

## Chapter Comm 113

### ALLOCATION OF VOLUME CAP ON TAX-EXEMPT PRIVATE ACTIVITY BONDS

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Note: Chapter DOD 13 was repealed and recreated as an emergency rule effective December 30, 1996. Chapter DOD 13, as it existed on June 30, 1997, was repealed and recreated as chapter Comm 113, effective July 1, 1997. Chapter Comm 113, as it existed on December 31, 1997, was repealed and a new chapter Comm 113 was created effective January 1, 1998.

**Comm 113.01 Purpose.** The purpose of this chapter is to establish a procedure relating to the annual allocation of volume cap for tax-exempt "private activity bonds" that may be issued by Wisconsin issuers pursuant to the internal revenue code of 1986, 26 USC 146.

History: Cr. Register, December, 1997, No. 504, eff. 1-1-98; emerg. am. eff. 2-15-99; am. Register, August, 1999, No. 524, 9-1-99.

**Comm 113.02 Definitions.** In this chapter:

- (1) "Authority" means the Wisconsin housing and economic development authority.
- (2) "Beginning farmer bonds" means bonds or notes authorized under s. 234.66, Stats.
- (3) "Carry forward purpose" has the meaning assigned to that term in 26 USC 146 (f)(5).
- (4) "Code" means the internal revenue code of 1986, as amended.
- (5) "Council" means the advisory volume cap allocation council established by the department under s. 15.04 (1) (c), Stats. and s. Comm 113.05.
- (6) "Department" means the department of commerce.
- (7) "Economic development bonds" means bonds described in 26 USC 142(a), 144(a) and 144(c). "Economic development bonds" does not include multi-family housing bonds.
- (8) "Issuer" means:
  - (a) Any municipality.
  - (b) Any agency, authority or political subdivision of the state of Wisconsin that is empowered to borrow money, including the authority and any other public corporation or commission established by or on behalf of these entities.
  - (c) For purposes of s. Comm 113.06 (2), any person acting for or on behalf of the entities listed in par. (a) or (b).
- (9) "Issuer-owned project bonds" means bonds issued for a facility that is owned by an issuer, would be treated as owned by the issuer pursuant to 26 USC 142 (b) (1) (B), and is described in 26 USC 142 (a) (1) to (11). It does not include single-family housing bonds but does include multi-family housing bonds.
- (10) "Multi-family housing bonds" means bonds issued for a qualified residential rental project, as defined in 26 USC 142 (a) (7) and 142 (d).
- (11) "Municipality" has the meaning assigned to that term in s. 67.01(5), Stats.
- (12) "Other private activity bonds" means private activity bonds other than those certified to the department as issuer owned project bonds, multi-family housing bonds or single-family housing bonds.
- (13) "Private activity bonds" has the meaning assigned to that term in 26 USC 141 (a).

(14) "Project" means any issuer-owned project, multi-family housing project, or economic development project for which private activity bonds may be issued under applicable federal law.

(15) "Qualified redevelopment bonds" has the meaning assigned to that term in 26 USC 144 (c).

(16) "Single-family housing bonds" means qualified mortgage bonds as defined in 26 USC 143 (a).

(17) "Small economic development bonds" means any economic development bond issue where the aggregate face amount to be issued is \$2 million or less.

(18) "Unified volume cap" means the annual state ceiling for the issuance of private activity bonds applicable to the state of Wisconsin.

Note: The "unified volume cap" is determined according to 26 USC 146 (d) (1) and (2). It is an amount equal to the prior year census estimate of the resident population of the state of Wisconsin released by the bureau of census multiplied by \$50 per person.

History: Cr. Register, December, 1997, No. 504, eff. 1-1-98.

**Comm 113.03 Allocation to the authority.** (1) There is allocated annually to the authority \$125 million of the unified volume cap to be further allocated to local issuers by the authority under sub. (2) or utilized by the authority for single-family housing bonds, multi-family housing bonds and beginning farmer bonds. The authority shall certify to the department promptly after issuance of any private activity bonds the total amount of the bonds issued pursuant to this allocation.

(2) From the volume cap allocated under sub. (1), the authority shall allocate up to \$45 million in volume cap to local issuers for multi-family housing bonds pursuant to guidelines established by the authority and approved by the department.

History: Cr. Register, December, 1997, No. 504, eff. 1-1-98.

**Comm 113.04 Building commission allocation.** There is allocated annually to the state building commission \$10 million of the unified volume cap to be further allocated by the building commission and utilized for any private activity bonds as the building commission in its discretion shall determine are needed. Any amount of the allocation for which bonds have not been issued by September 1 each year shall be automatically transferred to the department to be further allocated as provided in ss. Comm 113.06, 113.07 and 113.08. The building commission shall promptly certify to the department, on September 1 each year, the amount of unused allocation.

