



# **HOBE-ST. LUCIE CONSERVANCY DISTRICT**

## **MARTIN COUNTY**

**REGULAR BOARD OF SUPERVISORS MEETING  
FEBRUARY 28, 2024  
9:30 A.M.**

**Special District Services, Inc.  
The Oaks Center  
2501A Burns Road  
Palm Beach Gardens, FL 33410**

**[www.hobestluciecd.org](http://www.hobestluciecd.org)  
561.630.4922 Telephone  
877.SDS.4922 Toll Free  
561.630.4923 Facsimile**

**AGENDA**  
**HOBE-ST. LUCIE CONSERVANCY DISTRICT**  
Conference Room at Becker Tree Farm  
2400 SE Bridge Road  
Hobe Sound, Florida 33455  
**REGULAR BOARD OF SUPERVISORS MEETING**  
February 28, 2024  
9:30 a.m.

- A. Call to Order
- B. Proof of Publication.....Page 1
- C. Establish Quorum
- D. Additions or Deletions to Agenda
- E. Comments from the Public for Items Not on the Agenda
- F. Approval of Minutes
  - 1. January 24, 2024 Regular Board of Supervisors Meeting & Public Hearing Minutes.....Page 2
- G. Old Business
  - 1. Status Update Regarding RG Reserve Pipe Permit
  - 2. Update on Backup Generator and Fuel Tank Price Quotes
- H. New Business
  - 1. Consider Resolution No. 2024-03 – Adopting Policies and Procedures.....Page 9
  - 2. Consider Landowners Agreement.....Page 96
- I. Administrative Matters
  - 1. Engineer’s Report
  - 2. Attorney’s Report
  - 3. Manager’s Report
  - 4. Field Operations Report
- J. Board Members Comments
- K. Adjourn

**PROOF OF PUBLICATION**

Laura Archer  
Peter Pimentel  
Hobe-St. Lucie Conservancy District  
2501 Burns RD # A  
Palm Beach Gardens FL 33410-5207

STATE OF WISCONSIN, COUNTY OF BROWN

Before the undersigned authority personally appeared, who on oath says that he or she is the Legal Advertising Representative of the Indian River Press Journal/St Lucie News Tribune/Stuart News, newspapers published in Indian River/St Lucie/Martin Counties, Florida; that the attached copy of advertisement, being a Legal Ad in the matter of Govt Public Notices, was published on the publicly accessible websites of Indian River/St Lucie/Martin Counties, Florida, or in a newspaper by print in the issues of, on:

10/13/2023

Affiant further says that the website or newspaper complies with all legal requirements for publication in chapter 50, Florida Statutes.

Subscribed and sworn to before me, by the legal clerk, who is personally known to me, on 10/13/2023

\_\_\_\_\_  
Legal Clerk

\_\_\_\_\_  
Notary, State of WI, County of Brown

My commission expires

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HOBE-ST. LUCIE  
CONSERVANCY DISTRICT  
FISCAL YEAR 2023/2024  
REGULAR MEETING SCHEDULE  
NOTICE IS HEREBY GIVEN that  
the Board of Supervisors of the  
Hobe-St. Lucie Conservancy District  
will hold Regular Meetings in the  
Conference Room at Becker Tree  
Farm located at 2400 SE Bridge  
Road, Hobe Sound, Florida 33455 at  
9:30 a.m. on the following dates:  
October 25, 2023  
November 15, 2023  
December 13, 2023  
January 24, 2024  
February 28, 2024  
March 27, 2024  
April 24, 2024  
May 22, 2024  
June 26, 2024  
July 24, 2024  
August 28, 2024  
September 25, 2024

The purpose of the meetings is to  
conduct any business coming before  
the Board. Meetings are open to the  
public and will be conducted in  
accordance with the provisions of  
Florida law. A copy of the Agenda  
for any of the meetings may be  
obtained from the District's website  
or by contacting the District  
Manager at (561) 630-4922 and/or toll  
free at 1-877-737-4922 prior to the  
date of the particular meeting.  
From time to time one or more  
Supervisors may participate by  
telephone; therefore a speaker  
telephone will be present at the  
meeting location so that Supervisors  
may be fully informed of the  
discussions taking place. Said  
meetings may be continued as found  
necessary to a time and place  
specified on the record.  
If any person decides to appeal any  
decision made with respect to any  
matter considered at these  
meetings, such person will need a  
record of the proceedings and such  
person may need to insure that a  
verbatim record of the proceedings  
is made at his or her own expense  
and which record includes the  
testimony and evidence on which the  
appeal is based.  
In accordance with the provisions of  
the Americans with Disabilities Act,  
any person requiring special  
accommodations or an interpreter to  
participate at any of these meetings  
should contact the District Manager  
at (561) 630-4922 and/or toll-free at 1-  
877-737-4922 at least seven (7) days  
prior to the date of the particular  
meeting.  
Meetings may be cancelled from  
time to time without advertised  
notice.  
HOBE-ST. LUCIE CONSERVANCY  
DISTRICT  
www.hobestluciecd.org  
PUBLISH: STUART NEWS 10/13/23  
#9389027

**RYAN SPELLER**  
Notary Public  
State of Wisconsin

MINUTES OF THE BOARD OF SUPERVISORS MEETING  
OF HOBE-ST. LUCIE CONSERVANCY DISTRICT  
January 24, 2024

Pursuant to the above Notice, the Board of Supervisors of Hobe-St. Lucie Conservancy District held its Board of Supervisors Meeting on January 24, 2024 at 9:30 A.M. at the Becker Tree Farm & Nursery located at 2400 SE Bridge Road, Hobe Sound, Florida 33455.

Present were Rick Melchiori, Edward Weinberg and Robert Brown, Supervisors; Michael McElligott of Special District Services, Inc. as District Manager; Robert Higgins of Higgins Engineering, Inc. as District Engineer; and Mary M. Viator, Attorney and Secretary. Also in attendance was Mr. Ray Spear of The Grassroots Corp., Mr. Paul Whalen, Mr. Curtis Love and John Haluska. Attending via telephone was Mr. Jacques Mouracadeh of Coventry Development and Brett Sealy.

A. CALL TO ORDER

The Board of Supervisors Meeting was called to order by President Melchiori.

B. PROOF OF PUBLICATION

C. ESTABLISHMENT OF QUORUM

The President announced a quorum was present and it was in order to transact any business to come before the Board.

D. ADDITIONS OR DELETIONS TO AGENDA

None.

E. COMMENTS FROM THE PUBLIC FOR ITEMS NOT ON THE AGENDA

None.

F. APPROVAL OF MINUTES

A motion was made by Mr. Brown, seconded by Mr. Weinberg and unanimously passed approving the Minutes of the December 13, 2023 Board of Supervisors Board Meeting.

G. PUBLIC HEARING:

1. Proof of Publication: The Proof of Publication of the Public Hearing was presented.
2. Receive Public Comment on the Creation of Unit of Development No. 6. The President announced that it was appropriate to hold a Public Hearing to Consider Approving and Confirming the Creation of Unit of Development No. 6.

The District Manager stated a Request had been received from SFWMD to consider creating a New Unit of Development in a portion of the Balance of the District.

The Board discussed the proposed boundaries of Unit No. 6 which included SFWMD lands and lands owned by TIIFT and HSLCD. A legal description was needed along with authorization of all of the Landowners in the Unit to be included in the Project.

The Board discussed continuing with the formation process without the TIIFT and HSLCD parcel(s), but directed that the consent of both TIIFT and HSLCD was needed before designation of Unit of Development No. 6 included the TIIFT and HSLCD parcels.

The Attorney explained the procedures to be followed regarding the Water Control Plan Approval Process. The Attorney stated it was appropriate to approve and confirm the Creation of Unit of Development No. 6.

It was explained that further action will require the preparation of a Water Control Plan and construction of certain site-specific Water Control Plan Improvements. Today the action designates a geographical area. The District Engineer will then be authorized to develop the Water

Control Plan. There will be further opportunity for Board review and Public Input.

Adjournment: There being no Public Comments, the Public Hearing was adjourned.

3. Consider Resolution No. 2024-01 Approving and Confirming the Creation of Unit of Development No. 6:

The Attorney presented the proposed Resolution to Consider Approving and Confirming the Creation of Unit of Development No. 6.

A motion was made by Mr. Weinberg, seconded by Mr. Brown and unanimously passed to approve Resolution No. 2024-01, Approving and Confirming the Creation of Unit of Development No. 6 as follows:

RESOLUTION NO. 2024-01

RESOLUTION OF THE BOARD OF SUPERVISORS OF  
HOBE-ST. LUCIE CONSERVANCY DISTRICT  
APPROVING AND CONFIRMING THE CREATION OF  
UNIT OF DEVELOPMENT NO. 6

(Copy Filed in District Records.)

H. OLD BUSINESS

1. Status Update Regarding RG Reserve Pipe Permit Application

The District Engineer indicated he had previously reached out to the Consultant of RG Reserve who was putting together a plan for the Engineer's review. The District Engineer indicated the need for RG Reserve to pay for the District's review and the adverse effects resulting from the washout of the structure. The District Engineer indicated the previous damage to the District Facilities could occur again including seepage into the District's Canal.

The District Engineer reported he had followed up with SFWMD after re-sending the demand letter to SFWMD relating to any permits for mitigation as well as the Mitigation Bank security. The District Engineer reported he was awaiting SFWMD's response.

2. Update Regarding Howe Holdings Agreement

The District Engineer commented on the Howe Holdings Agreement.

The District Engineer explained that Howe Holdings had signed the Irrigation Agreement. The District had been awaiting the original re-executed Agreement. He confirmed the parties were in agreement.

The District Manager indicated the Invoice had been sent to Howe Holdings and he confirmed payment.

The District Attorney reported the re-executed original Irrigation Agreement had been received from Howe Holdings.

3. Update on Backup Generator and Fuel Tank Sizes

Mr. Ray Spear reported on the information relating to the backup generator and sizes of the fuel tanks. Proposed was the 750 and 1500 gallon tanks. Mastery recommended the pumps not run at full capacity and include an automatic switch.

A motion was made by Mr. Weinburg, seconded by Mr. Brow and unanimously passed authorizing action to order the generator.

I. NEW BUSINESS

1. Consider Resolution 2024-02 Approving the Amended and Restated Water Control Plan and Restated Report of Engineer for Unit of Development No. 1A

The District Engineer presented the Proposed Amended and Restated Water Control Plan and Restated Report of Engineer for Unit of Development No. 1A. He explained

the Amended and Restated Water Control Plan modifies the Unit of Development No. 1A HSLCD improvements/facilities currently operated and/or maintained by HSLDC. Existing District facilities will be modified, and new facilities constructed, as necessary, to facilitate further changes in development plans for the proposed Discovery PUD subdivision and to accommodate a new gold course and ancillary facilities.

A motion was made by Robert Brown, seconded by Ed Weinberg and passed approving the following Resolution 2024-02 subject to legal and Engineer review.

#### RESOLUTION 2024-02

#### RESOLUTION OF THE BOARD OF SUPERVISORS OF HOBE-ST. LUCIE CONSERVANCY DISTRICT APPROVING THE AMENDED AND RESTATED WATER CONTROL PLAN AND RESTATED REPORT OF ENGINEER FOR UNIT OF DEVELOPMENT NO. 1A

(Copy filed in District Records)

Mr. Melchiori and Mr. Weinburg announced a Conflict of Interest. Form 8B filed in the District Records.

#### 2. Consider Authorizing Staff to File for Recording the Notice and Disclosure of Taxing Authority for Unit of Development No. 1A

A motion was made by Mr. Brown, seconded by Mr. Weinburg and unanimously passed, authorizing Staff to file for Recording the Notice and Disclosure of Taxing Authority for Unit of Development No. 1A.

Mr. Melchiori and Mr. Weinburg announced a Conflict of Interest. Form 8B filed in the District Records.

#### J. ADMINISTRATIVE MATTERS

##### 1. District Engineer's Report

The District Engineer commented on the District's operations and matters as they



appear on the Agenda.

2. District Attorney's Report

Status Update Regarding SFWMD Access Permit for Geotech:

The District Attorney reported on the status of the Access Permit for Geotech relating to access and hydrological matters.

The Board previously approved the SFWMD Access Permit for Geotech subject to Legal and Engineering review.

SFWMD Staff proposed limiting the amount of damages as well as limiting damages to lands in Unit 6.

Following discussion, the Board directed the Permit include the District's standard damage provisions and not limit coverage solely to Unit of Development No. 6.

4. Manager's Report

The District Manger reported on matters as they appeared on the Agenda. He further reported on Supervisor Ethics Training and Legislative update relating to Special Districts.

5. Field Operations Report

Mr. Spear commented on field operations and coordination with FPL for electronic services.

K. BOARD MEMBERS COMMENTS

None.

NEXT MEETING

The Board confirmed the February Board Meeting would be held on February 28, 2024, in the Becker Tree Farm Conference Room.

L. ADJOURN

There being no further business to come before the Board, the Meeting was adjourned.

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President

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Secretary

**RESOLUTION NO. 2024-03**

**A RESOLUTION OF THE BOARD OF SUPERVISORS OF HOBE-ST. LUCIE CONSERVANCY DISTRICT APPROVING THE DISTRICT'S POST-ISSUANCE COMPLIANCE GUIDE FOR TAX-EXEMPT BONDS; AND PROVIDING AN EFFECTIVE DATE.**

**WHEREAS**, Hobe-St. Lucie Conservancy District (the "District") expects to issue its tax-exempt bonds for the principal purpose of financing and/or refinancing public capital projects (collectively, the "Bonds"); and

**WHEREAS**, the District desires to formally memorialize, in a single document, guidelines relating to compliance with certain applicable requirements of the Internal Revenue Code of 1986, as amended, and certain of its covenants and undertakings in connection with its Bonds.

**BE IT RESOLVED BY THE BOARD OF SUPERVISORS OF HOBE-ST. LUCIE CONSERVANCY DISTRICT AS FOLLOWS:**

**SECTION 1.** The Post-Issuance Compliance Guide for Tax-Exempt Bonds (the "Guide") in the form attached hereto as Exhibit A is hereby adopted and approved. The person then serving as District Manager of the District or a representative or representatives of the entity then serving as District Manager of the District designated by such entity shall act as the Tax Compliance Officer for purposes of the Guide.

**SECTION 2.** This resolution shall be effective immediately upon adoption.

**PASSED AND APPROVED** at a meeting of the Board of Supervisors of Hobe-St. Lucie Conservancy District this 28th day of February, 2024.

[SEAL]

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President, Board of Supervisors

ATTEST:

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Secretary, Board of Supervisors

## EXHIBIT A

**HOBE-ST. LUCIE CONSERVANCY DISTRICT**

**POST-ISSUANCE COMPLIANCE GUIDE**

**FOR**

**TAX-EXEMPT BONDS**

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## PURPOSE

Section 141 of the Internal Revenue Code of 1986, as amended (the “Code”) contains limitations on the extent to which proceeds of tax-exempt bonds can benefit persons other than a state or local governmental unit. In addition, Section 148 of the Code imposes limitations on the investment of proceeds of tax-exempt bonds and required rebate of excess earnings to the federal government. The procedures set forth herein are intended to maintain the tax-exempt status of the outstanding tax-exempt bonds of the Hobe-St. Lucie Conservancy District (the “District”) by establishing procedures for: (1) identifying uses that may constitute private use, (2) managing and tracking changes in use, (3) accomplishing remedial action when necessary, and (4) assuring compliance with the arbitrage requirements of the Code. The procedures set forth herein also address matters relating to the District’s compliance with bond covenants.

## RESPONSIBILITY

In order to facilitate continuing compliance with the federal income tax requirements relating to the tax-exempt status of its outstanding tax-exempt bond issues, the person then serving as District Manager of the District or a representative or representatives of the entity then serving as District Manager of the District shall act as the Tax Compliance Officer who will have the primary responsibility to monitor the District’s compliance with federal tax requirements for the District’s Bonds. The Tax Compliance Officer may engage third parties to assist in accomplishing the duties of the Tax Compliance Officer hereunder. The tax requirements include both limitations on the private use of facilities financed by Bonds and arbitrage limitations on the investment of proceeds of Bonds under the Code. The general responsibilities of the Tax Compliance Officer with respect to bond compliance shall include, but not be limited to, communication of monitoring procedures for Bonds (as outlined herein) to applicable department heads of the District, if any, or other parties responsible for construction and/or operation of Bond-Financed Property if other than the District Manager (the “District Representatives”) confirming consistent application of these procedures, monitoring the completeness of documentation required by these procedures, and conferring with Bond Counsel as necessary. The Tax Compliance Officer will also monitor the District’s compliance with other covenants in its bond documents. Set forth below are the procedures that will be undertaken. The District will supplement and update these procedures as appropriate to provide a continuing source of guidance on these requirements.

## PRIVATE ACTIVITY LIMITATIONS

### *Definitions*

1. **Bonds** – The term Bonds includes bonds, notes, and installment sale or financing lease arrangements issued on a tax-exempt basis.
2. **Eligible Mixed-Use Project** -- An eligible mixed-use project is a project wholly owned by one or more governmental persons (or 501(c)(3) organizations) or by a partnership with at least one governmental partner that is financed with governmental bonds (or qualified 501(c)(3) bonds) and with qualified equity pursuant to the same plan of financing

3. **Governmental Bonds.** – Governmental Bonds are Bonds that are not Private Activity Bonds.
4. **Management Contract** – A Management Contract is a management, service or incentive payment contract between a governmental unit and a non-governmental service provider under which the service provider provides services involving all, a portion of, or any function of a facility. A management contract with respect to financed property generally results in a private business use if the contract provides for compensation of services rendered with compensation based, in whole or in part, on a share of net profits from the operation of the facility. Revenue Procedure 97-13, as amended, provides safe harbors pursuant to which qualifying management contracts would not be treated as constituting private use of a financed facility.
5. **Private Activity Bonds.** - A Bond is a private activity bond if the bond issue meets: (i) **both** the private business use test **and** the private payment or security test; **or** (ii) the private loan financing test. The tests are applied on a basis of reasonable expectations of the District on the date of each issue of Bonds and by taking into account deliberate actions of the District while such Bonds are outstanding. In many cases a deliberate action that causes Bonds to become private activity bonds can be cured by taking remedial actions.
6. **Private Business Use Test.** The private business use test is met if the amount of proceeds of Bonds that are used in a private business use is more than ten percent of total proceeds. A five percent limit is used in lieu of a ten percent limit if the private use is unrelated to a governmental use or related but disproportionate to a governmental use. Private Business Use means use, directly or indirectly, in a trade or business carried on by any person other than the District or another state or local governmental unit, including a use by a 501(c)(3) organization or the federal government. All private business uses over the life of the Bonds are aggregated in determining whether the limitations are met.
7. **Private Payment or Security Test-** The private security or payment test is met if the payment of debt service on more than ten percent of the issue of Bonds is directly or indirectly (i) secured by any interest in property used for a private business use or payments in respect of such property or (ii) derived from payments in respect of property or borrowed money used for a private business use. A five percent limit is used in lieu of a ten percent limit if the private use is unrelated to a governmental use or related but disproportionate to a governmental use. Private payments are not taken into account to the extent properly allocated to ordinary and necessary expenses directly attributable to the operation and maintenance of the Bond-Financed Property (hereinafter defined) used by the private user.
8. **Private Loan Financing Test.** The Private Loan Financing Test is met if the District uses proceeds of Bonds to make loans to private persons exceeding the lesser of 5% of the proceeds or \$5 million.
9. **Qualified Equity** -- Qualified equity includes proceeds of taxable bonds other than tax-credit bonds, and funds not derived from a borrowing. The qualified equity is treated as financing the project under the same plan of financing if it pays for capital expenditures of the project on a date no earlier than the date on which such expenditures would be eligible



for reimbursement under the reimbursement regulations and no later than the date the measurement period begins, generally the placed-in-service date.

### ***Bond-Financed Property***

The first step in undertaking a review of private use limitations is to identify all of the property that was financed by a particular issue of Bonds. In many cases a particular property or project may have been partially financed or refinanced with multiple issues and a change in the use of that property or project could affect all those issues. The Tax Compliance Officer will identify all outstanding Bonds of the District by reference to the applicable audited financial statements for each fiscal year and any interim unaudited financial statements. The Tax Compliance Officer will establish and maintain books and records that reflect the actual expenditure of proceeds of particular Bonds on specific projects comprising Bond-Financed Property.

### ***Private Activity Review***

Reference should be made to the Private Activity Restrictions on Private Business Use and accompanying attachments, attached as Tab I, for further guidance on the Private Activity Limitations of Section 141 of the Code.

In order to demonstrate compliance with the Private Activity Limitations of the Code, the Tax Compliance Officer will make inquiry, including of each District Representative, on a periodic basis as to the ownership and use of such Bond-Financed Property. A form of Private Business Use Questionnaire that can be utilized for this inquiry is attached as Tab II. The Tax Compliance Officer will identify the potential occurrence of any of the events set forth below (a “Tax Event”) with respect to any Bond-Financed Property:

**Change of ownership or use of the Bond-Financed Property** -- the ownership of any portion of the Bond-Financed Property is transferred to anyone, prior to the earlier of the end of the expected economic life of the property, or the latest maturity date of any of the Bonds financing (or refinancing) the Bond-Financed Property or any restriction on the ability of the general public to access the Bond-Financed Property occurs.

**Private business use of the Bond-Financed Property** -- any portion of the Bond-Financed Property will be used by anyone other than a State or local governmental unit, such as the District, or members of the general public who are not using the property in the conduct of a trade or business. Examples of uses that can give rise to private business use include use by a person as an owner, lessee, purchaser of the output of facilities under a “take” or “take or pay” contract, purchaser or licensee of research, a manager or independent contractor under certain management or professional service contracts or any other arrangement that conveys special legal entitlements (*e.g.*, arrangement that conveys priority rights to the use or capacity of the Bond-Financed Property) for beneficial use of the Bond-Financed Property.

**Leases of the 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** -- any portion of the Bond-Financed Property is to be used under a management contract or professional service contract, other than a contract for services that are solely incidental to the primary function of Bond-Financed Property, such as janitorial services or office equipment repair.

**Sale of Output from Bond-Financed Facility** – any output of the Bond-Financed Property is to be sold to or otherwise used by any person other than a state or local governmental unit or a member of the general public.

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

**Research using the 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 Bond Proceeds** -- any portion of the proceeds of any issue of Bonds (including any investment earnings thereon) is to be loaned by the District.

The existence of private uses may trigger a need to review whether there have also been payments received by an District either from a non-governmental party, such as lease payments, or payments with respect to Bond-Financed Property. It at any time there is a question or potential problem that arise with respect to private payments, it should be brought to the attention of the Tax Compliance Officer as soon as possible and Bond Counsel to the District should be consulted on the application of the private payment test. For purposes hereof, the term “Bond Counsel” shall be deemed to refer to the law firm then serving as Bond Counsel to an District.

