



COMMONWEALTH OF VIRGINIA

Department of the Treasury

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September 8, 2023

MEMORANDUM

TO: Attached Distribution List

FROM: Leslie M. English *Leslie M. English*
Public Finance Manager

SUBJECT: 2024A 9(c) Bond Sale

The Treasury Board anticipates pricing its Commonwealth of Virginia General Obligation Bonds, Series 2024A in February 2024, with funds becoming available to participating institutions in March 2024. The purpose of this memorandum is to provide institutions with notice of the sale and the direction to the electronic information regarding the Bond Sale Survey, Use of Proceeds Certificate and Board of Visitor's Resolution for inclusion in the financing.

The electronic information package, including the Bond Sale Survey, Use of Proceeds Certificate and form of the Board of Visitor's Resolution is available at the Department of the Treasury home page on the Internet at:

<https://www.trs.virginia.gov/Bond-Finance/General-Obligation-Bonds>

This package will better acquaint you with the General Obligation Bond program. Please access the Internet address shown above to secure the documents and instructions needed to submit the survey for participation in the Series 2024 bond sale. The information also includes:

- ATTACHMENT A – Background and Survey Information;
- ATTACHMENT B – Preliminary Financing Schedule;
- ATTACHMENT C – Form of Board of Visitor's Resolution;
- ATTACHMENT D – Use of Proceeds Certificate; and
- ATTACHMENT E – Private Use/Management Contracts/Research Agreements.

Participation in the sale is limited to Virginia public institutions of higher education planning to request financing for capital projects authorized under the **Virginia Acts of Assembly**, and otherwise meeting the requirements of Article X, Section 9(c) of the *Constitution of Virginia*. Institutions planning to move forward with financing for their 9(c) capital projects must complete and submit the survey separately for each project for which 2024 General Obligation 9(c) Bond proceeds are being sought. Additional pages may be used to supplement the survey where descriptive language is required to complete a specific question.

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Draw Schedules

The draw schedule(s) that you submit to Treasury with your survey will be used to determine the size of your institution's portion of the bonds. Treasury will factor in costs of issuance, construction fund earnings, etc. **Repayment of any borrowing done in anticipation of the sale (e.g., interfund loan, Treasury Loan, Bond Anticipation Note) must be reflected in the first draw against bond proceeds. If your draw schedule extends beyond 24 months, your project may be split into two or more bond issues to ensure that the draw schedules comply with the Internal Revenue Service arbitrage rebate spend-down requirements for bond proceeds. The spend-down requirements for bond proceeds are: 10% must be spent in the first 6-months, 45% must be spent in the first 12-months, 75% must be spent in the first 18-months, and 100% must be spent in the first 24-months.**

Board of Visitors Resolutions

The Board of Visitors ("BOV") of each institution participating in the general obligation bond sale must have adopted a BOV resolution prior to the sale date with respect to the bonds. The BOV which, among other things, requests the Treasury Board to issue the bonds, covenants to fix, revise, charge and collect fees in connection with use, and pledges the net fees to the payment of debt service. Accordingly, if your BOV has already adopted such a resolution, each institution must include a copy of the approved BOV resolution with your survey form. If your BOV has not yet adopted a resolution and you plan to participate, be sure to provide the dates of upcoming BOV meetings, so those dates can be considered in finalizing the sale date.

Financial Feasibility Studies

In accordance with §4-4.01(i)(3) of the General Provisions of the Appropriations Act, prior to the issuance of debt for 9(c) general obligation projects, when more than one year has elapsed since the review and evaluation of financial feasibility, institutions must prepare and submit an updated Financial Feasibility Study ("FFS") to the Department of the Treasury for review and evaluation by the State Treasurer prior to participation in the sale. In addition, Treasury's review is required prior to requesting the Governor's Opinion of Financial Feasibility required under Article X, Section 9(c) of the *Constitution of Virginia*. **Your institution will be required to either update or reaffirm your FFS by October 11, 2023.**

