

Approved:

Effective: May 14, 2019
Review: October 1, 2018
Office: Comptroller
Topic No.: 350-080-002-b



Department of Transportation

BOND COMPLIANCE

AUTHORITY

Sections 20.23(3)(a) and 334.048(3), Florida Statutes (F.S.)

REFERENCES

Sections 11 and 17, Article VII, Florida Constitution

Section 215.605, F.S.

Section 215.615, F.S.

Section 215.616, F.S.

Section 215.617, F.S.

Section 338.165, F.S.

Section 338.166, F.S.

Section 338.227, F.S.

Section 339.0801, F.S.

STATEMENT OF POLICY

It is the policy of the Florida Department of Transportation (Department) to establish requirements regarding the receipt and administration of tax-exempt or direct subsidy bonds (collectively referred to herein as “bonds”) assuring compliance with various tax and annual disclosure matters.

PURPOSE

The Department has statutory authority to receive and administer proceeds from tax-exempt or direct subsidy bonds through various Department programs. General Obligation bonds are used to accelerate the purchase of right-of-way for roads and to finance major bridge construction projects. Revenue bonds are used to finance Florida’s Turnpike Enterprise improvement and expansion projects, transportation and environmental improvements related to other department-owned and operated toll

facilities, capital improvements to the State's Seaports, the state-funded State Infrastructure Bank, and other various programs as authorized by statute.

The Department (and State of Florida) has traditionally issued tax-exempt debt which results in significant interest cost savings compared with the interest cost on taxable debt. Accordingly, it is the State's policy that debt should be issued to take advantage of the exemption from federal income taxes unless prohibited by federal law or applicable federal regulations.

In order to maintain tax-exempt status of bond issuances, the Department must meet compliance requirements in administering bond proceeds and monitoring the use of facilities financed thereby.

Consequences of non-compliance may include retroactive loss of tax-exempt status; significant liability to the Internal Revenue Service (IRS) or bondholders; reputational damage; inability to access future tax-exempt bond markets; and credit rating downgrades.

SCOPE

The requirements related to this procedure affect all Department employees responsible for managing and monitoring projects and right-of-way (ROW) parcels funded with bond proceeds. This includes any employee responsible for collecting revenue derived from such projects or parcels.

DEFINITIONS

Arbitrage: Investment earnings representing the difference between interest paid on bonds (which is tax-free and carries a lower yield) and the interest earned on securities in which bond proceeds are invested with a yield that is higher.

Available Spending Exceptions: Timeframes for the allocation of bond proceeds to expenditures for governmental or qualified purposes that provide exceptions to the arbitrage rebate requirements.

DBFOM Agreement: Design Build Finance Operate and Maintain Public Private Partnership arrangement.

Declaration of Intent: An issuer's memorandum declaring intent to reimburse an original expenditure with proceeds of an obligation.

Department: Florida Department of Transportation

Division: The Division of Bond Finance within the Florida State Board of Administration

OOC: Office of Comptroller within the Department of Transportation

OOC-DOO: Office of Comptroller – Disbursement Operations Office

OOC-PFO: Office of Comptroller – Project Finance Office

OOC-GAO: Office of Comptroller – General Accounting Office

Original Expenditure: An expenditure for a governmental purpose that is originally paid from a source other than a reimbursement bond.

Private Business Use: Use of bond proceeds or bond-financed property by a non-governmental person (individual or entity) in furtherance of a trade or business activity. This includes business corporations, partnerships, limited liability companies, associations, nonprofit corporations, natural persons engaged in trade or business activity, the United States Government, and any federal agency.

Reimbursement Allocation: Allocation in writing that evidences an issuer's use of proceeds of a reimbursement bond to reimburse an original expenditure.

Reimbursement Bond: The portion of a bond issue allocated to reimburse an original expenditure that was paid before the bond issue date.

