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**New Jersey Educational Facilities Authority  
Post-Issuance 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 “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 to New Jersey’s 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 "Grants"). 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.

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## **Financing Program**

Pursuant to the State-Backed Programs, Grants are provided to the 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 each State-Backed Program (other than HEFT) are secured by a contract with the State Treasurer to pay principal of and interest on such bonds subject to appropriations being made, from time to time, by the New Jersey State Legislature and in the case of HEFT, 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 the facilities financed are used in a manner consistent with the Bond documents and federal tax law requirements and, if not, proper remedial actions are utilized to maintain federal tax law compliance;
- Maintaining adequate records.

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## **Policy Sections**

### **I. Organizational Responsibility**

The Executive Director of the Authority has overall responsibility for post-issuance compliance for the Bonds and may delegate such responsibilities to a “Compliance Officer” who will have primary responsibility for post-issuance compliance to ensure and monitor post-issuance matters with respect to Bonds. The Compliance Officer is initially the Director of Risk Management and the Executive Director is responsible for assuring an adequate succession plan for transferring post-issuance compliance responsibility when changes in Authority staff occur.

The Authority’s Accounting 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 Accounting Department shall also direct investment of proceeds, review monthly bank statements from trustees or custodians and engage a Rebate Service Provider for each issue of Bonds and provide copies of written reports to the Compliance Officer, the Institutions to the extent the Institutions need such information for reporting or compliance at the institutional level, the State Treasurer or his/her designee and the Secretary or his/her designee. The Accounting Department will consult with the Compliance Officer if questions arise relating to the foregoing matters.

The Compliance Officer shall work with the Institutions to provide information and training on 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 use and reviewing rebate reports.

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

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 financed facilities. In cases where the Institution submits requisitions to the Authority, the Authority's Accounting Department shall maintain copies of approved requisitions and copies of invoices. Requisitions must be accompanied by copies of invoices for Contractor/Architect/Engineering bills and any other items over \$10,000 before being approved; provided however, that the Authority reserves the right to request invoices for items less than \$10,000 as necessary.

For bonds issued after the date of these Procedures, the Authority's Bond documents require the Institutions to monitor the application and use of Bond proceeds and Bond financed facilities on an ongoing basis and at least annually to inform the Authority of events relating to use of bond proceeds and financed facilities which may result in private 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 (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 to the Institutions during each Annual Compliance Period, asking for updated information about use of Bond-financed facilities and other appropriate matters.

### III. Private Business Use and Payments

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 a 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 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 IRS considers the use of bond proceeds to finance bond issuance costs of 501(c)(3) entities as PBU, the allowable PBU percentage is reduced by the cost of issuance percentage<sup>5</sup>.

Special legal entitlements to property financed with Bonds can give rise to PBU. Special legal entitlements 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. Typical examples of PBU in a college setting often include food service contracts, book store contracts, private research and summer camps if they don’t meet certain safe-harbors which are set out in IRS Revenue Procedures 97-13 and 2007-47. 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 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.

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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 financed facilities 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 use is available to each participating Institution or if a specific percentage of allowable private 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).

<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.

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#### **IV. Record Retention**

The Bond documents require the Institutions to maintain all relevant records relating to the Bonds. In addition, 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, 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. Currently, records of issuance and related post issuance compliance documentation must be maintained for the life of the bond issue, plus any refunding, plus three (3) years.

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

- Expenditures and investment of bond proceeds;
- Use of debt-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.

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#### **V. Arbitrage and Rebate**

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 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 Authority will invest Bond proceeds in investments permitted under the Bond documents. The Authority will engage the services of an Arbitrage Compliance Servicer, as necessary, to

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 Compliance Officer will work with the Accounting Department, the Arbitrage Compliance Servicer and to the extent necessary, each Institution, in order for the Arbitrage Compliance Servicer to perform calculations and prepare its report accurately.

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## **VI. Continuity and Training**

The Compliance Officer will receive periodic training regarding the tax and other requirements applicable to Bonds and provide periodic training to Authority staff with responsibilities relating to the procedures set forth above. Such training will cover the purposes and importance of these procedures. The Compliance Officer will also interact with and train or provide information about training 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 of events which may affect the permissible use and expenditure of bond proceeds or financed projects and to cooperate with the Authority in seeking remedial action with respect to such events. The Compliance Officer, either directly or through workshops and conferences, will interact with the Institutions to inform them about private use, changes in use and other events under the Code relating to tax compliance and which could necessitate remedial action pursuant to Treasury Regulations 1.141-12 or 1.145-2 or seeking a Voluntary Closing Agreement (VCAP) 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 an “Institution’s Policy”). Each Institution’s Policy must:

- Identify the compliance activities to be undertaken including

- Tracking and allocation of Grant<sup>6</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”
  - 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, the Secretary and the State Treasurer.
- Assign specific compliance tasks to individual officers and/or employees
- 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 central compliance officer report the results of the annual 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

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<sup>6</sup> Use of the term “Grants” also refers to “Leases” in the case of funding provided under ELF.