Institutions planning to participate in the 2024 General Obligation 9(c) Bond sale must complete and submit the survey electronically by Friday, September 22, 2023 to Leslie English at leslie.english@trs.virginia.gov and Sandra Stanley at sandra.stanley@trs.virginia.gov. **It is preferred that the completed survey be submitted via e-mail.** If another method of delivery is preferred, surveys may be delivered (for receipt by no later than 4:00 p.m. on September 22, 2023) as follows:

Overnight service

Department of the Treasury
James Monroe Building, Third Floor
101 North 14th Street
Richmond, Virginia 23219
Attention: Leslie M. English

US Mail

Department of the Treasury
P.O. Box 1879
Richmond, Virginia 23218-1879
Attention: Leslie M. English

Should you have any questions, please do not hesitate to contact me at (804) 371-0341.

LME:

Attachments

DISTRIBUTION LIST

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ATTACHMENT A – Background and Survey Information

GENERAL OBLIGATION BOND PROGRAM

Background and Authority

The Treasury Board (the "Board") is a policy board in the executive branch of state government established pursuant to Section 2.2-2416 et seq of the Code of Virginia. Among its powers and duties, the Board is responsible for the issuance of all Commonwealth general obligation debt. The Board exercises general supervision over all investments of state funds, administers the Security for Public Deposits Act and the State Non-Arbitrage Program. In addition, the Board makes recommendations to the Governor on proposed financing arrangements, approves the terms and structure of certain bonds or other financing arrangements paid from state appropriations, establishes guidelines for bonds or financing arrangements, and approves the financial terms of lease purchases for state agencies. The Board also oversees the leasing of personal property and energy efficiency projects by all state agencies, including the administration of a Master Equipment Leasing Program (MELP) and the Energy Leasing Program.

The Board consists of the State Treasurer, the State Tax Commissioner, the State Comptroller and four additional citizen members appointed by the Governor, subject to confirmation by the General Assembly, who serve at the pleasure of the Governor. The Governor designates the State Treasurer to serve as the Chairman, who serves as chief executive officer of the Board. The Department of the Treasury provides staff support for the Board.

General Obligation Bond Program

General Obligation Bonds of the Commonwealth are secured by a pledge of the full faith and credit. The Virginia Constitution sets out the requirements for Commonwealth debt in Article X, Section 9. Under the Virginia Constitution, two categories of general obligation (GO) bonds are generally issued.

Section 9(b)

Section 9(b) of Article X of the Constitution permits the issuance of general obligation debt for capital projects upon authorization by the General Assembly, and upon approval by a majority of the voters at referendum. In 2002, the issuance of the 9(b) Public Facilities Bonds was authorized by Chapters 827 and 859 and Chapters 854 and 884 of the 2002 Virginia Acts of Assembly, entitled the "Commonwealth of Virginia Educational Facilities Bond Act of 2002" and the "Commonwealth of Virginia Parks and Natural Areas Bond Act of 2002", respectively, enacted pursuant to Section 9(b) of Article X of the Constitution of Virginia (the "Constitution"). Chapters 827 and 859 authorized the issuance of bonds in the aggregate amount of \$900,488,645 to fund 132 capital projects at various educational facilities. Chapters 854 and 884 authorize the issuance of bonds in the aggregate amount of \$119,040,000 to fund 73 capital projects for park and recreational facilities. The General Obligation Bonds, Series 2009B completed the issuance of General Obligation bonds approved by voters in 2002 for educational institutions and park and recreational facilities.

