

# Chapter 365-135 WAC

## BOND CAP ALLOCATION

### WAC

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**WAC 365-135-010 Purpose.** The federal Tax Reform Act of 1986 imposes an annual ceiling on each state limiting the dollar volume of certain private activity bonds that can be issued. In addition, Congress from time-to-time enacts volume ceilings on other types of bonds. To allocate the bond volume ceilings among eligible issuers in Washington state, chapter 297, Laws of 1987 as amended has been enacted. In accordance with the statute, the department of commerce will allocate the state's bond ceilings and establish by rule a fee schedule. The department will carry out such functions through the bond cap allocation program (BCAP).

[Statutory Authority: Chapter 39.86 RCW, Executive Order 09-06, Federal American Recovery and Reinvestment Act of 2009, and Section 301(a) of Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Division C of Pub. L. 110-343. 10-07-128, § 365-135-010, filed 3/23/10, effective 4/23/10. Statutory Authority: Chapter 39.86 RCW and RCW 43.330.040 (2)(g). 97-02-093, § 365-135-010, filed 1/2/97, effective 2/2/97. Statutory Authority: 1987 c 297. 87-19-082 (Order 87-18), § 365-135-010, filed 9/16/87.]

**WAC 365-135-020 Definitions.** The definitions in this section apply throughout this chapter unless the context clearly provides otherwise.

**Allocation fee:** The total fee paid by the issuer to the department for receiving allocation from the BCAP. It is assessed by the department based on multiplying the requested allocation amount by .000277 or five hundred dollars, whichever is greater. The allocation fee, which includes the nonrefundable five hundred dollar filing fee, is due from the issuer upon filing an application.

**Department:** The Washington state department of commerce.

**Extension fee:** The fee the department may assess when an issuer requests and is granted an extension for issuing the allocation or carryforward of the allocation. The amount of the fee will not exceed two hundred fifty dollars and is non-refundable.

**Filing fee:** The nonrefundable five hundred dollar portion of the allocation fee.

**Original allocation:** The amount of qualified energy conservation bond, recovery zone economic development

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bond or recovery zone facility bond issuing authority awarded to an originally awarded locality by a formula in federal law.

**Originally awarded locality:** A city or county that has been allocated qualified energy conservation bond, recovery zone economic development bond or recovery zone facility bond authority by a formula contained in federal law.

**Reallocation:** The assignment of an unused portion of the state ceiling from one bond use category or issuer to another or the provision of a certificate of approval to any issuer for an allocation amount which previously had been returned to the department.

**Statute:** Chapter 39.86 RCW.

[Statutory Authority: Chapter 39.86 RCW, Executive Order 09-06, Federal American Recovery and Reinvestment Act of 2009, and Section 301(a) of Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Division C of Pub. L. 110-343. 10-07-128, § 365-135-020, filed 3/23/10, effective 4/23/10. Statutory Authority: Chapter 39.86 RCW. 00-02-061, § 365-135-020, filed 1/3/00, effective 2/3/00. Statutory Authority: Chapter 39.86 RCW and RCW 43.330.040 (2)(g). 97-02-093, § 365-135-020, filed 1/2/97, effective 2/2/97. Statutory Authority: Chapter 39.86 RCW. 93-13-012 (Order 93-05), § 365-135-020, filed 6/7/93, effective 1/1/94. Statutory Authority: 1987 c 297. 87-19-082 (Order 87-18), § 365-135-020, filed 9/16/87.]

**WAC 365-135-030 Initial allocations.** Initial allocations shall be made in accordance with provisions of the statute and federal code.

[Statutory Authority: Chapter 39.86 RCW, Executive Order 09-06, Federal American Recovery and Reinvestment Act of 2009, and Section 301(a) of Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Division C of Pub. L. 110-343. 10-07-128, § 365-135-030, filed 3/23/10, effective 4/23/10. Statutory Authority: 1987 c 297. 87-19-082 (Order 87-18), § 365-135-030, filed 9/16/87.]