### **Responsible Persons**

The Tax Compliance Officer is responsible for monitoring and enforcing compliance with policies and procedures relating to private use of Bond-Financed Property. It is the responsibility of the Tax Compliance Officer to track the planned and actual use thereof while the related issue of Bonds is outstanding. The Tax Compliance Officer shall review all private uses and work with any applicable District Representatives and Bond Counsel to make certain that no private use is undertaken which might adversely affect the tax-exempt status of any Bonds. A further breakdown of the procedures to carry out these responsibilities is detailed below.

### **Expected Use of Proceeds**

At the time of issuance of each issue of Bonds, the Tax Compliance Officer will work with any District Representatives to determine and document planned uses of Bond-Financed Property relating to the applicable issue of Bonds. On completion of the projects included in Bond-Financed Property and final expenditure of proceeds of the related issue of Bonds, the applicable District Representative, if any, and Tax Compliance Officer will review and document sources of funding,

including Qualified Equity, and any special, the allocation of proceeds of such Bonds to particular costs and note the existence and amount of any private use on a schedule of private use.

A final allocation of proceeds of each issue of Bonds to expenditures will be made and retained with the records of the issue of Bonds not later than 18-months after the later of the expenditure of the proceeds of such Bonds or the placed in service date for the related Bond-Financed Property. In the case of a qualified mixed-use project, qualified equity is allocated first to private business use of the eligible mixed-use project and then to governmental use, and tax-exempt bond proceeds are allocated first to governmental use and then to private business use.

### **Ongoing Review**

The Tax Compliance Officer will disseminate to, and discuss the list of Tax Events with any applicable District Representatives and will attempt to identify a potential Tax Event before it occurs. The Tax Compliance Officer should work closely on a regular basis with any applicable District Representatives involved with the operations involving Bond-Financed Property to learn about potential and actual changes as they are contemplated. By understanding potential changes in use that may affect private use of Bond-Financed Property, the Tax Compliance Officer and District Representatives can evaluate, on an ongoing basis, whether such changes could affect the tax-exempt status of any issue of Bonds before the change occurs.

Once a potential Tax Event has been identified, the Tax Compliance Officer shall work with any applicable District Representatives and potential private user, if applicable, to determine the parameters for the new use. Some of the parameters to consider include whether the use will be available to other organizations or the public, rents or compensation for use, costs of use to the District and square footage to be used, management contracts, leases, service, etc. These use parameters will determine if the use constitutes a non-qualified use and/or new private use of the facilities. The Tax Compliance Officer or applicable District Representative shall update the schedule summarizing private use.

In the case of a management or service contract, the Tax Compliance Officer will direct Bond Counsel to review the contract to determine if a safe harbor applies that would avoid private use from occurring. These types of agreements should be submitted to the Tax Compliance Officer in the early stages of discussions prior to going to the District for approval. Early Bond Counsel review of the contracts may help avoid private use problems.

On or prior to the occurrence of any Tax Event, including, without limitation, the proposed sale of any Bond-Financed Property, the Tax Compliance Officer will consult with Bond Counsel to the District to ascertain what effect, if any, a contemplated Tax Event may have on the tax-exemption of interest on the related Bonds. Bond Counsel also should be consulted regarding questions of measurement of private use and available safe harbors for management or service contracts. In certain circumstances, if the private use would cause a limitation on the overall issue to be exceeded, it may be necessary for the District to take a remedial action under Treasury Regulation Section 1.141-12, including an anticipatory remedial action, to preserve the tax-exempt status of interest on the related issue of Bonds. See Tab III regarding available remedial actions. Timely identification of a Tax Event is necessary to take a remedial action. In certain cases, remedial

action may not be available and the District may need to consider a voluntary closing agreement with the IRS.

### **Annual Review**

The Tax Compliance Officer shall be responsible for reviewing the outstanding Bonds on a yearly basis. This review will involve analyzing the planned uses for the Bond-Financed Property, as documented on the summaries and schedules indicated above, and determining whether any changes in use are contemplated and or have occurred and whether any sales or transfers of Bond-Financed Property are contemplated. This review shall include information and/or documentation concerning users of the Bond-Financed Property for any proposed or actual changes identified within the past year (e.g. changes in square footage, increased public or private uses, changes in activities including additions/deletions of specific activities). Such information and/or documentation may include, but is not limited to, the factual details of the proposed or actual change in use, policies and procedures related to use, expenses related to use, improvements made, etc.

On an annual basis, the Tax Compliance Officer and any applicable District Representatives will review the actual use of each issue of Bonds to determine whether the actual use has changed from the plan and any applicable District Representatives will file an annual report to the Tax Compliance Officer. Where the actual use is different, the Tax Compliance Officer will document how it is different and the effects of the differences on the private use calculations. The Tax Compliance Officer shall review all new private uses and work with any applicable District Representatives and Bond Counsel to make certain that no private use has been undertaken that might affect the qualified status of each issue of Bonds.

The Tax Compliance Officer will prepare an annual report summarizing current Bonds outstanding and the status of each based on the data collected and/or provided in the annual update reports. The Tax Compliance Officer will report to the Board of Supervisors of each District any potential problems that may arise that could threaten the tax-exempt status of Bonds issued by it and the steps being taken to resolve the potential problem. Discussions will be held with Bond Counsel to the District as to the steps required to be taken.

### **Recordkeeping**

The Internal Revenue Service has advised issuers of tax-exempt bonds that they have post-issuance recordkeeping responsibilities that are necessary to satisfy the Internal Revenue Service in the event of any future audit of the bonds. See IRS FAQs on Record Retention, attached as Tab IV. The Tax Compliance Officer shall maintain a file for each issue of Bonds. The file shall include a copy of the bond documents, detailed project schedule, cost schedule, amount of private use by project, and economic life of the project. The file shall contain a copy of all management or service contracts, leases, or agreements and documentation that any private use does not exceed permissible limits. The file shall contain annual reports from the Tax Compliance Officer or other applicable District Representative managing Bond-Financed Property summarizing all recalculations of private use percentage and private payment summaries. This file must be maintained for each issue of Bonds for the life of the issue plus three years.

## **ARBITRAGE COMPLIANCE**

The arbitrage restrictions imposed under the Code include restrictions on the investment of proceeds of Bonds at an unrestricted yield and the rebate of excess investment earnings to the federal government, as more fully described in the Tax Certificates for each of issue of Bonds and the Arbitrage Letter of Instructions, attached as Tab V.

### ***Arbitrage Review***

For each issue of Bonds, the Tax Compliance Officer will maintain the records and documents described below under “Recordkeeping.” For each issue of Bonds, the Tax Compliance Officer will establish a timeline for review of arbitrage-related issues as more fully described below.

#### **Temporary Period**

For all issues of Bonds, the Tax Compliance Officer will note the date of expiration of the three year temporary period for unrestricted investment of the proceeds of such Bonds. The three year temporary period runs from the date of issue of the original new money issue and is unaffected by note rollovers. Note, however, that the issuance of advance refunding bonds will terminate the three year temporary period of any issue that is advance refunded. For all Bonds which have unexpended proceeds held beyond the temporary period, the Tax Compliance Officer will assure that the proceeds are yield restricted. The relevant yield will be the yield on the original Bonds until those obligations are paid with the proceeds of another issue of Bonds (a “Refunding Issue”), at which time the relevant yield will be the yield on the Refunding Issue. Yield restriction will be accomplished through either an actual investment below the relevant yield or the making of yield reduction payments, as described in Section 3(b) of the Arbitrage Letter of Instructions found in Tab V. The Tax Compliance Officer will work with its auditor or other arbitrage consultant to make timely yield reduction payments.

#### **Rebate**

For each issue of Bonds the Tax Compliance Officer will note from the Tax Certificate delivered by the District in connection with the issuance of the related Bonds whether a rebate exception is available for the issue. The rebate exceptions include the bona fide debt service fund exception and the spending exceptions described in Section 4(a)(ii) of the Arbitrage Letter of Instructions found in Tab V. If the issue of Bonds is expected to meet one of the three spending exceptions to rebate, the six-month exception, the 18-month exception or the 2-year construction exception, the Tax Compliance Officer will establish a timeline of six month intervals following the date of issue of the Bonds and note whether the spending requirements related to that exception are met at the end of each period.

If no rebate exception is expected to apply or if a spending requirement is not met, the Tax Compliance Officer will establish a timeline for rebate analysis for each issue of Bonds. For bond issues, the timeline will provide for a rebate analysis to be conducted every five years and when

the bonds are discharged, as more fully described in Section 4 of the Arbitrage Letter of Instructions. For note issues the timeline will provide for a rebate analysis to be undertaken at the time of the retirement of the note issue. The Tax Compliance Officer will consult with its auditor or other arbitrage consultant and make timely filing of any rebate amount with the Internal Revenue Service, as more fully described in Section 4 of the Arbitrage Letter of Instructions.

### **Arbitrage Consultant**

The Tax Compliance Officer will maintain a contract with a third party arbitrage consultant 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 consultant will provide on an annual basis, an analysis of all Bonds for potential liability, rebate, yield restriction or other arbitrage related issues. The Tax Compliance Officer will review the arbitrage analysis and coordinate with the consultant to prepare the necessary filings and payments. The Tax Compliance Officer will timely file or cause to be filed with the Internal Revenue Service the appropriate IRS arbitrage rebate and yield restriction reports, Form 8038-T, along with any payments due for any Bonds.

### ***Recordkeeping***

In order to satisfy the arbitrage recordkeeping requirements, the Tax Compliance Officer shall create and maintain, or cause to be created and maintained, records of:

1. Purchases or sales of investments made with proceeds of Bonds (including amounts treated as “gross proceeds” as a result being part of a sinking fund or pledge fund) and receipts of earnings on those investments;
2. The final allocation of the proceeds of each issue of Bonds to expenditures, together with purchase contracts, construction contracts, invoices, and cancelled checks;
3. Information and records showing that investments made with unspent proceeds of each issue of Bonds after the expiration of the applicable temporary period were not invested in higher-yielding investments;
4. Information, if applicable, that will be sufficient to demonstrate to the Internal Revenue Service upon an audit of any issue of Bonds that such Bonds have complied with one or more available spending exceptions to the arbitrage rebate requirement with respect of such Bonds;

5. Information and calculations, when applicable, that will be sufficient to demonstrate to the Internal Revenue Service, upon an audit of any issue of Bonds, for which an exception to the arbitrage rebate requirement was not applicable, that the rebate amount, if any, that was payable to the United States of America with respect to investments made with gross proceeds of such Bonds was calculated and timely paid with Form 8038-T timely filed with the Internal Revenue Service;

6. Information and records showing that investments held in yield-restricted advance refunding or defeasance escrows for Bonds were not invested in higher-yielding investments; and

7. The Tax Certificate delivered by the District as part of the record of proceedings for each issue of Bonds.

## **BOND COVENANT AND CONTINUING DISCLOSURE UNDERTAKING COMPLIANCE**

The Tax Compliance Officer will become familiar with the various covenants in the applicable financing documents relating to each issue of Bonds and other obligations issued by the District, including the applicable bond resolution, trust indenture, loan agreement and/or agreement with credit enhancers. The Tax Compliance Officer will prepare and regularly update a written summary of the bond covenants and review on an annual basis the status of the District's compliance with such covenants. These covenants typically include matters such as the requirement to provide audited financial statements and/or annual budgets to bond trustees on an annual basis, the requirement to maintain specified insurance coverage, and monitoring compliance with rate covenants. The Tax Compliance Officer will consult with any applicable District Representatives to the extent necessary to obtain information to permit the District to comply with such covenants.

With respect to compliance with Rule 15c2-12 of the Securities and Exchange Commission (the "Rule"), subject to the requirements of the specific written undertaking in connection with each issue of Bonds subject to the Rule, the District issuing Bonds or other obligations subject to the Rule will be required to annually provide to the Electronic Municipal Market Access (EMMA) audited financial statements prepared in accordance with generally accepted accounting principles and updates of other financial and operating data, including revenues, annual debt service requirements and historical debt coverage, which is included in its Official Statements or Limited Offering Memorandums. The Tax Compliance Officer will review each written continuing disclosure agreement relating to any issue of Bonds subject to the Rule and takes steps to ensure that the District is in compliance with its continuing disclosure undertakings. The District will provide in a timely manner to EMMA or the Municipal Securities Rulemaking Board notice of any of the Material Events listed in the Rule in connection with each issue of Bonds subject to the Rule. Any submissions to the MSRB or EMMA in connection with an issue of Bonds may be made through a third-party dissemination agent engaged by the District for that purpose, subject to the requirements of any applicable written continuing disclosure agreement relating to that issue of Bonds.

### Attachments

|         |   |
|---------|---|
| Tab I   | Private Activity Restrictions on Private Business Use |
| Tab II  | Private Business Use Questionnaire                    |
| Tab III | Remedial Actions                                      |
| Tab IV  | IRS FAQs on Record Retention                          |
| Tab V   | Arbitrage Letter of Instructions                      |



# TAB I

## TAB I

### PRIVATE ACTIVITY RESTRICTIONS ON PRIVATE BUSINESS USE GOVERNMENTAL BONDS

#### Introduction

The Internal Revenue Code of 1986, as amended (the “Code”) limits the amount of proceeds of tax-exempt governmental bonds (including short term obligations such as notes) that can be used for the benefit of private businesses. Section 141 of the Code treats as a taxable private activity bond a bond issued as part of an issue that meets the private business use test and the private security or payment test, or the private loan test. The private business use test is met if the amount of proceeds of bonds that are used in a private business use is more than ten percent of total proceeds. The private security or payment test is met if the payment of debt service on more than 10 percent of the issue is directly or indirectly (i) secured by any interest in property used for a private business use or payments in respect of such property or (ii) derived from payments in respect of property or borrowed money used for a private business use. A five percent limit is used in lieu of a ten percent limit if the private use is unrelated to a governmental use or related but disproportionate to a governmental use. For purposes of Section 141, the term private business includes nonprofit, 501(c)(3) organizations as well as the federal government.

#### Private business use generally

Private business use can arise from almost any use of tax-exempt bond-financed property by anyone other than a state or local governmental unit (“Governmental Unit”) or members of the general public who are not using the property in the conduct of a trade or business. Examples of uses which can give rise to private business use include use (a) by a person as (i) an owner, (ii) a lessee, (iii) a purchaser of the output of facilities under a “take and pay” or “take or pay” contract, (iv) a purchaser, sponsor or licensee of research and (v) a manager or independent contractor under certain management or professional service contracts, (b) pursuant to an arrangement that conveys (i) special legal entitlements (e.g., an arrangement that conveys priority rights to the use or capacity of the financed property) for beneficial use of the property financed with proceeds of tax-exempt debt or (ii) other special economic benefits, (c) use by the United States government and its agencies and instrumentalities and (d) use by nonprofit corporations.

The purpose of this Summary is to assist employees of a Governmental Unit in recognizing uses, actions or other arrangements with respect to tax-exempt bond-financed property which may not comply with the requirements of the Internal Revenue Code of 1986, as amended, and which could jeopardize the tax-exempt status of bonds issued to finance such property. It is not exhaustive and may not be relied upon as legal advice. Before any use, action or other arrangement described herein is commenced, such use, action or other arrangement should be reviewed by bond counsel to the Governmental Unit.

**Leases of the Financed Property.** Leases and certain other agreements which transfer possession of tax-exempt financed property will result in a private business use if the party to whom the property is leased is not an Governmental Unit. Examples include leases of space for book stores and cafeterias.

**Priority Rights.** Arrangements that convey special legal entitlements (e.g., arrangements that convey priority rights to the use or capacity of the financed property) for control or beneficial use of property financed with proceeds of tax-exempt debt are treated as private business uses. Examples of such arrangements are contracts with research companies to set aside space for the testing of new products or arrangements pursuant to which a person which is not an Governmental Unit is entitled to limit, or control charges for, access to all or a portion of tax-exempt bond financed property.

**Naming Rights and Sponsorship Payments.** Agreements which permit a private company or organization to make payments for the right to have its name or logo used in connection with property financed with tax-exempt debt may result in private business use. The rules in this area continue to evolve but “qualified sponsorship payments” should not give rise to a private business use. A qualified sponsorship payment means any payment made by any person engaged in a trade or business with respect to which there is no arrangement or expectation that such person will receive any substantial return benefit other than the use or acknowledgement of the sponsor’s name or logo in connection with the activities of the Governmental Unit. Such use or acknowledgement may not include advertising such person’s products or services. The qualified sponsorship payment would not include (a) any payment that is contingent upon attendance at events or (b) any payment that entitles the payor to the use or acknowledgement of the payor’s name or logo in regularly scheduled and printed material published by or on behalf of the Governmental Unit. This would allow donations in exchange for the usual “brass plaque” but call into question arrangements such as the right to name a facility of the Governmental Unit and control how that facility is referred to in publications and press releases.

**Research Arrangements.** Research conducted under the sponsorship or for the benefit of organizations other than Governmental Units, including research sponsored by any branch of the Federal government, can result in the private business use of any property financed with tax-exempt debt which is used in the conduct of the research. The Internal Revenue Service has published guidance on the circumstances under which a research agreement does not result in private business use. The guidance for safe harbor research arrangements is set forth in Rev. Proc. 2007-47 (2007 IRB LEXIS 570; 2007-29 I.R.B. 108) attached hereto as Exhibit 1.

**Management and Service Contracts.** Both contracts for the management of property financed with tax-exempt debt and certain contracts for the provision of services in connection with property financed with tax-exempt debt can result in private business use. Contracts which may result in a private business use include management, service, or incentive payment contracts between the Governmental Unit and a service provider under which the service provider provides services involving all, a portion of, or any function of, a facility financed with tax-exempt debt. For example, a contract for the provision of management services for an entire facility, and a contract

for management services for a specific portion of a facility, such as a cafeteria are each treated as a management contract. However, contracts for services that are solely incidental to the primary function of the property financed with tax-exempt debt, such as janitorial services or office equipment repair, are not regarded as management or service contracts for this purpose. The Internal Revenue Service has published safe harbor guidance on the circumstances under which a management or service agreement does not result in private business use. For contracts entered into before August 18, 2017, the guidance is set forth in Rev. Proc. 97-13 (1997-1 C.B. 632; 1997 IRB LEXIS 14; 1997-5 I.R.B. 18, as modified by Rev. Proc. 2001-39, 2001 IRB LEXIS 229; 2001-28 I.R.B. 38), and IRS Notice 2014-67 attached hereto as Exhibit 2. For contracts entered into on or after January 17, 2017, or at the election of the District, at any time, the guidance is set forth in Rev. Proc. 2017-13, attached hereto as Exhibit 3.

**Output Facilities.** Occasionally a Governmental Unit will acquire facilities such as co-generation facilities. The sale of output (as distinguished from consumption of the output by the Governmental Unit) from an output type facility can result in a private business use.

**Joint Ventures and Partnerships.** Joint venture arrangements between a Governmental Unit and persons other than a Governmental Unit may result in private business use. These arrangements need to be examined to see if they are viewed as partnerships for federal tax purposes. The Regulations permit the governmental share of a project used in joint ventures to be financed with governmental bonds by treating the partnership of governmental entities and private entities as an aggregate of the partners rather than as a separate taxable entity. The private business use by a private entity partner will be determined based on that partner's greatest percentage share of any of the specified partnership items, income, gain, loss, deduction or credit attributable to the partnership during the measurement period.

### **Exclusions from Private Business Use**

**Incidental Uses.** A very limited spectrum of incidental uses are not treated as private business uses if certain conditions are met. Those conditions are: (a) except for vending machines, pay telephones, kiosks and similar uses, the use must not involve the transfer to the private user of possession and control of space that is separated from the other areas of the facility by a physical barrier; (b) the use must not be functionally related to another use of the facility by the same private user; and (c) such incidental uses may not, in the aggregate involve more than 2.5 percent of the facility. Examples of incidental uses include pay telephones, vending machines and advertising displays.

**General Public Use.** Use of facilities intended for general public use is not considered "use" by nongovernmental persons in a trade or business if such persons use the facilities in their trade or business on the same basis as other members of the public. Use of the financed facilities by organizations such as school groups, church groups, and fraternal organizations and numerous commercial organizations for a short period of time on a rate scale basis will not be considered use by nongovernmental persons in a trade or business if the rights of such a user are only those of a

transient occupant rather than the full legal possessory interests of a lessee. Any arrangement that conveys priority rights to the use or capacity of the financed property will be treated as a private business use.

**Short Term Uses.** Certain short term uses will not be treated as private use. Use by a nongovernmental person is not private use if either:

(i) (A) the term of the use under the arrangement, including all renewal options is not longer than 200 days, and (B) the use of the financed property under the same or similar arrangements is predominantly by natural persons who are not engaged in a trade or business; or

(ii) (A) the term of the use under the arrangement, including all renewal options, is not longer than 100 days, and (B) the arrangement would be treated as general public use, except that it is not available for use on the same basis by natural persons not engaged in a trade or business because generally applicable and uniformly applied rates are not reasonably available to natural persons not engaged in a trade or business; or

(iii) (A) the term of the use under the arrangement, including all renewal options, is not longer than 50 days; and (B) the arrangement is a negotiated arm's-length arrangement, and compensation under the arrangement is at fair market value.

In addition, in each case the property must not be financed for the principal purpose of providing that property for use by that non-Governmental Unit.

**Qualified improvements.** Proceeds of tax-exempt bonds that provide a governmentally owned improvement to a governmentally owned building (including its structural components and land functionally related and subordinate to the building) are not used for a private business use if

(i) The building was placed in service more than 1 year before the construction or acquisition of the improvement is begun;

(ii) The improvement is not an enlargement of the building or an improvement of interior space occupied exclusively for any private business use;

(iii) No portion of the improved building or any payments in respect of the improved building secures payment of the tax-exempt bonds; and

(iv) No more than 15 percent of the improved building is used for a private business use.

## **Allocation of Proceeds and Equity to Expenditures and Private Uses**

### **Identification of Bond-Financed Project**

The first step in a private business use analysis is to identify the project that is financed with the proceeds of the bonds. Generally the Regulations define a project as the facilities financed in whole or in part with the proceeds of a single bond issue. The scope of the project can be described in and limited by the financing documents.

### **Allocation of Sources of Funds to Expenditures and Uses**

Subject to the exception described below, multiple sources of funds for the same project are allocated on a proportionate basis to all the expenditures for the project and all the uses of the project. This includes multiple issues of tax-exempt bonds that finance the same project at the same time. Later improvements made to a project that are financed with a separate later issue are treated as a separate project.

