

GUIDELINES FOR DETERMINING PRIVATE BUSINESS USE/PRIVATE PAYMENTS and INSTRUCTIONS FOR COMPLETING THE PRIVATE ACTIVITY BOND REPORT

Tax-exempt bonds may be issued to finance governmental and certain non-governmental projects and facilities under the Internal Revenue Code (the “Code”). The proceeds of tax-exempt bonds¹ are generally restricted to governmental use or use that benefits the general public. The Code imposes numerous restrictions and limitations with respect to the use of tax-exempt bond proceeds and the facilities financed by those proceeds, including, but not limited to, a determination that the use of those proceeds does not violate what are known as the “private activity bond tests”. The private activity bond tests consists of two parts: i) the private business use limit; and ii) the private payment limit. If both of these limits are exceeded, the bonds are private activity bonds and thus generally lose their tax-exempt status.

Guidelines for Determining “Private Activity Bond” Status

Private activity bond status exists only if there is a violation of both the private business use limit and the private payment limit.

The Private Business Use Limit. Private business use exists when there is direct or indirect use by one or more private users in a manner or on a basis different than normal use of the bond financed space, facility, equipment or program by the general public (in the case of public education institutions, the general public includes students, faculty and staff). Private business use can involve the use of space, facilities, equipment or programs by any of the following “private users”:

- A private for-profit business.
- A person operating a business (e.g., a sole proprietorship).
- A private nonprofit organization (501(c)(3) or otherwise).
- An agency or instrumentality of the federal government.

Private users do not include state or local governmental units, private persons acting solely and directly as officers or employees of state or local governmental units, including public academic institutions, or persons using the facility for personal rather than business purposes.

Private business use exists if there is, or there is expected to be, an oral or written arrangement, agreement or contract under which any of the following apply:

- The private user will own or be a lessee, tenant or user of bond-financed space, facilities or equipment (other than as a member of the general public).
- The private user will manage the space or facility, manage the use or operations of the space or facility or otherwise provide a service with respect to the space or facility, under a contract that does not satisfy IRS guidelines for a qualified management or service contract.²
- The private user is entitled to a portion of the output or services of operations of the space, facility or equipment .
- The private user “sponsors” a research project under terms that do not satisfy a detailed set of IRS rules, which generally require that the research be “basic research”

¹ For purposes of these Guidelines references to “tax exempt bonds” also include federally tax advantaged bonds such as “Build America Bonds” (BABs).

² See IRS Revenue Procedure 97-13.

and that the sponsor obtain no greater rights to the results of the research than are available to other persons or businesses.³ Note that this form of “use” does not require actual (i.e., physical) use of the bond-financed facilities by the private user/sponsor; instead, the legal rights to the research results obtained by the private user/sponsor establish the “use” in these circumstances.

In the case of bond-financed renovations, expansions or improvements of existing space, the use of the renovated, expanded or improved portions of the space is the issue. In the case of site improvements and equipment, the use of the space or facility(ies) to be served by those improvements or equipment, as well as the use of the financed improvements or equipment themselves, are to be considered. In reviewing for possible private business use, all uses (except general public use) of any portion of the bond-financed project are to be considered.

The Private Payment Limit. This limit takes into account all revenues or other forms of payment derived, directly or indirectly, by the State (including any agency, instrumentality or higher education institution of the State) with respect to any portions of the bond-financed facility that are subject to private business use. The revenues are taken into account regardless of whether they are received from the private user or other persons, as long as they are derived from the privately used facility. Direct or indirect payments to the State – or in the case of bonds issued for higher education purposes, the higher education institution – that are taken into account under this “payment limit” include *all* of the following:

- Rent, user fees or other revenues derived from the bond-financed facilities.
- The portion of student fees and charges allocable to the part of the facility subject to private business use (e.g., room and board charges for cafeteria services).
- A share of receipts from the use.
- Royalties or license fees.
- Donations of money or other items or services in exchange for the use.
- Sponsorship payments for sponsored research that results in private business use.
- Certain other tangible or intangible benefits.

³ See IRS Revenue Procedure 2007-47.

Instructions for Completing the Private Activity Bond Report

As part of the process for reviewing and approving a release of State bond proceeds for a capital project, the attached Private Activity Bond Report must be fully completed, signed and submitted. A separate Private Activity Bond Report must be completed for each appropriation line item created for a capital biennium (whether created in a bill passed by the General Assembly or via a transfer of appropriation authorized by the Controlling Board). OBM and, in the case of higher education capital release requests, Regents, will not approve a Controlling Board request unless a Private Activity Bond Report has been submitted for the particular appropriation line item/capital act.

The report should be completed in the context of the bond financed project only. A project may involve one or more of the following:

- Building or adding new space.
- Renovating or reconfiguring existing space.
- General improvements (interior or exterior) that do not alter existing space but which benefit or serve that space (such as a new roof, HVAC system, utility line serving the facility, communications/computer wiring).
- Land acquisition and site improvements (such as land clearance, landscaping, sidewalks, parking).
- Acquisition of equipment.

Please follow these steps to complete each Private Activity Bond Report:

Overview (Page 1)

- 1) Enter name of the agency or institution, project title, appropriation act, appropriation line item and amount, and the total project amount.
- 2) Briefly describe the financed project/facility. Generally, the same phrasing of project scope in a program plan or budget request can be used.
- 3) Determine if there will or will not be “private business use” in or of the financed project/facility, and check the appropriate line. If you check WILL BE, page 2 of the report must be completed. Determine if there will or will not be “private payment” derived from the financed project/facility and check the appropriate line. If you check WILL BE, page 3 of the report must be completed.
- 4) Review the certification for accuracy and understanding. Sign it and date it.

Private Business Use Limit (Page 2)

Column (1) Lists a number of potential private business uses. In Other, list additional private business uses on the lines provided.

Column (2) Check each of the reasonably anticipated “private business uses”. It is understood that uses may change in the future; this Report is designed to capture your reasonable expectations as to the intended use of the bond financed facilities or space served by the bond financed improvements.

- Column (3) Provide an estimate of the portion of the cost of the bond-financed facilities/improvements that is allocable to the particular private business use.
- Column (4) Provide an estimate of the total cost of the bond-financed portion of the facilities/improvements (i.e., the total cost of the financed facilities/improvements regardless of whether the use will involve private business or governmental use).
- Column (5) Indicate the nature of the private business use arrangement (provide as an attachment if more space is needed).
- Column (6) State whether any direct or indirect payments or revenues will be received by the State with respect to the portion of the facilities/improvements that are subject to the private business use. Payments or revenues could take the form of any of the items listed above under the Private Payment Test. If any private payments are expected, page 3 of this Report must be completed.
- (7) Provide the total estimated bond-financed costs allocable to private business use across all potential use categories (i.e., the sum of all entries in column (3)).
- (8) Provide the total estimated bond-financed costs of the project/facility without regard to whether the use is private or governmental (i.e., the sum of all entries in column (4)).

Private Payment Limit (Page 3)

- Column (1) List each private business use for which payments or revenues are being or are expected to be received by the State (including the higher education institution).
- Column (2) State the type of payments or revenues expected to be received.
- Column (3) State the amount of payments or revenues expected to be received.
- Column (4) State the frequency of receipt of the payments or revenues.
- Column (5) State the total amount of payments or revenues expected to be received over the duration of the private business use arrangement, agreement, or contract.

Note, for each private business use involving payments or revenues, a copy of the agreement, arrangement, or contract that is the source of those revenues must be attached to this Private Activity Bond Report.