**WAC 365-135-035 Reallocations.** (1) Housing programs and projects will be given priority for the first fifty percent of the annual tax exempt private activity bond cap available after September 1 each year because of the need for affordable housing, the program's ability to serve lower-income households, its contribution to and support of economic development and long-term benefits that may be achieved.

(2) Bond cap will consider other categories of applications including industrial development bonds, exempt facilities, public utility districts, and student loans for allocation from the remaining bond cap available after September 1.

(a) The program will consider and then evaluate and balance the public benefits listed in statute and in rule in making allocation decisions. Allocations will be based upon the likelihood of a project achieving the highest overall public purposes and the degree to which a project:

(i) Provides an economic boost to an economically distressed community (based on the three-year unemployment figures from employment security);

- (ii) Creates or retains jobs that pay higher than the median wage for the county in which it is located, in sustainable industries, particularly for lower-income persons;
- (iii) Retains or expands the local tax base;
- (iv) Encourages and facilitates the provision of student loans for institutions of higher education;
- (v) Reduces environmental pollution;
- (vi) Facilitates investments in new manufacturing technologies enabling Washington industries to stay competitive;
- (vii) Diverts solid waste from disposal and manufactures it into value-added products;
- (viii) Encourages the environmentally sound handling of solid waste using best management's practices; or
- (ix) Produces competitively priced energy for use in the state.

(b) The criteria in this section and other applicable criteria otherwise established in statute and rule shall not be considered as ranked in any particular order but shall be weighed and balanced for each application and among applications in making allocation decisions.

(3) For the purposes of qualified energy conservation bonds, the federal code and U.S. Department of Treasury guidance contained in IRS Notice 2009-29 allow formula allocations to be reallocated to the state and passed on by the state to other issuers. An originally awarded locality may designate other issuing localities within the jurisdiction of the originally awarded locality to use all or a portion of its original allocation by any procedure mutually acceptable to both parties, on condition that the originally awarded locality provides documentation of the designation to the department within thirty days of making the designation and ensures that all other department requests for documentation are met. The following procedures will apply to qualified energy conservation bond reallocations:

(a) An originally awarded locality that intends to use its original allocation or intends to designate another issuer within the jurisdiction of the originally awarded locality to use the original allocation must file a *Notice of Intent* form with the department by January 1, 2010.

(b) An originally awarded locality that has chosen to decline its original allocation may affirmatively reallocate to the state by submitting an appropriately marked *Notice of Intent* form.

(i) The form must be signed by the official(s) of the jurisdiction authorized to execute the form pursuant to a resolution declining the allocation adopted by the jurisdiction's governing body; and

(ii) The form and the resolution declining the allocation must be delivered to the department by January 1, 2010.

(c) An originally awarded locality that has used the *Notice of Intent* form to express its intent to use its original allocation may amend the *Notice of Intent* at a later time if it is determined that the locality is unable to use the allocation and has decided to reallocate to the state.

(d) An originally awarded locality intending to use its original allocation must provide the department with project information and supporting documents by February 1, 2010. Supporting documents include *Bond Counsel* and *Underwriter Statement of Intent* forms, or equivalent, at the discretion of the bond cap manager, and a certified copy of an

inducement resolution by the governing board. A locality may request an extension if filed by February 1, 2010.

(e) If an originally awarded locality has not provided the department with the documents required by subsections (1), (2) or (4) of this section or has not issued bonds or requested an extension by June 1, 2010, the department may issue a *Notice of Intent to Reallocate*, informing the locality of the intent to reallocate the original allocation to another locality.

(f) An originally awarded locality will have fifteen days from receipt of a *Notice of Intent to Reallocate* to respond to the department with the required documentation or to ask the department to reconsider the reallocation determination.

(g) The department will respond to a request to reconsider a reallocation determination within ten business days with a decision by the assistant director of the local government division or designee to grant an extended time in which the issuing jurisdiction must demonstrate progress toward a qualified energy conservation bond issuance, or a decision to go forward with reallocation of the authority. The length of the time extension shall be determined at the discretion of the assistant director.