### **Eligible Mixed Use Projects Exception**

In lieu of the proportionate or pro rata allocation method described above, a special allocation rule, the undivided portion allocation method, applies to “eligible mixed use projects”. An eligible mixed use project is a project that is financed with proceeds of governmental bond and qualified equity pursuant to the same plan of financing. Qualified equity includes proceeds of taxable bonds and other funds not derived from a borrowing, but not the proceeds of taxable tax credit bonds. The plan of financing is defined by reference to the timing of the expenditure of the qualified equity. It includes as qualified equity funds spent no earlier than the earliest date funds would be eligible for reimbursement and no later than the beginning of the measurement period, generally the project’s placed in service date. Thus as of the placed in service date, the District can determine the extent to which qualified equity was used to finance the project.

Under this special allocation rule private business use is first allocated to qualified equity up to the percentage of qualified equity in the overall plan of financing, with governmental use allocated to the tax-exempt bond proceeds. Only if the percentage of private business use exceeds the percentage of qualified equity will private use be allocated to tax-exempt bond proceeds. As described below, these allocations are done on an annual basis.

### **Partnerships**

The Regulations permit the governmental share of a project used in joint ventures to be financed with governmental bonds by treating the partnership of governmental entities and private entities as an aggregate of the partners rather than as a separate taxable entity. The private business use by a private entity partner will be determined based on that partner’s greatest percentage share of any of the specified partnership items, income, gain, loss, deduction or credit attributable to the partnership during the measurement period. Taken together with the undivided portion allocation

method, this treatment permits qualified equity to be allocated to the private entity partner's private business use.

#### Measurement of Private Business Use

All private business uses of property financed by a bond issue are aggregated to determine if the limitations have been exceeded. Private business use of property is measured on an average basis over a measurement period that runs from the later of the issue date of the bonds or the date property is placed in service, through the earlier of the last date of the expected economic life of the property or the maturity date of the bonds or refunding bonds. The average percentage of private business use is the average of the percentages of private business during one-year periods within the measurement period. The percentage of private business use for any one-year period is the average private business use for that year, determined by comparing the amount of private business use during that year to the total amount of private business use and governmental use, taking into account any allocations of private business use to qualified equity.

EXHIBIT 1  
**RESEARCH CONTRACT GUIDELINES**

**Rev. Proc. 2007-47—Operating Guidelines for Research Agreements**

*(Also Part I, section 103, 141, 145; 1.141-3, 1.145-2.)*

June 26, 2007

**SECTION 1. PURPOSE**

The purpose of this revenue procedure is to set forth conditions under which a research agreement does not result in private business use under section 141(b) of the Internal Revenue Code of 1986 (the Code). This revenue procedure also addresses whether a research agreement causes the modified private business use test in section 145(a)(2)(B) of the Code to be met for qualified 501(c)(3) bonds. This revenue procedure modifies and supersedes Rev. Proc. 97-14, 1997-1 C.B. 634.

**SECTION 2. BACKGROUND**

*.01 Private Business Use.*

- (1) Under section 103(a) of the Code, gross income does not include interest on any State or local bond. Under section 103(b)(1), however, section 103(a) does not apply to a private activity bond, unless it is a qualified bond under section 141(e). Section 141(a)(1) defines “private activity bond” as any bond issued as part of an issue that meets both the private business use and the private security or payment tests. Under section 141(b)(1), an issue generally meets the private business use test if more than 10 percent of the proceeds of the issue are to be used for any private business use. Under section 141(b)(6)(A), private business use means direct or indirect use in a trade or business carried on by any person other than a governmental unit. Section 150(a)(2) provides that the term “governmental unit” does not include the United States or any agency or instrumentality thereof. Section 145(a) also applies the private business use test of section 141(b)(1) to qualified 501(c)(3) bonds, with certain modifications.
- (2) Section 1.141-3(b)(1) of the Income Tax Regulations provides that both actual and beneficial use by a nongovernmental person may be treated as private business use. In most cases, the private business use test is met only if a nongovernmental person has special legal entitlements to use the financed property under an arrangement with the District. In general, a nongovernmental person is treated as a private business user of proceeds and financed property as a result of ownership; actual or beneficial use of property pursuant to a lease, or a management or incentive payment contract; or certain other arrangements such as a take or pay or other output-type contract.



(3) Section 1.141-3(b)(6)(i) provides generally that an agreement by a nongovernmental person to sponsor research performed by a governmental person may result in private business use of the property used for the research, based on all the facts and circumstances.

(4) Section 1.141-3(b)(6)(ii) provides generally that a research agreement with respect to financed property results in private business use of that property if the sponsor is treated as the lessee or owner of financed property for Federal income tax purposes.

(5) Section 1.141-1(b) provides that the term “governmental person” means a State or local governmental unit as defined in section 1.103-1 or any instrumentality thereof. Section 1.141-1(b) further provides that governmental person does not include the United States or any agency or instrumentality thereof. Section 1.141-1(b) further provides that “nongovernmental person” means a person other than a governmental person.

(6) Section 1.145-2 provides that sections 1.141-0 through 1.141-15 apply to qualified 501(c)(3) bonds under section 145(a) of the Code with certain modifications and exceptions. (7) Section 1.145-2(b)(1) provides that, in applying sections 1.141-0 through 1.141-15 to section 145(a) of the Code, references to governmental persons include section 501(c)(3) organizations with respect to their activities that do not constitute unrelated trades or businesses under section 513(a).

*.02 Federal Government rights under the Bayh-Dole Act.*

(1) The Patent and Trademark Law Amendments Act of 1980, as amended, 35 U.S.C. section 200 et seq. (2006) (the “Bayh-Dole Act”), generally applies to any contract, grant, or cooperative agreement with any Federal agency for the performance of research funded by the Federal Government.

(2) The policies and objectives of the Bayh-Dole Act include promoting the utilization of inventions arising from federally supported research and development programs, encouraging maximum participation of small business firms in federally supported research and development efforts, promoting collaboration between commercial concerns and nonprofit organizations, ensuring that inventions made by nonprofit organizations and small business firms are used in a manner to promote free competition and enterprise, and promoting the commercialization and public availability of inventions made in the United States by United States industry and labor.

(3) Under the Bayh-Dole Act, the Federal Government and sponsoring Federal agencies receive certain rights to inventions that result from federally funded research activities performed by non-sponsoring parties pursuant to contracts, grants, or cooperative research agreements with the sponsoring Federal agencies. The rights granted to the Federal Government and its agencies under the Bayh-Dole Act generally include, among others, nonexclusive, nontransferable, irrevocable, paid-up licenses to use the products of federally sponsored research and certain so-called “march-in rights” over licensing under limited circumstances. Here, the term “march-in rights” refers to

certain rights granted to the sponsoring Federal agencies under the Bayh-Dole Act, 35 U.S.C. section 203 (2006), to take certain actions, including granting licenses to third parties to ensure public benefits from the dissemination and use of the results of federally sponsored research in circumstances in which the original contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the product of that research. The general purpose of these rights is to ensure the expenditure of Federal research funds in accordance with the policies and objectives of the Bayh-Dole Act.

### **SECTION 3. DEFINITIONS**

.01 *Basic research*, for purposes of section 141 of the Code, means any original investigation for the advancement of scientific knowledge not having a specific commercial objective. For example, product testing supporting the trade or business of a specific nongovernmental person is not treated as basic research.

.02 *Qualified user* means any State or local governmental unit as defined in section 1.1031 or any instrumentality thereof. The term also includes a section 501(c)(3) organization if the financed property is not used in an unrelated trade or business under section 513(a) of the Code. The term does not include the United States or any agency or instrumentality thereof.

.03 *Sponsor* means any person, other than a qualified user, that supports or sponsors research under a contract.

### **SECTION 4. CHANGES**

This revenue procedure modifies and supersedes Rev. Proc. 97-14 by making changes that are described generally as follows:

.01 Section 6.03 of this revenue procedure modifies the operating guidelines on cooperative research agreements to include agreements regarding industry or federally sponsored research with either a single sponsor or multiple sponsors.

.02 Section 6.04 of this revenue procedure provides special rules for applying the revised operating guidelines under section 6.03 of this revenue procedure to federally sponsored research. These special rules provide that the rights of the Federal Government and its agencies mandated by the Bayh-Dole Act will not cause research agreements to fail to meet the requirements of section 6.03, upon satisfaction of the requirements of section 6.04 of this revenue procedure. Thus, under the stated conditions, such rights themselves will not result in private business use by the Federal Government or its agencies of property used in research performed under research agreements. These special rules do not address the use by third parties that actually receive more than non-exclusive, royalty-free licenses as the result of the exercise by a sponsoring Federal agency of its rights under the Bayh-Dole Act, such as its march-in rights.

## SECTION 5. SCOPE

This revenue procedure applies when, under a research agreement, a sponsor uses property financed with proceeds of an issue of State or local bonds subject to section 141 or section 145(a)(2)(B) of the Code.

## SECTION 6. OPERATING GUIDELINES FOR RESEARCH AGREEMENTS

.01 *In general.* If a research agreement is described in either section 6.02 or 6.03 of this revenue procedure, the research agreement itself does not result in private business use. In applying the operating guidelines under section 6.03 of this revenue procedure to federally sponsored research, the special rules under section 6.04 of this revenue procedure (regarding the effect of the rights of the Federal Government and its agencies under the Bayh-Dole Act) apply.

.02 *Corporate-sponsored research.* A research agreement relating to property used for basic research supported or sponsored by a sponsor is described in this section 6.02 if any license or other use of resulting technology by the sponsor is permitted only on the same terms as the recipient would permit that use by any unrelated, non-sponsoring party (that is, the sponsor must pay a competitive price for its use), and the price paid for that use must be determined at the time the license or other resulting technology is available for use. Although the recipient need not permit persons other than the sponsor to use any license or other resulting technology, the price paid by the sponsor must be no less than the price that would be paid by any non-sponsoring party for those same rights.

.03 *Industry or federally-sponsored research agreements.* A research agreement relating to property used pursuant to an industry or federally-sponsored research arrangement is described in this section 6.03 if the following requirements are met, taking into account the special rules set forth in section 6.04 of this revenue procedure in the case of federally sponsored research —

- (1) A single sponsor agrees, or multiple sponsors agree, to fund governmentally performed basic research;
- (2) The qualified user determines the research to be performed and the manner in which it is to be performed (for example, selection of the personnel to perform the research);
- (3) Title to any patent or other product incidentally resulting from the basic research lies exclusively with the qualified user; and
- (4) The sponsor or sponsors are entitled to no more than a nonexclusive, royalty-free license to use the product of any of that research.

.04 *Federal Government rights under the Bayh-Dole Act.* In applying the operating guidelines on industry and federally-sponsored research agreements under section 6.03 of this revenue procedure to federally sponsored research, the rights of the Federal Government and its agencies mandated

by the Bayh-Dole Act will not cause a research agreement to fail to meet the requirements of section 6.03, provided that the requirements of sections 6.03(2), and (3) are met, and the license granted to any party other than the qualified user to use the product of the research is no more than a nonexclusive, royalty-free license. Thus, to illustrate, the existence of march-in rights or other special rights of the Federal Government or the sponsoring Federal agency mandated by the Bayh-Dole Act will not cause a research agreement to fail to meet the requirements of section 6.03 of this revenue procedure, provided that the qualified user determines the subject and manner of the research in accordance with section 6.03(2), the qualified user retains exclusive title to any patent or other product of the research in accordance with section 6.03(3), and the nature of any license granted to the Federal Government or the sponsoring Federal agency (or to any third party nongovernmental person) to use the product of the research is no more than a nonexclusive, royalty-free license.

## **SECTION 7. EFFECT ON OTHER DOCUMENTS**

Rev. Proc. 97-14 is modified and superseded.

## **SECTION 8. EFFECTIVE DATE**

This revenue procedure is effective for any research agreement entered into, materially modified, or extended on or after June 26, 2007. In addition, an issuer may apply this revenue procedure to any research agreement entered into prior to June 26, 2007.

## **SECTION 9. DRAFTING INFORMATION**

The principal authors of this revenue procedure are Vicky Tsilas and Johanna Som de Cerff of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue procedure, contact Johanna Som de Cerff at (202) 622-3980 (not a toll-free call).

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## EXHIBIT 2

### **MANAGEMENT CONTRACT GUIDELINES**

Rev. Proc. 97-13, 1997-1 C.B. 632—Management Contract Guidelines (Supersedes Rev. Proc. 93-19), as amended by Rev. Proc. 2001-39, 2001-2 C.B. 38 and Notice 2014-67

1997-1 C.B. 632; 1997 IRB LEXIS 14; 1997-5 I.R.B. 18; REV. PROV 97-13

Rev. Proc. 97-13

#### **SECTION 1. PURPOSE**

The purpose of this revenue procedure is to set forth conditions under which a management contract does not result in private business use under section 141(b) of the Internal Revenue Code of 1986. This revenue procedure also applies to determinations of whether a management contract causes the test in section 145(a)(2)(B) of the 1986 Code to be met for qualified 501(c)(3) bonds.

#### **SECTION 2. BACKGROUND**

##### *.01 Private Business Use.*

(1) Under section 103(a) of the 1986 Code, gross income does not include interest on any state or local bond. Under section 103(b)(1) of the 1986 Code, however, section 103(a) of the 1986 Code does not apply to a private activity bond, unless it is a qualified bond under section 141(e) of the 1986 Code. Section 141(a)(1) of the 1986 Code defines “private activity bond” as any bond issued as part of an issue that meets both the private business use and the private security or payment tests. Under section 141(b)(1) of the 1986 Code, an issue generally meets the private business use test if more than 10 percent of the proceeds of the issue are to be used for any private business use. Under section 141(b)(6)(A) of the 1986 Code, private business use means direct or indirect use in a trade or business carried on by any person other than a governmental unit. Section 145(a) of the 1986 Code also applies the private business use test of section 141(b)(1) of the 1986 Code, with certain modifications.

(2) Corresponding provisions of the Internal Revenue Code of 1954 set forth the requirements for the exclusion from gross income of the interest on state or local bonds. For purposes of this revenue procedure, any reference to a 1986 Code provision includes a reference to the corresponding provision, if any, under the 1954 Code.

(3) Private business use can arise by ownership, actual or beneficial use of property pursuant to a lease, a management or incentive payment contract, or certain other arrangements. The Conference Report for the Tax Reform Act of 1986, provides as follows:

The conference agreement generally retains the present-law rules under which use by persons other than governmental units is determined for purposes of the trade or business use test. Thus, as

under present law, the use of bond-financed property is treated as a use of bond proceeds. As under present law, a person may be a user of bond proceeds and bond-financed property as a result of (1) ownership or (2) actual or beneficial use of property pursuant to a lease, a management or incentive payment contract, or (3) any other arrangement such as a take-or-pay or other output-type contract. 2 H.R. Conf. Rep. No. 841, 99<sup>th</sup> Cong., 2d Sess. II-687-688, (1986) 1986-3 (Vol. 4) C.B. 687-688 (footnote omitted).

(4) A management contract that gives a nongovernmental service provider an ownership or leasehold interest in financed property is not the only situation in which a contract may result in private business use.

(5) Section 1.141-3(b)(4)(i) of the Income Tax Regulations provides, in general, that a management contract (within the meaning of section 1.141-3(b)(4)(ii)) with respect to financed property may result in private business use of that property, based on all the facts and circumstances.

(6) Section 1.141-3(b)(4)(i) provides that a management contract with respect to financed property generally results in private business use of that property if the contract provides for compensation for services rendered with compensation based, in whole or in part, on a share of net profits from the operation of the facility.

(7) Section 1.141-3(b)(4)(iii), in general, provides that certain arrangements generally are not treated as management contracts that may give rise to private business use. These are—

(a) Contracts for services that are solely incidental to the primary governmental function or functions of a financed facility (for example, contracts for janitorial, office equipment repair, hospital billing or similar services);

(b) The mere granting of admitting privileges by a hospital to a doctor, even if those privileges are conditioned on the provision of de minimis services, if those privileges are available to all qualified physicians in the area, consistent with the size and nature of its facilities;

(c) A contract to provide for the operation of a facility or system of facilities that consists predominantly of public utility property (as defined in section 168(i)(10) of the 1986 Code), if the only compensation is the reimbursement of actual and direct expenses of the service provider and reasonable administrative overhead expenses of the service provider; and

(d) A contract to provide for services, if the only compensation is the reimbursement of the service provider for actual and direct expenses paid by the service provider to unrelated parties.

(8) Section 1.145-2(a) provides generally that sections 1.141-0 through 1.141-15 apply to section 145(a) of the 1986 Code.

(9) Section 1.145-2(b)(1) provides that in applying sections 1.141-0 through 1.141-15 to section 145(a) of the 1986 Code, references to governmental persons include section 501(c)(3) organizations with respect to their activities that do not constitute unrelated trades or businesses under section 513(a) of the 1986 Code.

.02 *Existing Advance Ruling Guidelines*. Rev. Proc.. 93-19, 1993-1 C.B. 526, contains advance ruling guidelines for determining whether a management contract results in private business use under section 141(b) of the 1986 Code.

### **SECTION 3. DEFINITIONS**

.01 *Adjusted gross revenues* means gross revenues of all or a portion of a facility, less allowances for bad debts and contractual and similar allowances.

.02 *Capitation fee* means a fixed periodic amount for each person for whom the service provider or the qualified user assumes the responsibility to provide all needed services for a specified period so long as the quantity and type of services actually provided to covered persons varies substantially. For example, a capitation fee includes a fixed dollar amount payable per month to a medical service provider for each member of a health maintenance organization plan for whom the provider agrees to provide all needed medical services for a specified period. A capitation fee may include a variable component of up to 20 percent of the total capitation fee designed to protect the service provider against risks such as catastrophic loss.

.03 *Management contract* means a management, service, or incentive payment contract between a qualified user and a service provider under which the service provider provides services involving all, a portion of, or any function of, a facility. For example, a contract for the provision of management services for an entire hospital, a contract for management services for a specific department of a hospital, and an incentive payment contract for physician services to patients of a hospital are each treated as a management contract. See sections 1.141-3(b)(4)(ii) and 1.145-2.

.04 *Penalties* for terminating a contract include a limitation on the qualified user's right to compete with the service provider; a requirement that the qualified user purchase equipment, goods, or services from the service provider; and a requirement that the qualified user pay liquidated damages for cancellation of the contract. In contrast, a requirement effective on cancellation that the qualified user reimburse the service provider for ordinary and necessary expenses or a restriction on the qualified user against hiring key personnel of the service provider is generally not a contract termination penalty. Another contract between the service provider and the qualified user, such as a loan or guarantee by the service provider, is treated as creating a contract termination penalty if that contract contains terms that are not customary or arm's-length that could operate to prevent the qualified user from terminating the contract (for example, provisions under

which the contract terminates if the management contract is terminated or that place substantial restrictions on the selection of a substitute service provider).

.05 *Periodic fixed fee* means a stated dollar amount for services rendered for a specified period of time. For example, a stated dollar amount per month is a periodic fixed fee. The stated dollar amount may automatically increase according to a specified, objective, external standard that is not linked to the output or efficiency of a facility. For example, the Consumer Price Index and similar external indices that track increases in prices in an area or increases in revenues or costs in an industry are objective external standards. Capitation fees and per-unit fees are not periodic fixed fees.

.06 *Per-unit fee* means a fee based on a unit of service provided specified in the contract or otherwise specifically determined by an independent third party, such as the administrator of the Medicare program, or the qualified user. For example, a stated dollar amount for each specified medical procedure performed, car parked, or passenger mile is a per-unit fee. Separate billing arrangements between physicians and hospitals generally are treated as per-unit fee arrangements.

.07 *Qualified user* means any state or local governmental unit as defined in section 1.103-1 or any instrumentality thereof. The term also includes a section 501(c)(3) organization if the financed property is not used in an unrelated trade or business under section 513(a) of the 1986 Code. The term does not include the United States or any agency or instrumentality thereof.

.08 *Renewal option* means a provision under which the service provider has a legally enforceable right to renew the contract. Thus, for example, a provision under which a contract is automatically renewed for one-year periods absent cancellation by either party is not a renewal option (even if it is expected to be renewed).

.09 *Service provider* means any person other than a qualified user that provides services under a contract to, or for the benefit of, a qualified user.

## **SECTION 4. SCOPE**

This revenue procedure applies when, under a management contract, a service provider provides management or other services involving property financed with proceeds of an issue of state or local bonds subject to section 141 or section 145(a)(2)(B) of the 1986 Code.

## **SECTION 5. OPERATING GUIDELINES FOR MANAGEMENT CONTRACTS**

.01 **IN GENERAL.** If the requirements of section 5 of this revenue procedure are satisfied, the management contract does not itself result in private business use. In addition, the use of financed property, pursuant to a management contract meeting the requirements of section 5 of this revenue procedure, is not private business use if that use is functionally related and subordinate to that management contract and that use is not, in substance, a separate contractual agreement (for



example, a separate lease of a portion of the financed property). Thus, for example, exclusive use of storage areas by the manager for equipment that is necessary for it to perform activities required under a management contract that meets the requirements of section 5 of this revenue procedure, is not private business use.

## .02 GENERAL COMPENSATION REQUIREMENTS.

(1) IN GENERAL. The contract must provide for reasonable compensation for services rendered with no compensation based, in whole or in part, on a share of net profits from the operation of the facility. Reimbursement of the service provider for actual and direct expenses paid by the service provider to unrelated parties is not by itself treated as compensation.

(2) ARRANGEMENTS THAT GENERALLY ARE NOT TREATED AS NET PROFITS ARRANGEMENTS. For purposes of section 1.141-3(b)(4)(i) and this revenue procedure, compensation based on--

(a) A percentage of gross revenues (or adjusted gross revenues) of a facility or a percentage of expenses from a facility, but not both;

(b) A capitation fee; or

(c) A per-unit fee is generally not considered to be based on a share of net profits.

(3) PRODUCTIVITY REWARD. For purposes of section 1.141-3(b)(4)(i) and this revenue procedure, a productivity reward equal to a stated dollar amount based on increases or decreases in gross revenues (or adjusted gross revenues), or reductions in total expenses (but not both increases in gross revenues (or adjusted gross revenues) and reductions in total expenses) in any annual period during the term of the contract, generally does not cause the compensation to be based on a share of net profits. A productivity reward for services in any annual period during the term of the contract generally also does not cause the compensation to be based on a share of net profits of the financed facility if:

- The eligibility for the productivity award is based on the quality of the services provided under the management contract (for example, the achievement of Medicare Shared Savings Program quality performance standards or meeting data reporting requirements), rather than increases in revenues or decreases in expenses of the facility; and

- The amount of the productivity award is a stated dollar amount, a periodic fixed fee, or a tiered system of stated dollar amounts or periodic fixed fees based solely on the level of performance achieved with respect to the applicable measure.