History: Cr. Register, December, 1997, No. 504, eff. 1-1-98.

**Comm 113.041 Commerce rapid response set aside volume cap.** The department shall annually set aside 15% of its designated total volume cap to be allocated for projects that shall affect an area that has experienced or is about to experience severe economic distress as determined by the department. The department shall review and evaluate applications for this volume cap. Any application for volume cap for severe economic conditions applied for under this section may be approved solely by the department. The applicant shall indicate why the area should qualify for the rapid response set aside volume cap. Any of the rapid response set aside volume cap remaining as of September 1,

shall be made available for the allocation process established under ss. Comm 113.06 and 113.07.

History: Emerg. cr. eff. 2-15-99; cr. Register, August, 1999, No. 524, eff. 9-1-99.

#### Comm 113.05 Volume cap allocation council.

(1) Pursuant to s. 15.04 (1) (c), Stats., there is created the volume cap allocation council attached to the department consisting of all of the following:

- (a) The secretary of the department or the secretary's designee.
- (b) The executive director of the authority or the executive director's designee.
- (c) Up to 5 additional members appointed by the secretary of the department for 2-year terms.

(2) The council shall evaluate applications and make recommendations to the secretary of the department relating to the allocation of volume cap among applicants pursuant to s. Comm 113.07. The secretary of the department shall make final decisions on the allocation of volume cap.

History: Cr. Register, December, 1997, No. 504, eff. 1-1-98; emerg. am. (1) (c), eff. 2-15-99; am. (1) (c), Register, August, 1999, No. 524, eff. 9-1-99.

#### Comm 113.06 Department's allocation; allocation process. (1)

There is allocated to the department the remainder of the annual unified volume cap, including any amount that is surrendered, transferred or terminated under s. Comm 113.04, 113.06 (6), or 113.07 (6), which shall be allocated for issuer-owned project bonds, economic development bonds and other private activity bonds, but not for single family housing bonds or multi-family housing bonds.

(2) Any issuer may submit an application to the department for an allocation of the unified volume cap in connection with a project. An application shall be accompanied by a nonrefundable application fee of \$500 for economic development bonds up to \$2 million, a nonrefundable fee of \$1,000 for economic development bonds between \$2 million up to \$5 million, a nonrefundable fee of \$1,500 for economic development bonds between \$5 million up to \$10 million, and a nonrefundable fee of \$2,000 for all other projects over \$10 million. An application shall include all of the information required under s. Comm 113.07 (1).

(3) If the department approves an application under this section, the department shall promptly certify a portion of its allocation of the unified volume cap that has not been allocated to an issuer and shall allocate the approved portion of the amount requested to the issuer. The allocation shall be valid for a period equal to the lesser of 90 calendar days or the remainder of the calendar year. The amount of the allocation shall not exceed the maximum amount authorized for issuance under the official action taken by the issuer with respect to the obligation. Certain allocations are subject to earlier termination pursuant to subs. (6) and (7). Any allocation under this section shall be valid only with respect to bonds issued in the same calendar year. Any allocations for a carry forward purpose shall be obtained under the provisions of s. Comm 113.08.

(4) (a) Each issuer shall notify the department in writing as to the amount of obligations issued pursuant to the allocation within 5 business days after the issuance of the bonds and as part of the notification, make a payment by cash or cashier's check to the department equal to 3-one hundredths of one percent of the amount of the obligations issued pursuant to the allocation.

(b) Upon notification and payment under par. (a), the allocation in the amount issued shall, subject to par. (c), become permanent and irrevocable.

(c) The department shall treat any notice received pursuant to this subsection more than 5 business days after the issuance of the bonds as a reapplication pursuant to this chapter.

(5) An application shall be made only within 90 calendar days prior to the planned issuance of the bond.

(6) An issuer may surrender to the department all or any part of its rights to a particular allocation under any section of this chapter prior to its expiration. Upon surrender of all or any part of an issuer's allocation, the allocation shall expire.

(7) (a) Unless the department has received notice of the issuance of bonds pursuant to sub. (4) or a deposit of cash or a certified or cashier's check in an amount equal to .5% of the allocation requested, if requested prior to October 1, and one percent if requested on October 1 or thereafter, any allocation shall terminate on the earlier of 30 days after the allocation is made or December 1. No additional deposit may be required with respect to an allocation made upon reapplication if the required deposit has already been made, and not refunded, with respect to the project.

