ECONOMIC DEVELOPMENT

ECONOMIC DEVELOPMENT HANDBOOK

TRANSACTIONS INVOLVING

- **Industrial Development Agencies**
- **Local Development Corporations**
- **Certain State and Federal Programs, including:**
  - Empire Zones
  - NYS Brownfield Cleanup Program
  - Empowerment Zones
  - Enterprise Communities
  - Renewal Communities and the
  - New Markets Tax Credit Program

Also includes information on the ARRA

(available via Internet at *www.harrisbeach.com*)

BY
SHAWN M. GRIFFIN

April 2009
Ninth Edition

HARRIS BEACH PLLC
ATTORNEYS AT LAW

Primary Points of Contact
Harris Beach PLLC
Public Finance & Economic Development Practice Group

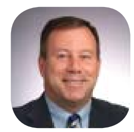
PARTNERS AND COUNSEL


Governor H. L. Carey
(212) 912-3550
hcarey@harrisbeach.com

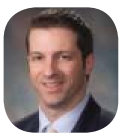

Michael G. Carey
(212) 912-3663
mcarey@harrisbeach.com


Shawn M. Griffin, Co-Chair
(585) 419-8614
sgriffin@harrisbeach.com


Charles I. Schachter, Co-Chair
(585) 419-8633
cschachter@harrisbeach.com

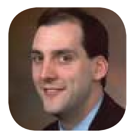

William M. Flynn
(518) 701-2711
wflynn@harrisbeach.com


Michael J. Townsend
(585) 419-8656
mtownsend@harrisbeach.com

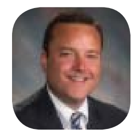

Joseph Amicone, Senior Counsel
(518) 701-2720
jamicone@harrisbeach.com


Doron M. Bar-Levav
(212) 313-5413
dbar-levav@harrisbeach.com


H. Todd Bullard
(585) 419-8696
tbullard@harrisbeach.com


Brendan F. Chudy
(518) 701-2717
bchudy@harrisbeach.com

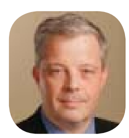

Timothy A. Frateschi
(315) 214-2035
tfrateschi@harrisbeach.com

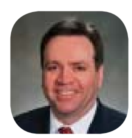

Christopher A. Andreucci
(585) 419-8606
candreucci@harrisbeach.com


Mark J. Gabriele
(716) 304-3110
mgabriele@harrisbeach.com

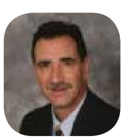

Russell E. Gaenzle
(585) 419-8718
rgaenzle@harrisbeach.com


Gerald J. Greenan, Of Counsel
(716) 200-5105
ggreenan@harrisbeach.com


Timothy J. Greenan
(716) 200-5110
tgreenan@harrisbeach.com


Kevin T. Hyland
(212) 313-5406
khyland@harrisbeach.com

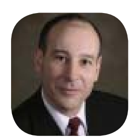

Patrick M. Malgieri
(585) 419-8665
pmalgieri@harrisbeach.com


Anthony P. Marshall
(315) 214-2033
amarshall@harrisbeach.com


Justin S. Miller
(518) 701-2710
jmiller@harrisbeach.com

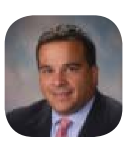

Robert Murray
(716) 200-5180
bmurray@harrisbeach.com


Linda Oldfield
(585) 419-8627
loldfield@harrisbeach.com

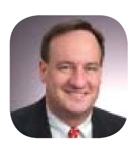

John J. Ottaviano, Of Counsel
(716) 438-0488
jottaviano@harrisbeach.com


Munesh Patel
(585) 419-8722
mpatel@harrisbeach.com


Hal C. Patrick
(518) 701-2719
hpatrick@harrisbeach.com


Frank C. Pavia
(585) 419-8709
fpavia@harrisbeach.com


Robert Ryan, Senior Counsel
(518) 701-2175
rryan@harrisbeach.com


Karl J. Sleight
(518) 701-2716
ksleight@harrisbeach.com

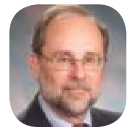

R. J. Stapell
(716) 200-5137
rstapell@harrisbeach.com

Primary Points of Contact
Harris Beach PLLC
Public Finance & Economic Development Practice Group

