

# **NORTHERN VIRGINIA TRANSPORTATION AUTHORITY**

## **Policy 23 - Tax-Exempt Bonds** **Post-Issuance Tax Compliance Policies and Procedures**

### **Statement of Purpose**

The Northern Virginia Transportation Authority ("NVRTA") intends to issue bonds the interest on which is excludable from gross income for federal income tax purposes (the "Tax-Exempt Bonds") to obtain funds to finance portions or all of various transportation projects approved for financing by the NVRTA (the "Projects"). The NVRTA has adopted these policies and procedures (these "Policies") to assist in monitoring and maintaining compliance with the provisions of the Internal Revenue Code of 1986, as amended (the "Internal Revenue Code"), and the regulations of the U.S. Treasury promulgated thereunder (the "Treasury Regulations"), applicable to the Tax-Exempt Bonds in order to preserve their tax-exempt status. Compliance with applicable provisions of the Internal Revenue Code and the Treasury Regulations is an ongoing requirement and an integral component of the NVRTA's financial policies and internal controls programs. These Policies specifically cover (i) record retention, (ii) limitations on "private business use," including in particular the rules relating to the taking of "remedial action" to preserve the status of an issue of Tax-Exempt Bonds, and (iii) limitations on earning arbitrage, including the payment of arbitrage rebate to the federal government at various intervals (the "Rebate Requirement").

These Policies require ongoing surveillance through, and sometimes beyond, the final maturity of the particular issue of Tax-Exempt Bonds and may require consultation with Bond Counsel and/or the Council of Counsels (hereinafter referred to collectively as "Counsel") long after the issue date of the issue.

These Policies are intended to reflect best practices, to be revised periodically as the NVRTA's financing plans and other circumstances warrant, including changes in federal tax law, and as the municipal bond market and Internal Revenue Service ("IRS") enforcement each evolve. Failure to conform to any element of these Policies should in no way imply that the NVRTA is not in compliance with the provisions of the Internal Revenue Code applicable to its Tax-Exempt Bonds. In addition, the CFO (defined below) is authorized, after consultation with Counsel to allow deviations from strict compliance with these Policies to the extent necessary to carry out the intent and purpose of these Policies and provided such deviations do not jeopardize the tax-exempt status of any Tax-Exempt Bonds.

Unless otherwise defined, each capitalized term used in these Policies has the meaning set forth in the Master Indenture of Trust dated as of December 1, 2014, as it may be amended or supplemented hereafter (the "Indenture"), or in the Standard Project Agreement for Funding and Administration (the "SPA") between the NVRTA and the Member Locality or other state, regional or local governmental project sponsor that will receive proceeds of the NVRTA's Tax-Exempt Bonds (each a "Project Sponsor").

## **Background**

The NVTA is a political subdivision of the Commonwealth of Virginia created by and existing under Chapter 25, Title 33.2, Code of Virginia of 1950, as amended (the "NVTA Act"). As provided by the NVTA Act, the NVTA embraces the Counties of Arlington, Fairfax, Loudoun and Prince William, and the Cities of Alexandria, Fairfax, Falls Church, Manassas and Manassas Park (collectively, the "Member Localities"). Each Member Locality is located within the boundaries of Planning District 8.

The NVTA Act provides, among other things, that the NVTA (i) will prepare a regional transportation plan for Planning District 8 that will include, but not necessarily be limited to, transportation improvements of regional significance, and those improvements necessary or incidental thereto, and will from time to time revise and amend the plan and (ii) has the power to construct or acquire, by purchase, lease, contract, or otherwise, the transportation facilities specified in the regional transportation plan when adopted.

The NVTA Act empowers the NVTA to issue bonds and other evidences of indebtedness, including Tax-Exempt Bonds, to finance transportation projects benefiting the Member Localities.

The NVTA's Tax-Exempt Bonds are limited obligations of the NVTA and payable solely from the revenues, moneys and other property pledged by the NVTA for such purpose, which principally consist of the Regional Revenues.

The NVTA anticipates that its activities will be limited to funding transportation facilities ("Projects") to be constructed and acquired by the Project Sponsors. The NVTA is not expected to own, lease, control (except via contract), operate or maintain any of the Projects.

The NVTA has developed the SPA to formalize the terms under which an approved Project will receive funding. Each SPA will be executed by the NVTA and the applicable Project Sponsor with respect to each Project.

The SPA provides that the Project Sponsor receives funding on a reimbursement basis, and memorializes the Project budget and cash flow timing. The SPA also obligates the Project Sponsor to comply with the applicable requirements of the Virginia Code and federal law and to provide information to the NVTA so that the NVTA can monitor compliance by the Project Sponsor with applicable law. Each SPA for a Project that is expected to receive proceeds of Tax-Exempt Bonds also contains covenants with which the Project Sponsor must comply to help the NVTA preserve the excludability of interest on such Tax-Exempt Bonds.

### **I. Responsible Officer and Review and Update of Policies**

- A.** The NVTA's Chief Financial Officer (the "CFO") shall be the individual responsible for overseeing tax compliance with regard to the NVTA's Tax-Exempt Bonds. The CFO may delegate responsibilities to such individuals as he or she deems appropriate (each such designee, is a "Tax Compliance Designee"). The CFO, with the assistance from the Tax Compliance Designees, shall be responsible for ensuring an adequate succession plan for transferring tax compliance responsibilities when changes in staff occur.

- B.** The CFO shall use these Policies, together with other procedures applicable to her or his area of responsibility, to timely identify and elevate the resolution of potential or actual tax law violations relating to the NVTA's outstanding Tax-Exempt Bonds.
- C.** The CFO is to review and update these Policies and the associated systems in consultation with the Counsel before each issuance by the NVTA of Tax-Exempt Bonds and otherwise on a periodic basis (at least annually).

## **II. Annual Questionnaires**

- A.** One of the primary sources of the information necessary to monitor the use of the proceeds of the Tax-Exempt Bonds and the property financed and refinanced therewith will be generated pursuant to the questionnaire attached hereto as Appendix A (the "Annual Project Sponsor Questionnaire"). Not less than 30 days after the end of each of the NVTA's fiscal years during the Term of an issue of Tax-Exempt Bonds (as defined below), the CFO will receive a completed Annual Project Sponsor Questionnaire from each Project Sponsor of a Project financed in whole or in part with the issue. The CFO will retain the completed Annual Project Sponsor Questionnaires in accordance with the Records Retention requirements of these Policies.
- B.** Not less than 60 days after the end of each of the NVTA's fiscal years during the Term of an issue of Tax-Exempt Bonds, the CFO will complete the Annual CFO Questionnaire with respect to each issue of the Tax-Exempt Bonds. The form of the Annual CFO Questionnaire is set forth in Appendix B. The CFO will retain the completed Annual CFO Questionnaires in accordance with the Records Retention requirements of these Policies.
- C.** The "Term of an issue of Tax-Exempt Bonds" means the term to final maturity or, if earlier, the final redemption of an issue of the NVTA's Tax-Exempt Bonds, or any Tax-Exempt Bonds issued to refund such issue in whole or in part.