(b) 1. Subject to subd. 2., the deposit shall be refunded, without interest, if prior to January 1 of the succeeding year bonds are issued by the issuer pursuant to the allocation or to an allocation made upon reapplication.

2. A ratable portion of the deposit proportionate to the amount by which the allocation exceeds the face amount of the bonds may not be refunded.

3. Any deposits, or portions of the deposits, which have not become refundable pursuant to subs. 1. and 2. as of the fifth business day of the succeeding year shall remain in the department and be used as determined by the department.

4. Any refund shall be made within 30 days after a request for refund, together with any evidence as the department may reasonably require, is furnished to the department.

(8) Notwithstanding any other provision, the deposit required with respect to any issuer-owned project bonds or qualified redevelopment bonds shall be \$1,000 for each \$5 million of allocation or portion of \$5 million of allocation requested, and no deposit shall be required with respect to any allocation to the state building commission.

(9) If a project is located in the territory of more than one municipality, a municipality in which a portion of the project will be located may apply for volume cap and then assign its volume cap to the municipality which will act as issuer for the bonds relating to the project.

History: Cr. Register, December, 1997, No. 504, eff. 1-1-98; emerg. am. (1), (2) and (7) (b) 3., eff. 2-15-99; am. (1), (2), (7) (b) 3., Register, August, 1999, No. 524, eff. 9-1-99.

**Comm 113.07 Application process: criteria for volume cap. (1)** An application to the department for an allocation of the unified volume cap shall include all of the following:

- (a) The name and address of the issuer.
- (b) A description of the project.
- (c) The name and address of the person that proposes to invest in the project.
- (d) The amount that the person proposes to invest in the project.
- (e) The total investment in the project.
- (f) The total number of jobs that will be created, retained or substantially upgraded in connection with the project.
- (g) The average wages and benefits that will be provided to persons hired as a result of the project.
- (h) The person's plans to make reasonable attempts to hire employees who are recipients of unemployment compensation under ch. 108, Stats., or relief funded by a relief block grant under ch. 49, Stats.
- (i) Evidence that official action has been taken by the issuer with respect to the issuance of the obligation which, for obligations issued pursuant to s. 66.521, Stats., shall be the initial resolution previously filed with the department with respect to the obligation.
- (j) A written, signed opinion of the issuer's legal counsel or bond counsel, certifying that the obligations qualify as private

activity bonds subject to the unified volume cap and stating whether the bonds qualify as issuer-owned project bonds, qualified redevelopment bonds, or other private activity bonds.

(k) Any other information required by the department.

(2) Upon receipt of an application, the department shall evaluate whether it meets the requirements of sub. (3) and score the application based upon a comparative ranking with other applications received. Comparative rankings shall be based upon the department's consideration of the factors in subs. (3) and (4). The department may establish a cutoff score for applications submitted to the council and the secretary for consideration and approval.

(3) The council and the department may approve an allocation of the unified volume cap if they determine all of the following:

(a) The project serves a public purpose.

(b) The project will likely retain or increase employment in this state.

(c) The project will likely positively affect an area's economic distress.

1. The unemployment rate in the area is higher than the state average for the 18 months immediately preceding the date on which the application under sub. (1) was submitted to the department.

2. The percentage of persons residing in the area who are members of households with household income levels at or below 80% of the statewide median household income is higher than the state average.

3. The percentage of households in the area receiving unemployment compensation under ch. 108, Stats. or relief funded by a relief block grant under ch. 49, Stats. is higher than the state average.

4. In the 36 months immediately preceding the date on which the application under sub. (1) was submitted to the department, a number of workers in the area were permanently laid off by their employer or became unemployed as a result of a business action subject to s. 109.07 (1m), Stats.

5. An employer in the vicinity of the area has given public notice under s. 109.07 (1m), Stats. of either a business closing or a mass layoff of at least 25 employees, or 25% of the employees, of a business whichever is greater, that will result in a number of workers in the area being laid off permanently.

6. Property values in the area have been declining.

7. There has been a decline in the population in the area.

(4) In making a determination under sub. (3), the council and the department shall consider all of the following:

(a) The extent of poverty, unemployment or other factors contributing to general economic hardship in the area.

(b) The prospects for new investment and economic development in the area.

(c) The amount of investment that is likely to result from the project.

(d) The number of jobs that are likely to be retained or created as a result of the project.

(e) The number of jobs that are likely to be made available as a result of the project to persons who are recipients of unemployment compensation under ch. 108, Stats. or relief funded by a relief block grant under ch. 49, Stats.