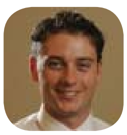
ECONOMIC DEVELOPMENT PROFESSIONALS

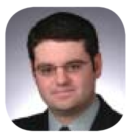

Roberta Jordans
585-419-8653
rjordans@harrisbeach.com


George E. Leveille
(518) 701-2741
gleveille@harrisbeach.com


Richard E. Rising
(585) 419-8747
rrising@harrisbeach.com

ASSOCIATES


Kyle Andrews
(716) 304-3113
kandrews@harrisbeach.com


Kevin T. Bezio
(518) 701-2718
kbezio@harrisbeach.com


Marybeth E. Frantz
(585) 419-8713
mfrantz@harrisbeach.com


Pietra G. Lettieri
(716) 200-5112
plettieri@harrisbeach.com


David M. Rothman
(914) 729-0264
drothman@harrisbeach.com

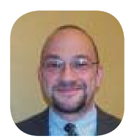
PARALEGAL PROFESSIONALS


Amy Abbink
(585) 419-8744
aabbink@harrisbeach.com


Melinda Boesken
(716) 304-3114
mboesken@harrisbeach.com


Marybeth Clark
(716) 200-5140
mclark@harrisbeach.com


Mary Beth Doyle
(585) 419-8701
mdoyle@harrisbeach.com


Alex Neubert
(585) 419-8705
aneubert@harrisbeach.com


Lori A. Palmer
(585) 419-8681
lpalmer@harrisbeach.com

ADMINISTRATIVE PROFESSIONALS


Kathy Drumm
(716) 200-5136
kdrumm@harrisbeach.com


Kelly Eldred
(585) 419-8682
keldred@harrisbeach.com


Teresa Hill
(716) 304-3116
thill@harrisbeach.com


Meghan Lawrence
(585) 419-8702
mlawrence@harrisbeach.com


Jodi Orlando
(585) 419-8946
jorlando@harrisbeach.com


Pamela Thompson
(212) 912-3674
pthompson@harrisbeach.com


Jackalyn WIlliams
(585) 419-8688
jwilliams@harrisbeach.com

Harris Beach is committed to providing the highest quality legal and professional services and to reducing our firm's carbon footprint. With the launch of our "Practice Green" initiative we reduced our firm's consumption of paper by almost 30 percent in one year.

In the interest of saving paper and energy in the future we would still like to provide this handbook to you electronically through our website. Otherwise, we will notify you each time the electronic edition is updated and posted to our website.

The web version is more comprehensive as it also includes click-on links to each attorney's biographical information, our complete Economic Development team's e-mail addresses, and links to the websites of NYSERDA, EFC, DEC, EPA, and many other recommended websites including links to resources on the American Recovery and Reinvestment Act.

If you would like to receive hard copies of this handbook in the future, please send an email with your current mailing address to economicdevelopmenthandbook@harrisbeach.com, and we would be happy to provide one.

Thank you and remember to Practice Green.

HARRIS BEACH PLLC
Attorneys at Law

practice GREEN

Harris Beach PLLC formed the Public Finance & Economic Development Practice Group to specialize in State and local financings, and economic development in New York State. By drawing on our experience in public finance, corporate law, municipal law, tax law, environmental law, real estate and litigation, we offer our clients a wide range of legal services to support their economic development efforts.

This Ninth Edition Economic Development Handbook contains additions and updates to reflect statutory and regulatory changes that have occurred in the past year. As existing programs have evolved and new programs have been created, it has become imperative that individual agencies, developers and their respective counsels assess each economic development project from a comprehensive viewpoint. More often than not, two or more programs, conduits or benefits may provide valuable financial, technical and/or programmatic assistance to a development project. In fact, it is now becoming common within our Public Finance & Economic Development Practice Group to assist with projects that involve not only IDA assistance and Empire Zone benefits, but also the establishment of or use of a local development corporation, empowerment zone, renewal community incentives, and/or Brownfield Cleanup Program credits.

Just as this Handbook has undergone significant evolution and development, the Harris Beach Public Finance & Economic Development Practice Group has experienced significant growth. We are pleased to be joined by two new attorneys: Patrick Malgieri, based in our Garnsey Road office, specializing in municipal development projects; and John Ottaviano in our new Lockport office; specializing in municipal development projects. Additionally, we are pleased to announce Munesh Patel's recent transition to partner.

Our Practice Group's experience is a result of learning from our clients and their projects over time. Practice Group members and our clients actively participate in educational sessions sponsored by the New York State Economic Development Council (the "NYSEDC"). Anyone working in the field of economic development will benefit from the efforts of the NYSEDC and, in particular, its executive director, Brian McMahon, especially in the current climate facing economic development in New York State. The current and past chairs of the NYSEDC have worked diligently to lobby for and to create a business-friendly environment in New York. The NYSEDC has consistently pursued legislative and policy changes to provide economic developers with the tools to fight the battles of retention and expansion in New York State. Brian's input, along with input from my father, James W. Griffin (past chair and NYSEDC board member), as well as that of our clients and other NYSEDC members, provides the foundation for this Handbook. If you work in the area of economic development in New York State, I encourage you to join and actively support the NYSEDC. You can contact the NYSEDC by phone: (518) 426-4058, or on the web: *www.nysedc.org*.

As a final note, this Handbook is a collaborative effort of our Practice Group. We offer it to our clients and friends with the goal that it serve as a useful tool in economic development efforts. If you have questions or comments, please call or write any member of our Practice Group at the contact information noted on the covers of this Handbook.

SHAWN M. GRIFFIN

PLEASE NOTE THAT THE INFORMATION CONTAINED IN THIS HANDBOOK IS SOLELY FOR INFORMATIONAL PURPOSES AND DOES NOT CREATE AN ATTORNEY-CLIENT RELATIONSHIP. IT ALSO DOES NOT PURPORT TO BE A SUBSTITUTE FOR ADVICE OF COUNSEL ON SPECIFIC MATTERS.