## **III. Records Retention**

- A.** The CFO is to coordinate procedures for record retention and review of such records as more fully described herein and shall be familiar with IRS Forms of the 8038 series, and relevant provisions of the Internal Revenue Code and the Treasury Regulations, including but not limited to Treasury Regulations Sections 1.141-2, 1.141-3, 1.141-12, and 1.148-1 through 1.150-2. Specific records relating to tax compliance to be retained are more fully described in Appendix C.
- B.** Electronic media will be the preferred method for storage of all documents and other records maintained by the NVTA in connection with tax compliance. Document maintenance requirements may change over time, and the CFO shall consult with Counsel to update its records retention policy so as to facilitate continuing compliance with the provisions of the Internal Revenue Code applicable to the NVTA's Tax-Exempt Bonds.
- C.** The Commonwealth of Virginia statutes also address record retention requirements (the "Virginia Record Retention Requirements"). This Post-Issuance Compliance Procedure

is not intended to conflict with the Virginia Record Retention Requirements. It is the NVTAs policy and intention to comply fully with both the federal requirements applicable to Tax Exempt Bonds and the Virginia Record Retention Requirements.

#### **IV. Private Business Use-Change in Use and Remedial Action**

##### **A. Private Business Use Generally**

1. Tax-Exempt Bonds may lose their tax status if they meet (1) (a) the private business use test in Section 141(b)(1) of the Internal Revenue Code, and (b) the private security or payment test in Section 141(b)(2) of the Internal Revenue Code, or (2) the private loan financing test in Section 141(c) of the Internal Revenue Code. The private business use test relates to the use of the proceeds of an issue and the test is met if more than the lesser of (1) \$15,000,000 and (2) 10%<sup>1</sup> of the proceeds of an issue meet the private business use test. Generally, private business use arises if proceeds of an issue are used by persons or entities other than state or local governmental entities ("Nongovernmental Entities") in a trade or business ("Private Business Use"). It is necessary to look to direct and indirect uses as well as actual and beneficial uses. In most cases, Private Business Use arises if a Nongovernmental Entity has special legal entitlements with respect to financed property.
2. Private payments include revenues derived, directly or indirectly, with respect to property used or to be used for a Private Business Use. Private security takes into account the payment of debt service on an issue that is directly or indirectly secured by any interest in property used or to be used for a Private Business Use.
3. For purposes of the private security or payment test, generally applicable taxes are not taken into account (that is, are not payments from a Nongovernmental Entity and are not payments in respect of property used for a private business use). Under current law, a generally applicable tax is an enforced contribution exacted pursuant to legislative authority in the exercise of the taxing power that is imposed and collected for the purpose of raising revenue to be used for governmental or public purposes. A generally applicable tax must have a uniform tax rate that is applied to all persons of the same classification in the appropriate jurisdiction and a generally applicable manner of determination and collection.
4. The Regional Revenues pledged to secure and pay the Bonds are the receipts from additional retail sales and use taxes, a regional congestion relief fee and transient occupancy taxes levied by the General Assembly of Virginia in the Member Localities, credited to the Northern Virginia Transportation Authority Fund (the "NVTAs Fund"), and appropriated by the General Assembly from the NVTAs Fund to the NVTAs for credit to the Revenue Fund established under the Indenture, net of the 30 percent transferred to the Member Localities as provided under the NVTAs Act. It is anticipated that in each federal tax certificate and compliance agreement ("Tax Certificate") executed for a series of Tax-Exempt Bonds, the NVTAs will be able to

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<sup>1</sup> The 10% limitation is reduced to 5% with respect to Private Business Use that is either unrelated to governmental uses of proceeds of the same issue, or disproportionate to related governmental uses of proceeds of such issue.

represent, in consultation with Counsel, that the Regional Revenues will be derived from generally applicable taxes.

5. The Projects are expected to be either non-revenue-producing, such as freeway improvements, or Projects the revenues from which inure to the benefit of the Project Sponsors or other governmental units, such as WMATA or the Virginia Railway Express. Neither the Member Localities nor any of the other Project Sponsors are expected to be "related persons" to the NVRTA for federal tax purposes.
  6. Notwithstanding that it is anticipated that most of the NVRTA's issuances of Tax-Exempt Bonds will have no private security or payments, the SPA for a Tax-Exempt Bond-Financed Project will require the Project Sponsor to limit the amount of Private Business Use of such Project. The NVRTA is doing this (i) out of an abundance of caution and (ii) because most of the Member Localities and other Project Sponsors are subject to similar requirements for each of their bond-financed capital projects. Many of the questions on the Project Sponsor Questionnaire relate to compliance with the Private Business Use restrictions.
  7. Private Business Use and Private Payments are described more fully in Appendix D attached hereto. In addition to Appendix D, the Tax Compliance Designee shall refer to the Tax Certificate executed for a particular issue of Tax-Exempt Bonds and the related SPAs for purposes of ascertaining the application of the private business tests and the private loan financing test to such issue of Tax-Exempt Bonds and unique circumstances that may be applicable to the issue. The Tax Compliance Designee shall also consult with Counsel as appropriate for clarification and guidance with respect to the application of such tests.
- B.** The following are specific NVRTA policies with respect to addressing Private Business Use:
- **Structuring of Arrangements to Avoid Private Business Use or Private Payments.** It is the policy of the NVRTA that, to the extent consistent with the governmental objectives of the NVRTA, any potential arrangement that might result in Private Business Use of bond financed property shall be structured by the NVRTA and the Project Sponsors so as to avoid or minimize Private Business Use or Private Payments.
  - **Use Short-Term Use Exception to Private Business Use.** For recurring arrangements that have the potential to result in Private Business Use (e.g., periodic uses of meeting rooms by community members), it is the general policy of the NVRTA to work with the Project Sponsors to structure such arrangements to satisfy a Short-Term Use Exception to Private Business Use (defined in Appendix D).
  - **Allocating Equity to Project Components with Private Business Use or Private Payments.** It is the general policy of the NVRTA that to the extent an arrangement that might result in Private Business Use cannot be structured so as to avoid Private Business Use or Private Payments, where reasonably possible, the

NVTA will finance the subject property on a PayGo basis or with taxable debt. The allocations of PayGo funds and taxable debt proceeds shall be evidenced in the Final Allocation described below if the Project was financed in part by Tax-Exempt Bonds.

- **Allocation of Bond Proceeds to Assets Financed.** For each issue of Tax-Exempt Bonds, the NVTA shall require the related Project Sponsors to produce and maintain records establishing costs financed. Guidelines for allocating proceeds to expenditures/costs are set forth in Treasury Regulations Sections 1.141-6 and 1.148-6. Generally, the NVTA may use any reasonable, consistently applied accounting method to account for gross proceeds, investments and expenditures of an issue. Such information and allocations shall be evidenced in the Final Allocation described below.
- **Final Allocations.** For each issue of Tax-Exempt Bonds, the CFO must prepare a written account of the allocation of proceeds to expenditures not later than 12 months after the last date an expenditure is paid with the proceeds of the issue but in no event later than the date 60 days after the fifth anniversary of the respective issue date or the date 60 days after the retirement of the issue, if earlier. Such written account is referred to in these Policies as the "Final Allocation." The NVTA acknowledges that, in the absence of records to establish an accounting method for an issue and the allocation of proceeds of an issue, the specific tracing method applies.
- **Quantifying Private Business Use and Periodic Review.** The NVTA will monitor compliance with the private business tests and the private loan financing tests and develop and maintain a log with respect to each issue of Tax-Exempt Bonds, and periodically (e.g., annually), set forth the amount of proceeds of such issue allocable to each separate facility financed by the NVTA, and the amount of proceeds of such issue attributable to Private Business Use. The primary tool for monitoring compliance with this Policy will be the Annual Project Sponsor Questionnaire.
- **Dispositions.** It is the policy of the NVTA that all dispositions of assets financed with Tax-Exempt Bonds are to be addressed in a manner that does not jeopardize the tax-exempt status of the NVTA's Tax-Exempt Bonds.

