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3.437 Post Issuance Bond Compliance

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ANTIOCH UNIVERSITY

<div style="border: 1px solid black; padding: 5px;"> Type of Policy <input checked="" type="checkbox"/> University <input type="checkbox"/> <i>Campus</i> <input type="checkbox"/> <i>Department/Unit</i> <input type="checkbox"/> Interim </div>		Post-Issuance Bond Compliance Policy 3.437	
Business Management Policies		Effective date: January 1, 2016	
Policy History:	Approved by:	Resolution #	Date:
Approved	Chancellor	N/A	December 7, 2015
Revised (Non-substantive):	Office of General Counsel	N/A	April 13, 2018
Responsible Office:	Responsible Administrator:	Contact information:	Applies to:
Office of Vice Chancellor of Finance / CFO	Vice Chancellor of Finance/ CFO	937-769-1304	Executive Employees

I. Introduction

The purpose of this policy is to provide procedures and guidance for compliance with the federal income tax law requirements applicable to the investment and expenditure of tax-exempt bond proceeds and the use of facilities financed with such proceeds. These procedures are intended to satisfy Section 7.2.3.4.4 of the Internal Revenue Manual of the Internal Revenue Service, and they are hereby adopted by the University as of the foregoing date in respect of all tax-exempt bonds for which it is the conduit borrower and for any future issuances of tax-exempt bonds for which it will be the conduit borrower.

Except as otherwise noted herein, the Vice Chancellor of Finance/CFO (“VC/CFO”) shall be responsible for implementing these procedures and performing the tasks described herein. The VC/CFO shall work with such other University officials, employees and agents as they may deem necessary to assure compliance herewith. The VC/CFO is authorized to designate from time to time alternate or additional University officials as being responsible for compliance with all or portions of these procedures.

II. Part I - Use of Proceeds Checklist

A. Use of Proceeds

Upon issuance of any tax-exempt bonds for which Antioch University is the conduit borrower, the VC/CFO shall:

1. Ensure there exists a clearly established accounting procedure for tracking investment and expenditures of bond proceeds, including investment proceeds;
2. At or shortly after issuance of a bond issue, allocate proceeds of the bond issue to reimbursement of prior expenditures, as appropriate;
3. Ensure that a final allocation of bond proceeds (including investment proceeds) to qualifying expenditures is made if bond proceeds are to be allocated to project expenditures on a basis other than "direct tracing" (direct tracing means treating the bond proceeds as spent as shown in the accounting records for bond draws and project expenditures). *An allocation other than on the basis of "direct tracing" is often made to reduce the private business use (see Section B, below) of bond proceeds that would otherwise result from "direct tracing" of bond proceeds to project expenditures. This allocation must be made within 18 months after the later of the date the expenditure was made or the date the project was placed in service, but not later than five years and 60 days after the issuance date of the bonds or 60 days after the bond issue is retired. Bond counsel can assist with the final allocation of bond proceeds to project costs;*
4. Maintain careful records of all facilities and other costs (e.g., issuance costs, credit enhancement and capitalized interest) and uses (e.g., deposit to reserve fund) for which bond proceeds were spent or used. These records should be maintained separately for each issue of bonds;
5. Ensure that no more than 2% of the sale proceeds of a bond issue are used to pay issuance costs;
6. Ensure that all proceeds are spent in accordance with the published notice of public hearing for the issue and useful life calculation for the facilities financed by the issue;
7. Ensure that all bond-financed facilities are owned by a 501(c)(3) organization or a governmental unit;
8. On at least an annual basis, identify all current and contemplated uses of bond-financed facilities and confer as necessary with bond counsel to ensure that the use of the bond-financed facilities complies with the covenants and restrictions set forth in the transaction documents for the bond issue.

B. Monitoring Private Business Use

During the term of any bond issues, the VC/CFO shall further:

1. Before entering into any new management, service, or research agreements described in I, B, 3a or 3b, below, engage bond counsel to review such agreements to determine whether they result in private business use;
2. Analyze at least annually any private business use of bond-financed facilities to determine whether the 5% limitation on private business use of proceeds of the issue is exceeded. Contact bond counsel if this limit is exceeded;
3. Maintain copies of all of the following contracts or arrangements (or, if no written contract exists, maintain detailed records of the following contracts or arrangements) with a private person:
 - a. Sales of bond-financed facilities;
 - b. Leases of bond-financed facilities;
 - c. Management or service contracts relating to bond-financed facilities;
 - d. Research contracts under which a private person or entity sponsors research in bond-financed facilities; and
 - e. Any other contracts involving “special legal entitlements” (such as naming rights or exclusive provider arrangements) granted to a private person with respect to bond-financed facilities.