INDEX

Note: For current links and resources on The American Recovery and Investment Act, please see the Harris Beach website.

Circular 230 Disclosure

In accordance with Internal Revenue Service Circular 230, we inform you that any discussion of a Federal tax issue contained in this Economic Development Handbook is not intended or written to be used, and it cannot be used, by any reader for the purpose of (i) avoiding penalties that may be imposed on the reader under United Stated Federal tax laws, or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein. This Handbook does not provide and is not intended to provide tax advice. To apply the tax incentives discussed herein to your own situation, speak with your tax professional.

LOCAL AGENCIES AND INCENTIVES

I. INDUSTRIAL DEVELOPMENT AGENCIES ("IDAs")

A. INTRODUCTION

Industrial development agencies ("IDAs") are formed under Article 18-A of New York State General Municipal Law ("GML"), as amended (the "Act"), as public benefit corporations. From 1969 to 1984, approximately 176 IDAs were formed by legislative acts contained within Title 2 of the Act. IDAs were created to actively promote, encourage, attract and develop job and recreational opportunities and economically-sound commerce and industry in cities, towns, villages and counties throughout New York State (the "State"). IDAs are empowered to provide financial assistance to private entities through tax incentives in order to promote the economic welfare, prosperity and recreational opportunities for residents of a municipality ("Benefited Municipality"). Although the activity level for each IDA varies, any company considering a construction/renovation/expansion project or other economic development activity within the State should begin with a call to the local IDA. Additionally, any company who seeks assistance to retain its business interests within the State should contact the local IDA.

Title 1 of the Act vests broad powers in IDAs, including the ability to purchase, sell, lease and/or mortgage real property and to borrow and make money available in connection with properly-induced IDA projects. However, as discussed in detail below, because IDAs are public benefit corporations, they are subject to open government laws, have limited investment powers and specifically are not empowered to make outright gifts to a private enterprise.

B. STRUCTURE OF AN IDA-ASSISTED TRANSACTION

Any entity – either for-profit or not-for-profit[1] – that wants to undertake a construction or expansion project[2] in a Benefited Municipality can, in general, be considered a qualified applicant. The IDA usually participates by taking title to or a leasehold interest in the real and/or personal property involved in the project. The IDA then leases the property under a lease agreement, or sells the property under an installment sale agreement, to the company undertaking the project. The payment under the lease or installment sale agreement is usually a nominal consideration, plus debt service on any money the IDA borrowed to fund the project. At the time of closing, the IDA will generally charge an administrative fee ranging from 0.5% to 1.5% of the total project costs.

If a company owns the property before starting the project, it transfers title (either fee title or a leasehold interest) to the IDA without paying a transfer tax. If a third party owns the property, the company must arrange for the transfer of an interest in the property to the IDA. The length of time the IDA stays in title depends on the financial assistance being provided to the company. (<u>See</u> Section C, below.) When financial assistance is limited to the issuance of tax-exempt bonds and/or a mortgage recording tax exemption, the IDA need only stay in title for a period as short as one day. When providing a sales tax exemption, the IDA needs to stay in title through the construction or installation period. The IDA will stay in title for upwards of 20 years or more when offering a real property tax abatement.

---

[1] As of the date of this Ninth Edition, an IDA's ability to provide financial assistance to, or undertake projects for the benefit of not-for-profit corporations has expired. NYSEDC and many others are working with the State to have this portion of the Act, known as "civic facility," reenacted.

[2] "Project" is currently defined broadly by GML § 854(4) as "any land, any building or other improvement, and all real and personal properties located within the State of New York and within or partially outside the municipality for whose benefit the agency was created…."

Appendix A, attached hereto, shows schematics illustrating the relationships between the parties involved in a straight lease transaction and a tax-exempt bond transaction.

C. FINANCIAL ASSISTANCE

The current provisions of the Act allow IDAs to provide four basic forms of financial assistance that include: (1) mortgage recording tax exemption, (2) sales and use tax exemption, (3) real property tax abatement, and (4) interest rate savings via tax-exempt financing.

1. Mortgage Recording Tax Exemption

Whenever a county clerk records a mortgage in the State, the mortgagor must pay a 0.75% to 1.85% (of the mortgaged amount) mortgage recording tax – a significant expense on projects involving substantial financing. The IDA, however, can qualify a company for a mortgage recording tax exemption. If an IDA (on a non-recourse basis) is in title (either fee title or leasehold interest) at the time the mortgage is recorded, the IDA will mortgage its interest in the property (exempt from the mortgage recording tax under GML § 874) and the company will simultaneously mortgage its interest in the property (exempt from the mortgage recording tax under New York State Tax Law ("Tax Law") (§ 255). As an alternative, the IDA and the company can execute one mortgage with the IDA agreeing to pay the mortgage recording tax (which triggers a single exemption under GML § 874). Either arrangement can save a substantial amount of money for the company – from $7,500 to $18,500 for example, on a $1 million principal mortgage.