(4) REVISION OF COMPENSATION ARRANGEMENTS. In general, if the compensation arrangements of a management contract are materially revised, the requirements for compensation arrangements under section 5 of this revenue procedure are retested as of the date of the material

revision, and the management contract is treated as one that was newly entered into as of the date of the material revision.

.03 PERMISSIBLE ARRANGEMENTS. The management contract must be described in section 5.03(1), (2), (3), (4), (5), (6), or (7) of this revenue procedure.

(1) 95 PERCENT PERIODIC FIXED FEE ARRANGEMENTS. At least 95 percent of the compensation for services for each annual period during the term of the contract is based on a periodic fixed fee. The term of the contract, including all renewal options, must not exceed the lesser of 80 percent of the reasonably expected useful life of the financed property and 15 years. For purposes of this section 5.03(1), a fee does not fail to qualify as a periodic fixed fee as a result of a one-time incentive award during the term of the contract under which compensation automatically increases when a gross revenue or expense target (but not both) is reached if that award is equal to a single, stated dollar amount.

(2) 80 PERCENT PERIODIC FIXED FEE ARRANGEMENTS. At least 80 percent of the compensation for services for each annual period during the term of the contract is based on a periodic fixed fee. The term of the contract, including all renewal options, must not exceed the lesser of 80 percent of the reasonably expected useful life of the financed property and 10 years. For purposes of this section 5.03(2), a fee does not fail to qualify as a periodic fixed fee as a result of a one-time incentive award during the term of the contract under which compensation automatically increases when a gross revenue or expense target (but not both) is reached if that award is equal to a single, stated dollar amount.

(3) SPECIAL RULE FOR PUBLIC UTILITY PROPERTY. If all of the financed property subject to the contract is a facility or system of facilities consisting of predominantly public utility property (as defined in section 168(i)(10) of the 1986 Code), then “20 years” is substituted—

(a) For “15 years” in applying section 5.03(1) of this revenue procedure; and

(b) For “10 years” in applying section 5.03(2) of this revenue procedure.

(4) 50 PERCENT PERIODIC FIXED FEE ARRANGEMENTS. Either at least 50 percent of the compensation for services for each annual period during the term of the contract is based on a periodic fixed fee or all of the compensation for services is based on a capitation fee or a combination of a capitation fee and a periodic fixed fee. The term of the contract, including all renewal options, must not exceed 5 years. The contract must be terminable by the qualified user on reasonable notice, without penalty or cause, at the end of the third year of the contract term.

(5) PER-UNIT FEE ARRANGEMENTS IN CERTAIN 3-YEAR CONTRACTS. All of the compensation for services is based on a per-unit fee or a combination of a per-unit fee and a periodic fixed fee. The term of the contract, including all renewal options, must not exceed 3 years. The contract must be terminable by the qualified user on reasonable notice, without penalty or cause, at the end of the second year of the contract term.

(6) Percentage Of Revenue Or Expense Fee Arrangements In Certain 2-Year Contracts. All the compensation for services is based on a percentage of fees charged or a combination of a per-unit fee and a percentage of revenue or expense fee. During the start-up period, however, compensation may be based on a percentage of either gross revenues, adjusted gross revenues, or expenses of a facility. The term of the contract, including renewal options, must not exceed 2 years. The contract must be terminable by the qualified user on reasonable notice, without penalty or cause, at the end of the first year of the contract term. This section 5.03(6) applies only to--

(a) Contracts under which the service provider primarily provides services to third parties (for example, radiology services to patients); and

(b) Management contracts involving a facility during an initial start-up period for which there have been insufficient operations to establish a reasonable estimate of the amount of the annual gross revenues and expenses (for example, a contract for general management services for the first year of operations).

#### .04 NO CIRCUMSTANCES SUBSTANTIALLY LIMITING EXERCISE OF RIGHTS.

(1) IN GENERAL. The service provider must not have any role or relationship with the qualified user that, in effect, substantially limits the qualified user's ability to exercise its rights, including cancellation rights, under the contract, based on all the facts and circumstances.

(2) SAFE HARBOR. This requirement is satisfied if--

(a) Not more than 20 percent of the voting power of the governing body of the qualified user in the aggregate is vested in the service provider and its directors, officers, shareholders, and employees;

(b) Overlapping board members do not include the chief executive officers of the service provider or its governing body or the qualified user or its governing body; and

(c) The qualified user and the service provider under the contract are not related parties, as defined in section 1.150-1(b).

#### (7) ARRANGEMENTS IN CERTAIN 5-YEAR CONTRACTS.

All of the compensation for services is based on a stated amount; periodic fixed fee; a capitation fee; a per-unit fee; or a combination of the preceding. The compensation for services also may include a percentage of gross revenues, adjusted gross revenues, or expenses of the facility (but not both revenues and expenses). The term of the contract, including all renewal options, does not exceed five years. Such contract need not be terminable by the qualified user prior to the end of the term. For purposes of this section 5.03(7), a tiered productivity award as described in section 5.02(3) will be treated as a stated amount or a periodic fixed fee, as appropriate.

## **SECTION 6. EFFECT ON OTHER DOCUMENTS**

Rev. Proc. 93-19, 1993-1 C.B. 526, is made obsolete on the effective date of this revenue procedure.

## **SECTION 7. EFFECTIVE DATE**

This revenue procedure is effective for any management contract entered into, materially modified, or extended (other than pursuant to a renewal option) on or after May 16, 1997. In addition, an issuer may apply this revenue procedure to any management contract entered into prior to May 16, 1997.

## **DRAFTING INFORMATION**

The principal author of this revenue procedure is Loretta J. Finger of the Office of Assistant Chief Counsel (Financial Institutions and Products). For further information regarding this revenue procedure contact Loretta J. Finger on (202) 622-3980 (not a toll-free call).

Rev. Proc. 2001--39; 2001--28 IRB 1 (18 Jun 2001)

### **===== SUMMARY =====**

The Service in Rev. Proc. 2001--39 has modified the definitions of capitation fee and per-unit fee in Rev. Proc. 97--13, 1997--1 C.B. 632, to allow an automatic increase of those fees according to a specified, objective, external standard that isn't linked to the output or efficiency of a facility.

Rev. Proc. 2001--39 applies when, under a management contract, a service provider provides management or other services involving property financed with proceeds of an issue of state or local bonds subject to section 141 or section 145(a)(2)(B). Rev. Proc. 2001-39 is effective for any management contract entered into, materially modified, or extended after July 8, 2001. Also, an issuer may apply the revenue procedure to any management contract entered into before July 9, 2001.

### **===== FULL TEXT ===== Part III**

Administrative, Procedural, and Miscellaneous

26 CFR 601.601: Rules and regulations. (Also Part I, sections 103, 141, 145; 1.141--3, 1.145--2.)

## **SECTION 1. PURPOSE**

This revenue procedure modifies the definitions of capitation fee and per-unit fee in Rev. Proc. 97--13, 1997--1 C.B. 632, to permit an automatic increase of those fees according to a specified, objective, external standard that is not linked to the output or efficiency of a facility (for example, the Consumer Price Index).

## SECTION 2. BACKGROUND

.01 Rev. Proc. 97--13 sets forth conditions under which a management contract does not result in private business use under section 141(b) of the Internal Revenue Code. The revenue procedure also applies to determinations of whether a management contract causes the test in section 145(a)(2)(B) to be met.

.02 Section 3 of Rev. Proc. 97--13 defines various terms, including capitation fee, periodic fixed fee, and per-unit fee.

.03 Section 3.02 of Rev. Proc. 97--13 defines a capitation fee as a fixed periodic amount for each person for whom the service provider or the qualified user assumes the responsibility to provide all needed services for a specified period so long as the quantity and type of services actually provided to covered persons varies substantially. A capitation fee may include a variable component of up to 20 percent of the total capitation fee designed to protect the service provider against risks such as catastrophic loss.

.04 Section 3.05 of Rev. Proc. 97--13 defines a periodic fixed fee as a stated dollar amount for services rendered for a specified period of time. The definition of periodic fixed fee provides that the stated dollar amount may automatically increase according to a specified, objective, external standard that is not linked to the output or efficiency of a facility.

.05 Section 3.06 of Rev. Proc. 97--13 defines a per--unit fee as a fee based on a unit of service provided specified in the contract or otherwise specifically determined by an independent third party, such as the administrator of the Medicare program, or the qualified user.

.06 Neither the capitation fee definition nor the per--unit fee definition expressly contemplates an automatic increase based on a specified, objective, external standard not linked to the output or efficiency of the facility.

.07 This revenue procedure clarifies that a capitation fee and a per-unit fee may be determined using an automatic increase according to a specified, objective, external standard that is not linked to the output or efficiency of a facility (for example, the Consumer Price Index).

## SECTION 3. SCOPE

This revenue procedure applies when, under a management contract, a service provider provides management or other services involving property financed with proceeds of an issue of state or local bonds subject to section 141 or section 145(a)(2)(B).

## SECTION 4. MODIFICATIONS

.01 Section 3.02 of Rev. Proc. 97--13 is modified to add the following text immediately before the last sentence:

A fixed periodic amount may include an automatic increase according to a specified, objective, external standard that is not linked to the output or efficiency of a facility. For example, the Consumer Price Index and similar external indices that track increases in prices in an area or increases in revenues or costs in an industry are objective, external standards. .02 Section 3.06 of Rev. Proc. 97--13 is modified to add the following text at the end:

A fee that is a stated dollar amount specified in the contract does not fail to be a per-unit fee as a result of a provision under which the fee may automatically increase according to a specified, objective, external standard that is not linked to the output or efficiency of a facility. For example, the Consumer Price Index and similar external indices that track increases in prices in an area or increases in revenues or costs in an industry are objective, external standards.

#### SECTION 5. INQUIRIES

For further information regarding this revenue procedure contact David White at (202) 622-3980 (not a toll-free call).

#### SECTION 6. EFFECT ON OTHER DOCUMENTS

This revenue procedure modifies Rev. Proc. 97--13, 1997--1 C.B. 632.

#### SECTION 7. EFFECTIVE DATE

This revenue procedure is effective for any management contract entered into, materially modified, or extended (other than pursuant to a renewal option) on or after July 9, 2001. In addition, an issuer may apply this revenue procedure to any management contract entered into prior to July 9, 2001.

#### DRAFTING INFORMATION

The principal authors of this revenue procedure are Mary Truchly and Rebecca Harrigal, Office of Chief Counsel.

## **EXHIBIT 3**

### **MANAGEMENT CONTRACT GUIDELINES**

Rev. Proc. 2017-13

#### **SECTION 1. PURPOSE**

This revenue procedure provides safe harbor conditions under which a management contract does not result in private business use of property financed with governmental tax-exempt bonds under § 141(b) of the Internal Revenue Code or cause the modified private business use test for property financed with qualified 501(c)(3) bonds under § 145(a)(2)(B) to be met. This revenue procedure modifies, amplifies, and supersedes Rev. Proc. 2016-44, 2016-36 IRB 316, to address certain types of compensation, the timing of payment of compensation, the treatment of land, and methods of approval of rates. Sections 2.11 through 2.14 of this revenue procedure generally describe the modifications and amplifications made to Rev. Proc. 2016-44 by this revenue procedure.

#### **SECTION 2. BACKGROUND**

.01 Section 103(a) provides that, except as provided in § 103(b), gross income does not include interest on any State or local bond. Section 103(b)(1) provides that § 103(a) shall not apply to any private activity bond that is not a qualified bond (within the meaning of § 141). Section 141(a) provides that the term “private activity bond” means any bond issued as part of an issue (1) that meets the private business use test and private security or payment test, or (2) that meets the private loan financing test.

.02 Section 141(b)(1) provides generally that an issue meets the private business use test if more than 10 percent of the proceeds of the issue are to be used for any private business use. Section 141(b)(6) defines “private business use” as use (directly or indirectly) in a trade or business carried on by any person other than a governmental unit. For this purpose, any activity carried on by a person other than a natural person must be treated as a trade or business.

.03 Section 1.141 -3(a)(1) of the Income Tax Regulations provides, in part, that the 10 percent private business use test of § 141 (b)(1) is met if more than 10 percent of the proceeds of an issue is used in a trade or business of a nongovernmental person. For this purpose, the use of financed property is treated as the direct use of proceeds. Section 1.141-3(a)(2) provides that, in determining whether an issue meets the private business use test, it is necessary to look at both indirect and direct use of proceeds. Proceeds are treated as used in the trade or business of a nongovernmental person if a nongovernmental person, as a result of a single transaction or a series of related transactions, uses property acquired with the proceeds of an issue.

.04 Section 1.141 -3(b)(1) provides that both actual and beneficial use by a nongovernmental person may be treated as private business use. In most cases, the private business use test is met only if a nongovernmental person has special legal entitlements to use the financed property under an arrangement with the District. In general, a nongovernmental person is treated as a private business user as a result of ownership; actual or beneficial use of property pursuant to a lease, a management contract, or an incentive payment contract; or certain other arrangements such as a take or pay or other output-type contract.

.05 Section 1.141 -3(b)(3) provides generally that the lease of financed property to a nongovernmental person is private business use of that property. For this purpose, any arrangement that is properly characterized as a lease for federal income tax purposes is treated as a lease. Section 1.141 -3(b)(3) further provides that, in determining whether a management contract is properly characterized as a lease, it is necessary to consider all the facts and circumstances, including the following factors: (1) the degree of control over the property that is exercised by a nongovernmental person; and (2) whether a nongovernmental person bears the risk of loss of the financed property.

.06 Section 1.141 -3(b)(4)(i) provides generally that a management contract with respect to financed property may result in private business use of that property, based on all of the facts and circumstances. A management contract with respect to financed property generally results in private business use of that property if the contract provides for compensation for services rendered with compensation based, in whole or in part, on a share of net profits from the operations of the facility. Section 1.141-3(b)(4)(iv) provides generally that a management contract with respect to financed property results in private business use of that property if the service provider is treated as the lessee or owner of financed property for federal income tax purposes.

.07 Section 1.141 -3(b)(4)(ii) defines “management contract” as a management, service, or incentive payment contract between a governmental person and a service provider under which the service provider provides services involving all, a portion, or any function, of a facility. For example, a contract for the provision of management services for an entire hospital, a contract for management services for a specific department of a hospital, and an incentive payment contract for physician services to patients of a hospital are each treated as a management contract.

.08 Section 1.141 -3(b)(4)(iii) provides that the following arrangements generally are not treated as management contracts that give rise to private business use: (A) contracts for services that are solely incidental to the primary governmental function or functions of a financed facility (for example, contracts for janitorial, office equipment repair, hospital billing, or similar services); (B) the mere granting of admitting privileges by a hospital to a doctor, even if those privileges are conditioned on the provision of de minimis services if those privileges are available to all qualified physicians in the area, consistent with the size and nature of the hospital’s facilities; (C) a contract to provide for the operation of a facility or system of facilities that consists primarily of public utility property, if the only compensation is the reimbursement of actual and direct expenses of the service provider and reasonable administrative overhead expenses of the service provider; and (D)



a contract to provide for services, if the only compensation is the reimbursement of the service provider for actual and direct expenses paid by the service provider to unrelated parties.

.09 Section 141(e) provides, in part, that the term “qualified bond” includes a qualified 501(c)(3) bond if certain requirements stated therein are met. Section 145(a) provides generally that “qualified 501(c)(3) bond” means any private activity bond issued as part of an issue if (1) all property that is to be provided by the net proceeds of the issue is to be owned by a 501(c)(3) organization or a governmental unit, and (2) such bond would not be a private activity bond if (A) 501(c)(3) organizations were treated as governmental units with respect to their activities that do not constitute unrelated trades or businesses, determined by applying § 513(a), and (B) § 141(b)(1) and (2) were applied by substituting “5 percent” for “10 percent” each place it appears and by substituting “net proceeds” for “proceeds” each place it appears. Section 1.1452 provides that, with certain exceptions and modifications, §§ 1.141-0 through 1.141-15 apply to § 145(a).

.10 Rev. Proc. 2016-44 provides safe harbor conditions under which a management contract does not result in private business use of property financed with governmental tax-exempt bonds under § 141(b) or cause the modified private business use test for property financed with qualified 501(c)(3) bonds under § 145(a)(2)(B) to be met. Rev. Proc. 2016-44 modified and superseded Rev. Proc. 97-13, 1997-1 C.B. 632; Rev. Proc. 2001-39, 2001-2 C.B. 38; and section 3.02 of Notice 2014-67, 2014-46 I.R.B. 822.

.11 Section 5.02 of Rev. Proc. 2016-44 sets forth general financial requirements for management compensation arrangements eligible for the safe harbor. Sections 5.02(2) and 5.02(3) of Rev. Proc. 2016-44 provide that the contract must neither provide to the service provider a share of net profits nor impose on the service provider the burden of bearing any share of net losses from the operation of the managed property. Before the publication of Rev. Proc. 2016-44, previously applicable revenue procedures expressly treated certain types of compensation, including capitation fees, periodic fixed fees, and per-unit fees (as defined therein), as not providing a share of net profits. Questions have arisen regarding whether these common types of compensation continue to be treated in a similar manner under Rev. Proc. 2016-44. Related questions have arisen about whether a service provider’s payment of expenses of the operation of the managed property without reimbursement from the qualified user (as defined in section 4.04 of Rev. Proc. 2016-44) affects the treatment of these types of compensation. To provide continuity with the previous safe harbors, this revenue procedure clarifies that these types of compensation and certain incentive compensation will not be treated as providing a share of net profits or requiring the service provider to bear a share of net losses.

.12 Sections 5.02(2) and 5.02(3) of Rev. Proc. 2016-44 also provide that the timing of payment of compensation cannot be contingent upon net profits or net losses from the operation of the managed property. Questions have arisen about the effect of these restrictions on the timing of payment of compensation. This revenue procedure clarifies that compensation subject to an annual payment requirement and reasonable consequences for late payment (such as interest charges or late payment fees) will not be treated as contingent upon net profits or net losses if the

contract includes a requirement that the qualified user will pay the deferred compensation within five years of the original due date of the payment.

.13. Section 5.03 of Rev. Proc. 2016-44 provides that the term of the contract, including all renewal options (as defined in § 1.141-1(b)), must be no greater than the lesser of 30 years or 80 percent of the weighted average reasonably expected economic life of the managed property. For this purpose, under Rev. Proc. 2016-44, economic life is determined in the same manner as under §147(b), but without regard to §147(b)(3)(B)(ii), as of the beginning of the term of contract. Section 147(b)(3)(B)(i) provides that generally land is not taken into account, but §147(b)(3)(B)(ii) provides that if 25 percent or more of the net proceeds of any issue is to be used to finance the acquisition of land, such land shall be taken into account and treated as having an economic life of 30 years. Questions have arisen about excluding land when the cost of the land accounts for a significant portion of the managed property. This revenue procedure provides that economic life is determined in the same manner as under §147(b) as of the beginning of the term of the contract. Thus, land will be treated as having an economic life of 30 years if 25 percent or more of the net proceeds of the issue that finances the managed property is to be used to finance the costs of such land.

.14 Section 5.04 of Rev. Proc. 2016-44 provides that the qualified user must exercise a significant degree of control over the use of the managed property. Section 5.04 of Rev. Proc. 2016-44 further provides that this requirement is met if the contract requires the qualified user to approve, among other things, the rates charged for use of the managed property. Section 5.04 of Rev. Proc. 2016-44 also provides that a qualified user may show approval of rates charged for use of the managed property by either expressly approving such rates (or the methodology for setting such rates) or by including in the contract a requirement that service provider charge rates that are reasonable and customary as specifically determined by an independent third party. Questions have arisen about the requirement to approve the rates in various circumstances in which it may not be feasible to approve each specific rate charged, such as for a physician's professional services at a § 501(c)(3) hospital or hotel room rates at a governmentally-owned hotel. This revenue procedure clarifies that a qualified user may satisfy the approval of rates requirement by approving a reasonable general description of the method used to set the rates or by requiring that the service provider charge rates that are reasonable and customary as specifically determined by, or negotiated with, an independent third party.

### SECTION 3. SCOPE

This revenue procedure applies to a management contract (as defined in section 4.03 of this revenue procedure) involving managed property (as defined in section 4.04 of this revenue procedure) financed with the proceeds of an issue of governmental bonds (as defined in §1.141-1(b)) or qualified 501(c)(3) bonds (as defined in §145).

## SECTION 4. DEFINITIONS

For purposes of this revenue procedure, the following definitions apply:

.01 Capitation fee means a fixed periodic amount for each person for whom the service provider or the qualified user assumes the responsibility to provide all needed services for a specified period so long as the quantity and type of services actually provided to such persons varies substantially. For example, a capitation fee includes a fixed dollar amount payable per month to a medical service provider for each member of a health maintenance organization plan for whom the provider agrees to provide all needed medical services for a specified period. A fixed periodic amount may include an automatic increase according to a specified, objective, external standard that is not linked to the output or efficiency of the managed property. For example, the Consumer Price Index and similar external indices that track increases in prices in an area or increases in revenues or costs in an industry are objective, external standards. A capitation fee may include a variable component of up to 20 percent of the total capitation fee designed to protect the service provider against risk such as risk of catastrophic loss.

.02 Eligible expense reimbursement arrangement means a management contract under which the only compensation consists of reimbursements of actual and direct expenses paid by the service provider to unrelated parties and reasonable related administrative overhead expenses of the service provider.

.03 Management contract means a management, service, or incentive payment contract between a qualified user and a service provider under which the service provider provides services for a managed property. A management contract does not include a contract or portion of a contract for the provision of services before a managed property is placed in service (for example, pre-operating services for construction design or construction management).

.04 Managed property means the portion of a project (as defined in § 1.141-6(a)(3)) with respect to which a service provider provides services.

.05 Periodic fixed fee means a stated dollar amount for services rendered for a specified period of time. For example, a stated dollar amount per month is a periodic fixed fee. The stated dollar amount may automatically increase according to a specified, objective external standard that is not linked to the output or efficiency of the managed property. For example, the Consumer Price Index and similar external indices that track increases in prices in an area or increases in revenues or costs in an industry are objective external standards. Capitation fees and per-unit fees are not periodic fixed fees.

.06 Per-unit fee means a fee based on a unit of service provided specified in the contract or otherwise specifically determined by an independent third party, such as the administrator of the Medicare program, or the qualified user. For example, a stated dollar amount for each specified medical procedure performed, car parked, or passenger mile is a per-unit fee. Separate billing

arrangements between physicians and hospitals are treated as per-unit fee arrangements. A fee that is a stated dollar amount specified in the contract does not fail to be a per-unit fee as a result of a provision under which the fee may automatically increase according to a specified, objective, external standard that is not linked to the output or efficiency of the managed property. For example, the Consumer Price Index and similar external indices that track increases in prices in an area or increases in revenues or costs in an industry are objective, external standards.