Section 9(c)

Section 9(c) of Article X of the Constitution permits the issuance of general obligation bonds without voter approval for specific revenue-producing capital projects secured by net revenues derived from rates, fees and charges of the project, and the full faith and credit of the Commonwealth. The debt must be authorized by the affirmative vote of two-thirds of the members elected to each house of the General Assembly. Consequently, only revenue-producing capital projects are eligible (e.g., dormitories, dining facilities, etc.). Further, prior to its authorization by the General Assembly, and again prior to its issuance, the Governor must certify that the anticipated net revenues of the project will be sufficient to pay principal and interest on the debt. The Financial Feasibility Studies ("FFS") is a critical part of this determination. The Department of the Treasury reviews FFS submitted by agencies and institutions of higher education seeking approval of this type of project.

Higher Education Bonds

The issuance of 9(c) Higher Education Bonds has been authorized by various Virginia Acts of Assembly entitled Commonwealth of Virginia Institutions of Higher Education Bond Acts (the “Higher Education Acts”).

The Higher Institution Acts authorize the issuance of bonds in an aggregate principal amount of \$2,116,356,275 of which \$395,428,570 has been authorized by the 2006 Higher Education Act, \$103,550,000 by the 2007 Higher Education Act, \$350,565,000 by the 2008 Higher Education Act, \$40,000,000 by the 2009 Higher Education Act, \$206,870,000 by the 2010 Higher Education Act, \$64,579,000 by the 2011 Higher Education Act, \$135,244,000 by the 2012 Higher Education Act, the 2013 Higher Education Act (amends and re-enacts §2 of the first enactment of the 2008 Higher Education Act and the 2012 Higher Education Act), \$245,020,705 by the 2014 Higher Education Act, \$67,500,000 by the 2015 Higher Education Act, \$40,987,000 by the 2016 Higher Education Act, \$13,637,000 by the 2017 Higher Education Act, \$21,000,000 by the 2018 Higher Education Act, \$17,500,000 by the 2019 Higher Education Act, \$279,470,000 by the 2020 Higher Education Act, \$34,136,000 by the 2021 Higher Education Act and \$100,869,000 by the 2022 Higher Education Act.

Parking Facilities Bonds

The issuance of the 9(c) Parking Facility Bonds has been authorized by Chapters 49 and 161 of the 2009 Virginia Acts of Assembly entitled the “Commonwealth of Virginia Parking Facilities Bond Act of 2009 (the “Parking Facilities Act”) enacted pursuant to Section 9(c) of Article X of the Constitution. The Parking Facilities Act authorizes the issuance of bonds in an aggregate principal amount of \$16,000,000.

Survey Information/Instructions

The Treasury Board anticipates pricing the Series 2024A Bonds in February 2024 with funds available to participating institutions early March 2024. A preliminary schedule, subject to change, is Attachment B of this document. Any changes and/or revisions to the preliminary schedule will be clearly communicated to the participating institutions in advance of any deadlines. **The Treasury Board anticipates providing each institution with its preliminary debt service schedule(s) by mid-October to ensure that the institutions have sufficient time to review prior to the bond sale. Each institution will be required to approve its preliminary debt service schedule(s) on the day of the deadline provided by the Treasury Board.**

Institutions participating in financing through the 9(c) General Obligation Bond program may withdraw from the financing without a Late Withdrawal Fee, as defined below, at any time prior to the Treasury Board requesting ratings. The anticipated deadline to withdraw is highlighted and bolded in red on the preliminary schedule of this memorandum. Any change to the deadline will be clearly communicated to the participating institutions in advance of the deadline. Institutions will be provided with revised preliminary numbers and debt service schedules no less than a week prior to the Treasury Board requesting ratings to ensure that the institutions have sufficient time to review prior to the withdrawal deadline. Treasury will also provide all participating institutions with a reminder regarding the deadline to withdraw upon distribution of the aforementioned revised preliminary numbers and again on the day of the deadline. **Any institution withdrawing after the deadline will be responsible for paying their estimated pro-rated costs of issuance in the amount(s), as shown in their revised preliminary numbers (“Late Withdrawal Fee”). In the event an institution has requested to finance multiple projects but only withdraws a portion of those projects after the deadline, any estimated costs of issuance related to the withdrawn projects shall be reallocated to that institution’s remaining projects in the amount(s) provided in the revised preliminary numbers.**