2. Sales and Use Tax Exemption

The sales and use tax rates in the State generally range from 7% to 8.75%. Under GML § 874, all purchases made by an IDA or its agents are exempt from sales and use tax. The IDA can issue a sales tax exemption letter to a company, authorizing it to act as an agent for the IDA. The company can then acquire the equipment, materials and services needed to acquire, construct, reconstruct and/or equip the project without having to pay sales or use taxes. The exemption is generally limited to the construction, reconstruction or installation period and cannot cover ongoing operational costs. However, tax exemptions for operational costs are now available through the New York State Empire Zones program. (<u>See</u> discussion, below.) A company in an Empire Zone can benefit from both the IDA sales tax exemption (exempts both the local and State portions for purchases of equipment and materials) and the Empire Zone sales tax exemption (exempts State portion only, but also exempts operational costs for up to 10 years).

Depending on the size of the project, the cost savings for the company under this arrangement can be significant. On a project where $1 million of the costs are subject to sales and use tax, the exemption can result in a savings of $70,000 to $87,500. When the lease or installment sale agreement expires, the IDA transfers any personal property that is involved in the project to the company without the payment of any sales or use tax.

3. Real Property Tax Abatement

In the State, property owners pay a real property tax based on the assessed value of land and improvements to a site. Any real property owned or controlled by an IDA is not subject to ad valorem real property taxes, under GML § 874 and Real Property Tax Law ("RPTL") § 412-a. However, real property owned or controlled by an IDA continues to be subject to special assessments and user fees (water, sewer, fire, etc). When an IDA takes title to or a leasehold interest in real property, the property becomes 100% exempt from ad valorem real property taxes. To accommodate the needs of the local tax jurisdictions, however, the IDA generally negotiates a Payment-In-Lieu-Of-Tax Agreement ("PILOT Agreement") with the company. The IDA will then direct, or receive and forward, these payments-in-lieu-of-taxes to the affected tax jurisdictions in the percentage that each affected tax jurisdiction would otherwise have received but for the Agency's involvement. By law, IDAs have the authority to negotiate any PILOT Agreement they deem reasonable. There is no required formula for calculating the payments to be made under a PILOT Agreement. They are, however, required to have specific policies adopted which outline the types of PILOT Agreements they are offering and procedures for deviation from those stated policies (the Uniform Tax Exemption Policy) ("UTEP"). If the IDA deviates from its UTEP, it must notify the affected jurisdictions. Although there is no statutory limit to the period or amount of the abatement, IDAs generally limit the period to between 10 and 20 years, with the assumption that the abatement generally results in more revenue for the tax jurisdictions than was generated by the property before the IDA's involvement.

This benefit is generally referred to as a "real property tax abatement" rather than a real property tax exemption, given the interplay between the 100% exemption from real property taxes and the IDA policy of requiring a payment in lieu of taxes. Some PILOT Agreements provide a specific dollar amount to be paid each year for the term of the PILOT Agreement. The mere predictability provided by such a PILOT Agreement can be invaluable to a developer. Since each PILOT Agreement is negotiated on a project-by-project basis, it is difficult to estimate the exact savings from the real property tax abatement. There is little doubt, however, that the abatement can provide significant savings. As a reminder, certain projects may already qualify for a partial exemption from real property taxes for new improvements under RPTL § 485-b or 485-e. A company in an Empire Zone may benefit from a refund of real property taxes paid on payments made under a PILOT Agreement. Where companies qualify for a 100% refund from the State, the IDA will often negotiate a payment in lieu of tax equal to full taxes and allow the increment (difference between full taxes and otherwise negotiated amount) to be used to repay debt service related to certain infrastructure improvements (referred to as "PILOT Increment Financing" or "PIF").

4. PILOT Administration Issues

PILOT Agreements; Generally. Pursuant to GML § 874(1), IDAs "shall be required to pay no taxes or assessments on any of the property acquired by it or under its jurisdiction or control or supervision or upon its activities." This broad exemption is mirrored within RPTL § 412-a, wherein real property owned by or under the jurisdiction, supervision or control of industrial development agencies enumerated in GML shall be entitled to such exemption (see 9 Op. Counsel SBEA No. 17 and Ch. 228 of the Laws of 1988, Section 1.)

In order to secure this exemption, an application (see Form RP-412-a, as prescribed by the New York State Office of Real Property Services ("ORPS")) must be filed in the office of the applicable assessor on or before the appropriate taxable status date for the year in which the exemption is first claimed. At such time, copies of the RP-412-a application along with the PILOT Agreement (or extract of terms thereof) must be mailed or delivered to the chief elected official of each school district, city, county, town and village within which the project is located. Additional applications are not required for subsequent PILOT years unless the terms of the agreement are modified or changed.

It is important to note that the real property tax exemption afforded to and provided by IDAs applies only to general taxes and not to special assessments and special ad valorem levies (see 1 Op. Counsel SBEA No. 23). Likewise, the extent to which an IDA may afford an abatement from real property taxes largely depends upon each Agency's adopted UTEP, which are required to have been adopted by each IDA on or before April 1, 1999 (see GML § 874).