.07 Qualified user means, for projects (as defined in § 1.141-6(a)(3)) financed with governmental bonds, any governmental person (as defined in § 1.141-1 (b)) or, for projects financed with qualified 501(c)(3) bonds, any governmental person or any 501(c)(3) organization with respect to its activities which do not constitute an unrelated trade or business, determined by applying § 513(a).

.08 Service provider means any person other than a qualified user that provides services to, or for the benefit of, a qualified user under a management contract.

.09 Unrelated parties means persons other than either: (1) a related party (as defined in § 1.150-1(b)) to the service provider or (2) a service provider's employee.

## SECTION 5. SAFE HARBOR CONDITIONS UNDER WHICH MANAGEMENT CONTRACTS DO NOT RESULT IN PRIVATE BUSINESS USE

.01 In general. If a management contract meets all of the applicable conditions of sections 5.02 through section 5.07 of this revenue procedure, or is an eligible expense reimbursement arrangement, the management contract does not result in private business use under § 141(b) or 145(a)(2)(B). Further, under section 5.08 of this revenue procedure, use functionally related and subordinate to a management contract that meets these conditions does not result in private business use.

.02 General financial requirements.

(1) In general. The payments to the service provider under the contract must be reasonable compensation for services rendered during the term of the contract. Compensation includes payments to reimburse actual and direct expenses paid by the service provider and related administrative overhead expenses of the service provider.

(2) No net profits arrangements. The contract must not provide to the service provider a share of net profits from the operation of the managed property. Compensation to the service provider will not be treated as providing a share of net profits if no element of the compensation takes into account, or is contingent upon, either the managed property's net profits or both the managed property's revenues and expenses (other than any reimbursements of direct and actual expenses paid by the service provider to unrelated third parties) for any fiscal period. For this purpose, the elements of the compensation are the eligibility for, the amount of, and the timing of

the payment of the compensation. Incentive compensation will not be treated as providing a share of net profits if the eligibility for the incentive compensation is determined by the service provider's performance in meeting one or more standards that measure quality of services, performance, or productivity, and the amount and the timing of the payment of the compensation meet the requirements of this section 5.02(2).

(3) No bearing of net losses of the managed property.

(a) The contract must not, in substance, impose upon the service provider the burden of bearing any share of net losses from the operation of the managed property. An arrangement will not be treated as requiring the service provider to bear a share of net losses if:

(i) The determination of the amount of the service provider's compensation and the amount of any expenses to be paid by the service provider (and not reimbursed), separately and collectively, do not take into account either the managed property's net losses or both the managed property's revenues and expenses for any fiscal period; and (ii) The timing of the payment of compensation is not contingent upon the managed property's net losses.

(b) For example, a service provider whose compensation is reduced by a stated dollar amount (or one of multiple stated dollar amounts) for failure to keep the managed property's expenses below a specified target (or one of multiple specified targets) will not be treated as bearing a share of net losses as a result of this reduction.

(4) Treatment of certain types of compensation. Without regard to whether the service provider pays expenses with respect to the operation of the managed property without reimbursement by the qualified user, compensation for services will not be treated as providing a share of net profits or requiring the service provider to bear a share of net losses under sections 5.02(2) and 5.02(3) of this revenue procedure if the compensation for services is: (a) based solely on a capitation fee, a periodic fixed fee, or a per-unit fee; (b) incentive compensation described in the last sentence of section 5.02(2) of this revenue procedure; or (c) a combination of these types of compensation.

(5) Treatment of timing of payment of compensation. Deferral due to insufficient net cash flows from the operation of the managed property of the payment of compensation that otherwise meets the requirements of sections 5.02(2) and 5.02(3) of this revenue procedure will not cause the deferred compensation to be treated as contingent upon net profits or net losses under sections 5.02(2) and 5.02(3) of this revenue procedure if the contract includes requirements that:

(a) The compensation is payable at least annually;

(b) The qualified user is subject to reasonable consequences for late payment, such as reasonable interest charges or late payment fees; and

(c) The qualified user will pay such deferred compensation (with interest or late payment fees) no later than the end of five years after the original due date of the payment.

.03 Term of the contract and revisions. The term of the contract, including all renewal options (as defined in §1.141-1 (b)), must not be greater than the lesser of 30 years or 80 percent of the weighted average reasonably expected economic life of the managed property. For this purpose, economic life is determined in the same manner as under §147(b) as of the beginning of the term of the contract. A contract that is materially modified with respect to any matters relevant to this section 5 is retested under this section 5 as a new contract as of the date of the material modification.

.04 Control over use of the managed property. The qualified user must exercise a significant degree of control over the use of the managed property. This control requirement is met if the contract requires the qualified user to approve the annual budget of the managed property, capital expenditures with respect to the managed property, each disposition of property that is part of the managed property, rates charged for the use of the managed property, and the general nature and type of use of the managed property (for example, the type of services). For this purpose, for example, a qualified user may show approval of capital expenditures for a managed property by approving an annual budget for capital expenditures described by functional purpose and specific maximum amounts; and a qualified user may show approval of dispositions of property that is part of the managed property in a similar manner. Further, for example, a qualified user may show approval of rates charged for use of the managed property by expressly approving such rates or a general description of the methodology for setting such rates (such as a method that establishes hotel room rates using specified revenue goals based on comparable properties), or by requiring that the service provider charge rates that are reasonable and customary as specifically determined by, or negotiated with, an independent third party (such as a medical insurance company).

.05 Risk of loss of the managed property. The qualified user must bear the risk of loss upon damage or destruction of the managed property (for example, due to force majeure). A qualified user does not fail to meet this risk of loss requirement as a result of insuring against risk of loss through a third party or imposing upon the service provider a penalty for failure to operate the managed property in accordance with the standards set forth in the management contract.

.06 No inconsistent tax position. The service provider must agree that it is not entitled to and will not take any tax position that is inconsistent with being a service provider to the qualified user with respect to the managed property. For example, the service provider must agree not to claim any depreciation or amortization deduction, investment tax credit, or deduction for any payment as rent with respect to the managed property.

.07 No circumstances substantially limiting exercise of rights.

(1) In general. The service provider must not have any role or relationship with the qualified user that, in effect, substantially limits the qualified user's ability to exercise its rights under the

contract, based on all the facts and circumstances.

(2) Safe harbor. A service provider will not be treated as having a role or relationship prohibited under section 5.07(1) of this revenue procedure if:

(a) No more than 20 percent of the voting power of the governing body of the qualified user is vested in the directors, officers, shareholders, partners, members, and employees of the service provider, in the aggregate;

(b) The governing body of the qualified user does not include the chief executive officer of the service provider or the chairperson (or equivalent executive) of the service provider's governing body; and

(c) The chief executive officer of the service provider is not the chief executive officer of the qualified user or any of the qualified user's related parties (as defined in §1.150-1(b)).

(3) For purposes of section 5.07(2) of this revenue procedure, the phrase "service provider" includes the service provider's related parties (as defined in §1.150-1(b)) and the phrase "chief executive officer" includes a person with equivalent management responsibilities.

.08 Functionally related and subordinate use. A service provider's use of a project (as defined in §1.141-6(a)(3)) that is functionally related and subordinate to performance of its services under a management contract for managed property that meets the conditions of this section 5 does not result in private business use of that project. For example, use of storage areas to store equipment used to perform activities required under a management contract that meets the requirements of this section 5 does not result in private business use.

## SECTION 6. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2016-44 is modified, amplified, and superseded.

## SECTION 7. DATE OF APPLICABILITY

This revenue procedure applies to any management contract that is entered into on or after January 17, 2017, and an issuer may apply this revenue procedure to any management contract that was entered into before January 17, 2017. In addition, an issuer may apply the safe harbors in Rev. Proc. 97-13, as modified by Rev. Proc. 2001-39 and amplified by Notice 2014-67, to a management contract that is entered into before August 18, 2017 and that is not materially modified or extended on or after August 18, 2017 (other than pursuant to a renewal option as defined in § 1.141-1 (b)).

## SECTION 8. DRAFTING INFORMATION

The principal authors of this revenue procedure are Johanna Som de Cerff and David White of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue procedure, contact David White on (202) 317-6980 (not a toll free call).



**TAB II**  
**PRIVATE BUSINESS USE QUESTIONNAIRE**  
**GOVERNMENTAL BONDS**

TO: [NAME]

[TITLE]

FROM: .

DATE: [CURRENT DATE]

RE: Use of Tax-Exempt Bond-Financed Property

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In order to maintain the tax-exempt status of bonds (including any short-term obligations such as notes) which have been issued to finance facilities or equipment for the benefit of \_\_\_\_\_ (the “Issuer”), the ownership and certain uses of the Bond-Financed Property must be monitored and recorded. In general, the ownership and use of the Bond-Financed Property must be monitored and recorded from the date of issue of the bonds until the earlier of the end of the expected life of the property, or the final maturity date of any bonds issued to finance the property. Because it is the Internal Revenue Service’s position that records be maintained until 3 years after the final maturity date of any bonds issued to finance (or refinance) the property, staff will be asked to update these records for changes in the use or ownership of the property.

Attached is a schedule with a brief description of property financed with proceeds of tax-exempt bonds. Our records indicate the property is located at [NAME OF FACILITY]. Please review your records and respond to each of the questions for the Bond-Financed Property listed, including both the present use of the property and any past uses of it. Please do not skip questions. If you are uncertain how to respond to a particular question please provide a brief explanation in the space immediately following the question. If necessary one of my staff members will contact you for clarification. Please refer to Tab I-A, Private Activity Restrictions on Private Business Use, of the Post-Issuance Compliance Guide, for a brief description of types of private use.

We recognize that some of the requested information and records may not be available. However, your cooperation is necessary in order to collect as much of this information as possible.

## SCHEDULE

### **USE OF TAX-EXEMPT BOND BOND-FINANCED PROPERTY**

Description of property: [Description] (the “Bond-Financed Property”)

Location: [facility name]

Bond or Note Issue: [name of bonds or notes]

Survey Date: [current date]

### **PLEASE REVIEW APPENDIX A FOR APPLICABLE RULES ON PRIVATE USE**

#### **I. Familiarity with Uses**

1.1 My familiarity with, and/or the records with respect to, the uses made of the Bond-Financed Property, dates back to \_\_\_\_\_ [insert date]

1.2 For information on uses of the Bond-Financed Property prior to the date set forth in Section 1.1, I suggest contacting \_\_\_\_\_.

#### **II. Ownership and Use of the Bond-Financed Property.**

2.1 When was the Bond-Financed Property placed in service? \_\_\_\_\_

2.2 Is the Bond-Financed Property still owned by the District? Yes ☐ No ☐

2.3 If, no, on what day was the Bond-Financed Property disposed of? \_\_\_\_\_.  
What were the terms of the disposition?

2.4 Is the Bond-Financed Property still in use? Yes ☐ No ☐ If No, please explain when it stopped being used and what its current state is.

2.5 Is the Bond-Financed Property still being used for its original purpose? Yes ☐ No ☐ If No, please explain how it is being used.

#### **III. Leases of the Bond-Financed Property.**

3.1 Has any portion of the Bond-Financed Property been leased to or been the subject of a possessory interest, such as a license in, any person? YES ☐ NO ☐

3.2 If the answer to the preceding question is yes, describe the nature and the extent of all such interests, including the lease payments, and identify the persons or organizations to whom such interests have been given.

#### **IV. Priority Rights.**

4.1 Has any portion of the Bond-Financed Property been the subject of an arrangement with a person other than a Governmental Unit for priority use or for use of certain capacity of the Bond-Financed Property? YES ☐ NO ☐

4.2 If the answer to the preceding question is Yes, describe the nature and the extent of all such interests, including any payments, and identify the persons or organizations to whom such interests have been given.

4.3 Has any portion of the Bond-Financed Property been used in the testing of products under a contract with a person other than a Governmental Unit? YES ☐ NO ☐

4.4 If the answer to the preceding question is Yes, describe the nature and the extent of all such arrangements, and identify the persons or organizations with whom such arrangements have been entered into.

#### **V. Naming Rights or Sponsorship Agreements.**

5.1 Has any portion of the Bond-Financed Property been the subject of a contract or other arrangement with anyone pursuant to which the that person will make a payment to the District in return for the right to have its name or logo used in connection with the District or any portion thereof? YES ☐ NO ☐ If Yes, please provide details of the arrangement.

#### **VI. Research.**

6.1 Has any portion of the Bond-Financed Property been used in research sponsored by anyone other than a Governmental Unit? (Note that the federal government is not a Governmental Unit.) YES ☐ NO ☐

6.2 If Yes, please describe the nature and the extent of all such arrangements, and identify the persons or organizations with whom such arrangements have been entered into. Please attach a copy of any contract or arrangement relating to such research.

#### **VII. Management Agreements and Service Agreements.**

7.1 Has any portion of the Bond-Financed Property been used in connection with any type of service contract or management contract described below?

(a) A contract with a non-employee group, other than a Governmental Unit, to provide services to, or manage any function of, the District? YES ☐ NO. If Yes,

identify the person or organization that is a party to the contract and provide a copy of such contract with this questionnaire response.

(b) A contract with an employee to provide services to, or manage any function of, the District, where such contract contains an incentive compensation arrangement? YES ☐ NO ☐ If Yes, identify the person or organization that is a party to the contract and provide a copy of such contract with this questionnaire response.

(c) A contract with a person other than a Governmental Unit to provide services, such as food services to the District? YES ☐ NO ☐ If Yes, identify the person or organization that is a party to the contract and provide a copy of such contract with this questionnaire response.

### **VIII. Output Facilities.**

8.1 Is any portion of the Bond-Financed Property an output type facility? YES ☐  
NO ☐

8.2 If the answer to the preceding question is Yes, has any of the output from those facilities been sold or been used to service facilities used in the trade or business of persons other than Governmental Units? YES ☐ NO ☐

### **IX Joint Ventures.**

9.1 Has any portion of the Bond-Financed Property been used in any joint venture arrangement with any person other than a Governmental Unit? YES ☐ NO ☐ If Yes, please provide details of the arrangement.

Date: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

## **TAB III**

**TAB III**  
**REMEDIAL ACTIONS**  
**GOVERNMENTAL BONDS**

**Introduction**

The Internal Revenue Code of 1986, as amended (the “Code”) limits the amount of proceeds of tax-exempt governmental bonds (including short-term obligations such as notes) that can be used for the benefit of private businesses. Section 141 of the Code treats as a taxable private activity bond a bond issued as part of an issue that meets the private business use test and the private security or payment test, or the private loan test. The private business use test is met if the amount of proceeds of bonds that are used in a private business use is more than ten percent of total proceeds. The private security or payment test is met if the payment of debt service on more than 10 percent of the issue is directly or indirectly (i) secured by any interest in property used for a private business use or payments in respect of such property or (ii) derived from payments in respect of property or borrowed money used for a private business use. A five percent limit is used in lieu of a ten percent limit if the private use is unrelated to a governmental use or related but disproportionate to a governmental use. For purposes of Section 141, the term private business includes use by nonprofit, 501(c)(3) organizations as well as the federal government.

**Deliberate Action**

The Regulations promulgated by the Internal Revenue Service (“IRS”) under Section 141 of the Code, specifically provide that bonds will be treated as private activity bonds if the District takes a deliberate action subsequent to the issue date that causes the tests for a private activity bond to be met. An issuer cannot rely merely on its expectations on the date of issuance to avoid jeopardizing the status of its bonds as governmental bonds. A deliberate action is any action taken by an issuer, but not including an action, such as a condemnation, that would be treated as an involuntary or compulsory conversion under Section 1033 of the Code, or an action that is taken in response to a regulatory directive made by the federal government. A deliberate action is deemed to occur when the District enters into a binding contract with a nongovernmental person for use of the financed property that is not subject to any material contingencies. In most cases, material conditions to closing a transaction will be treated as material contingencies so that the date of deliberate action will be the date disposition proceeds are received.

**Conditions to Remedial Action**

Under the Regulations, in order to take a remedial action to preserve the tax-exempt status of interest on bonds, the following conditions must be met:

- (1) *Reasonable expectations test.* The District must reasonably have expected on the issue date that neither the private business test nor the private loan test would be met. The period of time that has elapsed since the bonds were issued will be a factor in evaluating the reasonableness of expectations. Under certain conditions an expectation on the issue date to take a deliberate action

that would cause one of the tests to be met (e.g., a sale of the project) will be disregarded if the District expected on the issue date that the financed property would be used for a qualified purpose for a substantial period before such action, the District is required to redeem all nonqualifying bonds (without regard to the amount of disposition proceeds) within 6 months of the action, the redemption meets all the remedial action conditions (described below) and there was no arrangement on the date of issue with a nongovernmental person or a non-501 (c)(3) organization with respect to the activity;

(2) *Maturity not unreasonably long.* The term of the bond *issue* must not be longer than is reasonably necessary for the governmental purpose of the issue. This requirement is met under a safe harbor if the weighted average maturity of the bonds is not greater than 120 percent of the average reasonably expected economic life of the financed property as of the issue date.

(3) *Fair market value consideration.* The terms of any change in use or loan arrangement are bona fide and arms-length and the new user pays fair market value for the use of the financed property. For this purpose fair market value may take into account restrictions on the use of the financed property that serve a bona fide governmental purpose.

(4) *Disposition proceeds treated as gross proceeds for arbitrage purposes.* Any disposition proceeds must be treated as gross proceeds for arbitrage purposes. This will require that the District meet yield restriction or rebate requirements with respect to these funds. The District may treat the date of receipt of the proceeds as an issue date for purposes of eligibility for temporary periods and exemptions from rebate.

(5) *Proceeds expended on a governmental purpose.* Except where a redemption or defeasance remedial action is taken, the proceeds must have been expended on a governmental purposes before the date of the deliberate action.

### **Effect of Remedial Action**

A remedial action is treated as curing a change in ownership or a private use or private loan of proceeds, thereby preserving the tax-exempt status of existing bonds. It does not cure a failure to meet the private payment or security interest limitation. In the case of advance refunding bonds, remedial action taken with respect to the refunding bonds proportionally reduces the amount of proceeds of the refunded bonds that is taken into account under the private business use or loan test. In other words, the remedial action taken with respect to the refunding bonds proportionally "cures" the refunded bonds.

### **Disposition Proceeds and Nonqualified Bonds**

Generally, in order to take one of the remedial actions it is necessary to know what the disposition proceeds are and how much of the disposition proceeds are allocated to particular issues. Disposition proceeds arise in a sale, exchange or other disposition of bond-financed property. Disposition proceeds do not arise, however, in an installment sale arrangement and the bond

proceeds remain allocated to the transferred property in that case. This distinction becomes important when determining what remedial action is appropriate.

In the case of property financed from different sources of funding, the disposition proceeds are first allocated to the outstanding bonds (both taxable and tax-exempt) that financed the property in proportion to the principal amount of the outstanding bonds. Disposition proceeds may not be allocated to bonds that are no longer outstanding or to revenues if the disposition proceeds are not greater than the total principal amount of the outstanding bonds allocable to that property. Only amounts in excess of that total may be allocated to another source.

Under the Regulations, the amount of nonqualified bonds that arise from a deliberate action is a percentage of the outstanding bonds equal to the highest percentage of private business use in any one-year period commencing with the deliberate action. Allocations to nonqualified bonds must be made on a pro-rata basis except that for purposes of the redemption or defeasance remedial action the District may treat bonds with longer maturities as the nonqualified bonds. This treatment would be necessary, for example, where the bonds are required to be called in inverse order of maturity rather than pro rata.

## **Permitted Remedial Actions**

### **Redemptions or Defeasance**

The first remedial action is redemption or defeasance which is available in the case of a deliberate action taking the form of a sale, lease or nonqualified management contract or other action. This remedial action probably will be the most frequently used remedial action in sale transactions. Under this remedial action, other than in the case of an exclusively cash disposition, all nonqualified bonds must be redeemed within 90 days of the deliberate action. Proceeds of tax-exempt bonds may not be used to effect the redemption unless they are proceeds of qualified private activity bonds (e.g., exempt facility bonds) taking into account the purchaser's use. If the bonds are not currently redeemable, a defeasance escrow must be established for all nonqualified bonds within 90 days of the deliberate action and notice of defeasance must be furnished to the Commissioner of Internal Revenue within 90 days of the escrow establishment. Defeasance is only available as a remedial action, however, if the period between the issue date and the first call date is not more than 10½ years. Thus, for example, if a bond-financed building is leased to a private for-profit entity, all tax-exempt bonds that financed that building would have to be redeemed or defeased within 90 days of entering into that lease.

In the case of a disposition, a sale, exclusively for cash, if the disposition proceeds are less than the amount of the nonqualified bonds, only an amount equal to the disposition proceeds must be used to redeem or defease a pro rata portion of the nonqualified bonds.

### **Anticipatory Remedial Action**

An amendment to the Regulations in October 2015 permits a redemption or defeasance remedial action to be taken in advance of a deliberate action that will cause the private activity limits to be



exceeded. To meet this new remedial action rule, an issuer must declare its official intent to redeem or defease all the bonds that would become nonqualified bonds as a result of a subsequent deliberate action and redeem or defease such bonds prior to the action occurring. The declaration of intent must precede the redemption or defeasance, identify the financed property with respect to which the remedial action is being undertaken and describe the deliberate action that is expected to occur. The redemption or defeasance of the nonqualified bonds must not result in an extension of the weighted average maturity of the bonds, subject to a limited transition rule.

#### Alternative Use of Disposition Proceeds

In the case of a disposition exclusively for cash, the District may, in lieu of redeeming or defeasing bonds, expend the disposition proceeds on other qualifying facilities. The District must reasonably expect to expend the disposition proceeds within two years of the deliberate action and must treat the disposition proceeds as bond proceeds for purposes of Section 141. The District must not use such proceeds in a manner that would cause the private business tests or the private loan test to be met. Furthermore the District must not take any action subsequent to the date of deliberate action to cause either of these tests to be met. This requirement precludes the District from repeatedly taking advantage of the remedial action provisions with respect to the same bond issue. If the District does not use all of the disposition proceeds for an alternative use it must use the remaining proceeds to redeem or defease bonds as described above.

In the case of certain long-term leases, as opposed to dispositions for cash, Revenue Procedure 2018-26, released April 11, 2018, provides a methodology for using the Alternative Use of Disposition Proceeds remedial action instead of the Redemption or Defeasance remedial action. The lease must be an “eligible lease”, the payments under which are exclusively cash and the term of which (i) is at least equal to the lesser of 20 years or 75% of the weighted average expected economic life at the start of the lease or (ii) runs through the end of the measurement period, generally the final maturity of the bonds or the end of the economic life of the property. An amount equal to the “lease amount” must be expended on qualifying facilities as described above. The “lease amount” is the present value of all the lease payments under the lease using the bond yield as the discount rate.