(4) For the purposes of recovery zone economic development bond and recovery zone facility bond allocations, an originally awarded locality may designate other issuing localities within the jurisdiction of the originally awarded locality to use all or a portion of its original allocation by any procedure mutually acceptable to both parties, on condition that the originally awarded locality provides documentation of the designation to the department within thirty days of making the designation and ensures that all other department requests for documentation are met.

If an originally awarded locality is not able to or chooses not to use its original allocation or to offer it to another issuer within the jurisdiction of the originally awarded locality, the authority may be waived. Waived recovery zone economic development bond or recovery zone facility bond authority may be reallocated by the department to other issuing localities. In addition, if an originally awarded locality does not respond to the department's requests for information regarding its intent to use its original allocation or progress in moving toward issuance by the federal deadline, the department may deem the allocation to have been waived.

In such cases, federal code provisions and U.S. Department of Treasury guidance in IRS Notice 2009-50 allow original allocations to be waived then reallocated by the state to other issuing localities. The following procedures will apply to any reallocations of waived recovery zone economic development bond or recovery zone facility bond authority:

(a) An originally awarded locality that intends to use its original allocation or intends to designate another issuer within the jurisdiction of the originally awarded locality to use the original allocation must file a *Notice of Intent* form with the department by January 1, 2010.

(b) An originally awarded locality that has chosen to decline its original allocation may affirmatively waive the allocation for reallocation by the state by submitting an appropriately marked *Notice of Intent* form.

(i) The form must be signed by the official(s) of the jurisdiction authorized to execute the form pursuant to a resolution declining the allocation adopted by the jurisdiction's governing body; and

(ii) The form and the resolution declining the allocation must be delivered to the department by January 1, 2010.

(c) An originally awarded locality that has used the *Notice of Intent* form to express its intent to use its original allocation may amend the *Notice of Intent* at a later time if it is determined that the locality is unable to use its original allocation and has decided to waive the allocation for reallocation by the state.

(d) An originally awarded locality intending to use its original allocation must provide the department with project information and supporting documents by February 1, 2010. Supporting documents include *Bond Counsel* and *Underwriter Statement of Intent* forms, or equivalent, at the discretion of the bond cap manager, and a certified copy of an inducement resolution by the governing board. A locality may request an extension if filed by February 1, 2010.

(e) If an originally awarded locality has not provided the department with the documents required by subsections (1), (2) or (4) of this section or has not issued bonds or requested an extension by June 1, 2010, the department may issue a *Notice of Intent to Reallocate*, informing the locality of the intent to deem the original allocation to have been waived and to reallocate it to another locality.

(f) An originally awarded locality will have fifteen days from receipt of a *Notice of Intent to Reallocate* to respond to the department with the required documentation or to ask the department to reconsider its waiver and reallocation determination.

(g) The department will respond to the request to reconsider its waiver and reallocation determination within ten business days with a decision by the assistant director of the local government division to grant an extended time in which the issuing jurisdiction must demonstrate progress toward a recovery zone economic development bond or recovery zone facility bond issuance, or a decision to go forward with waiver and reallocation of the authority. The length of the time extension shall be determined at the discretion of the assistant director.

(h) All recovery zone bonds must be issued by the deadlines established in the code.

[Statutory Authority: Chapter 39.86 RCW, Executive Order 09-06, Federal American Recovery and Reinvestment Act of 2009, and Section 301(a) of Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Division C of Pub. L. 110-343. 10-07-128, § 365-135-035, filed 3/23/10, effective 4/23/10. Statutory Authority: Chapter 39.86 RCW and RCW 43.330.040 (2)(g). 97-02-093, § 365-135-035, filed 1/2/97, effective 2/2/97.]

**WAC 365-135-040 Procedure for obtaining an allocation, reallocation, extension, or carryforward.** No issuer may receive an allocation, or reallocation, of the state ceiling without a certificate of approval from the department.

Issuers may apply for a certificate of approval by submitting a completed allocation request form to the department and paying an allocation fee. An allocation request form will be available from the department.