PILOT Agreements effective as of taxable status date and drive subsequent tax years. While property acquired by the State or Federal government after taxable status date and prior to lien date is immune from taxation (see 2 Op. Counsel SBEA No. 33; 1 Op. Counsel SBEA No. 40, respectively), property acquired by quasi-governmental agencies, such as IDAs (see 5 Op. Counsel SBEA No. 55), urban renewal agencies (see 1 Op. Counsel SBEA No. 68) and economic development agencies (see 2 Op. Counsel SBEA No. 28), after taxable status date in the taxing jurisdiction are subject to taxation until tax years related to the taxable status date.

Therefore, the execution, delivery and filing of any IDA PILOT Agreement and related Form RP-412-a, should be carefully timed to account for the applicable taxable status date. Likewise, the exemption afforded by the IDA's jurisdiction, control or supervision of the subject parcel (via deed or lease agreement), along with the applicable abatement schedule, will be effective for the tax years following the applicable taxable status date through the termination date of the PILOT Agreement itself.

PILOT Termination effective immediately. In contrast to the taxable status date driving the effectiveness of the commencement of the PILOT Agreement, the termination of a PILOT Agreement is considered an immediate taxable event whereby the subject property becomes a fully-taxable improvement as of the date of PILOT Agreement termination. Section 520 of RPTL provides that whenever property receiving a total or partial exemption is transferred to an owner not entitled to receive such exemption, the property becomes immediately liable to taxation both for the unexpired portions of the fiscal years during which the transfer occurs and for succeeding fiscal years (see OSC Opinion 87-61 and 10 Op. Counsel SBEA No. 87). The appropriate appointed assessor is thereafter empowered to establish the corresponding assessed valuation attributable to the project facility as of the PILOT Agreement termination date and such determination is subject to the administrative and judicial review process set forth within Article VII of RPTL. (See also 10 SBRPS No. 21.)

5. Lower Interest Rates for Debt Incurred as Part of the Project

IDAs are authorized by State law to issue bonds and notes. An IDA can issue tax-exempt bonds, subject to the limitations imposed by the Internal Revenue Code of 1986, as amended (the "Code"). The proceeds of these tax-exempt bonds can be used to fund all, or substantially all, of the costs of a project (excluding certain costs of issuance in excess of 2% of the total amount of the bond issue). If the project meets the strict qualification requirements of the Code, the company should then determine if issuing tax-exempt bonds is a cost-effective method of financing the project.

An IDA itself provides no credit enhancement and issues bonds on a non-recourse basis. For that reason, the ability to sell bonds depends solely on the creditworthiness of the company (or the credit rating of the credit enhancement supporting the transaction, if any – see discussion, below). State law does not allow an IDA to loan the net proceeds directly to the company, as is done in other states. Because an IDA does not have the statutory authority to "loan" money (as is the case in many other states), bond proceeds are used by the company to build the project in the name of the IDA. The project is then leased or sold by the IDA to the company for an amount equal to debt service on the bonds issued. The company's rental payments under the lease agreement, or installment purchase payments made under the installment sale agreement to the IDA (or bond trustee), are used to pay principal of and interest on the bonds. The property involved is generally used as collateral and the company's direct guaranty is generally required. It may be necessary to provide some form of credit enhancement, such as a letter of credit issued by a bank or other qualified financial institution, bond insurance, or FHA insurance, depending on the market where the tax-exempt bonds are sold and on the creditworthiness of the company.

Before proceeding with a bond transaction, the company should conduct a cost/benefit analysis, weighing the cost of financing through traditional means against those costs associated with a tax-exempt bond transaction. Does it pay to finance the project with funds that are at an interest rate that is generally two to three percentage points lower than the cost of borrowing money directly through a taxable transaction? Or will that benefit be outweighed by the additional costs of documenting a bond transaction such as bond counsel fees and, potentially, letter of credit fees of .75% to 1.5% of the bond amount, underwriter discount fees of 1% to 3% of the bond amount, underwriter counsel fees, letter of credit and issuer counsel fees, trustee fees and other incidental costs?

A detailed discussion concerning tax-exempt financing is included herein under the Federal Incentives section, below.

D. LIMITATIONS ON FINANCIAL ASSISTANCE AND IDA POWERS

While it is the purpose of an IDA to promote the economic welfare and prosperity of a Benefited Municipality's inhabitants and to actively attract and encourage the development of such activities, Article 18-A of the Act does place some restrictions on an IDA's ability to participate in certain types of projects. In addition, there are certain statutorily required prerequisites an IDA must comply with prior to undertaking a project.

This section is intended to highlight certain sections of GML that must be addressed prior to commencing any project seeking IDA assistance. Despite these requirements, the vast majority of projects, whether new construction, expansion, renovation or equipment acquisition will qualify for IDA assistance.

1. Public Hearing Required

Section 859-a of GML requires IDAs to hold a public hearing with respect to any proposed project that would provide more than $100,000 in financial assistance. The hearing must be held within the municipality that the proposed project will be located and present details of the project and the financial assistance being contemplated by the IDA. The IDA must give at least 10 days' published notice of the public hearing, and a notice must be provided to the CEO of each affected tax jurisdiction. When a tax-exempt bond is being issued, a hearing is required on 14 days' published notice under the Code. These hearings are generally combined.