### C. Change in Use and Remedial Action

1. Even though the NVTA reasonably expects on the issue date of each issue of Tax-Exempt Bonds to satisfy all applicable federal tax requirements relating to such bonds for so long as the bonds remain outstanding, post-issuance events can occur that jeopardize compliance with these requirements. "Change in use" generally relates to Private Business Use considerations and generally means a change in the use of proceeds of an issue of State or local bonds from the use for which those proceeds were used, or expected to be used, as of the date of issue. Change in use transactions that may affect the status of Tax-Exempt Bonds often include the sale, transfer or lease of property financed with bond proceeds to another entity (often the other entity is a for-profit entity). Such transactions may be entered into out of necessity or

without an understanding that it may be contrary to the private business tests. As an arbitrage example, the NVTA may inadvertently violate an applicable yield restriction requirement with respect to an issue of Tax-Exempt bonds.

## **V. Arbitrage and Rebate**

Section 148 of the Internal Revenue Code, the regulations promulgated thereunder and pronouncements relating thereto (the "Arbitrage Rules") are intended to ensure that issuers of Tax-Exempt Bonds, such as the NVTA, issue Tax-Exempt Bonds for the primary purpose of financing property needed by the NVTA to carry out its governmental purposes, and not for the purpose of exploiting the difference between the interest cost to the NVTA on the Tax-Exempt Bonds and the yield on higher yielding taxable obligations. Section 148(f) of the Internal Revenue Code, which sets forth the "Rebate Requirement," requires that an amount equal to the sum of (i) the excess of the aggregate amount earned on all investments over the amount that would have been earned if such investments had a yield equal to the yield with respect to the respective Tax-Exempt Bonds, plus (ii) any income attributable to the excess described in (i), be paid to the United States Treasury.

Compliance with the Arbitrage Rules is required on a continuing basis and primarily involves ensuring that proceeds of Tax-Exempt Bonds are invested in accordance with the applicable yield limitations, and rebating certain investment earnings to the United States Treasury, unless an exception to the Rebate Requirement can be satisfied.

In furtherance of complying with the Arbitrage Rules, the CFO shall oversee the undertaking of the actions set forth in Appendix E.

**VI. Post-issuance Credit Enhancement Transactions. Prior to engaging in any post-issuance credit enhancement transactions (e.g., bond insurance, letter of credit) or hedging transactions (e.g., interest rate swaps, caps), the CFO is to consult with Counsel.**

**VII. Refunding Bonds. In the case of refunding bonds, the CFO should coordinate with the NVTA's financial advisor, Counsel, the bond trustee or escrow agent to arrange for the purchase of the refunding escrow securities, and should obtain a computation of the yield on such escrow securities from the NVTA's outside arbitrage rebate specialist.**

## **VIII. Voluntary Compliance Agreement Program**

If the NVTA does not stay within the limitations of the private business tests, the private loan financing tests, or the arbitrage requirements described herein, the CFO shall work with Counsel to take appropriate steps to preserve the tax-exempt status of the respective Tax-Exempt Bond issue, including taking appropriate "remedial action" pursuant to Treasury Regulations Section 1.141-12. Remedial action for this purpose may consist of the redemption or defeasance of bonds and/or the investment/expenditure of amounts received as a result of the sale of bond financed property in other qualified approved project financings of the NVTA. The NVTA may also be able to take corrective action under the Voluntary Compliance Agreement Program of the IRS (commonly referred to as VCAP). Counsel is

available to provide guidance as to the implementation of such action. The CFO shall maintain copies of the documentation with respect to any remedial actions taken.

## **IX. Reissuance**

Generally, a reissuance occurs when there are significant changes to the terms of a Tax-Exempt Bond so that the bond ceases to be the same bond for federal tax purposes. A reissuance is a deemed exchange of the modified bond for the original bond for federal income tax purposes. The reissuance rules apply to all Tax-Exempt Bonds, from a large bond issue, a loan from Virginia Resources Authority, a small lease entered into to purchase equipment and to a note held by a local bank.

The CFO is to (i) identify and consult with Counsel regarding any post-issuance change to any terms of an issue of Tax-Exempt Bonds, (ii) request Counsel to determine whether such potential change would cause the issue to be treated as "reissued" for federal income tax purposes, and (iii) take such action as may be required to preserve the tax-exempt status of the issue.

## **X. Training Policy**

The NVTA personnel are to periodically obtain training with regard to the record retention, private business use, arbitrage and rebate issues addressed by these Policies. The training shall include a review of the NVTA's recent compliance initiatives, discussions relating to restrictions on the use of proceeds of Tax-Exempt Bonds, arbitrage requirements and recent developments with respect to Tax-Exempt Bonds. Training is especially warranted in the event of changes in law or changes in the NVTA staff.

## **XI. Additional Resources**

Additional resources available to the NVTA include the following, accessible on the internet.

### Description

IRS Form 13907	Tax-Exempt Bond Financings Compliance Check Questionnaire
IRS Form 14246	Advance Refunding Bonds Compliance Check Questionnaire
IRS Form 14429	Tax-Exempt Bond Voluntary Closing Agreement Program Request
IRS Publication 3755	Addresses filing requirements applicable to tax-exempt bonds ( <i>e.g.</i> , 8038-G and 8038-T)
IRS Publication 4079	IRSTax-Exempt Governmental Bonds Compliance Guide
<a href="http://www.irs.gov/taxexemptbond">http://www.irs.gov/taxexemptbond</a>	IRS website providing Information for the Tax Exempt Bond Community

**Approved by the Finance Committee:** December 5, 2014

**Approved by Northern Virginia Transportation Authority:** December 11, 2014

**APPENDIX A**

**ANNUAL PROJECT SPONSOR QUESTIONNAIRE**

The \_\_\_\_\_ ("Project Sponsor") is the "Recipient Entity" under the Standard Project Agreement for Funding and Administration dated \_\_\_\_\_, \_\_\_\_ (the "SPA") between the Northern Virginia Transportation Authority ("NVTA") and the Project Sponsor.

Unless otherwise defined, each capitalized term used in this Annual Project Sponsor Questionnaire (this "Questionnaire") has the meaning set forth in the SPA.

Under the SPA, the Project Sponsor is to receive a portion of the proceeds (the "NVTA Bond Proceeds") of the NVTA's \_\_\_\_\_ Bonds, Series \_\_\_\_ (the "NVTA Bonds"), to assist the Project Sponsor in the financing, in whole or in part, of the NVTA Project Number \_\_\_\_\_, which is described on Appendix A to the SPA (the "Project").