The department will respond to any such completed request in accordance with the statute. If an issuer does not issue bonds or mortgage credit certificates in the amount and by the date for which it has received a certificate of approval, the unused amount shall revert to the department for reallocation, unless an extension or carryforward is granted.

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An issuer may apply for an extension or carryforward of its allocation by submitting its request to the department and supplying any additional information required by the department. The department will promptly notify the issuer if any fees are due and respond to the request for extension or carryforward in a timely manner.

The housing category will be given priority for carryforward allocations of the annual tax exempt private activity bond ceiling.

[Statutory Authority: Chapter 39.86 RCW, Executive Order 09-06, Federal American Recovery and Reinvestment Act of 2009, and Section 301(a) of Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Division C of Pub. L. 110-343. 10-07-128, § 365-135-040, filed 3/23/10, effective 4/23/10. Statutory Authority: Chapter 39.86 RCW and RCW 43.330.040 (2)(g). 97-02-093, § 365-135-040, filed 1/2/97, effective 2/2/97. Statutory Authority: Chapter 39.86 RCW. 93-13-012 (Order 93-05), § 365-135-040, filed 6/7/93, effective 1/1/94. Statutory Authority: 1987 c 297. 87-19-082 (Order 87-18), § 365-135-040, filed 9/16/87.]

**WAC 365-135-050 Fees.** (1) A fee schedule is hereby established, which will consist of:

(a) An allocation or reallocation fee, due at the time a request is filed with the department of commerce; and

(b) In certain cases, an extension or carryforward fee.

If an issuer's allocation or reallocation request is denied, the allocation fee, less the five hundred dollar filing fee, will be refunded.

Annually, the department will determine if an adjustment of the fees is warranted by reviewing the account of BCAP revenues and expenses for the preceding fiscal year and by considering BCAP budget projections for the following fiscal year.

(2) Payment of the fees will occur as indicated by the schedule below.

(a) Filing. Upon filing an allocation request, the issuer must submit the total allocation fee, of which the five hundred dollar filing fee is nonrefundable.

(b) Extensions and carryforwards. The department may assess an extension fee, not to exceed two hundred fifty dollars, upon any request for extension or carryforward. The extension fee must be paid prior to the extension being granted. However, if the BCAP administrator determines that an issuer's allocation fee included a sufficient amount to pay for the additional administrative expenses associated with granting or denying such a request, the additional fee shall be waived.

(c) Refunds. If a requesting issuer pays any fee greater than the amount assessed by the department, that amount shall be refunded by the department.

If the allocation request is denied or a partial allocation is approved, the issuer will receive either a full or partial refund of the allocation fee, less the five hundred dollar filing fee. Once the allocation amount is approved, the allocation fee is not refundable, even if the issuer does not issue all or any of the approved allocation.

[Statutory Authority: Chapter 39.86 RCW, Executive Order 09-06, Federal American Recovery and Reinvestment Act of 2009, and Section 301(a) of Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Division C of Pub. L. 110-343. 10-07-128, § 365-135-050, filed 3/23/10, effective 4/23/10. Statutory Authority: Chapter 39.86 RCW and RCW 43.330.040 (2)(g). 97-02-093, § 365-135-050, filed 1/2/97, effective 2/2/97. Statutory Authority: Chapter 39.86 RCW. 93-13-012 (Order 93-05), § 365-135-050,

filed 6/7/93, effective 1/1/94. Statutory Authority: 1987 c 297. 87-19-082 (Order 87-18), § 365-135-050, filed 9/16/87.]

**WAC 365-135-060 Criteria for small issue (industrial revenue) bonds.** In addition to the statute, the following guidelines will be used as criteria for evaluating small issue requests:

(1) Until June 1 of each year, a minimum percentage of the ceiling available for small issues will be set aside for issuers in those locations which BCAP designates by certain geographic and distress indicators, as follows:

Designation	Allocation set-aside
East/distressed	15% or greater
West/distressed	15% or greater
East/nondistressed	10% or greater

(2) In evaluating the number of jobs created or retained a project would offer in relationship to the dollars which would be allocated from the ceiling, priority will be given to those projects, relative to their appropriate designation, which do not exceed the following ratios for dollars allocated per job:

Designation	\$ (in thousands) per job offered
East/distressed	\$192.2/job
East/nondistressed	121.6/job
West/distressed	146.2/job
West/nondistressed	106.6/job
Statewide	116.8/job

(3) The program will consider the number and type of jobs that will be created or retained. Projects that create new jobs will, in general, have priority over others. Projects that involve relocation from one part of Washington to another will, in general, have a lower priority than those that create net new jobs, unless the relocation was caused through displacement for other job creating or economic development activity.