Temporary Period: Specified time (generally three years) from the issuance of the bond in which arbitrage rules do not apply.

1. INVESTMENT OF BOND PROCEEDS

The Department, through investment activities performed by the Division of Bond Finance, will comply with all applicable Federal, State, and contractual restrictions regarding the use and investment of bond proceeds. This includes compliance with restrictions on the types of investment securities allowed, restrictions on the allowable yield of some invested funds, as well as restrictions on the time period over which some bond proceeds may be invested.

1.1 ARBITRAGE

In general, bond proceeds may be invested at an unrestricted yield during temporary periods. For bonds issued for capital projects, the temporary period is typically three years after issuance. Rebate calculations are performed annually and earnings from the investment of bond proceeds at a yield in excess of the bond yield must be rebated to the U.S. Treasury every fifth year, unless the requirements of available spending exceptions are met. Investment of bond proceeds and monitoring of available spending exceptions are handled by the Division of Bond Finance within the State Board of Administration (SBA).

The Division will use the Interest Apportionment statements provided by the Division of Treasury of the Department of Financial Services to track the investment and expenditure of bond proceeds. Rebate amounts are calculated using the activity shown on the statements. The Division will report any accrued arbitrage rebate liabilities and the Department will pay any outstanding rebate amounts due.

2. BOND PROCEEDS

Allocation of bond proceeds to capital projects is an important element in the ongoing compliance effort. Bond proceeds may be allocated to reimburse expenditures for amounts incurred prior to issuance or for future capital costs of identified projects.

2.1 DECLARATION OF INTENT

In order for the Department to reimburse itself with bond proceeds for qualified expenditures paid from other sources, the Department will coordinate with the Division to issue a Declaration of Intent not later than 60 days after payment of the original expenditure. Declarations of Intent shall:

- A. Be made in a reasonable form; which may include, issuer resolution, action by an appropriate representative of the issuer, or specific legislative authorization for the issuance.
- B. Generally describe the project for which the original expenditure is paid.
- C. State the maximum principal amount of obligations expected to be issued for the project.
- D. Be made with a reasonable expectation that the Department will in fact reimburse that expenditure with proceeds of a reimbursement bond.

Please note that project, as referenced above, includes any property, project, or program (e.g., ROW Acquisition and Bridge Construction Program). The OOC-GAO will coordinate with the Division on any updates to existing Declarations or in the creation of new Declarations, as needed.

2.2 ALLOCATION OF PROCEEDS

- A. Bond proceeds must be spent on qualified purposes in accordance with the Declaration of Intent and Official Statements issued by the Division and should be spent within the applicable temporary period (usually three years from issuance).
- B. No more than the lessor of Five Million dollars (\$5,000,000) or five percent (5%) of bond proceeds may be used to finance a loan to any person other than a state or local government.

- C. The reimbursement allocation must be made no later than 18 months after the later of the date the original expenditure is paid; or the date the project is either placed in service or abandoned. However, in no event may the reimbursement allocation be made more than three (3) years after the date the original expenditure is paid.
- D. Under U.S. Treasury Regulation Title 26 CFR, Section 1.150-2(d)(3), a reimbursement allocation is only permitted for the following types of expenditures:
- Capital expenditures;
 - Costs of issuance;
 - Certain extraordinary working capital expenditures incurred before issuance of the reimbursement bond;
 - Grants;
 - Qualified student loans;
 - Qualified mortgage loans; and
 - Qualified veteran's mortgage loans.
- E. Prior to issuance, the Department will prepare a list of projects that are to be funded by the bond proceeds. This list of projects constitutes the initial allocation of projects to a specific bond issue and is also used for the private use analysis prior to issuance. Upon compliance review and approval, the list will be provided to the Division by the OOC-GAO ensuring that all expenditures meet the reimbursement allocation criteria.