2. Projects Benefiting Continuing Care Retirement Communities

GML § 859-b requires special procedures to be undertaken where an IDA project will benefit a continuing care retirement community. Project applicants seeking financial assistance in the form of tax-exempt financing must present to the IDA a completed application for a certificate of authority and documentation establishing the continuing care retirement community council's approval of that application, pursuant to Article 46 of Public Health Law ("PHL"). In addition, at the request of the IDA, the applicant shall present an analysis of project impacts that takes into account the parameters set forth within the IDA's UTEP, which is required pursuant to GML § 874. Applicants must also present the IDA with a financial feasibility study, including a financial forecast and market study, and the analysis of economic costs and benefits required by Article 46 of PHL.

All required documentation must be made available to the public at the time of publication of the notice of the public hearing for the project during regular office hours in at least two locations, at least one of which shall be in the city, town or village within which the proposed project is located. The public hearing notice must include a statement indicating the location and times of availability of the required documentation.

Pursuant to GML § 862(2)(a), IDAs may not adopt any resolution authorizing any financial assistance, including the issuance of bonds, notes or other obligations, for the benefit of a continuing care retirement community unless and until the project has received a certificate of authorization pursuant to PHL § 464-a. Furthermore, the IDA may not undertake the project unless it will serve the public purposes of the Act by preserving permanent, private sector jobs, or increasing the overall number of permanent, private sector jobs in the State.

3. Retail Facilities

Under § 862 of GML, an IDA is limited in its ability to provide financial assistance to projects where facilities "that are primarily used in making retail sales to customers who personally visit such facilities" constitute more than one-third of the total project cost. This retail restriction does not apply to "tourism destinations" which are defined as locations or facilities which are likely to attract a significant number of visitors from outside the economic development region in which the project is located. "Economic Development Regions" are defined by the Economic Development Law. A map of the State's Economic Development Regions is located on the back cover of this Handbook.

The retail restriction is also inapplicable where: (i) the project occupant would, but for the financial assistance being provided by the IDA, locate outside the State; (ii) the predominant purpose of the project is to make available goods or services which would not be, but for the project, reasonably accessible to residents of the municipality where the project is located; or (iii) the project is located within a "highly distressed area" as defined in § 854 of GML. Projects located in an Empire Zone qualify as being in a highly distressed area.

The IDA must make an additional finding for projects listed in (i), (ii) or (iii) above, that the project will preserve permanent, private sector jobs or increase the overall number of permanent, private sector jobs in the State. This finding, once adopted by the IDA, must also be confirmed by the CEO of the municipality for whose benefit the IDA was created. This confirmation must be made by the CEO, as defined within § 2(5-a) of the Local Finance Law, of the Benefited Municipality.

4. IDA Investment, Procurement and Gift Restrictions

<u>Investment of Surplus Funds.</u> GML § 858-a states that deposits and investments made by an IDA are subject to the provisions of GML § 10 and 11, which govern cash flow management practices of local governments in the State. The term "local government" is defined to include IDAs. (<u>See</u> GML § 10(1)(a).) These statutory provisions were enacted for the purpose of establishing uniform standards for the deposit and investment of municipal moneys. (Ch. 464, L. 1954; Ch. 708, L. 1992.) IDAs were included within the definition of "local government" for purposes of this regulatory scheme as a part of the IDA Reform Act of 1993. (Ch. 356, L. 1993.) This legislative framework provides uniform standards to which local governments must adhere when depositing and investing public moneys. In essence, these uniform standards serve to eliminate any risk factor associated with both the deposit and investment of public moneys.

Generally speaking, the governing board of an IDA, or a delegate thereof, may temporarily invest moneys not required for immediate expenditure in special time-deposit accounts or certificates of deposit (hereinafter, "Deposits") with a bank or trust company located and authorized to do business in the State (<u>see</u> GML § 11(2).) In addition, an IDA also may invest moneys not required for immediate expenditure in: (i) obligations of the United States of America (the "USA"); (ii) obligations guaranteed by agencies of the USA where payment of principal and interest are guaranteed by the USA; (iii) obligations of the State; and, with the approval of the Office of the State Comptroller; (iv) tax anticipation notes and revenue anticipation notes issued by any municipality, school district or district corporation within the State pursuant to §§ 24 and 25, respectively, of the Local Finance Law of the State. (<u>See</u> GML § 11(3)(a)(1).)

The terms "bank" and "trust company" are defined to have the same meanings as set forth within the Banking Law of the State. The term "bank" may also include a national banking association located and authorized to do business in the State. Trust companies, as the term is defined, must also be located and authorized to do business in the State. (<u>See</u> GML § 11(1), referring to GML §§ 10(1)(d) and (e).)

Any Deposits made by an IDA must be payable within such time as the IDA may be required to meet expenditures for which the moneys were obtained. Furthermore, and of significant importance, any Deposits in excess of the amount insured by the Federal Deposit Insurance Act ($100,000) must be secured in conformance with GML § 10(3)(a), which requires: (i) a pledge to the IDA of eligible securities equal to the Deposit, together with a security agreement from the bank or trust company; and/or (ii) an eligible surety bond payable to the IDA in an amount equal to the Deposit; and/or (iii) an eligible letter of credit payable to the IDA in an amount equal to 140% of the Deposit, plus negotiated interest, if any; and/or (iv) an irrevocable letter of credit issued in favor of the IDA by certain Federal home loan banks in an amount equal to 100% of the Deposit, plus negotiated interest, if any. (See GML § 10(3)(a) and (c).)