(4) Projects that involve the creation of semiskilled and skilled jobs as well as unskilled jobs, or that will provide special training and promotion opportunities to employees, will have priority over those that do not. Projects that will be located in enterprise communities, neighborhood empowerment zones, or distressed areas will be accorded priority over other projects.

(5) Priority will be given to projects that result in publicly owned facilities over privately owned facilities.

(6) If the department finds that a particular project does not meet the guidelines in this section, but is nonetheless in the best interest of the state, the department may approve the request. Factors that may lead to such a finding include the following:

(a) The level of unemployment in a particular community within a county, to the extent that figures are available from the Washington state employment security department; and

(b) The number of secondary or spin-off jobs expected to be generated by the project.

(7) If demand for allocation exceeds the amount available, priority will be given to counties designated as distressed, using unemployment figures from the employment security department.

(8) The department will review these guidelines at least annually.

[Statutory Authority: Chapter 39.86 RCW and RCW 43.330.040 (2)(g). 97-02-093, § 365-135-060, filed 1/2/97, effective 2/2/97. Statutory Authority: 1987 c 297. 87-19-082 (Order 87-18), § 365-135-060, filed 9/16/87.]

**WAC 365-135-070 Criteria for exempt facility bonds.** (1) In addition to the state statute, the following guidelines will be used as criteria for evaluating exempt facility requests:

(a) Until September 1st of each year, any one exempt facility project may not receive more than thirty percent of the initial allocation amount available in the exempt facility category.

(b) The level of unemployment in a particular community within a county, to the extent that figures are available from the Washington state employment security department.

(c) The number of direct jobs and secondary or spin-off jobs expected to be generated by the project.

(d) The degree to which the project proposes to provide jobs for lower-income persons from the community.

(e) The number of jobs created in proportion to the amount of the bond cap allocation.

(f) The proportionate number of persons in relationship to the size of the community who will benefit from the project.

(g) The degree to which the project provides an economic boost to an economically distressed community (based on the three-year unemployment figures from employment security).

(h) The degree to which the project retains or expands the local tax base.

(i) The degree to which the project reduces environmental pollution.

(j) The degree to which the project diverts solid waste from disposal and manufactures it into value-added products.

(k) The degree to which the project produces energy at a lower cost than alternative or existing energy sources.

(l) The environmental benefit of the project to the particular community, the county or the state.

(m) The availability of bond cap from the exempt facility category.

(n) Recognize and accommodate the unique timing, and issuance needs of large scale projects that may require allocations in more than one year.

(o) Projects that result in publicly owned facilities over privately owned facilities.

(2) Exempt facility applications will not be considered for allocation until:

(a) The department receives:

(i) A list of all permits required to complete the project and the date each permit application was submitted to and/or granted by the appropriate authority;

(ii) A copy of any environmental impact statements; and

(b) Significant progress is demonstrated in securing project financing.

(3) The criteria in this section and other applicable criteria otherwise established in rule and statute shall not be considered as ranked in any particular order but shall be weighed and balanced for each application and among applications in making allocation decisions.

(4) After September 1st of each year, the department may approve an allocation amount prior to the issuer completing all of the criteria listed above.

(5) Exempt facility projects may receive an allocation in order to convert taxable financing to tax-exempt financing, but only in January or September of any year. The request for conversion will be compared against other requests for conversion and current exempt facility applications. Projects that use the Washington economic development finance authority to complete their financing will have priority over projects in obtaining future allocations to convert to tax-exempt financing. Conversion is only allowed within the federal guidelines of one year after the project comes online or two calendar years after the Washington economic development finance authority financing is approved, whichever comes first.