2.3 EXCEPTIONS

U.S. Treasury Regulation Title 26, Section 1.150-2(f) provides two exceptions to the general requirements that the issuer adopt a declaration of intent to reimburse the original expenditures and that the reimbursement allocation be made within the reimbursement period. The two exceptions are the:

- A. **De Minimis Exception.** This exception applies for original expenditures in an amount not in excess of the lesser of One Hundred Thousand dollars (\$100,000) or 5 percent (5%) of the proceeds of the issue.
- B. **Preliminary Expenditures Exception.** This exception applies for preliminary expenditures up to an amount not in excess of 20 percent (20%) of the aggregate issue price of the issue(s) that finance or are reasonably expected to finance the project for which the preliminary expenditures were incurred.

3. USE OF TAX-EXEMPT FINANCED PROPERTY

There are federal restrictions under Title 26 CFR, Section 1.141-1 through 1.141-9 on private business use that apply to land, buildings, facilities and equipment (“property”) that are financed with bond proceeds. Private business use may result from ownership of the property or use of the property under **any lease agreement**, management or service contract (except for certain “qualified” management service contracts), output contract for the purchase of electricity or water, privately sponsored research contract (except for certain “qualified” research contracts), “naming rights” contract, “**public-private partnership**” arrangement, or any similar use arrangement that provides special legal entitlements for the use of the bond-financed property.

3.1 PRIVATE BUSINESS USE LIMITATIONS

No more than ten percent (10%) of bond proceeds may be used for private business use, of which no more than five percent (5%) of bond proceeds may be used for any “unrelated” private business use. Unrelated private business use is a private business use that is not functionally related to the governmental purposes of the bonds.

Given the above limitations, bond proceeds need to be reviewed and approved prior to use for financing Public Private Partnership projects that are structured as long term DBFOM agreements. The OOC-PFO in conjunction with the OOC-GAO will be responsible for this review during the evaluation stage of proposed P3 projects.

3.2 PRIVATE BUSINESS USE REPORTING

- A. Prior to allocating ROW acquisition expenditures to bond proceeds, the OOC-GAO will request Central Office ROW to coordinate a review of any private use related to the parcels anticipated to be reimbursed with bond proceeds. This review should include a review of lease payments, sale of surplus property, and any other revenue associated with the parcel that could indicate private use.
- B. The OOC-GAO will review the results of the private business use analysis and determine whether or not the compliance requirements are met before proceeding with the allocation of bond proceeds. If needed, parcel expenditures with private use will be excluded and replaced with non-private use parcels in order to maintain compliance requirements.
- C. Once bond proceeds have been allocated to selected parcel expenditures, Central Office ROW will be notified of the allocation and will be responsible for reporting any revenue associated with bond financed parcels to the OOC-GAO on an annual basis.
- D. The OOC-GAO will calculate the private business use percentage as needed to determine compliance with applicable regulations.

- E. The OOC-GAO will coordinate with any office responsible for bond funded expenditures to ensure any private use is reported and meets the compliance requirements of the related bond issue.

4. ANNUAL DISCLOSURE REQUIREMENTS

- A. The Department will sign a Continuing Disclosure Agreement (CDA) for each bond issuance assuming responsibility for any continuing disclosure requirements under Title 17 CFR Section 240.15c2-12 of the Securities and Exchange Commission.
- B. The Department will provide the Division with financial information, operating data, and other information as may be required from time to time, so that the Division can make the appropriate disclosure filings. Typical information includes, but is not limited to:
- Audited Financial Statements;
 - Motor and Diesel Fuel Tax Collections;
 - Investment of Funds;
 - Debt Service Coverage;
 - Five Year History of Trust Fund and General Revenues;
 - Operating and Fixed Capital Outlay Budget by Program Area;
 - Statement of Assets and Liabilities;
 - Debt Outstanding by Type and Program;
 - Total State Debt Outstanding;
 - Litigation; and
 - Material Events Notices, including but not limited to:
 - i. Principal and interest payment delinquencies;
 - ii. Non-payment related defaults, if material;
 - iii. Unscheduled draws on debt-service reserves reflecting financial difficulties;
 - iv. Unscheduled draws on credit enhancements reflecting financial difficulties;
 - v. Substitution of credit or liquidity providers, or their failure to perform;
 - vi. Adverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701- TEB) or other material notices or determinations with respect to the tax status of the security, or other material events affecting the tax status of the security;
 - vii. Modifications to rights of security holders, if material;
 - viii. Bond calls, if material, and tender offers;
 - ix. Defeasances;
 - x. Release, substitution or sale of property securing repayment of the securities, if material;
 - xi. Rating changes;

