

## COLORADO EDUCATIONAL AND CULTURAL FACILITIES AUTHORITY

### GUIDELINES FOR FINANCINGS OF EDUCATIONAL AND CULTURAL INSTITUTIONS

The following guidelines provide a general overview of the requirements of the Colorado Educational and Cultural Facilities Authority for issuance of bonds through the Authority. It is not intended to answer all questions or enumerate all requirements of the CECFA financing program. Questions should be directed to the Authority's Executive Director or its General Counsel. The Authority's enabling statute is 23-15-101 et seq. of Colorado Revised Statutes (the "Act").

#### **Qualification as an Educational Institution**

An educational borrower must be either:

- (a) a governmental, quasi-governmental, or nonprofit organization which is organized principally to provide educational services; or
- (b) a private foundation, nonprofit association or other entity which is organized principally for the support and benefit of an educational entity (a "supporting organization") described in (a) above.

The educational institution must provide or finance, directly or indirectly through one or more affiliates, an educational program or educational services.

Some examples of "educational institutions" are colleges and universities, community and junior colleges, vocational schools, charter schools, and private elementary and secondary schools.

A supporting organization can borrow for the benefit of an entity which provides educational services, if the supporting organization provides the Authority with required covenants as to the use of proceeds of the financing and the continuing use of the financed facilities for educational purposes.

With respect to a financing on behalf of a public educational institution, the Act requires evidence of compliance with all constitutional and statutory provisions and legislative approvals applicable to the financing and the project being financed.

## **Qualification as a Cultural Institution**

To qualify as a borrower, a cultural institution must be:

- (a) a governmental, quasi-governmental, or nonprofit organization engaged in cultural, intellectual, scientific, educational, or artistic enrichment or
- (b) a private nonprofit foundation, association, or other entity which is organized principally for the support and benefit of an institution described in (a) above.

The following are some examples from the Authority's statute of cultural institutions which are permissible borrowers:

- *Aquarium*
- *Botanical society*
- *Educational society*
- *Historical society*
- *Library*
- *Museum*
- *Gallery*
- *Performing arts association or society*
- *Nonprofit sports association, committee, or governing body*
- *Scientific society*
- *Natural history society or organization*
- *Zoological society*
- *Society for western history and western culture*
- *Sponsor of housing facilities that serve cultural needs of the residents*

## **Requirements Relating to Activities of the Educational or Cultural Institution**

A private nonprofit foundation, nonprofit educational or cultural institution must have tax-exempt status under federal tax laws.

The educational or cultural institution must demonstrate that it provides public benefit to the citizens of Colorado.

The educational or cultural institution must covenant that it currently is in substantial compliance with and in the future will substantially comply with all applicable federal and state nondiscrimination laws; provided if it shall fail to comply it will diligently take such actions as may be necessary to restore compliance.

## **Requirements Relating to Project Being Financed**

With respect to educational and cultural institutions, the Authority is authorized to finance:

- (a) any structure or facility required or useful for the operation of the institution;
- (b) related equipment and furnishings; and
- (c) the acquisition and development of real estate on which the facility is located.

In addition, with respect to cultural institutions, the Authority may finance the items contained in the facility and used for display, exhibition or performance.

The facilities to be financed must be used for the tax-exempt activities of the educational or cultural institution for the term of the financing; leasing of portions of the financed facilities to other tax-exempt entities or state or local governmental units is permitted if used for the purposes permitted under the Act and if consented to by the Authority as may be required. Federal tax law imposes substantial restrictions on leasing space financed with bond proceeds.

There are substantial restrictions under federal and state law on the financing of working capital in connection with the financing of a project.

The facilities to be financed or refinanced cannot be used exclusively or predominantly for religious worship or sectarian instruction (other than the academic or comparative study of various religions or religious philosophies) as determined under state and federal law. The disclosure language at the end of this summary is required for transactions involving sectarian school or other affiliated religious organizations.

## **Financial Requirements**

A proposed financing must meet one of the following criteria:

**Institutional Rating.** The bonds (if not credit enhanced) are rated in the investment grade category by a nationally recognized rating agency acceptable to the Authority (a "Rating Agency") based on a credit analysis of the educational or cultural institution;

**Credit Enhanced Rating.** The bonds are secured by a letter of credit, an insurance policy, guarantee by a third party or other comparable additional

collateral, the provider or parent of which is rated in the letter grade of “A” or better by a Rating Agency.

CECFA Approved. Repayment of the bonds is supported by a supplemental reserve fund, guarantee by a third party or other comparable additional collateral acceptable to CECFA.