The undersigned acknowledges that this Questionnaire is designed to document and evidence the Project Sponsor's compliance with provisions of the SPA, including but not limited to the Project Sponsor's agreement to comply with the tax covenants attached to the SPA. The tax covenants are designed to preserve the tax-exempt status of the NVTA Bonds.

1. Has the undersigned been duly authorized by the governing body of the Project Sponsor to complete and submit this Questionnaire?

Yes \_\_\_\_\_ No \_\_\_\_\_

2. Is the description of the Project set forth on Appendix A to the SPA still accurate in all material respects?

Yes \_\_\_\_\_ No \_\_\_\_\_

If "No," please attach an explanation.

3. Has the Project been completed?

Yes \_\_\_\_\_ No \_\_\_\_\_

If "Yes," please provide the date of final completion: \_\_\_\_\_

If "No," please provide the expected final completion date: \_\_\_\_\_

4. If the Project has been completed, has the final allocation of the NVTA Bond Proceeds and other funds to the expenditures for the Project been completed?

Yes \_\_\_\_\_ No \_\_\_\_\_

If "Yes," please attach a copy of the final allocation.

If "No," please provide the date that the final allocation will be provided \_\_\_\_\_.

[Note that these Policies require a final allocation for the Bonds not later than 12 months after the final completion of all of the financed Projects.]

5. If the Project has not been completed, are the Project Budget and Cash Flow projections attached as Appendix B to the SPA still accurate?

Yes \_\_\_\_\_ No \_\_\_\_\_ N/A \_\_\_\_\_

If "No," please attach an update to Appendix B to the SPA.

6. Is the Project owned by the Project Sponsor for federal tax purposes?

Yes \_\_\_\_\_ No \_\_\_\_\_

If "No," please attach an explanation.

7. Are there any lease arrangements that may result in Private Business Use of the Project?

Yes \_\_\_\_\_ No \_\_\_\_\_

If "Yes," please attach an explanation.

8. Are there any management or service contracts that may result in Private Business Use of all or any portion or function of the Project?

Yes \_\_\_\_\_ No \_\_\_\_\_

If "Yes," please attach an explanation and provide a copy of any such contract.

9. Enter the percentage of the portion of the Project financed by the NVTA Bond Proceeds that is used in a Private Business Use by a Nongovernmental Entity.

\_\_\_\_\_ %

10. Has there been any sale or disposition of any of the Project to a Nongovernmental Entity since the NVTA Bonds were issued?

Yes \_\_\_\_\_ No \_\_\_\_\_

If "Yes," please attach an explanation.

11. Has the Project Sponsor used any of the NVTA Bond Proceeds directly or indirectly to make or finance loans to Nongovernmental Entities?

Yes \_\_\_\_\_ No \_\_\_\_\_

If "Yes," please attach an explanation.

12. Has the Project Sponsor requisitioned or spent any of the NVTA Bond Proceeds for any Project Cost not constituting a Capital Expenditure?

Yes \_\_\_\_\_ No \_\_\_\_\_

If "Yes," please attach an explanation.

13. Has or will the Project Sponsor have any funds that are restricted, segregated, legally required or otherwise intended to be used, directly or indirectly, for the purposes for which the Project Sponsor is receiving NVTA Bond Proceeds, other than those funds reflected on Appendix B to the SPA?

Yes \_\_\_\_\_ No \_\_\_\_\_

If "Yes," please attach an explanation.

14. Have all the NVTA Bond Proceeds requisitions by the Project Sponsor been (i) remitted directly by the NVTA to the Project contractors/vendors or applied to reimburse the Project Sponsor for its funds that have been so remitted as (ii) paid to the contractors/vendors within five (5) banking days after the date on which the NVTA advances the amount of the requisition?

Yes \_\_\_\_\_ No \_\_\_\_\_

If "No," please attach an explanation. Please note that Appendix D of the SPA provides that the NVTA may request detailed information about the investment of any NVTA Bond Proceeds not remitted or paid as described in this Question 14.

15. Is any portion of the Project NOT intended to be available or in fact is NOT reasonably available for General Public Use?

Yes \_\_\_\_\_ No \_\_\_\_\_

If "Yes," please attach an explanation.

16. Other than as may be described above or in any attachment to this Questionnaire, is the Project Sponsor in default of any of its obligations under the SPA?

Yes \_\_\_\_\_ No \_\_\_\_\_

If "Yes," please attach an explanation.

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

\_\_\_\_\_  
Authorized Representative

**APPENDIX B**

**ANNUAL CFO QUESTIONNAIRE**

**Part I - General**

1. Name of Bond Issue: \_\_\_\_\_
2. Issue Date: \_\_\_\_\_
3. Original Principal Amount: \$\_\_\_\_\_
4. Issue Price: \$\_\_\_\_\_
5. Fiscal Year: \_\_\_\_\_ ("FY")

**Part II – Proceeds**

1. Amount of bonds retired before and during the FY: \$\_\_\_\_\_
2. Amount of bonds legally defeased before and during the FY: \$\_\_\_\_\_
3. Total proceeds of issue: \$\_\_\_\_\_
4. Gross proceeds in reserve funds: \$\_\_\_\_\_
5. Capitalized interest from proceeds: \$\_\_\_\_\_
6. Proceeds in refunding escrows: \$\_\_\_\_\_
7. Issuance costs from proceeds: \$\_\_\_\_\_
8. Credit enhancement from proceeds: \$\_\_\_\_\_
9. Working capital expenditures from proceeds: \$\_\_\_\_\_
10. Capital expenditures from proceeds: \$\_\_\_\_\_
11. Other spent proceeds: \$\_\_\_\_\_
12. Other unspent proceeds: \$\_\_\_\_\_
13. Date of completion of all Projects financed by bonds: \_\_\_\_\_
14. Were the bonds issued as part of a current refunding issue?  
Yes \_\_\_\_\_ No \_\_\_\_\_
15. Were the bonds issued as part of an advance refunding issue?  
Yes \_\_\_\_\_ No \_\_\_\_\_

16. Has the final allocation of proceeds been made?  
 Yes \_\_\_\_\_ No \_\_\_\_\_
17. Does the NVT A maintain adequate books and records to support the final allocation of proceeds?  
 Yes \_\_\_\_\_ No \_\_\_\_\_
18. Have all Annual Project Sponsor Questionnaires for Projects financed by the Bonds been completed and submitted in a timely manner?  
 Yes \_\_\_\_\_ No \_\_\_\_\_
- If "No," please attach an explanation.