(6) Exempt facility projects up to \$50,000,000 may receive an allocation for up to one hundred percent of the total project cost. Projects from \$50,000,001 to \$75,000,000 may receive an allocation for up to ninety percent of the total project cost. Projects from \$75,000,001 to \$100,000,000 may receive an allocation for up to eighty percent of the total project cost. Projects over \$100,000,000 may receive an allocation for up to seventy percent of the total project cost. A project may obtain additional allocation above these percentages after September 1 of the last year of eligibility only if the total demand for cap is lower than the amount available.

[Statutory Authority: Chapter 39.86 RCW and RCW 43.330.040 (2)(g). 97-02-093, § 365-135-070, filed 1/2/97, effective 2/2/97. Statutory Authority: Chapter 39.86 RCW. 93-13-012 (Order 93-05), § 365-135-070, filed 6/7/93, effective 1/1/94.]

**WAC 365-135-080 Criteria for state allocation and reallocation of qualified energy conservation bonds.** The following criteria will be used by the department to prioritize allocation and reallocation requests. Not all criteria need to be demonstrated in a single project:

(1) The extent to which the project demonstrates the potential to directly conserve energy.

(2) The extent to which the project supports the development or implementation of innovative energy conservation technology.

(3) The extent to which the project uses renewable resources to produce energy.

(4) The number of citizens benefiting from the project.

(5) The number of jobs created or retained by the project and the amount of qualified energy conservation bond authority per job created or retained.

(6) The readiness of the project to proceed.

(7) The likelihood that the issuer will use the allocation within the timelines.

(8) The amount of other public and private funding leveraged by the qualified energy conservation bond allocation.

(9) The amount of local community support for the project.

[Statutory Authority: Chapter 39.86 RCW, Executive Order 09-06, Federal American Recovery and Reinvestment Act of 2009, and Section 301(a) of Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Division C of Pub. L. 110-343. 10-07-128, § 365-135-080, filed 3/23/10, effective 4/23/10.]

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**WAC 365-135-090 Criteria for reallocation of recovery zone economic development bonds.** In accordance with the intent of the code and state priorities, the following criteria will be used to prioritize reallocation requests by the department:

(1) The relative level of economic distress in the local community.

(2) The number of citizens benefiting from the project.

(3) The estimated positive economic impact of the project on the state or the local community.

(4) The number of jobs created or retained by the project and the amount of recovery zone economic development bond authority per job created or retained.

(5) The readiness of the project to proceed.

(6) The likelihood that the issuer will use the allocation within the timelines.

(7) The amount of other public and private funding leveraged by the recovery zone economic development bond allocation.

(8) The amount of local community support for the project.

[Statutory Authority: Chapter 39.86 RCW, Executive Order 09-06, Federal American Recovery and Reinvestment Act of 2009, and Section 301(a) of Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Division C of Pub. L. 110-343. 10-07-128, § 365-135-090, filed 3/23/10, effective 4/23/10.]

**WAC 365-135-100 Criteria for state allocation and reallocation for recovery zone facility bonds.** In accordance with the intent of the code and state priorities, the following criteria will be used to prioritize reallocation requests by the department:

(1) The relative level of economic distress in the local community.

(2) The number of citizens benefiting from the project.

(3) The estimated positive economic impact of the project on the state or the local community.

(4) The number of jobs created or retained by the project and the amount of recovery zone facility bond authority per job created or retained.

(5) The readiness of the project to proceed.

(6) The likelihood that the issuer will use the allocation within the timelines.

(7) The amount of other public and private funding leveraged by the recovery zone facility bond allocation.

(8) The amount of local community support for the project.

[Statutory Authority: Chapter 39.86 RCW, Executive Order 09-06, Federal American Recovery and Reinvestment Act of 2009, and Section 301(a) of Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Division C of Pub. L. 110-343. 10-07-128, § 365-135-100, filed 3/23/10, effective 4/23/10.]