Below Investment Grade Rating. If the institution or bonds do not satisfy one of the requirements above, the bonds must:

(a) Be offered and sold only to “Qualified Institutional Buyers” within the meaning of Rule 144A of the Securities Act of 1933, as amended, or “Accredited Investors”, within the meaning of Rule 501 of Regulation D of the Securities Act of 1933, as amended (“Sophisticated Investors”), and representations that the purchaser is a Sophisticated Investor are included in the investment letters executed by the purchasers in form acceptable to the Authority; and

(b) Be issued in minimum denominations of:

(i) \$100,000 and have investment letters executed by the original purchasers of the bonds; or

(ii) \$25,000 if the bonds are purchased by a single investment manager registered with the Securities and Exchange Commission with more than \$500 million in capital under management and with demonstrated historical financial liquidity, for deposit in its clients’ accounts. The manager must demonstrate that it has complete discretionary control over the bonds in individual client accounts and that all accounts to which the bonds are assigned are owned by Sophisticated Investors. The manager also must agree with the Authority to repurchase any such bonds from any owner which terminates its relationship with the manager and to deliver to the Authority annually its SEC Investor Advisor certification.

(c) Bonds issued in minimum denominations can be converted to \$5,000 denominations upon the receipt of an investment grade rating from a nationally recognized Rating Agency.

(d) Below investment grade bonds issued pursuant to the limitations stated above may be sold by separate series within an issue of bonds pursuant to the conditions stated in (a), (b) or (c) above, provided that any individual series shall comply with, and be restricted to, only one of the applicable categories of permissible denominations stated in (a), (b) or (c) above.

Swaps and Hedges. Any interest rate swap, cap, collar, option, floor, forward or other hedging arrangement must be provided by a qualified counterparty. A qualified counterparty is any financial institution or insurance company which has unsecured long-term obligations rated in one of the three highest rating categories of a national rating agency. The Authority will not be a party to any swap or other derivative agreement.

Financial Statements. For all fiscal years following the closing date, Borrowers are required to submit audited financial statements to the Authority and other parties as required by the bond documents. In cases in which the borrower is a limited liability company with a single member, audited financial statements from the sole member will meet this requirement.

Other Requirements. The Authority may impose additional requirements in financings involving unusual circumstances, including verification of the financial feasibility of the transaction by a “feasibility study” drafted by a nationally or regionally recognized accounting firm or financial services firm with documented expertise in the business situation being analyzed.

### **Bond Counsel Opinion**

The Authority approves all final documents when it adopts the financing resolution authorizing issuance of the bonds. The Authority requires that either bond counsel or co-bond counsel for all financings must be a bond counsel firm which is listed in The Bond Buyer’s Municipal Marketplace Directory and have an office in Colorado with a lawyer licensed to practice in Colorado. If a bond counsel firm is utilized as co-bond counsel in a multi-state financing, each bond counsel firm must render the customary bond opinion which covers both federal and Colorado law relating to the issuance of the bonds and the tax-exempt status of interest on any series of tax-exempt bonds. Bond counsel must also be experienced in tax-exempt financings for educational and cultural institutions.

Bond counsel must provide the Authority with an unqualified opinion (i) as to the due authorization of the bonds; (ii) that the bonds constitute valid and binding special obligations of the Authority; and (iii) if a tax-exempt financing is proposed, that the interest on the bonds will be excluded from gross income for federal and state income purposes

### **Charter School Financings and Use of State’s Moral Obligation Program**

The Authority is authorized to issue obligations to finance the construction of charter schools within the State. Two State programs provide direct benefit to these financings.

Intercept Program. The State Treasurer is authorized to intercept State payments made to charter schools and apply those amounts to debt service on

charter school obligations. The Authority requires that each charter school borrowing through the Authority participate in the Intercept Program. The Intercept Program enhances the ability of the charter school to obtain favorable financing terms for its bonds by ensuring that the money for debt payments is segregated from operation fund.

Moral Obligation Program. This program provides State support which enhances the credit of a charter school that has obtained an investment grade credit rating on a “stand alone” basis. Schools that qualify are able to obtain more favorable financing terms on their capital construction and refunding bonds.

- a. A charter school which has an investment grade rating from a nationally recognized rating agency is eligible to use State’s moral obligation program as credit enhancement for the bonds being issued on behalf of the charter school. The details of the program are contained in Colorado Revised Statutes Sections 22-30.5-407 and 22-30.5-408. The Authority will accept an application from a charter school for a moral obligation financing based on the representation signed by the school’s investment banker or financial advisor that he/she reasonably expects that the school will obtain the required investment grade rating.
- b. The statute establishes the maximum amount of bonds which can be outstanding at any time under the moral obligation program. The amount outstanding changes with new transactions and principal payments on existing transactions. The amount available to be used for moral obligation bonds at any given time is referred to as the “cap.” The Board will allocate the cap using the following guidelines:
  - (i) Cap allocations will be made at the meeting at which the inducement resolution (or the first financing resolution if there is not an inducement resolution) for the financing is adopted by the Board.
  - (ii) A school which is refinancing existing moral obligation bonds will automatically be entitled to use the dollar amount of the outstanding bonds being refunded (the “outstanding principal”). If the school seeks moral obligation approval for an amount more than the outstanding principal, the allocation guidelines below will apply to the amount in excess of the outstanding principal.
  - (iii) The amount of cap available for allocation will be deemed to be the difference between the statutory moral obligation limit and the total amount of moral obligation bonds which will be outstanding as of the first day of the month following the month in which the Board meeting is held.
  - (iv) If more than one school seeks an inducement for a moral obligation transaction at the same Board meeting, and if there is not enough cap to meet the requests of all those schools, the