- xii. Bankruptcy, insolvency, receivership or similar event of the obligated person;
 - xiii. The consummation of merger, consolidation, or acquisition involving an obligated person or the sale of all or substantially all of the assets of the obligated person, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material.
 - xiv. Appointment of a successor or additional trustee or the change of name of trustee, if material.
 - xv. Incurrence of a Financial Obligation of the obligated person, if material, or agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the obligated person, any of which affect security holders, if material.
 - xvi. Default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a Financial Obligation of the obligated person, any of which reflect financial difficulties.
- C. On an annual basis, the Division will send the Department a letter requesting the financial information and operating data specified in the CDA. All Department submissions of information related to disclosure filings should be sent to the Division's dedicated email address, DBFdisclosure@sbafla.com. Upon Department submission of the requested information, the Division will review the information and work with the Department to address any questions or concerns.
- D. After addressing all issues, the Department will sign a statement certifying the accuracy and completeness of the information presented.
- E. Upon receipt of the signed certification, the Division will file the information on the Municipal Securities Rulemaking Board's (MSRB) Electronic Municipal Market Access (EMMA) website.

5. RECORD RETENTION

Written records (which may be in electronic form) must be maintained for each bond issue for as long as the bonds remain outstanding (including any refunding thereof), plus three years. This enables the Department to demonstrate to the IRS, in the event of an audit, that full compliance with the federal tax requirements has been maintained to support the tax-exempt status of the bonds. The records to be maintained for all bond issues include, but are not limited to:

- A. Records showing how bond proceeds were invested;
- B. Records showing how and when bond proceeds were spent, including purchase contracts, construction contracts, progress payment requests, invoices, receipts,

cancelled checks, general ledgers, and allocations of bond proceeds to make reimbursements for project expenditures made before the bonds were issued;

- C. Records showing the percent and type of private use of bond financed property, including copies of leases, contracts or other documentation evidencing special use arrangements. Documentation (e.g., bond counsel opinions) showing that all special use arrangements affecting bond-financed property are consistent with applicable restrictions on private business use and the restrictions on the use of bond proceeds to make or finance loans to any person other than a state or local government should also be maintained.

5.1 RECORD RETENTION RESPONSIBILITIES

A. The Division will maintain records of how the bond proceeds were invested.

B. The Department will maintain records of how and when bond proceeds were spent.

- Each month, OOC-GAO will send a list of expenditures associated with Work Program bond fund codes to OOC-DOO.
- Each month, OOC-PFO will send a list of State Infrastructure Bank expenditures associated with Work Program bond fund codes to OOC-DOO.
- OOC-DOO will maintain all voucher information in electronic form for the life of the bonds plus three years.

C. Department program offices (ROW, Seaport, SIB, Turnpike, Tolls, etc.) responsible for bond funded programs will maintain copies of all purchase contracts, construction contracts, lease agreements, and any other agreements associated with bond financing. Per the Department of State's General Records Schedule for State and Local Government Agencies GS1-SL, these records must be maintained permanently.

6. TRAINING

Training will be provided as needed. Questions or requests for training can be directed to the Deputy Comptroller, General Accounting Office within the OOC.

7. FORMS

There are currently no forms associated with this procedure.