Use of Proceeds Certificates

The Use of Proceeds Certificate (the “Certificate”) must be completed by each participating institution in connection with each project that will be financed or refinanced with the proceeds of the General Obligation 9(c) Bonds, Series 2024A. The participating institution will represent that the project(s) will be used for governmental purposes of the participating institution during the period of time the Bonds are outstanding. In Attachment B of the Certificate, the participating institution must list and describe any contracts, arrangements, leases (or subleases) or uses with respect to the project(s) or loans made from the proceeds of the 9(c) Bonds that have been or will be entered into or agreed upon with persons or entities other than state or local governmental entities. In addition, in Attachment B of the Certificate, the participating institution must describe any other uses of the project(s) or activities of the participating institution that may constitute a Private Use.

Board of Visitors Resolutions

The Board of Visitors (BOV) of each institution participating in the bond sale must have adopted a resolution **prior to the sale** which, among other things, requests the Treasury Board to issue the bonds, covenants to fix and collect fees, and pledges the net fees to the payment of debt service. Accordingly, if your BOV has already adopted such a resolution, each institution must include a copy of the adopted resolution with your survey form. **If your BOV has not yet adopted a resolution, the requisite board of visitors approval must be received prior to the sale date with respect to the bonds.**

Financial Feasibility Studies (FFSs)

In accordance with §4-4.01(i)(3) of the General Provisions of the Appropriations Act, prior to the issuance of debt for 9(c) general obligation projects, when more than one year has elapsed since the review and evaluation of financial feasibility, institutions must prepare and submit an updated Financial Feasibility Study (“FFS”) to the Department of the Treasury for review and evaluation prior to participation in the sale. In addition, Treasury’s review is required prior to requesting the Governor’s Opinion of Financial Feasibility required under Article X, Section 9(c) of the *Constitution of Virginia*. **You will be required to either update or reaffirm your FFS by October 11, 2023.**

Complete and submit the survey separately for each project for which 2024A General Obligation 9C Bond proceeds are being sought. Additional pages may be used to supplement the survey where descriptive language is required to complete a specific question.

The deadline for receipt of surveys is **4:00 p.m. on Friday, September 22, 2023. The Surveys may be submitted via e-mail to Leslie English at leslie.english@trs.virginia.gov and Sandra Stanley at sandra.stanley@trs.virginia.gov.** The survey should be used by Virginia public institutions of higher education planning to request financing for capital projects through the Commonwealth of Virginia’s General Obligation 9(c) Bond Program.

ATTACHMENT B – Tentative Financing Schedule

PRELIMINARY FINANCING SCHEDULE
(as of September 2023)
COMMONWEALTH OF VIRGINIA
GENERAL OBLIGATION 9(c) BONDS
SERIES 2024A

SCHEDULE FOR PARTICIPATING INSTITUTIONS

DATE (Subject to change)	TASK
Friday 9/8/2023	Surveys Distributed to Institutions
Friday 9/22/2023	Surveys received from Institutions
Friday 10/11/2023	Send initial estimated (sample) debt service schedules to Borrowing Institutions
Friday 10/18/2023	Borrowing Institutions sign-off on preliminary debt service schedules
Wednesday 11/15/2023	Treasury Board Meeting
Friday 1/18/2024	Send revised debt service schedules to Borrowing Institutions.
Thursday 1/25/2024	Last day for Borrowing Institutions to withdraw without Late Withdrawal Fee.
Friday 1/26/2024	Request Ratings
Week of 1/29/2024	Due diligence calls with institutions
Tuesday 1/30/2024	BOV resolutions due from Borrowing Institutions
Wednesday 2/14/2024	Series 2024A SALE at 11:00 am
Wednesday 3/6/2024	GOB Closing Distribute final debt service schedules and closing memorandum to Borrowing Institutions

Note:

All dates are tentative and are subject to change by the Treasury Board.