amount of cap will be allocated pro rata based on the par amount of bonds proposed to be issued as listed in the sources and uses table in the applications (or, in the case of refundings, the amount in excess of the outstanding principal).

- (v) If a school which has received a cap allocation determines that it will not obtain an investment grade rating, it shall notify the Authority promptly in writing, and that school's allocation will expire. The Authority will, by letter, offer the expired cap to other schools which received a cap allocation at the same Board meeting, on a pro rata basis up to the maximum requested by each school. If any school declines the offer to use expired cap, the amount of cap offered will be allocated to any remaining school(s) which received a cap allocation at the same Board meeting.
- (vi) Transactions which receive allocations of cap must close within 90 days from the date of the Board meeting at which the school first received an allocation of cap. If this deadline is not met, the allocation of cap to that school will expire and the amount of the allocation will be offered by letter to any other school which received a cap allocation at the same Board meeting. If all such schools decline to use the expired cap allocation, or no other school was allocated cap at the same Board meeting, or for other good cause, the Authority's Executive Director may, in his or her sole discretion or in consultation with the Board, extend the 90-day deadline.
- (vii) The Board reserves the right to modify application of the terms of this policy at its discretion and for good cause for the purposes of (A) deriving the greatest financial benefit from the moral obligation program for its intended beneficiaries, (B) allocating unscheduled prepayments of outstanding moral obligation program bonds, or (C) alleviating any forfeiture of an allocation of cap in circumstances determined by the Board to be in the best interests of the moral obligation program.

### **Additional Guidelines and Requirements for Multi-State Financings**

The Authority has statutory authority to finance facilities of an educational and cultural institution located outside the state of Colorado in certain circumstances. The Authority's statute allows such a financing if the educational or cultural institution, or an affiliate of such institution, operates or finances an educational or cultural facility within the state of Colorado. If the proposed financing includes property which is not located in Colorado ("multi-state financing"), the following additional requirements must be met.

Use of Local Bond Counsel. The Authority requires that either bond counsel or co-bond counsel for all financings must be a bond counsel firm which is

listed in The Bond Buyer's Municipal Marketplace Directory and have an office in Colorado with a lawyer licensed to practice in Colorado.

Benefit to Colorado. The Board of Directors requires that the borrower clearly articulate, both in its application and in its presentation to the Board, the benefits to the State and its citizens of any multi-state financing.

Multi-State Financing Programs. Most multi-state financings of the Authority are undertaken pursuant to a "program" of financings established by an entity located in Colorado or its affiliates. Requests to establish a program for multi-state borrowings generally must be submitted for approval prior to the meeting at which the Board of Directors considers a request for an individual financing under the program. The purpose of prior program approval is to provide the Board with an opportunity to review the nexus with Colorado and the benefit to Colorado of the proposed program without requiring a specific borrower to fill out an application for financing.

Public Approval. A public hearing (TEFRA hearing) must be held in each jurisdiction in which a facility being financed with tax exempt bonds is located and the appropriate official must approve the issuance of bonds for the project in accordance with federal law. These local approvals must be completed before the Colorado approval is submitted to the State.

Specific Guidelines for Multi-State Financings. In authorizing multi-state financings by the Authority, it was the clear intent of the Colorado General Assembly that multi-state financings should be undertaken by the Authority only if the following conditions are satisfied:

- (a) The multi-state financing must benefit the citizens of Colorado; for example, the multi-state financing enhances or assists the programs and/or financial stability of the educational or cultural facilities located within the state or improves the education-related or cultural-related employment opportunities within the state;
- (b) The multi-state financing must provide the participants in the financing (the borrower, any affiliates and other related entities which will benefit from the use of bond proceeds) cost savings and/or increased efficiencies in the financing process;
- (c) The participants in the multi-state financing must share a common goal of providing educational or cultural services to the communities in which they are located and must demonstrate this commitment through their operations and activities; and
- (d) The multi-state financings of the Authority have provided different forms of direct or indirect benefits to Colorado organizations and Colorado

citizens, as described below. In general, one form of these benefits should be present in a proposed multi-state financing:

(i) *Direct Benefit to Colorado Entity.* A borrower with operations in Colorado and other states finances a facility in Colorado and facilities or operations in other states.