If the disposition proceeds are to be used by a 501(c)(3) organization, the nonqualified bonds must, in addition, be treated as reissued and must, beginning on the date of the deliberate action, meet all the requirements for qualified 501(c)(3) bonds. For example, this requires that a TEFRA hearing be held and approval obtained with respect to the new uses of proceeds before the date of the deliberate action.

#### Alternative Use of Facility

The third remedial action, alternative use of a facility, permits the bonds to remain outstanding if the facility is now used for a qualifying purpose and the nonqualified bonds are treated as reissued as of the date of deliberate action as qualified bonds, e.g., qualified 501(c)(3) bonds or qualified exempt facility bonds. The nonqualified bonds must satisfy all the requirements for that particular type of issue from the date of deliberate action, including the volume cap limitation of Section 146

of the Code, if applicable. The Regulations specifically provide, however, that the used property limitation of Section 147 will not apply. In the case of exempt facility bonds, and other non-501(c)(3) qualified bonds, the interest will be treated as a preference item for alternative minimum tax ("AMT") purposes (see discussion below). This remedial action is not available if the deliberate action involves a disposition to a purchaser who finances the purchase with tax-exempt bonds.

The Regulations provide that any disposition proceeds, including proceeds from an installment sale, must be used to pay debt service on the bonds on the next available payment date or within 90 days of receipt, be deposited into a defeasance escrow, yield restricted and used to pay debt service on the bonds on the next available payment date. The Regulations do not address under this remedial action alternative how to deal with the change in status of interest from non-AMT to AMT. This is addressed, however, in *Rev. Proc. 97-15*, discussed below.

### **Rev. Proc. 97-15**

Rev. Proc. 97-15 provides a program under which an issuer may request a closing agreement as a remedial action to prevent interest on outstanding bonds from being included in gross income or to prevent interest from being treated as an item of tax preference for AMT purposes as a result of a subsequent action. Closing agreements under this program will not resolve any other issue, nor will they preclude an examination by the IRS of any matters not addressed in the closing agreement. These closing agreements are not available with respect to an issue of outstanding bonds that is under examination by the IRS.

#### *Closing Agreement as to Exclusion from Gross Income*

A number of procedural and substantive conditions to obtaining a closing agreement are set forth in Rev. Proc. 97-15. In addition, in the case of a closing agreement that provides that interest will not be included in gross income, the District must agree to redeem the outstanding bonds at the next redemption date. The District also must pay a closing agreement amount equal to the sum of the present value amounts determined by multiplying the amount of interest accruing on the nonqualified bonds in each year by .29 and present valuing each such number from April 15 of the year after the interest accrues to the date on which the payment is sent to the IRS, using as the discount rate the taxable applicable federal rate for a term equal to the period from the subsequent action to the redemption date. It is expected that the figure of .29 may be adjusted for years after 2018 to reflect the reduction in income tax rates.

#### *Alternative Minimum Tax Closing Agreement*

In the case of a closing agreement that provides that the interest will not be treated as an item of tax preference, among other conditions, the District must pay an amount equal to the sum of certain present value amounts. These amounts are determined by multiplying the principal amount of the nonqualified bonds that will be outstanding on January 1 in each calendar year beginning in the year of the subsequent action and ending the first calendar year in which the bonds will no longer be outstanding, by .0014 and present valuing each such number from April 15 of the year following

each such calendar year to the date of payment to the IRS, using the applicable federal rate for the period specified in the closing agreement as the discount rate.

## **VCAP**

The IRS has adopted procedures for its Voluntary Closing Agreement Program (“VCAP”) under which issuers of tax-exempt bonds can voluntarily resolve violations of the Code or Regulations on behalf of their bondholders or themselves through closing agreements with the IRS. These procedures are set forth in Internal Revenue Manual 7.2.3.1. If a deliberate action has occurred that cannot be remedied with a remedial action, a VCAP should be considered.

## **TAB IV**

## **TAB IV**

### **INTERNAL REVENUE SERVICE – TAX-EXEMPT BONDS**

#### **TAX-EXEMPT BOND FAQs REGARDING RECORD RETENTION REQUIREMENTS**

During the course of an examination, IRS Tax-exempt Bonds (TEB) agents will request all material records and information necessary to support a municipal bond issue's compliance with section 103 of the Internal Revenue Code. The following information is intended solely to answer frequently asked questions concerning how the broad record retention requirements under section 6001 of the Code apply to tax-exempt bond transactions. Although this document provides information with respect to many of the concerns raised by members of the municipal finance industry about record retention, it is not to be cited as an authoritative source on these requirements. TEB recommends that issuers and other parties to tax-exempt bond transactions review section 6001 of the Code and the corresponding Income Tax Regulations in consultation with their counsel.

These frequently asked questions and answers are provided for general information only and should not be cited as any type of legal authority. They are designed to provide the user with information required to respond to general inquiries. Due to the uniqueness and complexities of Federal tax law, it is imperative to ensure a full understanding of the specific question presented, and to perform the requisite research to ensure a correct response is provided.

The freely available Adobe Acrobat Reader software is required to view, print, and search the questions and answers listed below.

1. Why keep records with respect to tax-exempt bond transactions?
2. Who may maintain records?
3. What are the basic records that should be retained?
4. Are these the only records that need to be maintained?
5. In what format must the records be kept?
6. How long should records be kept?
7. How does this general rule apply to refundings?
8. What happens if records aren't maintained?
9. Can a failure to properly maintain records be corrected?
10. Are there exceptions to the general rule regarding record retention for certain types of records?

## **Why keep records with respect to tax-exempt bond transactions?**

Section 6001 of the Internal Revenue Code provides the general rule for the proper retention of records for federal tax purposes. Under this provision, every person liable for any tax imposed by the Code, or for the collection thereof, must keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe. Section 1.6001-1(a) of the Income Tax Regulations amplifies this general rule by providing that 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, including inventories, 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 of such tax or information.

The IRS regularly advises taxpayers to maintain sufficient records to support their tax deductions, credits and exclusions. In the case of a tax-exempt bond transaction, the primary taxpayers are the beneficial holders of the bonds. However, in most cases, the beneficial holders of tax-exempt bonds will not have any records to support their exclusion of the interest paid on those bonds. Instead, these records will generally be found in the bond transcript and the books and records of the District, the conduit borrower, and other participants to the transaction. Therefore, in order to ensure the continued exclusion of interest by the beneficial holders, it is important that the District, the conduit borrower and other participants retain sufficient records to support the continued exclusion being taken by the beneficial holders of the bonds. Pursuant to this statutory regime, IRS agents conducting examinations of tax-exempt bond transactions will look to these parties to provide books, records, and other information documents supporting the bonds continued compliance with federal tax requirements.

Additionally, in the case of many private activity bonds, the conduit borrowers are also primary taxpayers. For instance, the conduit borrower will generally deduct the interest indirectly paid on the bond issue through the loan documents. Conduit borrowers are also often entitled to claim depreciation deductions for bond-financed property. Consequently, conduit borrowers should maintain sufficient records to support their interest deductions, depreciation deductions or other tax deductions, exclusions or credits related to the tax-exempt bond issue.

Moreover, issuers and conduit borrowers should retain sufficient records to show that all tax-exempt bond related returns submitted to the IRS are correct. Such returns include, for example, IRS Forms 8038, 8038-G, 8038-GC, 8038-T, and 8038-R.

In addition to the general rules under section 6001, issuers and conduit borrowers are subject to specific recordkeeping requirements imposed by various other Code sections and regulations. For example, section 1.148-5(d)(6)(iii)(E) of the arbitrage regulations requires that an issuer retain certain records necessary to qualify for the safe harbor for establishing fair market value for guaranteed investment contracts and investments purchased for a yield restricted defeasance escrow.

## **Who may maintain records?**

Read together, section 6001 of the Code and section 1.6001-1(a) of the Regulations apply to taxpayers and persons filing tax returns, including returns related to tax-exempt bond transactions

(i.e., Forms 8038, 8038-G, 8038-GC, 8038-T, 8038-R, 8328, 8703). This encompasses several parties to the bond transaction including:

1. issuers as the party responsible for satisfying the filing requirements under section 149(e) of the Code;
2. conduit borrowers for deductions taken for payment of interest on outstanding bonds or depreciation of bond-financed facilities; and
3. bondholders, lenders, and lessors as recipients of exempt income from the interest paid on the bonds.

Since many of the same records may be examined to verify, for example, both the tax-exempt status of the bonds and the interest deductions of the conduit borrower, it is advisable for the bond documents to specify which party will bear the responsibility for maintaining the basic records relating to a bond transaction. Additional parties may also be responsible for maintaining records under contract with any of the parties named above. For example, a trustee may agree to maintain certain records pursuant to the trust indenture.

### **What are the basic records that should be retained?**

Although the required records to be retained depend on the transaction and the requirements imposed by the Code and the regulations, records common to most tax-exempt bond transactions include:

Basic records relating to the bond transaction (including the trust indenture, loan agreements, and bond counsel opinion);

Documentation evidencing expenditure of bond proceeds;

Documentation evidencing use of bond-financed property by public and private sources (i.e., copies of management contracts and research agreements);

Documentation evidencing all sources of payment or security for the bonds; and

Documentation pertaining to any investment of bond proceeds (including the purchase and sale of securities, SLGs subscriptions, yield calculations for each class of investments, actual investment income received the investment of proceeds, guaranteed investment contracts, and rebate calculations).

### **Are these the only records that need to be maintained?**

No, the list above is very general and only highlights the basic records that are typically material to many types of tax-exempt bond financings. Each transaction is unique and may, accordingly, have other records that are material to the requirements applicable to that financing. The decision

as to whether any particular record is material must be made on a case-by-case basis and could take into account a number of factors, including, for instance, the various expenditure exceptions. Moreover, certain records may be necessary to support information related to certain requirements applicable to specific types of qualified private activity bonds. With respect to single and multifamily housing bonds as well as small issue industrial development bonds, examples of such additional material records include:

|   |   |
|---|---|
| Single<br>Housing Bonds                     | Family Documents evidencing that at least 20% of proceeds were available for owner financing of targeted area residences.<br><br>Documentation evidencing proper notification of each mortgagor of potential liability of the mortgage subsidy recapture tax.                       |
| Multi-Family<br>Housing Bonds               | Documentation evidencing that the facility is not used on a transient basis.<br><br>Documentation evidencing compliance with the income set-aside requirements.<br><br>Documentation evidencing timely correction, if any, of noncompliance with the income set-aside requirements. |
| Small Issue Industrial<br>Development Bonds | Documentation evidencing compliance with the \$10,000,000 limitation on the aggregate face amount of the issue.<br><br>Documentation evidencing that no test-period beneficiary has been allocated more than \$40,000,000 in bond proceeds.   |

### **In what format must the records be kept?**

All records should be kept in a manner that ensures their complete access to the IRS for so long as they are material. While this is typically accomplished through the maintenance of hard copies, taxpayers may keep their records in an electronic format if certain requirements are satisfied.

Rev. Proc. 97-22, 1997-1 C.B. 652 provides guidance to taxpayers that maintain books and records by using an electronic storage system that either images their hardcopy (paper) books and records, or transfers their computerized books and records, to an electronic storage media. Such a system may also include reasonable data compression or formatting technologies so long as the requirements of the revenue procedure are satisfied. The general requirements for an electronic storage system of taxpayer records are provided in section 4.01 of Rev. Proc. 97-22. A summary of these requirements is as follows:

1. The system must ensure an accurate and complete transfer of the hardcopy books and records to the electronic storage system and contain a retrieval system that indexes, stores, preserves, retrieves, and reproduces all transferred information.



2. The system must include reasonable controls and quality assurance programs that (a) ensure the integrity, accuracy, and reliability of the system; (b) prevent and detect the unauthorized creation of, addition to, alteration of, deletion of, or deterioration of electronically stored books and records; (c) institute regular inspections and evaluations; and (d) reproduce hardcopies of electronically stored books and records that exhibit a high degree of legibility and readability.
3. The information maintained in the system must be cross-referenced with the taxpayer's books and records in a manner that provides an audit trail to the source document(s).
4. The taxpayer must maintain, and provide to the Service upon request, a complete description of the electronic storage system including all procedures relating to its use and the indexing system.
5. During an examination, the taxpayer must retrieve and reproduce hardcopies of all electronically stored books and records requested by the Service and provide the Service with the resources necessary to locate, retrieve, read and reproduce any electronically stored books and records.
6. The system must not be subject, in whole or in part, to any agreement that would limit the Service's access to and use of the system.
7. The taxpayer must retain electronically stored books and records so long as their contents may become material in the administration of federal tax law.

### **How long should records be kept?**

Section 1.6001-1(e) of the Regulations provides that records should be retained for so long as the contents thereof are material in the administration of any internal revenue law. With respect to a tax-exempt bond transaction, the information contained in certain records support the exclusion from gross income taken at the bondholder level for both past and future tax years. Therefore, as long as the bondholders are excluding from gross income the interest received on account of their ownership of the tax-exempt bonds, certain bond records will be material. Similarly, in a conduit financing, the information contained in the bond records is necessary to support the interest deduction taken by the conduit borrower for both past and future tax years for its payment of interest on the bonds.

To support these tax positions, material records should generally be kept for as long as the bonds are outstanding, plus 3 years after the final redemption date of the bonds. This rule is consistent with the specific record retention requirements under section 1.148-5(d)(6)(iii)(E) of the arbitrage regulations.

Certain federal, state, or local record retention requirements may also apply.

### **How does this general rule apply to refundings?**

For certain federal tax purposes, a refunding bond issue is treated as replacing the original new money issue. To this end, the tax-exempt status of a refunding issue is dependent upon the tax-exempt status of the refunded bonds. Thus, certain material records relating to the original new money issue and all material records relating to the refunding issue should be maintained until 3 years after the final redemption of both bond issues.

### **What happens if records aren't maintained?**

During the course of an examination, TEB agents will request material records and information in order to determine whether a tax-exempt bond transaction meets the requirements of the Code and regulations. If these records have not been maintained, then the District, conduit borrower or other party may have difficulty demonstrating compliance with all federal tax law requirements applicable to that transaction. A determination of noncompliance by the IRS with respect to a bond issue can have various outcomes, including a determination that the interest paid on the bonds should be treated as taxable, that additional arbitrage rebate may be owed, or that the conduit borrower is not entitled to certain deductions.

Additionally, a conduit borrower who fails to keep adequate records may also be subject to an accuracy-related penalty under section 6662 of the Code on the underpayment of tax attributable to any denied deductions. Section 6662 of the Code imposes a penalty on any portion of an underpayment of tax required to be shown on a return that is attributable to one of several factors, including negligence or disregard of rules or regulations. Section 1.6662-3(b)(1) of the Regulations provides that negligence includes any failure by the taxpayer to keep adequate books and records or to substantiate items properly. Under section 6662(a) of the Code, the penalty is equal to 20 percent of the portion of the underpayment of tax attributable to the negligence. Section 6664(c)(1) provides an exception to the imposition of accuracy-related penalties if the taxpayer shows that there was reasonable cause for the underpayment and that the taxpayer acted in good faith.

### **Can a failure to properly maintain records be corrected?**

Yes, a failure to properly maintain records can be corrected through the Tax-exempt Bonds Voluntary Closing Agreement Program (TEB VCAP). This program provides an opportunity for state and local government issuers, conduit borrowers, and other parties to a tax-exempt bond transaction to voluntarily come forward to resolve specific matters through closing agreements with the IRS. For example, the TEB Office of Outreach, Planning & Review has resolved arbitrage rebate concerns in cases where issuers have approached the IRS and reported a failure to retain sufficient records to determine, precisely, the correct amount of arbitrage rebate due on a bond issue. Notice 2001-60, 2001-40 I.R.B. 304 provides more information about this program including the procedures for submitting a VCAP request.

### **Are there exceptions to the general rule regarding record retention for certain types of records?**

No, but TEB encourages members of the municipal finance industry to submit comments and suggestions for developing record retention limitation programs for specific types of bond records,

for specific classes of tax-exempt bond issues, or for specific segments of the bond industry. Comments can be submitted in writing to TEB and sent to the following address:

Internal Revenue Service (TE/GE)  
Attention: Clifford J. Gannett, Director, TEB  
T:GE:TEB, Rm. 583  
1111 Constitution Ave., NW  
Washington, DC 20224

You may also contact TEB by calling 202-283-2999 (not a toll-free call).

## TAB V

## TAB V

### ARBITRAGE LETTER OF INSTRUCTIONS

#### 1. Definitions.

Capitalized terms not otherwise defined herein will have meanings given to them in sections 103, 141, 148, 149 and 150 of the Code and the Treasury Regulations promulgated thereunder.

“Available Construction Proceeds” means, in general, an amount equal to the sum of (a) the issue price (within the meaning of sections 1273 and 1274 of the Code but without regard to accrued interest) of the Construction Issue, (b) investment earnings on a Reasonably Required Reserve or Replacement Fund allocable to the Construction Issue prior to the earlier of 2 years after the date of issue of the Obligations and the date that construction is substantially completed, and (c) the investment earnings on amounts described in (a) and (b), reduced by (i) the amount of the issue price deposited in a Reasonably Required Reserve or Replacement Fund and (ii) the amount of the issue price used to pay issuance costs. Available Construction Proceeds does not include (a) Sale Proceeds or Investment Proceeds derived from Payments under any Purpose Investment of the Construction Issue, (b) repayments of any Grants financed by the issue, (c) investment earnings on accrued interest, (d) amounts that are not Gross Proceeds as a result of the application of the Universal Cap under Treasury Regulations section 1.148-6(b)(2) and (e), if the District has elected in its Tax Certificate, earnings with respect to any portion of a Reasonably Required Reserve or Replacement Fund allocable to the Construction Issue. For purposes of determining compliance with the spending requirements as of the end of each of the first three spending periods, Available Construction Proceeds includes the amount of future earnings that the District reasonably expected as of the date of issue of the Obligations.

“Bid Records” means: (i) a copy of the Guaranteed Investment Contract actually acquired or, in the case of Yield Restricted Defeasance Escrow Investments, a copy of the purchase agreement or confirmations for the investments; (ii) the receipt or other record of the amount actually paid by the District for the investments, including a record of any administrative costs paid by the District, and the certification of the provider as to administrative costs; (iii) either a written copy of each bid received or a written certification from the party receiving the bids which lists for each bid that is submitted, the name of the person and entity submitting the bid, the time and date of the bid, and the bid results; (iv) the bid solicitation form and, if the terms of the Guaranteed Investment Contract or purchase agreement deviated from the bid solicitation form or a submitted bid is modified, a brief statement explaining the deviation and stating the purpose for the deviation; and (v) in the case of Yield Restricted Defeasance Escrow Investments, a schedule showing the cost of the most efficient portfolio of SLGS, determined at the time the bids were required to be submitted pursuant to the terms of the bid specifications.

“Bona Fide Debt Service Fund” means a bona fide debt service fund as defined in Treasury Regulations section 1.148-1, *i.e.*, one or more funds (including portions of funds, to the extent that

amounts deposited therein are reasonably expected to be used to pay debt service on an issue of bonds) that are used primarily to achieve a proper matching of revenues and debt service within each Bond Year and that is depleted at least once a year except for a reasonable carryover amount (not to exceed the greater of (i) the earnings on the fund for the immediately preceding Bond Year or (ii) one-twelfth the principal and interest payments on the issue for the immediately preceding Bond Year).

“Bona Fide Solicitation” means a solicitation that meets all of the following requirements: (i) the bid specifications are in writing and are timely forwarded to potential providers; (ii) the bid specifications include all material terms of the bid, *i.e.*, all terms that may directly or indirectly affect the yield of the investment; (iii) the bid specifications include a statement notifying potential providers that submission of a bid is a representation that the potential provider did not consult with any other potential provider about its bid, that the bid was determined without regard to any other formal or informal agreement that the potential provider has with the District or any other person (whether or not in connection with the Bond issue), and that the bid is not being submitted solely as a courtesy to the District or any other person for purposes of satisfying the requirements that there be at least three bids from persons with no Material Financial Interest, at least one of whom is a reasonably competitive provider; (iv) all the terms of the bid specifications are commercially reasonable in that there is a legitimate business purpose for the term other than to increase the purchase price or reduce the yield of the investment; (v) in the case of a Guaranteed Investment Contract, the terms of the solicitation take into account the District’s reasonably expected deposit and drawdown schedule for the amounts to be invested; (vi) all potential providers have an equal opportunity to bid and no potential provider is given the opportunity to review other bids before providing a bid; and (vii) at least three reasonably competitive providers are solicited for bids.

“Bond Year” means, in connection with the calculation of the Rebate Amount, each 1-year period (or shorter period from the date of issue) that ends at the close of business on the day in the calendar year that is selected by the District. If no day is selected by the District before the earlier of the final maturity date of the Obligations or the date that is 5 years after the issue date of the Obligations, each Bond Year ends at the close of business on the day preceding the anniversary of the date of issuance of the Obligations.

“Capital Expenditure” means any cost of a type that is properly chargeable to a capital account (or would be so chargeable with a proper election or with the application of the definition of Placed in Service under Treasury Regulations section 1.150-2(c)) under general federal income tax principles.

“Code” means the Internal Revenue Code of 1986, as amended.

“Commingled Fund” means any fund or account containing both Gross Proceeds of an issue and amounts in excess of \$25,000 that are not Gross Proceeds of that issue if the amounts in the fund or account are invested and accounted for collectively, without regard to the source of funds deposited in the fund or account. An open-end regulated investment company under section 851 of the Code, however, is not a Commingled Fund.

“Computational Base” means (i) for a Guaranteed Investment Contract, the amount of Gross Proceeds the District reasonably expects, as of the date the Guaranteed Investment Contract is acquired, to be deposited in the Guaranteed Investment Contract over the term of the Guaranteed Investment Contract; and (ii) for investments (other than Guaranteed Investment Contracts) to be deposited in a Yield Restricted Defeasance Escrow, the amount of Gross Proceeds initially invested in those investments.

“Computation Period” means the period between the computation dates described in Section 4(b) hereof. The first begins on the Issue Date of the Obligations and ends on the initial rebate Computation Date. Each succeeding Computation Period begins on the date immediately following the preceding rebate Computation Date and ends on the next rebate Computation Date.