Questions regarding the General Obligation 9(c) Bond Program may be addressed to Leslie English at (804) 371-0341 (leslie.english@trs.virginia.gov) Department of the Treasury, Division of Debt Management.

ATTACHMENT C – Form of Board of Visitor’s Resolution

ATTACHMENT D – Use of Proceeds Certificate

ATTACHMENT E – Private Use/Management Contracts/Research Agreements

Private Use, Management Contracts, and Research Agreements

The following analysis is meant to provide a basic understanding of the Internal Revenue Service regulations and procedures (the “IRS Guidance”) relating to the amount of private use permitted in projects financed with tax-exempt securities. This analysis is not meant to be a legal interpretation of the IRS Guidance. Institutions of higher education participating in the Treasury Board’s General Obligation Bond Program (the “Institutions” participating in the “Program”) should use this document only as a guide to understanding certain terms and questions asked in conjunction with completing the Survey Package for this Program.

Introduction

In an effort to limit the volume of tax-exempt bonds that finance the activities of entities (“nonqualified parties”) other than state governments, local governments, and certain 501(c)(3) (non-profit) organizations, certain IRS Guidance has been established which identifies arrangements that may transfer the benefits of tax-exempt financings to nonqualified parties. Failure to comply with the IRS Guidance can result in severe consequences. Improper use may cause the entire bond issue to be declared taxable, requiring the bondholders to pay federal and state income tax on the interest income earned on the bonds. Non-compliance also may lead to extensive administrative dealings with the IRS and/or litigation.

A primary goal of the Treasury Board (the “Board”) is to maintain the tax-exempt status of its bonds and to avoid any of the consequences related to non-compliance with the IRS Guidance. Therefore, the Board’s general policy in regard to private use is to limit the amount of such use for each project included within a bond issue to less than 10% (5% if unrelated use) of that project’s share of the issue. This limit may be measured by a number of factors including square footage, actual costs, costs per foot, etc. To ensure adherence to the IRS Guidance and the Board’s policy with respect to private use, the Board requires each participating Institution’s Board of Visitors to adopt a Resolution approving a General Certificate to be entered into by the Participating Institution in which the participating Institution pledges that it will not enter into private use arrangements without first seeking guidance and approval from the State Treasurer and Board’s Bond Counsel.

Private Activity Bonds

Bonds are private activity bonds if they meet either (i) the private business use test **and** the private security or payment test or (ii) the private loan test.

- The private business use and private security or payment test is met if:
 - an amount equal to more than 10% (5% if unrelated use) of the proceeds of an issue are used in a trade or business carried on by a nonqualified party; **AND**
 - an amount equal to more than 10% (5% if unrelated use) of debt service is paid to the Institution by a nonqualified party in connection with its use of the financed facility.
- The private loan financing test is met if more than the lesser of 5% or \$5 million of bond proceeds is to be used to make or finance loans to nonqualified parties.

The determination of private business use is based on the reasonable expectations for the issue for its term as of the date of issuance, although private business use may arise from deliberate actions subsequent to the issuance of bonds. Private business use includes:

- ownership of the financed property;
- lease of the financed property to a nonqualified party;
- management or service contracts;
- research agreements;

- legal entitlements with respect to the financial property (e.g., naming rights); and
- other actual or beneficial use on terms different from terms available to the general public.

Exceptions that are not deemed to be private business use include:

- use by a member of the general public;
- temporary use by a developer; and
- incidental use (e.g., janitorial service, pay telephones, vending machines, advertising displays).

Management and Service Contracts

As described above, management and service contracts may create private business use. However, IRS Guidance provides a “safe harbor” that if met by a management or service contract, will prevent the contract from giving rise to private business use. Prior IRS guidance was provided under Rev. Proc. 97-13 as supplemented. Generally, it required that such contracts provide for reasonable compensation with no portion of the compensation based on a share of net profits from the operation of the facility, and required that the manager or service provider not be related to the state or local governmental entity. Prior guidance set forth certain acceptable fee arrangements.