(ii) *Indirect Benefit to Colorado Entity.* A borrower with operations in Colorado and other states finances facilities in states other than Colorado. The cost savings and efficiencies associated with the multi-state financing benefits all the operations of the borrower including the operations of the borrower in Colorado.

(iii) *Direct Benefit to Colorado Entity from Network Financing Program.* A group of independent, associated organizations located in Colorado and other states which offer the same or comparable educational and cultural services to their communities have formed a network for the purpose of assisting network members in fulfilling their charitable purposes. The network provides various services to network members, including among other things a tax-exempt financing program for addressing the capital needs of the network members.

### **Small Borrower Program**

The Authority has created a special program to provide easier access to tax-exempt capital for borrowers which need smaller loan amounts. The program offers reduced initial fees and streamlined processing, which are made possible by using standard documents. In addition, the Authority offers extensive technical assistance for small borrowers which need help understanding the options and the process involved in borrowing through the program. Borrowers can finance facilities and equipment through the program.

#### **Eligibility.**

- (a) The borrower must qualify as an educational or cultural institution as defined previously in these Guidelines.
- (b) The loan amount must be less than \$4 million.
- (c) The loan must be placed with a single investor and not require a formal disclosure document.
- (d) The loan structure must not require the use of a trustee.
- (e) The facilities or equipment financed must be located in Colorado.

Application and Board Approval. The determination of whether a transaction qualifies for the program is made by the staff and general counsel of the Authority. If the transaction qualifies, the borrower submits the Small Borrower Application.

Bond Counsel. Sherman & Howard L.L.C. acts as bond counsel in all Small Borrower financings unless it has a conflict of interest.

Fees. Small borrowers pay a minimum \$7,500 Initial Fee, which does not include the fees of bond counsel. The Initial Fee may be increased gradually until it reaches \$20,000 for loans of \$4 million (the maximum permitted under the program). The Initial Fee is due along with the application. The borrower is also responsible for paying the normal annual fee of the Authority.

Documents. The Authority provides standard documents for Small Borrower transactions, which may be modified as required by the lender.

### Sample Disclosure Language for Financings Involving Certain Sectarian Institutions

*(To be used and modified based on the facts and circumstances of a financing and upon the advice of bond and disclosure counsel.)*

#### Risk of Possible Adverse Ruling under the First Amendment to the United States Constitution and the Colorado Constitution

The “Establishment Clause” of the First Amendment to the United States Constitution has been interpreted to restrict public financial assistance to certain sectarian institutions generally referred to as pervasively sectarian institutions. The Colorado Constitution also contains certain provisions that no governmental entity can use public funds to aid any church, sectarian society or for any sectarian purpose. The United States Supreme Court has not directly addressed the question of whether the Establishment Clause restricts the lending to pervasively sectarian institutions of the proceeds of a tax-exempt or taxable bond issue involving no expenditure of public funds. Also, the Colorado Supreme Court has not addressed the question of whether the Colorado Constitution prohibits the financing by a state political subdivision on behalf of a sectarian institution or the financing of a project involving a sectarian facility if such financing is accomplished with the proceeds of a tax-exempt or taxable bond issue involving no expenditure of public funds. However, Bond Counsel is of the opinion that the Bonds are valid, based upon the analysis of existing United States Supreme Court and lower court precedent in cases involving the Establishment Clause in various other contexts and upon the analysis of existing Colorado and lower court precedent in cases involving the Colorado Constitution in various other contexts.

If a court were to find the issuance of the Bonds and the use of the proceeds to finance the [Project] described in this [Official Statement] unconstitutional under

the federal and/or Colorado Constitution, and if such an adverse decision were to become final, the Bonds could be declared unenforceable and/or void. Such an adverse decision could become final if the [Borrower] does not appeal the adverse decision or if the [Borrower] were unsuccessful upon appeal because the adverse decision is upheld by the United States or Colorado Supreme Court or because the United States or Colorado Supreme Court declined to review the adverse ruling or such review is not sought. In the event of a final adverse decision, any interest paid on the Bonds could become includable in gross income for federal and state tax purposes.

The Authority is not obligated to appeal an adverse ruling with respect to the Bonds or any determination that the interest paid on the Bonds is includable in gross income for federal or state tax purposes. Sherman & Howard L.L.C., the Authority's general counsel, is not rendering any opinion as to the due authorization, execution, validity or enforceability of the Bonds, the Loan Agreement and the Bond Indenture under the First Amendment to the United States Constitution or the Colorado Constitution or as to the federal or state tax-exempt status of the Bonds.