“Construction Expenditures” mean construction expenditures as defined in Treasury Regulations section 1.148-7(g), i.e., Capital Expenditures that are allocable to the cost of real property or “constructed personal property.” In general, Construction Expenditures do not include expenditures for acquisitions of interests in land or other existing real property. Expenditures are not considered to be for the acquisition of an interest in existing real property, other than land, if the contract between the seller and the District requires the seller to build or install the property, but only to the extent that the property has not been built or installed at the time the parties enter into the contract. Constructed personal property means tangible personal property (or, if acquired pursuant to a single acquisition contract, properties) or “specially developed computer software” if: (a) a substantial portion of the property or properties is completed more than 6 months after the earlier of the date construction or rehabilitation commenced and the date the District entered into an acquisition contract; (b) based on the reasonable expectations of the District, if any, or representations of the person constructing the property, with the exercise of due diligence, completion of construction or rehabilitation (and delivery to the District) could not have occurred within that 6-month period; and (c) if the District itself builds or rehabilitates the property, not more than 75 percent of the capitalizable cost is attributable to property acquired by the District. Specially developed computer software means any programs or routines used to cause a computer to perform a desired task or set of tasks, and the documentation required to describe and maintain those programs, provided that the software is specially developed and is functionally related and subordinate to real property or other constructed personal property.

“Construction Issue” means, the portion (if any) of the Obligations determined to be a Construction Issue for purposes of the section 148(f)(4)(C) of the Code, Treasury Regulations section 1.148-7(e) and Section 4 hereof. With respect to any issue refunded by the Obligations, or which is a part of a series of issues refunded by the Obligations, “Construction Issue” means the portion (if any) of the original obligations issued to finance an expenditure (the “original obligations”) determined in the Tax Certificate with respect to original obligations to be a “Construction Issue” for purposes of the section 148(f)(4)(C) of the Code and Treasury Regulations section 1.148-7(e).

“Controlled Group” means a group of entities controlled directly or indirectly by the same entity or group of entities. The determination of direct control is made on the basis of all the relevant facts and circumstances. One entity or group of entities generally controls another entity

or group of entities if (i) the controlling entity possesses either (A) the right or power both to approve and to remove without cause a controlling portion of the governing body of the controlled entity, or (B) the right or power to require the use of funds or assets of the controlled entity for any purpose of the controlling entity; and (ii) the rights or powers are discretionary and non-ministerial. If a controlling entity controls another entity under this test the controlling entity also controls all entities controlled, directly or indirectly, by the controlled entity or entities. However, an entity is not controlled by another entity if the putative controlled entity possesses substantial taxing, eminent domain, and police powers.

“De Minimis Amount” means: (i) in reference to original issue discount (as defined in section 1273(a)(1) of the Code) or premium on an obligation, an amount that does not exceed 2 percent multiplied by the stated redemption price at maturity; plus any original issue premium that is attributable exclusively to reasonable underwriter’s compensation; and (ii) in reference to market discount (as defined in section 1278(a)(2)(A) of the Code) or premium on an obligation, an amount that does not exceed 2 percent multiplied by the stated redemption price at maturity.

“Fair Market Value” shall have the meaning set forth in Section 3(d) hereof.

“501(c)(3) Organization” means an organization that is described in section 501(c)(3) of the Code and is exempt from tax under section 501(a) of the Code.

“Fixed Rate Investment” means any investment whose yield is fixed and determinable on the issue date of the investment.

“Future Value” means such term as defined in Treasury Regulations section 1.148-3(c) or successor regulations applicable to the Obligations calculated based on the yield of the Obligations.

“Guaranteed Investment Contract” means, in general, any Nonpurpose Investment that has specifically negotiated withdrawal or reinvestment provisions and a specifically negotiated interest rate and includes any agreement to supply investments on two or more future dates (*e.g.*, a forward supply contract), debt service fund forward agreements and debt service reserve fund agreements (*e.g.*, agreements to deliver United States Treasury Obligations). The term “Guaranteed Investment Contract” does not include investments purchased for a yield restricted defeasance escrow, other than escrow float contracts and similar agreements which provide securities for the period of 90 days or less following the maturity of defeasance escrow securities.

“Governmental Unit” means a governmental unit within the meaning of section 150(a)(2) of the Code (*i.e.*, any state or division of a state with a substantial amount of sovereign powers) or instrumentality of a state or political subdivision thereof. The term Governmental Unit does not include the United States or any agency or instrumentality of the United States.

“Grant” means a grant as defined in Treasury Regulations section 1.148-6(d)(4)(iii), *i.e.*, a transfer for a governmental purpose of money or property to a transferee that is not a Related Party to, or an agent of, the transferor. The transfer must not impose any obligation or condition (directly or indirectly) to repay any amount to the transferor. Obligations or conditions intended solely to



assure expenditure of the transferred moneys in accordance with the governmental purpose of the transfer do not prevent a transfer from being a Grant.

“Gross Proceeds” means, except as otherwise indicated, gross proceeds as defined in Treasury Regulations section 1.148-1, *i.e.*, any Proceeds and Replacement Proceeds of an issue.

“Investment Proceeds” means investment proceeds as defined in Treasury Regulations section 1.148-1, *i.e.*, any amounts actually or constructively received from investing Proceeds of the Obligations.

“Investment Property” means any investment which is: (i) a “security” (as defined in section 165(g)(2)(A) or (B) of the Code), *i.e.*, a share of stock in a corporation or a right to subscribe for or to receive a share of stock in a corporation; (ii) an obligation other than a Tax-exempt Bond, unless such obligation is a “specified private activity bond” within the meaning of section 57(a)(5)(C) of the Code (*i.e.*, a Tax-exempt Bond other than an obligation the interest on which is subject to the alternative minimum tax imposed on individuals and corporations); (iii) any “annuity contract” (as defined in section 72 of the Code); (iv) any “investment-type property” (within the meaning of Treasury Regulations section 1.148-1(b)), *i.e.*, any property (other than property described in (i), (ii), (iii) or (v)) that is held principally as a passive vehicle for the production of income, including for this purpose, production of income includes any benefit based on the time value of money; or (v) any residential rental property for family units not located within the jurisdiction of the District unless such property is acquired to implement a court ordered or approved housing desegregation plan. A prepayment for property or services is “investment-type property” if a principal purpose for prepaying is to receive an investment return from the time the prepayment is made until the time payment otherwise would be made. However, a prepayment will not be treated as “investment-type property” if it is made for a substantial business purpose other than investment return and (i) the prepayment is on substantially the same terms as are made by a substantial percentage of persons who are similarly situated but who are not beneficiaries of tax-exempt financing, (ii) the prepayment is made within 90 days of the reasonably expected date of delivery to the District of all of the property or services for which the prepayment is made, (iii) the prepayment is made for maintenance, repair, or an extended warranty with respect to personal property (for example, automobiles or electronic equipment); or updates or maintenance or support services with respect to computer software; and the same maintenance, repair, extended warranty, updates or maintenance or support services, as applicable, are regularly provided to nongovernmental persons on the same terms or (iv) the prepayment is made to acquire a supply of natural gas or electricity within the meaning of Treasury Regulation section 1.148-1(e)(2)(iii).

“Issuer” means Miromar Lakes Community Development District.

“Lowest Cost Bona Fide Bid” means, in the case of Yield Restricted Defeasance Escrow Investments, either the lowest cost bid for the portfolio or, if the District compares bids on an investment by investment basis, the aggregate cost of a portfolio comprised of the lowest cost bid for each investment. Any payment received by the District from a provider at the time a Guaranteed Investment Contract (*e.g.*, an escrow float contract) is purchased for a Yield Restricted Defeasance Escrow under a bidding procedure that meets the requirements of clause (iv) of the

definition of Bona Fide Solicitation is taken into account in determining the lowest cost bid. The Lowest Cost Bona Fide Bid must not be greater than the cost of the most efficient portfolio comprised exclusively of SLGS determined at the time that bids are required to be submitted pursuant to the terms of the bid specifications. This cost comparison is not required to be made if SLGS are not available for purchase on the day the bids are required to be submitted because sales of those securities have been suspended.

“Material Financial Interest” shall have the meaning set forth in Section 3(d)(v) hereof.

“Minor Portion” means, in general, a minor portion as defined in section 148(e) of the Code and Treasury Regulation section 1.148-2(g), *i.e.*, the lesser of 5 percent of the Sale Proceeds of the Obligations or \$100,000.

“Net Sale Proceeds” means Sale Proceeds, less the portion of the Sale Proceeds invested in a Reasonably Required Reserve or Replacement Fund under section 148(d) of the Code and as part of the Minor Portion.

“New Money Portion” means the portion of an issue that is not a Refunding Issue.

“Nonconstruction Issue” means the Gross Proceeds of the Obligations other than the portion of Gross Proceeds of the Obligations meeting the requirements of section 148(f)(4)(C) of the Code, Treasury Regulations section 1.148-7(e) and Section 4 hereof as a Construction Issue.

“Nonpurpose Investment” means an investment allocated to Gross Proceeds of the Obligations that is not acquired to carry out the governmental purpose of an issue, *i.e.*, all Investment Property acquired or otherwise allocated to Gross Proceeds of the Obligations.

“Obligations” means any tax-exempt bonds or notes of the District.

“Opinion of Counsel” means, an opinion of nationally recognized bond counsel experienced in matters relating to the exclusion of interest on state and local governmental obligations from gross income for purposes of federal income taxation.

“Payment” means, in general, a payment as defined in Treasury Regulations section 1.148-5(b), *i.e.*, amounts to be actually or constructively paid to acquire the investment. For purposes of calculating the Rebate Amount under Section 4 hereof “payment” means a payment as defined in Treasury Regulations section 1.148-3(d), *i.e.*, (i) amounts actually or constructively paid to acquire a Nonpurpose Investment (or treated as paid to a Commingled Fund); (ii) for a Nonpurpose Investment that is first allocated to an issue on a date after it is actually acquired (*e.g.*, an investment that becomes allocable to Transferred Proceeds or to Replacement Proceeds) or that becomes subject to the rebate requirement on a date after it is actually acquired (*e.g.*, an investment allocated to a Reasonably Required Reserve or Replacement Fund for a construction issue at the end of the 2-year spending period), the value of that investment on that date; (iii) for a Nonpurpose Investment that was allocated to an issue at the end of the preceding computation period, the value of that investment at the beginning of the computation period; (iv) on the last day of each Bond Year during which there are amounts allocated to Gross Proceeds of

the Obligations that are subject to the rebate requirement, and on the final maturity date of the Obligations, a computation credit in the amount provided under Treasury Regulation section 1.148-3(d)(1)(iv); and (v) Yield Reduction Payments on Nonpurpose Investments made pursuant to Treasury Regulations section 1.148-5(c).

“Placed in Service” means placed in service as defined in Treasury Regulations section 1.150-2(c), *i.e.*, with respect to a facility, the date on which, based on all the facts and circumstances the facility has reached a degree of completion that would permit its operation at substantially its design level, and the facility is, in fact, in operation at such level.

“Plain Par Bond” means a qualified tender obligation or an obligation (i) that is issued with not more than a De Minimis Amount of original issue discount or premium; (ii) that is issued for a price that does not include accrued interest other than pre-issuance accrued interest; (iii) that bears interest from the issue date at a single, stated, fixed rate or that is a variable rate debt instrument under section 1275 of the Code, in each case with interest unconditionally payable at least annually; and (iv) that has a lowest stated redemption price that is not less than its outstanding stated principal amount.

“Plain Par Investment” means an investment that is an obligation (i) issued with not more than a De Minimis Amount of original issue discount or premium, or, if acquired on a date other than the issue date, acquired with not more than a De Minimis Amount of market discount or premium; (ii) issued for a price that does not include accrued interest other than pre-issuance accrued interest; (iii) that bears interest from the issue date at a single, stated, fixed rate or that is a variable rate debt instrument under section 1275 of the Code, in each case with interest unconditionally payable at least annually; and (iv) that has a lowest stated redemption price that is not less than its outstanding stated principal amount.

“Preliminary Expenditures” mean preliminary expenditures as defined in Treasury Regulations section 1.150-2(f)(2), *e.g.*, architectural, engineering, surveying, soil testing, costs of issuance and similar costs that were incurred prior to commencement of acquisition, construction or rehabilitation of a project, other than land acquisition, site preparation and similar costs incident to commencement of construction.

“Present Value” is computed under the economic accrual method. For purposes of computing the value of Obligations and yield on the Obligations, Present Value is computed taking into account all the unconditionally payable Payments of principal, interest, and fees for a Qualified Guarantee to be paid on or after that date and using the yield on that Obligation as the discount rate, except that for purposes of Treasury Regulations section 1.148-(6)(b)(2) (relating to the Universal Cap) these values may be determined by consistently using the yield on the entire issue of which such Obligations are a part. The Present Value of an investment on a date is equal to the Present Value of all unconditionally payable Receipts to be received from and Payments to be paid for the investment after that date, using the yield on the investment as the discount rate.

“Prior Issue” means an issue of Obligations all or a portion of the principal, interest, or call premium on which is paid or provided for with proceeds of a Refunding Issue.

“Proceeds” means, in general, any Sale Proceeds, Investment Proceeds, and Transferred Proceeds of an issue. However, Proceeds do not include Qualified Administrative Costs that may be recovered under Treasury Regulation section 1.148-5(e).

“Purpose Investment” means an investment that is acquired to carry out the governmental purpose of an issue.

“Qualified Administrative Costs” mean, with respect to Nonpurpose Investments reasonable, direct administrative costs, other than carrying costs, such as separately stated brokerage or selling commissions, but not legal and accounting fees, recordkeeping, custody, and similar costs. General overhead costs and similar indirect costs of the District such as employee salaries and office expenses and costs associated with computing the Rebate Amount are not qualified administrative costs. In general, administrative costs with respect to Nonpurpose Investments are not reasonable unless they are comparable to administrative costs that would be charged for the same investment or a reasonably comparable investment if acquired with a source of funds other than Gross Proceeds of Tax-exempt Bonds. Qualified Administrative Costs of Nonpurpose Investments include all reasonable administrative costs, without limitation on indirect costs, incurred by a publicly offered regulated investment company (as defined in section 67(c)(2)(B) of the Code) or by a Commingled Fund in which the District and any Related Parties do not own more than 10 percent of the beneficial interest in the fund. A broker’s commission or similar fee for a Guaranteed Investment Contract or a Yield Restricted Defeasance Escrow Investment which is paid on behalf of either the District or the provider is a Qualified Administrative Cost to the extent that (a) the amount of the fee that the District treats as a Qualified Administrative Cost does not exceed the lesser of (i) \$36,000 or (ii) 0.2% of the Computational Base or, if more, \$4,000, and (b) for any issue, the District does not treat as Qualified Administrative Costs more than \$101,000 in broker’s commissions or similar fees with respect to all Guaranteed Investment Contracts or Yield Restricted Defeasance Escrow Investments purchased with Gross Proceeds of the issue. All amounts referenced in the preceding sentence reflect adjustments as of 2011, and all amounts for future calendar years shall be increased by a cost of living adjustment as provided in Treasury Regulation section 1.148-5(e)(3)(B)(3). Qualified Administrative Costs of a Purpose Investment means costs or expenses paid, directly or indirectly, to purchase, carry, sell, or retire the Purpose Investment, and except with respect to a Program Investment, costs of issuing, carrying, or repaying the issue, and any underwriters’ discount.

“Qualified Guarantee” means a qualified guarantee as defined in Treasury Regulations section 1.148-4(f).

“Qualified Hedge” means a qualified hedge as defined in Treasury Regulations section 1.148-4(h)(2), *i.e.*, (i) a contract entered into primarily to reduce the District’s risk of interest rate changes with respect to a borrowing; (ii) the contract contains no significant investment element; (iii) the contract is entered into between the District and a provider that is not a Related Party; (iv) the hedge covers all of one or more groups of substantially identical Obligations; (v) changes in the value of the contract are based primarily on interest rate changes; (vi) the contract does not hedge an amount larger than the District’s risk with respect to interest

rate changes on the hedged Obligations; (vii) the payments to the District under the contract correspond closely, in both time and amount, to the specific interest payments being hedged; (viii) payments under the contract do not begin to accrue under the contract on a date earlier than the issue date of the hedged Obligations and do not accrue longer than the hedged interest payments on the hedged Obligations; (ix) payments to the hedge provider are reasonably expected to be made from the same source of funds that, absent the hedge, would be reasonably expected to be used to pay principal and interest on the hedged Obligations; and (x) the contract is identified by the District on its books and records maintained for the hedged Obligations not later than three days after the date on which the parties enter into the contract or the issue date of the hedged Obligations.

“Reasonable Retainage” means an amount not in excess of 5 percent of Available Construction Proceeds as of the end of the fourth spending period (or in the case of the *18-month Exception* set forth Treasury Regulations section 1.148-7(d) and Section hereof, 5 percent of the Net Sale Proceeds on the date 18 months after the issue date) that is retained for reasonable business purposes relating to the property financed with the proceeds of the issue.

“Reasonably Required Reserve or Replacement Fund” means, in general, a reasonably required reserve or replacement fund as described in Treasury Regulations section 1.148-2(f)(2).

“Receipt” means, except as otherwise provided with respect to the rebate requirement, a receipt as defined in Treasury Regulations section 1.148-3(d), *i.e.*, amounts to be actually or constructively received from the investment, such as earnings and return of principal.

“Refunding Escrow” means one or more funds established as part of a single transaction or a series of related transactions, containing proceeds of a Refunding Issue and any other amounts to provide for payment of principal or interest on one or more Prior Issues. For this purpose, funds are generally not so established solely because of (i) the deposit of Proceeds of an issue and Replacement Proceeds of the Prior Issue in an escrow more than 6 months apart, or (ii) the deposit of Proceeds of completely separate issues in an escrow.

“Refunding Issue” means, a refunding issue as defined in Treasury Regulations section 1.150-1(d). In general, a Refunding Issue means an issue (or the portion of an issue treated as a separate Refunding Issue under Treasury Regulations section 1.148-9(h)), the proceeds of which are used to pay principal, interest, or redemption price on another issue.

“Related Party” means, in reference to a Governmental Unit or a 501(c)(3) Organization, any member of the same Controlled Group, and, in reference to any person that is not a Governmental Unit or 501(c)(3) Organization, a related person (as defined in section 144(a)(3) of the Code).

“Replacement Proceeds” means replacement proceeds as defined in Treasury Regulation section 1.148-1(c).

“Sale Proceeds” means any amounts actually or constructively received from the sale of an issue, including amounts used to pay underwriter’s discount or compensation and accrued interest other than pre-issuance accrued interest.

“SLGS” means State and Local Government Series Securities purchased from the United States Department of Treasury, Bureau of Public Debt.

“Substantial Beneficiary” of the obligations means the District, any related party to the District and the State in which the District is located.

“Tax-exempt Bond” means any obligation of a state or political subdivision thereof under section 103(c)(1) of the Code (including financing leases and any other arrangements, however labeled) the interest on which is excludable from gross income under section 103(a) of the Code. Tax-exempt Bond includes an interest in a regulated investment company to the extent that at least 95 percent of the income to the holder of the interest is interest that is excludable from gross income under section 103(a) of the Code.

“Tax Certificate” means, with respect to each issue of Obligations, the District’s Tax Certificate delivered as part of the record of proceedings with respect to the issuance of the Obligations for the purpose of complying with Treasury Regulation section 1.148(2)(b).

“Transferred Proceeds” means transferred proceeds as defined in Treasury Regulation section 1.148-9.

“Universal Cap” means, on any date, either (i) the present value of the Obligations determined by taking into account all unconditionally payable payments of principal, interest and fees for a Qualified Guarantee to be paid on or after that date, using the yield on the Obligations as the discount rate, or (ii) in the case of any Obligations which are Plain Par Bonds, the outstanding stated principal amount of such Obligations, plus accrued unpaid interest.

## 2. Allocation and Accounting.

(a) *In General.* Except as otherwise provided in this Section 2, the District may use any reasonable accounting method for purposes of accounting for Gross Proceeds, investments, and expenditures, provided the accounting method is consistently applied. An accounting method means both the overall method used to account for Gross Proceeds of an issue (e.g., the cash method or a modified accrual method) and the method used to account for or allocate any particular item within that overall accounting method (e.g., accounting for investments, expenditures, allocations to and from different sources, and particular items of the foregoing). Consistently applied means applied uniformly within a fiscal period and between fiscal periods to account for Gross Proceeds of an issue and any amounts that are in a Commingled Fund. An accounting method will not fail to be reasonable and consistently applied solely because a different accounting method is used for a bona fide governmental purpose to consistently account for a particular item.

(b) *Allocation of Gross Proceeds to the Obligations.* (i) *In General.* Gross Proceeds will be allocated to the Obligations as Proceeds until those amounts are properly

allocated to an expenditure for a governmental purpose or are allocated to Transferred Proceeds of another issue, or cease to be allocated to the Obligations under the Universal Cap.

(i) *Universal Cap.* The Universal Cap provides an overall limitation on the amount of Gross Proceeds allocable to an issue. Except as provided in Section 2(b)(iii), unless the application of the Universal Cap would not result in a reduction or reallocation of Gross Proceeds of the Obligations on a date the District will determine or cause to be determined the Universal Cap with respect to the Obligations (A) as of the first day of each Bond Year, beginning with the first Bond Year that commences after the second anniversary of the date hereof, and (B) as of each date that, but for application of the Universal Cap, Proceeds of a refunded issue would become Transferred Proceeds of the Obligations but need not determine the Universal Cap in the Bond Year in which that date occurs.

(ii) If the District reasonably expects, as of the issue date of the Obligations that the Universal Cap will not reduce the amount of Gross Proceeds allocable to the Obligations during the term of the Obligations, the Universal Cap need not be calculated on any date on which: (A) no Replacement Proceeds are allocable to the Obligations, other than Replacement Proceeds in a Bona Fide Debt Service Fund or a Reasonably Required Reserve or Replacement Fund; (B) the Net Sale Proceeds of the Obligations qualified for one of the temporary periods provided in Treasury Regulations section 1.148-2(e)(2), (e)(3), or (e)(4), and those Net Sales Proceeds are in fact allocated to expenditures prior to the expiration of the longest applicable temporary period; or the Net Sale Proceeds of the Obligations were deposited in a Refunding Escrow and expended as originally expected; (C) the Obligations do not refund an issue that, on any transfer date, has unspent proceeds allocable to it; (D) none of the Obligations are retired prior to the date on which those Obligations are treated as retired in computing the yield on the Obligations; and (E) no Proceeds of the Obligations are invested in “qualified student loans” or “qualified mortgage loans” (as defined in Treasury Regulations section 1.150-1).

(iii) If the value of all Nonpurpose Investments allocated to the Gross Proceeds of the Obligations exceeds the Universal Cap on a date as of which the Universal Cap is determined such Nonpurpose Investments allocable to Gross Proceeds of the Obligations necessary to eliminate that excess will cease to be allocated to the Obligations, in the following order of priority: (A) Nonpurpose Investments allocable to Replacement Proceeds; (B) Nonpurpose Investments allocable to Transferred Proceeds; and (C) Nonpurpose Investments allocable to Sale Proceeds and Investment Proceeds.