(f) The competitive effect of the allocation of unified volume cap on other businesses in the area.

(g) Whether the project will result in dislocation of a business from one municipality to another.

(h) Whether the project will result in the redevelopment of a brownfield site.

(i) Whether the project is likely to occur or continue without allocation of the unified volume cap.

(j) Any other factors that the department and the council consider relevant.

(5) If the council and the department approve an application under this section, the department shall promptly certify a portion of its allocation of the unified volume cap that has not been allocated to an issuer and shall allocate the approved portion of the amount requested to the issuer. The allocation shall be valid for a period equal to the lesser of 90 calendar days or the remainder of the calendar year. The amount of the allocation shall not exceed the maximum amount authorized for issuance under the official action taken by the issuer with respect to the obligation. Certain allocations are subject to earlier termination pursuant to ss. Comm 113.06 (6) and (7). Any issue under this section shall be valid only with respect to bonds issued in the same calendar year.

(6) The council and the department may not approve an allocation in excess of \$5 million for any project unless they determine that the utilization is in the best interests of the people of the state of Wisconsin. In making a determination under this subsection, the council and the department shall consider all of the following:

(a) The needs of other areas of the state.

(b) The amount of unified volume cap requested by and available to other issuers.

(c) Any other factors that the department and the council consider relevant.

History: Cr. Register, December, 1997, No. 504, eff. 1-1-98; emerg. am. (1) (a), r. and recr. (3) (c), eff. 2-15-99; am. (1) (a), r. and recr. (3) (c), Register, August, 1999, No. 524, eff. 9-1-99.

#### Comm 113.08 Carry forward allocation process.

(1) (a) On the department's next to last working day of the year, the department shall determine the portion of its allocation of the unified volume cap that has not been allocated to issuers and shall then make allocations only for carry forward purposes. No allocation for carry forward purposes may be made pursuant to this subsection prior to that date. Any requests shall be considered by the department in the order received, and a request shall be deemed not to have been received if an allocation has been made and not surrendered with respect to the same project or portion of the project. An allocation may be made by the department to any issuer that has done all of the following:

1. Requested an allocation for a carry forward purpose.

2. Provided the department with information as is requested by the department and approved by the department as showing that an effective election can be made by the issuer under the federal tax reform act of 1986 and any applicable income tax regulations promulgated pursuant to 26 USC 146.

3. Paid to the department the application fee required by s. Comm 113.06 (2).

4. Paid to the order of the department a deposit of immediately available funds or a certified or cashier's check in an amount equal to one percent of the amount of the allocation requested.

(b) The deposit paid under par. (a) 4. shall be refunded, without interest, if bonds are issued by the issuer on or before December 31 of the third succeeding year, for the carry forward purpose indicated in the application for the allocation, provided that an amount of a deposit equal to one percent of the amount by which the allocation exceeds the face amount of bonds actually issued shall not be refunded. Any refund shall be made within 30 days after a request for refund, together with any evidence as the department may reasonably require, is furnished to the department.

(c) Any deposits under s. Comm 113.06 shall not be credited toward the deposit under this subsection.

(d) Any deposits or portions of the deposits which have not become refundable pursuant to par. (b) as of January 1 of the preceding year shall remain in department and be used as determined by the department.

(e) Notwithstanding any other provision, the deposit required with respect to any issuer-owned project bonds or qualified redevelopment bonds shall be \$1,000 for each \$5 million of allocation or portion of \$5 million of allocation requested, and no deposit shall be required with respect to any allocation to the state building commission.

(2) On the department's last working day of the year, the department shall determine the portion of its allocation of the unified volume cap that has not been allocated to issuers. The department shall assign that portion to the authority with direction to the authority, to make an election, pursuant to any applicable income tax regulations promulgated pursuant to 26 USC 146, to carry forward the portion for any carry forward purpose.

History: Cr. Register, December, 1997, No. 504, eff. 1-1-98; emerg. am. eff. 2-15-99; am., Register, August, 1999, No. 524, eff. 9-1-99.

**Comm 113.09 Department certification.** At the request of an issuer that has complied with all of the provisions of this chapter and that received an allocation, the department shall certify that the bond issue meets the requirements of 26 USC 146.

History: Cr. Register, December, 1997, No. 504, eff. 1-1-98.

**Comm 113.10 Designation of interest earned.** Any interest earned upon investment of amounts deposited under this chapter shall inure to the state of Wisconsin for the benefit of the people of the state of Wisconsin, to be used as provided by law.

History: Cr. Register, December, 1997, No. 504, eff. 1-1-98.