The terms "eligible securities," "eligible surety bond" and "eligible letter of credit" are defined within GML § 10(1). The necessary provisions of the required security agreement are set forth in GML § 10(3)(a).

Procurement. GML § 884 exempts IDAs from the public bidding and procurement requirements normally associated with public projects. (See GML § 103.) However, any goods or services procured by an IDA for its own use and account must be acquired pursuant to GML § 104-b.

Gift Powers. While the "gift clause" contained within Article 8 § 1 of the State Constitution specifically prohibits municipalities from making gifts or loans to private entities, this prohibition does not extend to public benefit corporations. However, the powers of public benefit corporations are limited to those granted by statute. Article 18-A of the Act specifically empowers IDAs to accept gifts, but no power has been granted to extend gifts to others. (See OSC Opinions 91-32 and 99-4 for relevant discussions.) In sum, IDAs are not empowered to make outright gifts to either public or private entities; however, services and funds may be expended by an IDA without equitable consideration in connection with the undertaking of a proper IDA project.

5. Note Regarding Civic Facility Legislation

As all IDAs are currently aware, the authority to finance or participate in "civic facility" (not-for-profit) projects expired January 31, 2008. This authority has been subject to sunset every 1-3 years since first being introduced in 1986. The extension generally involves a debate of other limitations and review of IDA practices. The retail limitations detailed in paragraph 3 above will likely be renewed as the civic facility legislation is renewed.

II. LOCAL DEVELOPMENT CORPORATIONS ("LDCs")

Economic development projects in New York often involve a local development corporation ("LDC"). In fact, use of LDCs pre-dates the existence of IDAs, and is often the vehicle through which local economic development is conducted. LDCs are formed and empowered to conduct certain projects pursuant to Not-For-Profit Corporation Law § 1411[3]. LDCs were frequently formed by local business or civic leaders to administer a revolving loan fund.

LDCs are predominately formed by, and work closely with, municipalities and IDAs by providing not only greater transactional flexibility for undertaking economic development projects, but also added liability protection because the LDC is a bankruptcy remote entity.

Distinguished from IDAs (which exist as public benefit corporations), LDCs are established as charitable corporations that are empowered to construct, acquire, rehabilitate and improve for use by others, industrial or manufacturing plants in the territory in which its operations are principally to be conducted

[3] This section is attached as Appendix B.

("Benefited Territory" and to make loans). LDCs can provide financial assistance for the construction, acquisition, rehabilitation, improvement, and maintenance of facilities for others in its Benefited Territory. Specific LDC powers include the ability to: (i) disseminate information and furnish advice, technical assistance and liaison services to Federal, State and local authorities; (ii) to acquire by purchase, lease, gift, bequest, devise or otherwise, real or personal property; and (iii) to borrow money and to issue negotiable bonds, notes and other obligations. LDCs are also uniquely empowered not-for-profit corporations because, without leave of a court, LDCs are empowered to sell, lease, mortgage or otherwise dispose of or encumber facilities or any real or personal property or any interest therein upon such terms as they may determine.

Of particular importance is the LDC's ability to directly acquire real property from municipalities without the need for public bidding or full market value consideration. (See N-PCL § 1411(d).) Notwithstanding the liability protections that may be afforded by building a bankruptcy-remote entity into a development project, the LDC's ability to acquire realty is a unique asset. More often than not, economic development efforts are significantly hindered by traditional constraints on municipally-owned realty. This special power granted to municipalities for the disposition of realty has become a crucial element in sophisticated economic development projects undertaken in recent years.

LDCs also offer great latitude to development professionals because they do not require special legislation to be created. However, great care must be employed when LDCs are formed because their structure and membership will dictate how the entity must undertake day-to-day business operations. Because these entities are quasi-governmental in nature and exist specifically to lessen the burdens of government, the make-up of an LDC's membership and board of directors can subject it to New York's open government laws, including the Open Meetings Law and FOIL (these topics are discussed in detail herein under the State Agencies, Incentives and Laws section, below).[4]

LDCs can provide financial assistance packages to developers similar to those provided by IDAs, except that LDCs are not specifically exempted from real property taxes (see RPTL § 420-a), and therefore cannot provide a real property transfer tax exemption. Hence, the IDA PILOT structure cannot be employed by an LDC without involvement of the IDA. Despite this, LDCs can provide significant project savings through mortgage recording tax exemptions (see Adv. Op. Comm. T&F, TSB-A-95(16)-R and TSB-A-97(7)-R and sales and use tax exemptions.) (See Tax Law § 1116(a)(4).)

