involving detailed facts and circumstances.

Resolution Benefit for Issuers with Post-Issuance Compliance Procedures

The TEB VCAP program provides an incentive for issuers and conduit borrowers to implement written post-issuance compliance monitoring procedures. Under this program, issuers that adopt written procedures to ensure their tax-advantaged bonds remain in compliance with all post-issuance related federal tax requirements that are conditions to the tax-advantaged status of the bonds may be eligible to resolve violations on terms that are more favorable than issuers that have not adopted such post-issuance compliance monitoring procedures. Please see section 7.2.3 of the IRM for additional information.



National Association of Bond Lawyers

POST ISSUANCE COMPLIANCE CHECKLIST

TRANSACTION PARTIES		
Overall Responsible Office for Debt Management Activities	_____	
Bond Counsel	_____	
Trustee	_____	
Paying Agent	_____	
Rebate Specialist	_____	
Other:	_____	
Other:	_____	
Other:	_____	
A. TAX LAW REQUIREMENTS	Document Reference	Responsibility
1. General Matters.		
(a) Proof of filing Form 8038, 8038-G or 8038-GC. Copies of Form 8038, etc., to State authorities as required by State procedures.		
(b) "Significant modification" to bond documents results in reissuance under Treas. Reg. § 1.1001-3. Proof of filing new Form 8038, etc., plus final rebate calculation on pre-modification bonds.		
2. Use of Proceeds: Governmental Bonds or Qualified 501(c)(3) Bonds.		
(a) No private business use arrangement with private entity (includes federal government) beyond permitted <i>de minimis</i> amount unless cured by remedial action under Treas. Reg. § 1.141-12.		
(i) Sale of facilities.		
(ii) Lease.		
(iii) Nonqualified management contract. Rev. Proc. 97-13.		
(iv) Nonqualified research contract. Rev. Proc. 97-14.		
(v) "Special legal entitlement."		

(b) Additional requirements for qualified 501(c)(3) bonds.		
(i) No unrelated business activity income in facility beyond permitted <i>de minimis</i> amount.		
(ii) No activities jeopardizing 501(c)(3) exemption of 501(c)(3) borrower.		
(c) Remedial action may consist generally of redemption or defeasance of bonds (with notice of defeasance to IRS). Where disposition is a cash sale, remedial action may be an alternative qualifying use of proceeds. If bonds are 501(c)(3) bonds, alternative use must have "TEFRA" hearing and elected official approval prior to sale of original facilities. Proof of filing new Form 8038, etc.		
3. Private Activity Bonds. IRC §142.		
(a) Exempt facilities—in general.		
(i) Continuing use of exempt facilities in accord with basis of tax exemption.		
(ii) Use excess proceeds for redemption or defeasance (with notice of defeasance to IRS) within 90 days of determination that proceeds will not be spent, or date financed facility is placed in service. Treas. Reg. § 1.142-2(c).		
(b) Residential rental project bonds.		
(i) Meet low-income requirements for qualified project period. IRC §142(d).		
(ii) Proof of filing annual reports of compliance by project operator on Form 8703.		
(c) Qualified mortgage bonds.		
(i) Good faith compliance efforts for mortgage eligibility. IRC §143(a)(2).		
(ii) Spend proceeds or redeem bonds within 42 months of issuance; use mortgage prepayments after first 10 years to redeem bonds at next semiannual debt service date after receipt.		

(iii) Proof of filing annual reports of mortgagor income due 8/15. Treas. Reg. § 1.103A-2(k)(2)(ii).		
(d) Small issue manufacturing bonds using \$10,000,000 (\$20,000,000 for 2007) capital expenditure limit; monitor capital expenditures during three years after issuance for compliance with limit. IRC §144(a).		
(e) Acquisition of existing facilities: make qualifying rehabilitation within 24 months unless covered by exceptions. IRC §147(d).		
4. Arbitrage.		
(a) Rebate. IRC §148(f).		
(i) First installment of arbitrage rebate due on fifth anniversary of bond issuance plus 60 days.		
(ii) Succeeding installments every five years.		
(iii) Final installment 60 days after retirement of last bonds of issue.		
(iv) Monitor expenditures prior to semi-annual target dates for six-month, 18-month, or 24-month spending exception.		
(b) Monitor expenditures generally against date of issuance expectations for three-year or five-year temporary periods or five-year hedge bond rules.		
(c) For advance refunding escrows, confirm that any scheduled purchases of 0% Securities of State and Local Government Series are made on scheduled date.		
5. Special Rules for Pool Bonds.		
(a) Redeem bonds at one-year and three-year expenditure target dates. Pay 95% of costs of issuance within 180 days. IRC §149(f), as amended 2006.		
(b) 501(c)(3) pools: redeem bonds at one-year expenditure target date. IRC §147(b)(4).		
6. Record Retention.		