Each of the foregoing contracts or arrangements may result in private business use of the bond-financed facilities, and a sale of bond-financed facilities to a private person would violate the requirement that a 501(c)(3) organization or governmental unit own all property financed or refinanced by the issue. Consult with bond counsel to undertake any necessary remedial actions, discussed below, in respect of “nonqualified bonds” of the issue. If a remedial action is not available, consult with bond counsel regarding the potential application of the voluntary closing agreement program maintained by the Internal Revenue Service (“IRS”).

C. Responsible Person, Training and Record Retention

1. The person(s) who hold the following title(s) shall be responsible for monitoring the use of proceeds and the existence of any private business use of bond-financed facilities, as set forth in these post-issuance compliance procedures: Vice Chancellor Finance / CFO.

2. The person(s) responsible for monitoring the use of proceeds and the existence of any private business use of bond-financed facilities shall receive appropriate training regarding the University's accounting systems (including entries for the expenditure of proceeds on bond-financed facilities), contract intake system, facilities management and other systems that track the expenditure and use of proceeds.
 - a. This training shall occur when a new individual assumes the responsibilities described in these post-issuance compliance procedures.
 - b. Training shall be available to ensure current knowledge of the University's existing accounting, contract, facilities management and other systems that involve qualified 501(c)(3) bonds and exposure to any pertinent additional systems that are subsequently implemented by the University.
3. The records required to be kept under the foregoing provisions of these post-issuance compliance procedures shall be maintained in paper or electronic format until the date three (3) years after the last bond of the applicable issue of qualified 501(c)(3) bonds ("**Issue**") has been retired; if any portion of such Issue is refunded by a refunding issue, such records shall be maintained until the later of the date three (3) years after the last bond of the Issue has been retired or the date three (3) years after the last bond of the refunding issue has been retired.

II. Part II – Remedial Action Instructions

A. Deliberate Action

With respect to a bond issue, a "deliberate action" ("**Deliberate Action**") is any action taken after the issuance date by the issuer of the tax-exempt bonds ("**Issuer**") or University that is within the control of the Issuer or University and that causes:

1. More than 5% of the net proceeds of the issue to be used for a private business use (the "**Private Business Use Limit**"), and more than 5% of either the principal of or interest on the Issue to be secured by or derived from private security or payments (collectively, the "**Private Business Limits**");
2. The amount of proceeds that are to be used to make or finance loans to any person other than a 501(c)(3) organization or governmental unit, in the aggregate, to exceed the lesser of 5% of such proceeds or \$5,000,000 ("**Private Loan Limit**" and collectively with the Private Business Limits, "**Limits**"); or

3. Any portion of the bond-financed facilities (**“Project”**) to be owned by a person other than a 501(c)(3) organization or governmental unit (**“Ownership Requirement”**).

For this purpose, proceeds of the issue used to pay issuance costs are treated as used for a private business use.

An action by the Issuer or University is not a Deliberate Action if the action was (i) the result of an involuntary conversion of all or a portion of the Project or (ii) an action that was taken in response to a regulatory directive made by the federal government (see Regulations §1.141-2(d)(3)(ii)).

It may be possible to avoid the effects of a Deliberate Action (1) by making a timely reallocation of proceeds, (2) by taking a “remedial action,” or (3) through the voluntary closing agreement program maintained by the IRS. The first two options above are described below. If neither of those options is available, bond counsel should be consulted regarding the voluntary closing agreement program.

B. Timely Reallocation

If a Deliberate Action occurs, the Issuer or University may reallocate the proceeds from the Project to which the Deliberate Action occurred to other permitted uses not later than 18 months after the later of (i) the date of the proceeds expenditure or (ii) the placed in service date of the Project to which such proceeds were originally allocated, but not later than 60 days after the earlier of the fifth anniversary of the issuance date or the retirement of the issue (see Regulations §§1.141-6(a) and 1.148-6(d)(1)(iii)).

C. Remedial Action

1. Effect. A “remedial action” cures the use of proceeds that caused: (i) the Private Business Use Limit to be exceeded, (ii) the Private Loan Limit to be exceeded, or (iii) the Ownership Requirement to be failed. A remedial action will not impact the amount of private security or payments.
2. Eligibility for Remedial Action. In order to achieve one or more of the effects set forth in C 1, five conditions must be satisfied (see C 3), and one of three alternative remedial actions must be taken (see C 4)).
3. Conditions. The Issuer or the University may use a “remedial action” only if the following five conditions are satisfied:
 - a. On the issuance date, the Issuer and University did not reasonably expect either the Private Business Limits or the Private Loan Limit to be exceeded or the Ownership Requirement to be failed at any time while

any portion of the issue was outstanding.