**Part III – Arbitrage**

1. Has the issuer filed Form 8038-T, Arbitrage Rebate, Yield Reduction and Penalty in Lieu of Arbitrage Rebate?  
 Yes \_\_\_\_\_ No \_\_\_\_\_
2. If "No," to question 1, did the following apply?
- a. Rebate not due yet?  
 Yes \_\_\_\_\_ No \_\_\_\_\_
  - b. Exception to rebate?  
 Yes \_\_\_\_\_ No \_\_\_\_\_
  - c. No rebate due?  
 Yes \_\_\_\_\_ No \_\_\_\_\_
  - d. If "Yes" to question 2c, what date was the rebate computation was performed?  
 \_\_\_\_\_, \_\_\_\_\_
3. Is the bond issue a variable rate issue?  
 Yes \_\_\_\_\_ No \_\_\_\_\_
4. a. Has the organization or the governmental issuer entered into a qualified hedge with respect to the bond issue?  
 Yes \_\_\_\_\_ No \_\_\_\_\_
- b. Name of provider: \_\_\_\_\_
  - c. Term of hedge: \_\_\_\_\_

- d. Was the hedge superintegrated?  
Yes \_\_\_\_\_ No \_\_\_\_\_
- e. Was the hedge terminated?  
Yes \_\_\_\_\_ No \_\_\_\_\_
- 5. a. Were gross proceeds invested in a guaranteed investment contract (GIC)?  
Yes \_\_\_\_\_ No \_\_\_\_\_
- b. Name of provider: \_\_\_\_\_
- c. Term of GIC: \_\_\_\_\_
- d. Was the regulatory safe harbor for establishing the fair market value of the GIC satisfied?  
Yes \_\_\_\_\_ No \_\_\_\_\_
- 6. Were any gross proceeds invested beyond an available temporary period?  
Yes \_\_\_\_\_ No \_\_\_\_\_

**Part IV – Miscellaneous**

- 1. Have the Policies been reviewed during the FY and, if necessary or desirable, updated or amended?  
Yes \_\_\_\_\_ No \_\_\_\_\_
- 2. [Reserved]
- 3. [Reserved]

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

\_\_\_\_\_  
Chief Financial Officer, Northern  
Virginia Transportation Authority

## APPENDIX C

### RETENTION OF RECORDS

Retention of Records. The NVTA is to retain the following documentation (the "Records"):

- (a) All legal and accounting documents relating to proceeds of the Tax-Exempt Bonds, including opinions of counsel and the tax certificate with respect to each issue of Tax-Exempt Bonds.
- (b) Expenditure of proceeds of Tax-Exempt Bonds as described below.
  - (i) Documents evidencing the expenditure of the proceeds of the Tax-Exempt Bonds and investment earnings thereon and the specific assets financed with such proceeds, including projected draw schedules and invoices (*e.g.*, records with respect to the bond accounts and funds);
  - (ii) Documents setting forth all funds and accounts relating to the Tax-Exempt Bonds;
  - (iii) Documents pertaining to the investment of the proceeds of the Tax-Exempt Bonds (*e.g.*, records with respect to the bond accounts and funds), including the purchase and sale of securities, guaranteed investment contracts, and swap/hedge transactions;
  - (iv) With respect to all investments acquired in any fund or account in connection with the Tax-Exempt Bonds, the specific information set forth under the heading "Arbitrage and Rebate" herein;
  - (v) The Annual Project Sponsor Questionnaires;
  - (vi) Each of the requisitions submitted under the SPA; and
  - (vii) Each of the Annual CFO Questionnaires.
- (c) Documents evidencing any allocations with respect to the proceeds of the Tax-Exempt Bonds, including the Final Allocation described in the Policies;
- (d) [Should be submitted by the Project Sponsors and retained by the NVTA] Documents evidencing the use and ownership of the bond financed property, including contracts for the use of such property, and documents evidencing the sale or other disposition of the bond financed property; and
- (e) Copies of the documentation with respect to any remedial actions.

Required Retention Periods. The NVTA will retain the Records until the date that is six years after the complete retirement of the related issue of Tax-Exempt Bonds and any Tax-Exempt Bonds issued to refund such issue in whole or in part.

Form of Records. The NVTA will keep all records in a manner that ensures complete access thereto for the applicable above described period either in hard copy or electronic format. If the records are kept in electronic format, compliance is necessary with the requirements of Revenue Procedure 97-22, 1997-1 C.B. 652 (or subsequent guidance provided by the Internal Revenue Service), which provides guidance for maintaining books and records by using an electronic storage system that either images their hardcopy books and records or transfers their computerized books and records to an electronic storage media (*e.g.*, an electronic data compression system).

## APPENDIX D

### DEFINITIONS OF PRIVATE PAYMENTS AND PRIVATE BUSINESS USE

**Definition of Private Payments.** For purposes of these Policies, "Private Payments" means payments derived, directly or indirectly, in respect of property used or to be used for Private Business Use. As an example, if there is Private Business Use with regard to a facility of the NVTAs as a result of a non-complying management contract and the NVTAs customers make payments with respect to such facility, such payments may be treated as Private Payments.

**Definition of Private Business Use.** For purposes of these Policies, the term "Private Business Use" means any activity that constitutes a trade or business that is carried on by persons or entities other than state or local governmental entities ("Nongovernmental Entities"). State or local governmental entities are referred to herein as "Governmental Entity." The United States of America is not treated as a Governmental Entity. Any activity carried on by a Person other than a natural person is treated as a trade or business. Any asset financed with Tax-Exempt Bonds not owned by a Governmental Entity will be considered to be used in a Private Business Use.

In most cases, Private Business Use will occur only if a Nongovernmental Entity has a special legal entitlement to use the bond financed property. Such a special legal entitlement includes ownership or actual or beneficial use pursuant to a lease, management, service or incentive payment contract, output contract, research agreement or similar arrangement. Private Business Use may also be established solely on the basis of a special economic benefit to one or more Nongovernmental Entities.

**Management and Service Contracts.** With respect to management and service contracts, the determination of whether a particular contract results in Private Business Use shall be based on the application of the Code and Treasury Regulations, including particularly Revenue Procedure 97-13, 1997-1 C.B. 632, as amended by Revenue Procedure 2001-39, 2001-2 C.B. 39 ("Revenue Procedure 97-13"). A summary of such Revenue Procedures is set forth in Appendix F to these Policies and a summary is set forth in a separate Memorandum to Clients for Tax-Exempt Financing Modified Rules Relating to Management Contracts provided to the NVTAs by Bond Counsel and is typically attached to the Tax Certificate executed in connection with each issue of Tax-Exempt Bonds. Such management and service contracts include, but are not limited to, operating agreements, construction management agreements, business services agreements, technical consulting services agreements and other similar agreements. Further, for purposes of determining the nature of a Private Business Use, any management or service contract that is properly characterized as a lease for federal income tax purposes is treated as a lease. Consequently, any such agreements, even though referred to as a management or service contract may nevertheless be treated as a lease. In determining whether a management or service contract is properly characterized as a lease, it is necessary to consider all of the facts and circumstances, including the following factors: (i) the degree of control over the property that is exercised by a Nongovernmental Entity; and (ii) whether a Nongovernmental Entity bears risk of loss of the financed or refinanced property.

**Short-Term Use Exception.** Arrangements fitting within either of the following two exceptions will not result in Private Business Use.

- **Use Pursuant to Generally Applicable and Uniformly Applied Rates.** Use pursuant to an arrangement will not result in Private Business Use if (i) the arrangement does not transfer ownership of the property to a Nongovernmental Entity, (ii) the term of the use under the arrangement, including all renewal options, is not longer than 100 days, and (iii) compensation under the arrangement is based on generally applicable and uniformly applied rates.

- **Use Pursuant to Negotiated Arm's Lengths Arrangements.** Use pursuant to an arrangement will not result in Private Business Use if (i) the arrangement does not transfer ownership of the property to a Nongovernmental Entity, (ii) the term of the use under the arrangement, including all renewal options, is not longer than 50 days, and (iii) the arrangement is a negotiated arm's-length arrangement and compensation under the arrangement is at fair market value.