For this purpose Nonpurpose Investments may be valued (i) in the case of a Plain Par Investment at its principal amount plus any accrued unpaid interest on that date; (ii) in the

case of fixed rate investments, at its Present Value on that date; or (iii) in the case of any other investment, at its Fair Market Value.

(c) *Allocations to Expenditures.* (i) In General. Reasonable accounting methods for allocating funds from different sources to expenditures for the same governmental purpose include any of the following methods if consistently applied: a specific tracing method; a Gross Proceeds spent first method; a first-in, first-out method; or a ratable allocation. An allocation of Gross Proceeds of an issue to an expenditure must involve a current outlay of cash for a governmental purpose of the issue. A current outlay of cash means an outlay reasonably expected to occur not later than 5 banking days after the date as of which the allocation of Gross Proceeds to the expenditure is made. A payment of Gross Proceeds to a Related Party of the District is not an expenditure of those Gross Proceeds. Gross Proceeds paid to the Related Party are expended only when the Gross Proceeds are properly allocable to an expenditure by the Related Party.

(ii) *Expenditures for Working Capital Purposes.* Except as otherwise provided in Section 2(c)(iii), Proceeds of the Obligations and Replacement Proceeds of the Obligations that are allocated to the payment of expenditures or to the reimbursement of expenditures other than expenditures that are (A) Capital Expenditures; (B) Qualified Administrative Costs; (C) fees for Qualified Guarantees of the issue or payments for a Qualified Hedge; (D) interest on the Obligations for a period commencing on the issue date and ending on the date that is the later of three years from the issue date or one year after the date on which the Projects are Placed in Service; (E) a Rebate Amount or Yield Reduction Payment paid to the United States; (F) costs that are directly related to Capital Expenditures financed by the issue that, in total, do not exceed 5 percent of the Sale Proceeds of the Obligations; (G) principal or interest on the Obligations paid from unexpected excess Sale Proceeds or Investment Proceeds; (H) principal or interest on the Obligations paid from investment earnings on a reserve or replacement fund that are deposited in a Bona Fide Debt Service Fund; (I) to pay for extraordinary, nonrecurring items that are not customarily payable from current revenues, such as casualty losses or extraordinary legal judgments in amounts in excess of reasonable insurance coverage; (J) for payment of principal, interest, or redemption prices on a Prior Issue; and (K) for a crossover Refunding Issue, interest on that issue will be treated as spent to the extent that those working capital expenditures exceed available amounts (as defined in Treasury Regulations section 1.148-6(d)(3)(iii)) as of that date.

(iii) *Commingled Investment Earnings.* Notwithstanding Subsection 2(c)(ii), investment earnings on Sale Proceeds of the Obligations (other than investment earnings held in a Refunding Escrow) may be allocated to expenditures other than expenditures described in Subsection 2(c)(ii), if the investment earnings are commingled for the purpose of accounting for expenditures with substantial tax or other substantial revenues from operations of the District and they are reasonably expected to be allocated (using any reasonable, consistently applied accounting



method) to expenditures for governmental purposes of the District within a period not to exceed six months from the date of the commingling.

(d) *Allocations of Gross Proceeds to Investments.* Upon the purchase or sale of a Nonpurpose Investment, Gross Proceeds of an issue will not be allocated to a Payment for that Nonpurpose Investment in an amount greater than, or to a Receipt from that Nonpurpose Investment in an amount less than, the Fair Market Value of the Nonpurpose Investment (adjusted to take into account Qualified Administrative Costs allocable to the investment) as of the purchase or sale date.

(e) *Allocation of Investments Held by a Commingled Fund.* (i) *In General.* All Payments and Receipts (including deemed Payments and Receipts) on investments held by a Commingled Fund must be allocated among the different “investors” in the fund not less frequently than as of the close of each fiscal period. This allocation must be based on a consistently applied reasonable, ratable allocation method. Reasonable ratable allocation methods include, methods that allocate these items in proportion to either (A) the average daily balances of the amounts in the Commingled Fund from different “investors” during a fiscal period; or (B) the average of the beginning and ending balances of the amounts in the Commingled Fund from different investors for a fiscal period that does not exceed one month. For purposes of this Subsection 2(e), the term “investor” means each different source of funds invested in a Commingled Fund. A Commingled Fund may use any consistent fiscal period that does not exceed three months.

(i) *Expenditures from a Commingled Fund.* If a ratable allocation method is used to allocate expenditures from the Commingled Fund, the same ratable allocation method must be used to allocate Payments and Receipts on investments in the Commingled Fund under this Subsection.

(ii) *Common Reserve Funds, Replacement Funds or Sinking Funds.* If a Commingled Fund serves as a common reserve fund, replacement fund, or sinking fund for two or more issues, investments held by that Commingled Fund must be allocated ratably (after any reallocations of Proceeds under Section 2(b)) among the issues served by the Commingled Fund according to (A) the relative values of the bonds of those issues (as determined under Treasury Regulations section 1.148-4(e)); (B) the relative amounts of the remaining maximum annual debt service requirements on the outstanding principal amounts of those issues; or (C) the relative original stated principal amounts of the outstanding issues. Such allocations must be made at least every three years and as of each date that an issue first becomes secured by the Commingled Fund. If relative original principal amounts are used to allocate, allocations must also be made on the retirement of any issue secured by the Commingled Fund.

3. *Yield and Valuation of Investments.* (a) *Mark-to-Market Requirement.* If Gross Proceeds of the Obligations are invested in a Commingled Fund in which the District and any Related Party own more than 25 percent of the beneficial interests in the Commingled Fund, the

Commingled Fund must treat all its investments as if sold at Fair Market Value either on the last day of the fiscal year or the last day of each fiscal period unless (i) the remaining weighted average maturity of all investments held by the Commingled Fund during the fiscal year does not exceed 18 months, and the investments held by the Commingled Fund during that fiscal year consist exclusively of Obligations, or (ii) the Commingled Fund operates exclusively as a reserve fund, sinking fund, or replacement fund for two or more issues of the same issuer. The net gains or losses from any such deemed sales of investments must be allocated to all investors of the Commingled Fund during the period since the last allocation. For purposes of this Subsection the “fiscal year” of a Commingled Fund is the calendar year unless the Commingled Fund adopts another “fiscal year.”

(a) *In General.* Yield on an investment, the Present Value of an investment and the Fair Market Value of an investment allocated to the Obligations will be computed under the economic accrual method, using the same compounding interval and financial conventions used to compute the yield on the Obligations. Except as otherwise provided in this Section 3, the yield on an investment allocated to the Obligations is the discount rate that, when used in computing the Present Value as of the date the investment is first allocated to the issue of all unconditionally payable Receipts from the investment, produces an amount equal to the Present Value of all unconditionally payable Payments for the investment. The Present Value of an investment on a date is equal to the Present Value of all unconditionally payable Receipts to be received from and Payments to be paid for the investment after that date, using the yield on the investment as the discount rate. The yield on a variable rate investment is determined in a manner comparable to the determination of the yield on a variable rate issue of Tax-exempt Bonds for purposes of section 148 of the Code. For purposes of the Investment Limitation described in the Tax Certificate, the yield on investments made with Sale Proceeds of the Obligations or investment earnings thereon that are subject to yield restriction will be computed separately from the yield on investments not subject to yield restriction.

(b) *Yield Reduction Payments to the United States.* The yield on any investments allocable to Sale Proceeds of the Obligations or investment earnings thereon that qualified for one of the temporary periods described in the Tax Certificate, other than Replacement Proceeds, may be calculated by taking into account any amount paid to the United States in accordance with this Section 3(b), including any Rebate Amount, as a Payment for that investment that reduces the yield on that investment. The yield on any investments allocable to Sale Proceeds may be calculated by taking into account any “Yield Reduction Payments,” as described in this Section 3(b) (including any Rebate Amount) as a Payment for that investment that reduces the yield on that investment. Yield Reduction Payments include payments paid to the United States at the same time and in the same manner as rebate amounts are required to be paid except:

(i) No Yield Reduction Payments are required to be paid until 60 days after the date on which the issue is no longer outstanding; and

(ii) For Yield Reduction Payments paid prior to the date on which the Obligations are retired, the District need not pay more than 75 percent of the amount otherwise required to be paid as of the date to which the payment relates.

(c) *Valuation of Investments.* The value of an investment (including a Payment or Receipt on the investment) on a date will be determined using one of the following valuation methods consistently for all purposes of section 148 of the Code to that investment on that date:

(i) A Plain Par Investment may be valued at its outstanding stated principal amount, plus any accrued unpaid interest on that date.

(ii) A Fixed Rate Investment may be valued at its Present Value on that date.

(iii) Any investment may be valued at its Fair Market Value on that date.

(d) *Fair Market Value.* (i) *In General.* The Fair Market Value of an investment is the price at which a willing buyer would purchase the investment from a willing seller in a bona fide, arm's-length transaction. Fair Market Value generally is determined on the date on which a contract to purchase or sell the Nonpurpose Investment becomes binding. Except as otherwise provided in this Section, an investment that is not of a type traded on an established securities market, within the meaning of section 1273 of the Code, will not be considered acquired or disposed of for a price that is equal to its Fair Market Value.

(i) *Direct United States Treasury Obligations.* The Fair Market Value of a United States Treasury obligation that is purchased directly from the United States Treasury is its purchase price.

(ii) *Certificate of Deposit.* The purchase price of a certificate of deposit that has a fixed interest rate, a fixed payment schedule, and a substantial penalty for early withdrawal may be treated as its Fair Market Value on the purchase date if the yield on the certificate of deposit is not less than the yield on reasonably comparable direct Obligations of the United States and the highest yield that is published or posted by the provider to be currently available from the provider on reasonably comparable certificates of deposit offered to the public.

(iii) *Guaranteed Investment Contracts.* The purchase price of a Guaranteed Investment Contract is treated as its Fair Market Value on the purchase date if: (A) the District makes a Bona Fide Solicitation for a specified Guaranteed Investment Contract; (B) the District receives at least three bids from providers for the specified Guaranteed Investment Contract that the District solicited under a Bona Fide Solicitation that have no Material Financial Interest in the issue, at least one of whom is a reasonably competitive provider, i.e., a provider that has an established industry reputation as a provider of Guaranteed Investment Contracts; (C) the District purchases the highest-yielding Guaranteed Investment Contract for

which a qualifying bid is made (determined net of broker's fees); (D) the obligor on the Guaranteed Investment Contract provides a written certification specifying all amounts that it is paying (or expects to pay) to third parties in connection with supplying the Guaranteed Investment Contract; and (E) the District retains the Bid Records with the bond documents until three years after the last outstanding Obligation is redeemed.

(iv) *Yield Restricted Defeasance Escrow Investment.* The purchase price of a Yield Restricted Defeasance Escrow Investment is treated as its Fair Market Value on the purchase date if: (A) the District makes a Bona Fide Solicitation for the purchase of the investment; (B) the District receives at least three bids from providers that the District solicited under a Bona Fide Solicitation that have no Material Financial Interest in the issue, at least one of whom is a reasonably competitive provider, i.e., a provider that has an established industry reputation as a provider of the type of investment being purchased; (C) the winning bid is the Lowest Cost Bona Fide Bid (including any broker's fees); (D) the provider of the investments certifies the administrative costs that it is paying (or expects to pay) to third parties in connection with supplying the investments; and (E) the District retains the Bid Records with the bond documents until three years after the last Obligation is redeemed.

(v) *Material Financial Interest.* For purposes of paragraphs (iii) and (iv) the following persons or entities are deemed to have a Material Financial Interest in the issue: (A) the lead underwriter in a negotiated underwriting transaction until 15 days after the issue date; (B) any entity acting as a financial advisor with respect to the purchase of the investment at the time the bid specifications are forwarded to potential providers; and (C) a Related Party to a provider that has a Material Financial Interest in the issue.

(vi) *Bidding.* If the District invests any Gross Proceeds of the Obligations in a Guaranteed Investment Contract or purchases with Gross Proceeds Yield Restricted Defeasance Escrow Investments, it will conduct, or will have conducted on its behalf, a Bona Fide Solicitation. The District will require the agent to certify as to the bidding process as set forth in the form of Certificate of Bidding Agent to be furnished by Bond Counsel, in the case of a Guaranteed Investment Contract or in the case of Yield Restricted Defeasance Escrow Investments. If the bidding process is not conducted through an agent, the District itself will provide a similar certificate. The District will file such certification together with the Bid Records, with the documents relating to the Obligations. If the District wishes to invest Gross Proceeds of the Obligations in Certificates of Deposit it will obtain from the provider a certification that the Certificate of Deposit has a fixed rate, a fixed payment schedule and a substantial penalty for early withdrawal, and the yield on the certificate of deposit is not less than (A) the yield on reasonably comparable direct Obligations of the United States and (B) the highest yield published by the

provider and currently available from the provider on reasonably comparable certificates of deposit offered to the public.

(e) *Administrative Costs.* Except for Qualified Administrative Costs, costs or expenses paid, directly or indirectly, to purchase, carry, sell, or retire investments will not increase Payments made for investments and will not reduce Receipts from Investments. Qualified Administrative Costs will increase the Payments for, or decrease the Receipts from, investments.

(f) *Record Keeping.* The District shall keep, or cause to be kept, accurate records of the status of compliance of the Obligations with respect to compliance with the expenditure requirements at the end of each 6-month period described in Section 4(a)(ii)(C) hereof. The District will keep, or cause to be kept, accurate records of each investment it makes in Investment Property acquired, directly or indirectly, with Gross Proceeds of the Obligations (other than revenues in a Bona Fide Debt Service Fund) and each expenditure it makes with Gross Proceeds of the Obligations. Such records will include all of the information necessary to compute the yield on each investment in Investment Property to the District, e.g., purchase price, nominal interest rate, dated date, maturity date, type of property, frequency of periodic payments, period of compounding, yield to maturity, amount actually or constructively received on disposition, disposition date and evidence of the Fair Market Value of such property on the purchase date and disposition date (or deemed purchase or disposition date) for each item of such Investment Property.

#### 4. Rebate Requirement.

(a) *Calculation of the Rebate Amount.* In general, the Rebate Amount, as of any date is the excess of the “future value.” as of that date, of all Receipts on Nonpurpose Investments allocated to the Obligations over the “future value.” as of that date, of all Payments on Nonpurpose Investments allocated to the Obligations. The “future value” of a Payment or Receipt at the end of any period is determined using the economic accrual method and equals the value of that Payment or Receipt when it is paid or received (or treated as paid or received), plus interest assumed to be earned and compounded over the period at a rate equal to the yield on the Obligations, using the same compounding interval and financial conventions used to compute the yield on the Obligations. Amounts earned on certain Gross Proceeds of the Obligations either may not be, or are not required to be, taken into account in determining the Rebate Amount. The earnings on Gross Proceeds excepted from the calculation of the Rebate Amount include the following:

(i) *Bona Fide Debt Service Fund.* Amounts earned on a Bona Fide Debt Service Fund for the Obligations and amounts earned on such amounts may not be taken into account if the gross earnings on the Bona Fide Debt Service Fund for the Bond Year is less than \$100,000.

(ii) *Spending Exceptions.* Earnings with respect to certain Gross Proceeds described in 4(a)(ii) of this Section are not required to be taken into account in determining the Rebate Amount if requirements of 4(a)(ii)(B),

4(a)(ii)(C) or 4(a)(ii)(D) of this Section are met with respect to such Gross Proceeds.

(A) *Special Rules.* For purposes of 4(a)(ii) of this Section the following special rules will apply.

(I) If any portion of the Obligations is treated as a separate Refunding Issue under Treasury Regulations section 1.148-9(h), that portion is treated as a separate issue.

(II) The only spending exception applicable to a Refunding Issue is the *6-month Exception*.

(III) Solely for purposes of determining whether or not the expenditure requirement has been met under the *6-month Exception* for a Refunding Issue, proceeds of the refunded issue that become Transferred Proceeds of the Refunding Issue are, in general, not treated as “gross proceeds” of the Refunding Issue and need not be spent for the Refunding Issue to satisfy that spending exception. However, Transferred Proceeds of the Refunding Issue that were from excluded “gross proceeds” of the refunded issue under the special definition of “gross proceeds” described in 4(a)(ii)(A)(IX) of this Section, and Transferred Proceeds from any prior taxable issue, are treated as “gross proceeds” of the Refunding Issue under the *6-month Exception* unless those Transferred Proceeds are used in a manner that causes those amounts to be excluded from gross proceeds under the special definition described in 4(a)(ii)(A)(IX) of this Section. Transferred Proceeds excluded from Gross Proceeds for purposes of determining whether or not the expenditure requirement has been met are subject to rebate as proceeds of the Refunding Issue unless an exception to rebate applied to those proceeds as proceeds of the refunded issue.

(IV) Proceeds of the refunded issue, which for other purposes become Transferred Proceeds of the Obligations, continue to be treated as unspent proceeds of the refunded issue for purposes of applying the spending exceptions to an issue refunded by the Obligations.

(V) If the refunded issue satisfies one of the spending exceptions, the proceeds of the refunded issue that are excepted from rebate under that spending exception are not subject to rebate either as proceeds of the refunded issue or as Transferred Proceeds of the Obligations.

(VI) Expenditures for the governmental purpose of an

issue include payments for interest, but not principal, on the issue, and for principal or interest on another issue of obligations. The preceding sentence does not apply for purposes of the *18-month Exception* and *2-year Construction Exception* if those payments cause the issue to be a Refunding Issue.

(VII) Any failure to satisfy the final spending requirement of the *18-month Exception* or the *2-year Construction Exception* described in 4(a)(ii)(D) of this Section is disregarded if the District exercises due diligence to complete the Project and the amount of the failure does not exceed the lesser of (1) 3 percent of the Issue Price of the Nonconstruction Issue in the case of the *18-month Exception* or the Construction Issue in the case of the *2-year Construction Exception* or (2) \$250,000.

(VIII) For purposes of this Section only, a Reasonably Required Reserve or Replacement Fund also includes any fund to the extent described in Treasury Regulations section 1.148-5(c)(3)(i)(E) or (G).

(IX) Solely for purposes of determining whether the expenditure requirements with respect to the *6-month Exception* (as described in Section 4(a)(ii)(B)(I)) and the *18-month Exception* (as described in Section 4(a)(ii)(C)(I)) have been met, “gross proceeds” does not include (1) amounts in a Bona Fide Debt Service Fund; (2) amounts in a Reasonably Required Reserve or Replacement Fund (as defined for purposes of this Section); (3) amounts that, as of the date the Obligations are issued, are not reasonably expected to be Gross Proceeds but that become Gross Proceeds after the end of the 6-month spending period (or the 1-year spending period in the case of the Minor Portion) and the third spending period in the case of the *18-month Exception*; and (4) amounts representing repayments of Grants financed by the Obligations (if any).

(B) *6-month Exception.* Earnings with respect to Gross Proceeds of a Nonconstruction Issue or the Refunding Issue (treated as separate issues) during the 6-month period beginning on the date of issue of the Obligations (the “6-month spending period”) and earnings with respect to an amount of Gross Proceeds of the Obligations not in excess of the Minor Portion during the 1-year period beginning on the date of issue of the Obligations (the “1-year spending period”) need not be taken into account if:

(I) The “gross proceeds” (as defined in this Section) of the respective issue are allocated to expenditures for the

governmental purposes of the issue within the 6-month spending period, other than Gross Proceeds not in excess of the Minor Portion and such Minor Portion is allocated to expenditures for the governmental purposes of the issue within the 1-year spending period; and

(II) The rebate requirement is met for amounts not required to be spent within the 6-month spending period (excluding earnings on a Bona Fide Debt Service Fund) or the 1-year spending period for the Minor Portion.

(C) *18-month Exception.* Earnings with respect to Gross Proceeds of the New Money Portion of the Obligations need not be taken into account if:

(I) The “gross proceeds” (as defined in this Section) are allocated to expenditures for a governmental purpose of the New Money Portion of the Obligations in accordance with the following schedule: (1) at least fifteen percent (15%) within 6 months; (2) at least sixty percent (60%) within 12 months; and (3) one hundred percent (100%) within 18 months (the “third spending period”). The New Money Portion of the Obligations will not be regarded as failing to satisfy the spending requirement for the third spending period as a result of a Reasonable Retainage if the Reasonable Retainage is allocated to expenditures within 30 months of the issue date.

(II) The rebate requirement is met for all amounts not required to be spent in accordance with the 18-month expenditure schedule (other than earnings on a Bona Fide Debt Service Fund).

(III) All of the “gross proceeds” (as defined in this Section) of the New Money Portion of the Obligations qualify for the initial temporary period under Treasury Regulations section 1.148-2(e)(2).

(IV) No portion of the New Money Portion of the Obligations is treated as meeting the exception from the rebate requirement for certain proceeds used to finance construction expenditures as provided in section 148(f)(4)(C) of Code and Treasury Regulations 1.148-7(e), as described in (D) of this Section.

(D) *2-year Construction Exception.* Amounts earned on Gross Proceeds which are Available Construction Proceeds of a Construction Issue are not required to be taken into account if Available Construction Proceeds of the Construction Issue are allocated to expenditures for the



governmental purposes of the Construction Issue in accordance with the following schedule: (I) 10 percent or more within six months after the date of issue of the New Money Portion of the Obligations; (II) 45 percent or more within 1 year after the date of issue of the New Money Portion of the Obligations; (III) 75 percent or more within 18 months after the date of issue of the New Money Portion of the Obligations; and (IV) 100 percent within 2 years after the date of issue of the New Money Portion of the Obligations (the “fourth spending period”). The Construction Issue will not be regarded as failing to satisfy the spending requirement for the fourth spending period as a result of unspent amounts for Reasonable Retainage if those amounts are allocated to expenditures within 3 years of the issue date.

(b) *Computation Dates.* The Computation Date for the calculation of the Rebate Amount required by this Section 4 for Obligations with a term of less than five years will be the latest of: (i) the date that the Obligations are discharged; (ii) 8 months after the date the Obligations were issued; or (iii) the date the District no longer reasonably expects that any of the spending exceptions under Treasury Regulations section 1.148-7 (as described in 4(a)(ii) of this Section) will apply to the Obligations. The Computation Dates for the calculation of the Rebate Amount required by this Section 4 for Obligations with a term of five years or more will be: (i) a date selected by the District which is no later than 5 years after the issue date of the Obligations, (ii) each fifth year thereafter, and (iii) the date that the last of the Obligations are discharged (i.e., the date of the retirement of the last maturity of the Obligations).

(c) *Rebate Payments.* The District will pay the Rebate Amount to the United States no later than 60 days after the Computation Date. Payment of a Rebate Amount will be filed with the Internal Revenue Service Center, Ogden, Utah 84201. Payment of a Rebate Amount will be accompanied by Form 8038-T.

**CONSIDER AMENDMENT TO  
LANDOWNERS AGREEMENT**

**TO BE DISTRIBUTED  
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