- b. On the Issuance Date, the weighted average maturity of the issue did not exceed 120% of the weighted average of the reasonably expected economic lives of the assets comprising the Project.
- c. Unless the Project is being used for an alternative use (as described in 3.D (2) below), the new user of all or any portion of the Project must have paid fair market value therefor.
- d. The Issuer or University must treat any “disposition proceeds,” which are all proceeds received from the sale, transfer or other disposition of all or a portion of the Project, as gross proceeds for arbitrage (Section 148) purposes.
- e. Prior to the Deliberate Action, the proceeds were used for a governmental purpose unless the remedial action to be taken is described in 3. (D)(1).

4. Types of Remedial Action

- a. Redemption of Non-Qualified Bonds. The “non-qualified bonds” are the portion of the issue allocable to the Deliberate Action that causes the issue to exceed the Private Business Limits or the Private Loan Limit or causes the issue to violate the Ownership Requirement. In general, within 90 days after the Deliberate Action, either the non-qualified bonds must be redeemed or an escrow that defeases the non-qualified bonds to their earliest redemption date must be established. A defeasance escrow may not be used, however, if the period between the issuance date and the earliest redemption date of the non-qualified bonds is more than 10.5 years; in such case a closing agreement with the Internal Revenue Service (“IRS”) may be necessary. If a defeasance escrow is established, the Issuer must notify the IRS within 90 days of its establishment. Notwithstanding the general requirement stated above that all non-qualified bonds must be redeemed or defeased, if the disposition proceeds consist exclusively of cash, it is sufficient that the disposition proceeds be used to redeem or defease a pro rata portion of the non-qualified bonds.
- b. Alternative Use of Disposition Proceeds. An Issuer or University satisfies the requirements of this remedial action if:
 - i. all disposition proceeds consist exclusively of cash;
 - ii. the Issuer or University reasonably expects to spend the disposition

- proceeds within two years after the date of the Deliberate Action;
 - iii. the disposition proceeds are treated as proceeds for purposes of the Limits and the Ownership Requirement, and the use of the disposition proceeds does not cause the issue to exceed these Limits or fail the Ownership Requirement, and neither the Issuer nor the University takes a subsequent Deliberate Action that causes either of the Limits to be exceeded or the Ownership Requirement to be failed;
 - iv. any unspent disposition proceeds must be used to redeem all or a portion of the issue; and
 - v. if the disposition proceeds are to be used by a 501(c)(3) organization, from the date of the Deliberate Action, the non-qualified bonds must constitute qualified 501(c)(3) bonds and are treated as reissued for that purpose.
- c. Alternative Use of Project. An Issuer of University satisfies the requirements of this remedial action if:
 - i. the portion of the Project that is transferred or disposed of could have been financed by another type of tax-exempt bond;
 - ii. the Deliberate Action taken by the Issuer or University did not involve a purchase financed by another issue of tax-exempt bonds; and
 - iii. any disposition proceeds resulting from the Deliberate Action (other than those related to the provision of services) are used to pay debt service on the issue on the next available payment date or, within 90 day of receipt, are deposited into a yield- restricted escrow that will be used to pay debt service on the next available payment date.

Under these circumstances, the non-qualified bonds are treated as reissued as of the date of the Deliberate Action, and must remain qualifying tax-exempt bonds throughout their term.

D. Selected Examples of Deliberate Action

1. Lease to a Private Person. A Deliberate Action generally occurs if the University (i) leases space within the Project to a private person that is not a tax- exempt organization and that use, when added to any other private business use, exceeds 5% of the facilities financed by the Issue so that more than 5% of the proceeds of the issue are considered used for a private business use and (ii) receives rent under that lease that, when added to any other private security or payments, exceeds 5% of the proceeds of the issue.

2. Service or Research Contract. A Deliberate Action generally occurs if:
 - a. the University enters into a service contract or a research contract with a private person that is not a tax-exempt organization,
 - b. that Service Contract or Research Contract will be performed within the Project,
 - c. that service contract or research contract is not a “qualified service contract” or a “qualified research contract, respectively, as set forth in Revenue Procedure 97-13 and Revenue Procedure 2007-47, and
 - d. that use, when added to any other private business use of the Project, exceeds 5% of the proceeds of the issue, and (ii) payments received or deemed received under that service contract or research contract that, when added to any other private security or payments, exceeds 5% of the proceeds of the issue.
3. Sale of Real Estate. A Deliberate Action generally occurs if the University sells all or any portion of the Project to a private person that is not a tax-exempt organization.
4. Loan to a Private Person. A Deliberate Action generally occurs if the University loans more than \$5,000,000 of the proceeds to a developer to assist the developer in completing a building on the campus of the University because that loan will constitute a private loan.

The requirements and effects of Remedial Action are highly technical and complex. Bond Counsel should be consulted before attempting to apply any of the Remedial Actions.