**Construction Contracts and Other Purchases of Capital Assets.** A contract with a Nongovernmental Entity to construct capital assets or to sell capital assets to the NVTAs does not generally result in Private Business Use unless additional services are being provided by the Nongovernmental Entity in connection with such contract, e.g., construction management or consulting services. Such services with respect to bond financed property must be analyzed for Private Business Use under Revenue Procedure 97-13. Public-private partnerships should be carefully analyzed for this purpose.

**Materials and Commodity Supply Contracts.** A contract or purchase order for materials, commodities, inventory or other supplies from a Nongovernmental Entity does not generally result in Private Business Use unless there are additional services being provided by the Nongovernmental Entity in connection with the contracts, e.g., consulting services. Such service arrangements with respect to bond financed property must be analyzed for Private Business Use under Revenue Procedure 97-13. Public-private partnerships should be carefully analyzed for this purpose.

**Ownership of bond financed property.** If bond financed property is owned by a Nongovernmental Entity, such ownership will be considered Private Business Use of the asset for purposes of the Private Business Use rules.

**Leases of bond financed property.** All leases of bond financed property to a Nongovernmental Entity constitute Private Business Use of such property unless an exception for short term use is satisfied.

**Non-possessory Incidental Use.** Any non-possessory incidental use such as vending machines, bank machines and similar uses may be excluded from the Private Business Use rules to the extent of 2.5% of an issue of Tax-Exempt Bonds. Such use of bond financed property shall be tracked by Tax Compliance Designee.

**Special Priority Rights or Special Economic Benefits.** A contract which conveys special priority rights or special economic benefits in bond financed property to a Nongovernmental Entity may create Private Business Use. In determining whether special economic benefit gives rise to Private Business Use of bond financed property, it is necessary to consider all of the facts and circumstances, including one or more of the following factors: (i) whether the bond financed property is functionally related or physically proximate to property used in the trade or business of a Nongovernmental Entity; (ii) whether only a small number of Nongovernmental Entities receive the economic benefit; and (iii) whether the cost of the bond financed property is treated as depreciable by the Nongovernmental Entity. Such arrangements with respect to bond financed property must be reviewed by Bond Counsel.

**Contract Logs.** For each of the items listed in the Contract Logs, records shall be maintained setting forth (i) the issue or issues of Tax-Exempt Bonds that financed property used in connection with such arrangement, (ii) the amount of proceeds of such issue allocable to such property, and (iii) the amount of payments, if any, expected with respect to such arrangement, net of the incremental costs incurred by the NVTAs to operate and maintain the facility as a result of such arrangement. [Should be compiled by the Project Sponsor, but retained by the NVTAs.]

## **APPENDIX E**

### **ARBITRAGE AND REBATE**

The CFO of the NVTA shall oversee the undertaking of the following actions.

- Refer to the Tax Certificate executed for a particular issue of Tax-Exempt Bonds for purposes of ascertaining the application of the Arbitrage Rules to such issue of Tax-Exempt Bonds.
- Consult with Counsel as appropriate for clarification and guidance with respect to application of the Arbitrage Rules.
- Review these Policies with Counsel periodically (at least annually) and refine and update the procedures as needed.
- Ensure that adequate records are established and maintained to set forth the date, amount and nature of each expenditure of the Bond Proceeds of each issue of Tax-Exempt Bonds and investment earnings thereon. Specifically, records of the following are to be established and maintained for each investment of Bond Proceeds: (i) the purchase date, (ii) the purchase price, (iii) information establishing that the purchase price is the fair market value as of such date (e.g., the published quoted bid by a dealer in such an investment on the date of purchase), (iv) any accrued interest paid, (v) the face amount, (vi) the coupon rate, (vii) periodicity of interest payments, (viii) disposition price, (ix) any accrued interest received, and (x) disposition date.
- For each issue of fixed rate Tax-Exempt Bonds, if any, obtain a computation of the yield on such issue from the NVTA's financial advisor, and obtain from Counsel the Tax Certificate and a listing of all arbitrage yield restrictions attributable to Bond Proceeds or amounts treated as Bond Proceeds of each such issue. The tax certificate will typically contain the information described in the preceding sentence.
- For each issue of variable rate Tax-Exempt Bonds, obtain from Bond Counsel the Tax Certificate and a listing of all arbitrage yield restrictions attributable to Bond Proceeds or amounts treated as Bond Proceeds of each such issue.
- Maintain with respect to each issue of Tax-Exempt Bonds a schedule setting forth the latest date the Bond Proceeds of each issue may be invested at an unrestricted yield;
- The benchmarks that must be satisfied in order to meet exceptions to the arbitrage rebate requirements (a general description of the rebate exceptions is set forth in Appendix F attached hereto); and
- The dates on which any arbitrage rebate computations are required to be completed and arbitrage rebate is required to be paid to the United States Treasury.
- Monitoring the expenditure of Bond Proceeds and any investment earnings, which monitoring shall include obtaining and reviewing monthly reports of the expenditure and investment of proceeds of each issue of Tax-Exempt Bonds.

- Maintain a procedure for the allocation of proceeds of each issue of Tax-Exempt Bonds and investment earnings to expenditures, including the reimbursement of pre-issuance expenditures.
- Consult with and seek the assistance of the NVTAs financial advisor as needed to comply with and memorialize compliance with the requirements set forth in these Policies.
- Engage a firm with expertise in the area of arbitrage rebate compliance (the "Rebate Consultant") with respect Tax-Exempt Bonds to arrange, as necessary, for the monitoring of Bond Proceeds expenditure for compliance with various expenditure exceptions (described in Appendix F) and timely computation of arbitrage rebate or arbitrage yield reduction liability.
- If rebate or a yield reduction payment is due to the IRS, arrange for the timely filing of Form 8038-T and the payment of such rebate liability.

## APPENDIX F

### REBATE EXCEPTIONS

#### Bona Fide Debt Service Fund Exceptions

Amounts earned on money in a bona fide debt service fund shall not be taken into account for a bond year for purposes of complying with the Rebate Requirement. For purposes of complying with the Rebate Requirement with respect to issues other than as described in the preceding sentence, amounts earned on money in a bona fide debt service Fund shall not be taken into account for a Bond Year if the gross earnings thereon are less than \$100,000; an issue with an average annual debt service not in excess of \$2,500,000 may be treated as satisfying this \$100,000 limitation. A bona fide debt service fund is defined as a fund that (a) is used primarily to achieve a proper matching of revenues with principal and interest payments within each bond year, and (b) is depleted at least once each bond year, except for a reasonable carryover amount not to exceed the greater of the earnings on the fund for the immediately preceding bond year or one-twelfth of the principal and interest payments on the issue for the immediately preceding bond year.

#### Expenditure Exceptions

The "Six-Month Exception" to rebate is set forth in subsection (a) below and the "Eighteen-Month Exception" to rebate is set forth in subsection (b) below. The "Two-Year Exception" to rebate, available only with respect "to available construction proceeds," is set forth in subsections (c) and (d) below.