Rev. Proc. 2017-13 replaced the safe harbor provisions of Rev. Proc. 97-13, as supplemented, with new requirements that, if satisfied, are intended to give certainty that use under a compliant management or service contract will not lead to private business use. The new provisions apply to contracts entered into on or after January 17, 2017. The new rules may by election be applied to contracts entered into before January 17, 2017. The new rule contains a transitional provision which permits continued use of the old rules for contracts entered into before August 18, 2017 that are not materially modified or extended after August 18, 2017. The general requirements of Rev. Proc. 2017-13 are these:

- First, the consideration to be paid by the “exempt person” (a governmental entity or a 501(c)(3) organization, i.e. the educational institution) under the contract must be “reasonable” for the services performed.
- Second, the consideration may not be based on a share of net profits derived from the operation of the managed property and the contract must not burden the service provider with any share of net losses from such operation.
- Third, the term of the contract must be limited. The maximum term, including renewal options, may not exceed 30 years or 80 percent of the useful life of the managed property, whichever is less.
- Fourth, the exempt person must retain sufficient control over the use of the managed property.
- Fifth, the exempt person must bear the risk of loss upon damage or destruction of the managed property.
- Sixth, the service provider must agree that it will not take tax positions that are inconsistent with being a service provider.
- Finally, the service provider cannot control the exempt person.

Research Agreements

An agreement by a private party (including the federal government) to sponsor research with respect to financed property can result in private business use if, for federal income tax purposes, the sponsor is treated as the lessee or owner, on a basis not available to others, of financed property or of the results of the research.

IRS Revenue Procedure 2007-47 provides three safe harbors which, if satisfied with respect to a research agreement, will ensure that use of property pursuant to such agreement will not result in private business use. The safe harbors, and the context in which they apply, are as follows:

I. Corporate-sponsored research: a research agreement relating to property used for basic research¹ supported or sponsored by a party (a “sponsor”) other than the “qualified user” (in this case, the Institution) so long as

A. any license or other use of resulting technology by the sponsor is permitted only on the same terms as the qualified user would permit that use by any unrelated, non-sponsoring party (that is, the sponsor must pay a competitive price for its use), and

B. the price paid for that use must be determined at the time the license or other resulting technology is available for use.²

II. Industry research agreements: a research agreement relating to property used pursuant to an industry research arrangement so long as

A. a single sponsor agrees, or multiple sponsors agree, to fund governmentally performed basic research;

B. the research to be performed and the manner in which it is to be performed (for example, selection of the personnel to perform the research) is determined by the qualified user;

C. title to any patent or other product incidentally resulting from the basic research lies exclusively with the qualified user; and

D. the sponsor or sponsors are entitled to no more than a nonexclusive, royalty-free license to use the product of any of that research.

III. Federally sponsored research: a research agreement relating to property used pursuant to a federally-sponsored industry research arrangement so long as

A. the research to be performed and the manner in which it is to be performed (for example, selection of the personnel to perform the research) is determined by the qualified user;

B. title to any patent or other product incidentally resulting from the basic research lies exclusively with the qualified user; and

C. any party other than the qualified user to use the product of the research is entitled to no more than a nonexclusive, royalty-free license to use the product of any of that research.

(Note: If a contract setting forth rights of the federal government and its agencies that are mandated by the Bayh-Dole Act otherwise meets the requirements of III A, B and C above, such Bayh-Dole rights will not cause a research agreement to fail this test.)

¹*Basic research* means any original investigation for the advancement of scientific knowledge not having a specific commercial objective. For example, product testing supporting the trade or business of a specific nongovernmental person is not treated as basic research.

² Although the qualified user need not permit persons other than the sponsor to use any license or other resulting technology, the price paid by the sponsor must be no less than the price that would be paid by any nonsponsoring party for those same rights.