III. Part III – Arbitrage Compliance Checklist

- A. Note the yield of the issue, as shown on the IRS Form 8038.
- B. Review the tax certificate and agreement (“Tax Agreement”) executed in connection with the tax-exempt bond issue to determine the temporary periods from yield restriction for the issue, during which periods various categories of gross proceeds may be invested at a yield that “materially exceeds” the yield of the bond issue.
- C. Do not invest gross proceeds in higher yielding investments following the end of the applicable temporary period identified in 3.02 unless yield reduction payments may be made (see Tax Agreement).

- D. Monitor expenditures of proceeds, including investment proceeds, against issuance date expectations for satisfaction of three-year or five-year temporary period from yield restriction on investment of proceeds and to avoid “hedge bond” status.
- E. Ensure that investments acquired with gross proceeds satisfy IRS regulatory safe harbors for establishing fair market value (e.g., through the use of bidding procedures), and maintain records to demonstrate satisfaction of such safe harbors.
- F. Consult with bond counsel before engaging in credit enhancement or hedging transactions in respect of the issue, and before creating separate funds that are reasonably expected to be used to pay debt service on the issue.
- G. Maintain copies of all contracts and certificates relating to credit enhancement and hedging transactions in respect of the issue.
- H. Before beginning a capital campaign that may result in gifts that are restricted to the Project (or, in the absence of such a campaign, upon the receipt of such restricted gifts), consult bond counsel to determine whether replacement proceeds may result.
- I. *Even after all proceeds of the issue have been spent*, ensure that the bond fund meets the requirements of a bona fide debt service fund, *i.e.*, one used primarily to achieve a proper matching of revenues with debt service that is depleted at least once each bond year, except for a reasonable carryover amount not to exceed the greater of:
 - 1. the earnings on the fund for the immediately preceding bond year; or
 - 2. one-twelfth of the debt service on the issue for the immediately preceding bond year. *To the extent that the bond fund qualifies as a bona fide debt service fund for a given bond year, the amounts held in that fund may be invested in higher yielding investments.*
- J. Ensure that amounts invested in any reasonably required debt service reserve fund do not exceed the least of:
 - 1. 10% of the stated principal amount of the issue (or the sale proceeds of the issue if the issue has original issue discount or original issue premium that exceeds 2% of the stated principal of the issue plus, in the case of premium, reasonable underwriter’s compensation);
 - 2. maximum annual debt service on the Issue; or

3. 125% of average annual debt service on the issue.
- K. Satisfaction of rebate requirement -- see rebate instructions attachment to the Tax Agreement. Subject to the exceptions described below, investment earnings on proceeds at a yield in excess of the bond yield (i.e., positive arbitrage) generally must be rebated to the U.S. Treasury, even if a temporary period exception from yield restriction allowed the earning of positive arbitrage.
 - L. Ensure that rebate calculations will be timely performed and payment of rebate amounts, if any, will be timely made; such payments are generally due 60 days after the fifth anniversary of the issuance date, then in succeeding installments every five years; the final rebate payment for the Issue is due 60 days after retirement of the last bond of the issue. Hire a rebate consultant if necessary.
 - M. If the 6-month, 18-month, or 24-month spending exceptions from the rebate requirement (as described in the rebate instructions) may apply to the issue, ensure that the spending of proceeds is monitored prior to semi-annual spending dates for the applicable exception.
 - N. Timely make rebate and yield reduction payments and file IRS Form 8038-T.
 - O. Even after all other proceeds of the issue have been spent, ensure compliance with rebate requirements for any debt service reserve fund and any debt service fund that is not exempt from the rebate requirement (see the rebate instructions).
 - P. The foregoing items in this arbitrage compliance checklist shall be monitored at least annually as long as there are unspent gross proceeds of a bond issue.
 - Q. Maintain records of investments and expenditures of proceeds, rebate exception analyses, rebate calculations, Forms 8038-T, and rebate and yield reduction payments, and any other records relevant to compliance with the arbitrage restrictions.
 - R. The person(s) who hold the following title(s) shall be responsible for monitoring compliance with the arbitrage rebate requirements of Section 148 of the Code, as set forth in this arbitrage compliance checklist: Vice Chancellor Finance / CFO
 - S. The person(s) responsible for monitoring compliance with the arbitrage rebate requirements of Section 148 of the Code shall receive appropriate training regarding the University's accounting systems and their application to the investment and expenditure of gross proceeds. This training shall occur when a new individual assumes the responsibilities described in this arbitrage compliance checklist. Training shall also be available to ensure current knowledge of the University's existing accounting systems and exposure to any pertinent

modifications that are subsequently implemented by the University.

- T. The records required to be kept under this arbitrage compliance checklist shall be maintained in paper or electronic format until the date three (3) years after the last bond of the applicable Issue has been retired; if any portion of such Issue is refunded by a refunding issue, such records shall be maintained until the later of the date three (3) years after the last bond of the Issue has been retired or the date three (3) years after the last bond of the refunding issue has been retired.