(a) **Six-Month Exception.**

- (i) In General: The Six-Month Exception will be treated as having been satisfied if (A) all "**Gross Proceeds**"<sup>2</sup> of the Tax-Exempt Bonds are allocated to expenditures for the governmental purposes of the Tax-Exempt Bonds no later than the date that is six months after the date of issuance of the Tax-Exempt Bonds, and (B) the Rebate Requirement is satisfied with respect to [ 1 ] other Gross Proceeds that arise after six months from the date of issue but that are not reasonably anticipated to arise as of the date of issue, [2] repayment of any grants made with proceeds of the Tax-Exempt Bonds, (3) sale or investment proceeds on payments under a purpose investment and [4] amounts on deposit in a reasonably required reserve or replacement fund, if any.
- (ii) **Gross Proceeds.** For purposes of meeting clause (i) above, the term Gross Proceeds excludes (A) amounts on deposit in the Debt Service Fund, (B) other Gross Proceeds that arise after six months from the date of issue but that are not reasonably anticipated to arise as of the date of issue, (C) repayment of any grants made with proceeds of the Tax-Exempt Bonds, (D) sale or investment proceeds on payments under any purpose

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<sup>2</sup> Gross Proceeds means proceeds and replacement proceeds, within the meaning of Treasury Regulation Section 1.148-1 Under Section 1.148-1 of the Treasury Regulations, proceeds are amounts derived from the sale of the Tax Exempt Bonds, investment earnings thereon and transferred proceeds of an issue. Under Section 1.148-1 of the Treasury Regulations, amounts are replacement proceeds of an issue if the amounts have a sufficiently direct nexus to the issue or to the governmental purpose of the issue to conclude that the amounts would have been used for that governmental purpose if the proceeds of the issue were not used or to be used for that governmental purpose. Replacement proceeds are more fully described in Section 1.148-1(c) and include, but are not limited to, sinking funds, pledged funds and "other replacement proceeds."

investment, and (E) amounts on deposit (if any) in a reasonably required reserve or replacement fund, as defined in Treasury Regulation Section 1.148-7(b)(5).

- (iii) **Additional Six Months for Non-Private Activity Bonds.** The Six-Month Exception will be treated as satisfied if, in addition to satisfying subparagraph (ii) of this subsection (a), all Gross Proceeds of the Tax-Exempt Bonds are expended as provided in paragraph (i) of this subsection (a) except for an amount of Gross Proceeds that does not exceed the lesser of five percent (5%) of the proceeds of the Tax-Exempt Bonds and \$100,000 and such unexpended amount of Gross Proceeds is expended within one year from the date of issuance of the Tax-Exempt Bonds.

(b) **Eighteen-Month Exception.**

- (i) **In General.** The Eighteen-Month Exception will be treated as having been satisfied if (A) all Eighteen-Month Moneys (as defined in paragraph (ii) below) meet the Eighteen-Month Test, (B) the Rebate Requirement is satisfied with respect to all Gross Proceeds of the Tax-Exempt Bonds other than Eighteen-Month Moneys and amounts on deposit in a bona fide debt service fund for the Tax-Exempt Bonds, and (C) all Eighteen-Month Moneys qualify for the three (3) year temporary period set forth in Section 1.148-2(e)(2) of the Treasury Regulations.
- (ii) **Eighteen-Month Moneys.** For purposes of meeting paragraph (b)(iii) below, the term "Eighteen-Month Moneys" means all Gross Proceeds of the Tax-Exempt Bonds other than (A) amounts on deposit in a bona fide debt service fund, (B) Gross Proceeds of the Tax-Exempt Bonds that arise after eighteen (18) months from the date of issue but are not reasonably anticipated to arise as of the date of issue, (C) repayment of grants financed with proceeds of the Tax-Exempt Bonds, (D) sale or investment proceeds derived from payments under any purpose investment of the Tax-Exempt Bonds, and (E) any amounts on deposit in a reasonably required reserve or replacement fund, as defined in Treasury Regulation Section 1.148-7(b)(5). For purposes of complying with the first two spending periods set forth in paragraph (b) (iii) below, above, the estimated amount of investment earnings as of the issue date (based on reasonable expectations) are to be included in the gross proceeds of the issue.
- (iii) **Eighteen-Month Test.** To meet the Eighteen-Month Test, (A) at least fifteen percent (15%) of the Eighteen-Month Moneys have been allocated to expenditures for the governmental purposes of the Tax-Exempt Bonds within the six (6) month period beginning on the date of issuance of the Tax-Exempt Bonds, (B) at least sixty percent (60%) of the Eighteen-Month Moneys have been allocated to expenditures for the governmental purposes of the Tax-Exempt Bonds within the one (1) year period beginning on the date of issuance of the Tax-Exempt Bonds and (C) all of the Eighteen-Month Moneys have been expended for the governmental purposes of the Tax-Exempt Bonds within the eighteen (18) month period beginning on the date of issuance of the Tax-Exempt Bonds.
- (iv) **Reasonable Retainage.** For purposes of paragraph (iii) of this subsection (b), an issue will not fail to satisfy the spending requirement for the third spending period as a result of a reasonable retainage if such amount is allocated to expenditures for the governmental purposes of the Tax-Exempt Bonds within thirty (30) months from the date of issuance of the Tax-Exempt Bonds. For purposes of this paragraph (iv), a reasonable retainage is an amount retained for reasonable business purposes relating to the property financed with

the proceeds of the Tax-Exempt Bonds, e.g., a retention to ensure compliance with a construction contract in circumstances in which the amount retained is not yet payable or in which the NVTa reasonably determines that a dispute exists regarding completion of payment, and shall not exceed five percent (5%) of the net sale proceeds of the Tax-Exempt Bonds minus \$100,000.

- (v) **De Minimis Exception.** Any failure to satisfy the final spending requirement of the Eighteen-Month Exception is disregarded if the NVTa exercises due diligence to complete the project and the amount of the failure does not exceed the lesser of three percent (3%) of the issue price of the Tax Exempt Bonds and \$250,000.

(c) **Two-Year Exception.**

- (i) **75 Percent Test.** The Issuer reasonably expects as of the issue date of the Tax-Exempt Bonds that at least seventy-five percent (75%) of the "available construction proceeds" (defined below) of the Tax-Exempt Bonds will be allocated to construction expenditures (including reconstruction and rehabilitation) with respect to property that is owned by a governmental unit or an organization described in Section 501(c)(3) of the Code and exempt from federal income tax under Section 501(a) of the Code.
- (ii) **Two Year Test.** To meet the Two Year Exception, (A) at least ten percent (10%) of the available construction proceeds of the Tax-Exempt Bonds have been allocated to expenditures for the governmental purposes of the Tax-Exempt Bonds within the six (6) month period beginning on the date of issuance of the Tax-Exempt Bonds, (B) at least forty-five percent (45%) of the available construction proceeds have been allocated to expenditures for the governmental purposes of the Tax-Exempt Bonds within the one (1) year period beginning on the date of issuance of the Tax-Exempt Bonds, (C) at least seventy-five percent (75%) of the available construction proceeds of the Tax-Exempt Bonds have been allocated to expenditures for the governmental purposes of the Tax-Exempt Bonds within the eighteen (18) month period beginning on the date of issuance of the Tax-Exempt Bonds, and (D) all of the available construction proceeds of the Tax-Exempt Bonds have been allocated to expenditures for the governmental purposes of the Tax-Exempt Bonds within the two (2) year period beginning on the date of issuance of the Tax-Exempt Bonds. For purposes of determining compliance with the first three spending periods described above, the estimated amount of investment earnings as of the issue date (based on reasonable expectations) are to be included in the gross proceeds of the issue.