(a) Maintain general records relating to issue for life of issue plus any refunding plus three years.		
(b) Maintain special records required by safe harbor for investment contracts or defeasance escrows. Treas. Reg. § 1.148-5.		
(c) Maintain record of identification on issuer's books and records of "qualified hedge" contract. Treas. Reg. § 1.148-4(h)(2)(viii) and § 1.148-11A(i)(3).		
(d) Maintain record of election not to take depreciation on leased property that must be treated as owned by a governmental unit. Treas. Reg. § 1.103(n)-2T Q/A7.		
(e) Maintain record of agreements and assignments between governmental units that affect volume cap allocations under IRC §146. Treas. Reg. § 1.103(n)-3T Q/A8, 13 & 14.		
(f) Maintain record of election to utilize the \$10,000,000 small issue bond limit on the books and records of the issuer. Treas. Reg. § 1.103-10(b)(2)(vi).		
7. Allocations of Bond Proceeds to Expenditures. Make any allocations of bond proceeds to expenditures needed under Treas. Reg. § 1.148-6(d) and § 1.141-6(a) by 18 months after the later of the date the expenditure was made or the date the project was placed in service, but not later than the earlier of five years after the bonds were issued or 60 days after the issue is retired.		
B. DISCLOSURE REQUIREMENTS		
1. SEC Rule 15c2-12 Requirements.		
(a) Determine applicability of continuing disclosure undertaking ("CDU").		
(b) Identification of "obligated person" for purposes of Rule 15c2-12. Governmental Bonds: Issuer. Private Activity Bonds: Issuer or Borrower.		
(c) Name of Dissemination Agent, if applicable.		
(d) Periodically determine that required CDU filings have been prepared, sent to and received by NRMSIR's.		

(e) Information required to be provided to NRMSIR and SID:		
(i) Annual Reports.		
(1) Quantitative financial information and operating data disclosed in official statement.		
(2) Audited financial statements.		
(ii) Other information.		
(1) Change of fiscal year.		
(2) Other information specified in CDU.		
(f) Material Event Disclosure. Notification by obligated person to SID and each NRMSIR, in timely manner, of any following events with respect to bonds, if event is material within the meaning of the federal securities laws:		
(i) Principal and interest payment delinquencies.		
(ii) Non-payment related defaults.		
(iii) Unscheduled draws on debt service reserves reflecting financial difficulties.		
(iv) Unscheduled draws on credit enhancements reflecting financial difficulties.		
(v) Substitution of credit or liquidity providers, or their failure to perform.		
(vi) Adverse tax opinions or events affecting the tax-exempt status of the bonds.		
(vii) Modifications to rights of holders of the bonds.		
(viii) Bond calls.		
(ix) Defeasances.		
(x) Release, substitution or sale of property securing repayment of the bonds.		

(xi) Rating changes.		
(g) Failure of the obligated person to timely file financial information (including audited financial statements) and operating data with SID and either each NRMSIR or MSRB.		
2. Notification to Underwriters of Bonds. Determination of whether bond purchase agreement requires issuer of the bonds to notify underwriters for a specified period of time of any fact or event that might cause the official statement to contain any untrue statement of material fact or omit to state a material fact necessary to make the statements made therein, in light of the circumstances in which they were made, not misleading.		
3. Information Required to be Filed with Other Entities.		
(a) Trustee.		
(b) Rating Agency(ies).		
(c) Bond Insurer.		
(d) Credit Enhancer.		
Examples:		
(i) Financial records.		
(1) Annual.		
(2) Quarterly.		
(ii) Budgets.		
(iii) Issuance of additional bonds.		
(iv) Events of default.		
(v) Notices of redemption.		
(vi) Amendments to bond documents.		
4. Local Disclosure. State and/or local requirements.		

C. MISCELLANEOUS STATE LAW AND DOCUMENT REQUIREMENTS		
1. Security.		
(a) Proof of filing UCC statements with appropriate authorities as required by State procedures.		
(i) Initial UCC financing statements filed with appropriate authorities. UCC 9-515(a).		
(ii) Continuation statements filed by fifth anniversary. UCC 9-515(d).		
(iii) Transfer by government or governmental unit not requiring a UCC statement. UCC 9-102(a)(45) (UCC exception adopted in certain jurisdictions).		
(iv) Public finance transaction in connection with debt securities (all or portion of securities have initial stated maturity of 20 years; obligated party is State or State governmental unit) qualifies for 30-year filing. UCC 9-515(b)		
(v) Other local requirements or exceptions.		
(b) Proof of filing recorded mortgages, deeds of trust with appropriate authorities and proof of delivery of originals to trustee or custodian.		
2. Insurance.		
(a) Proof of receipt of final title policy and proof of delivery to trustee or custodian.		
(b) Monitor compliance with property and casualty insurance requirements.		
3. Financial Covenants. Monitor compliance with rate covenant or other covenants not included in B(3) above.		
4. Transfer of Property.		
(a) Restrictions on transfer of cash.		
(b) Restrictions on releases of property.		
(c) Restrictions on granting liens or encumbering property.		

<p>5. Investments.</p> <p>Compliance with permitted investments.</p>		
<p>6. Derivatives.</p> <p>Entering into and ongoing compliance of derivatives contracts is complex and a universe in and of itself. GFOA has created a Derivatives Checklist and a Recommended Practice on the Use of Debt-Related Derivatives Products and the Development of a Derivatives Policy to assist issuers with understanding these products. These documents can be found at: http://gfoa.org/services/rp/debt.shtml.</p>		