(d) **Available Construction Proceeds.**

- (i) **In General.** For purposes of subsection (c), the term "available construction proceeds" means an amount equal to the issue price of the Tax-Exempt Bonds (or the portion thereof at least seventy-five percent (75%) of the available construction proceeds of which are to be used for the purposes described in paragraph (i) of subsection (c) above), plus investment earnings on the Tax-Exempt Bonds or, where applicable, such portion thereof, plus investment earnings on any reasonably required reserve or replacement fund not funded from proceeds of the Tax-Exempt Bonds, plus investment earnings on all of the above described investment earnings, minus the amount of the issue price of the Tax-Exempt Bonds (or, where applicable, such portion thereof) deposited in the debt service reserve fund (if any) or to be applied to pay costs of issuance of the Tax-Exempt Bonds (if any), minus pre-issuance accrued interest. The term "available construction

proceeds," however, shall not include payments on any obligation acquired to carry out the governmental purpose of the issue or the investment earnings thereon, and shall not include investment earnings on amounts on deposit in a debt service reserve fund, if any, after the earlier of two years from the date of issue or the date on which construction of the project is substantially completed.

- (ii) **Reasonable Retainage.** For purposes of paragraph (ii) of subsection (c), all of the available construction proceeds of the Tax-Exempt Bonds shall be treated as expended for the governmental purposes of the Tax-Exempt Bonds within two (2) years from the date of issuance of the Tax-Exempt Bonds if all of such proceeds are expended for the governmental purposes of the Tax-Exempt Bonds within three (3) years from the date of issuance of the Tax-Exempt Bonds and such amounts would have been expended for such purposes within two (2) years from the date of issuance of the Tax-Exempt Bonds but for an amount that is retained for reasonable business purposes relating to property financed with the proceeds of the Tax-Exempt Bonds and that amount retained does not exceed five percent (5%) of the available construction proceeds of the Tax-Exempt Bonds as of the end of the fourth (4th) spending period referred to in paragraph (ii) of subsection (c) above. Reasonable retainage may include, for example, an amount retained to ensure compliance with the terms of a construction contract in circumstances in which the amount retained is not yet payable, or in which the NVT A reasonably determines that a dispute exists regarding either completion of construction or payment.
- (iii) **De Minimis Exception.** Any failure to satisfy the final spending requirement of the Two-Year Exception is disregarded if the Issuer exercises due diligence to complete the project and the amount of the failure does not exceed the lesser of three percent (3%) of the issue price of the Tax-Exempt Bonds and \$250,000.

## APPENDIX G

### QUALIFIED MANAGEMENT CONTRACT GUIDELINES

#### I. Qualified Management Contracts and Guidelines.

Generally, a management or service contract that meets the requirements set forth below and that does not give a service provider that is a Nongovernmental Entity (i.e., a person or entity other than a state or local governmental entity) an ownership or leasehold interest in the Tax-Exempt Financed Assets for federal income tax purposes and will not result in Private Business Use. The guidelines set forth herein are referred to as the "Qualified Management Contract Guidelines," and a contract that satisfies the guidelines is referred to herein as a "Qualified Management Contract."

Arrangements providing for exclusive use of bond financed property which is functionally related and subordinate to performance of a management contract that satisfied the Qualified Management Contract Guidelines will not give rise to private trade or business use. For example, use of a storage area by a food service manager will not give rise to private trade or business use if the management agreement satisfied the Qualified Management Contract Guidelines, the actual use of the space is in furtherance of such management contract and the amount of the space is not in excess of the service provider's reasonable needs with respect to the management contract.

#### II. Permitted Compensation Arrangements.

To be a Qualified Management Contract, the compensation arrangement must conform to one of the following permitted compensation arrangements described in this Part II and meet the requirements in Part III below. In addition, compensation must be reasonable and not based in whole or in part on a share of the net profits from the operation of the facility. A table summarizing the permitted compensation arrangements, maximum term and required cancellation notice is attached.

#### Periodic Fixed Fee and/or Capitation Fee Contracts

**A. 95% Periodic Fixed Fee.** A contract will satisfy the Qualified Management Contract Guidelines if:

- (1) at least 95% of the compensation for services for each annual period is based on a Periodic Fixed Fee (defined below), and
- (2) the term of the contract, including all renewal options by the Nongovernmental Entity, is not longer than the lesser of fifteen years or eighty percent of the reasonably expected economic life of the bond-financed property.

The contract may have a one-time incentive award during the term of the contract in which compensation is automatically increased by a single, stated dollar amount when a gross revenue or expense (but not both) target is reached.

**B. 80% Periodic Fixed Fee.** A contract will satisfy the Qualified Management Contract Guidelines if:

- (1) at least 80% of the compensation for services for each annual period is based on a Periodic Fixed Fee, and
- (2) the term of the contract, including all renewal options by the Nongovernmental Entity, is not longer than the lesser of ten years or eighty percent of the reasonably expected economic life of the bond-financed property.

The contract may have a one-time incentive award during the term of the contract in which compensation is automatically increased by a single, stated dollar amount when a gross revenue or expense (but not both) target is reached.

**C. 50% Periodic Fixed Fee.** A contract will satisfy the Qualified Management Contract Guidelines if:

- (1) at least 50% of the compensation is based on a Periodic Fixed Fee,
- (2) the term of the contract, including all renewal options, is not longer than five years, and
- (3) The NVTA may terminate the contract on reasonable notice, without penalty or cause, at the end of the third year of the contract.

Similarly, if all of the compensation under a management contract is based on Capitation Fee (defined below) or a combination of a Capitation Fee and a Periodic Fixed Fee, the contract may be analyzed as if at least 50% of the compensation were based on a Periodic Fixed Fee.

**Periodic Fixed Fee Defined.** A "Periodic Fixed Fee" means a stated dollar amount for services rendered for a specified period of time.<sup>3</sup> The stated dollar amount may automatically increase in accordance with specified objective external standards that are 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.

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<sup>3</sup> A type of periodic fixed fees is a "Capitation Fee," which is defined as a fixed periodic amount for each person for whom the service provider assumes the responsibility for providing all needed services, provided that the quantity and type of services actually provided to such persons varies substantially. For example, a fixed dollar amount payable monthly to a medical service provider for each member of a health maintenance organization for whom the provider agrees to provide all needed medical services for a specified period. Additionally, a Capitation Fee 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. A Capitation Fee may include a variable component of up to 20 percent of the total Capitation Fee that is designed to protect the service provider against risks such as catastrophic losses.

**Per Unit Fee Contracts.** A contract will satisfy the Qualified Management Contract Guidelines if:

- (1) the compensation is based on a Per-Unit Fee (defined below) or a combination of a Per-Unit Fee and a Periodic Fixed Fee, if all of the financed property subject to the contract is a facility or system of facilities consisting predominantly of public utility property, the term of the contract may be as long as the lesser of 20 years or 80 percent of the reasonably expected economic life of the bond-financed property. Public utility property includes property used predominantly to furnish or sell electrical energy, water or sewage disposal services, gas or steam through a local distribution system, transportation of gas or steam through a pipeline, telephone services and certain other types of communications services.