Generally, LDCs may provide financial assistance in the form of exemptions from mortgage recording taxes and/or sales and use taxes. (These exemptions are more specifically detailed in A and B, below.) N-PCL § 1411(f) states that "the income and operations of corporations incorporated or re-incorporated under this section shall be exempt from taxation." Based on § 1411(f), the commissioner of the Tax Department (the "Commissioner") has indicated in several advisory opinions that the involvement of an LDC in the construction and/or finance aspects of a qualifying project may allow for an exemption from sales and use taxes and/or mortgage recording taxes. (See TSB-A-93(13)-R, TSB-A-95(16)-R, TSB-A-97(7)-R, and TSB-A-97(54)-S.) However, it should be noted that the facts and circumstances set forth within each of these advisory opinions are unique and that the use of an LDC should be carefully structured to assure that the exemptions sought are proper and obtainable. It is recommended that an advisory opinion be sought for projects of significant size and/or impact.

A. NEW YORK STATE MORTGAGE RECORDING TAX EXEMPTION

[4] For example, the Buffalo Enterprise Development Corporation had a board make-up and conducted its activities in a manner that caused it to be subject to the Open Meetings Law and FOIL. (See Matter of Buffalo News v. Buffalo Enter. Dev. Corp., 84 N.Y.2d 488 (1994)). In contrast, the Saratoga Economic Development Corporation had a board make-up and conducted its activities in a manner that caused it to be exempt from Open Meetings Law and FOIL. (See Matter of Farms First v. Saratoga Economic Dev. Corp., 222 A.D.2d 861 (1999)).

Section 252 of the Tax Law contains the codified and generally recognized exemptions from State tax imposed in connection with the recording of mortgages. While this statute does not contain a specific exemption for entities incorporated or re-incorporated under N-PCL § 1411, several advisory opinions have nonetheless granted exemptions for LDCs acting as either mortgagor or mortgagee. (See advisory opinions noted above.) In TSB-A-93(13)-R, the Commissioner found that, although § 252 of the Tax Law does not specifically exempt LDC mortgages and further states that there will be no exemptions other than the ones provided by that statute, the recording of mortgages issued by various public authorities were exempt. In that case, the Commissioner reasoned that since the petitioner (Empire State Certified Development Corporation) was re-incorporated under N-PCL § 1411 and that N-PCL § 1411(f) provides that the income and operations of LDCs are exempt from taxation, mortgages given to or by the petitioner, are exempt from mortgage recording taxes. The Commissioner made similar findings within TSB-A-95(16)-R and TSB-A-97(7)-R. It should be particularly noted that in TSB-A-97(7)-R, the Commissioner found that no mortgage recording tax is due where an LDC participates as mortgagor.

Based on the foregoing, it appears as though either an existing or newly-formed LDC could participate as mortgagor with the company for the purpose of providing an exemption from Article 11 taxation on the recording of mortgage(s) on the project. This financial assistance could be provided by an LDC, based upon the general LDC powers to (i) acquire real and personal property, and (ii) mortgage its interests therein.

B. NEW YORK STATE SALES AND USE TAX EXEMPTIONS

The imposition of sales and compensating use taxes in New York State is governed by Article 28 of the Tax Law. Section 1116 of Article 28 sets forth organizations that are exempt from the sales and compensating use tax as, "any corporation ... organized and operated exclusively for ... charitable ... purposes ... no part of the net earnings of which inures to the benefit of any private shareholder or individual ...". (See Tax Law § 1116(a)(4).) It is important to note that the Sales and Use Tax Regulations define "charitable" to include, "lessening the burdens of government" (See 20 NYCRR Part 529.7(e)(1)(ii).) The exemption afforded to charitable organizations, however, is not automatic. Rather, the applicable Sales and Use Tax Regulations provide that, "an organization is not exempt from tax because it is organized and operated as a nonprofit organization or because it appears to meet the requirements of this section. In order to establish exempt status, it is necessary to file a completed application as set forth in subdivision (f) of this section and prove that the organization meets the statutory requirements." (20 NYCRR Part 529.7(a)(2).)

The application to secure a State sales tax exemption pursuant to Tax Law § 1116(a) is made with State Form ST-119.2. Successful applicants are issued an Exempt Organization Certificate and thereafter, the applicant's purchases are exempt from sales and use taxes. Among other things, the application form requests submission of an exemption determination letter from the IRS 501(c)(3) Exemption Letter, or "IRS Determination"). It appears as though an application may still be made if an IRS Determination has not been applied for or received by the applicant; however, because the application requires a significant amount of organizational and project information to be provided in its place, applications unaccompanied by an IRS Determination will likely garner greater scrutiny by the State Department of Taxation and Finance, and the State may attempt to defer its decision until the IRS acts.

The Commissioner has consistently issued advisory opinions allowing the issuance of an Exempt Organization Certificate where an LDC meets the requirements of Tax Law § 1116(a)(4), 20 NYCRR Part 529.7(a)(2) and 529.7(f). (See TSB-A-97(54)-S, granting exemption to Greater Syracuse Business Development Corporation, hereinafter, the "GSBDC Advisory Opinion.") In the GSBDC Advisory Opinion, the Commissioner found that because N-PCL § 1411(a) states that LDCs are to be established and operated for "exclusively charitable or public purposes," the "charitable" requirements of Tax Law § 1116(a)(4) are met. The GSBDC Advisory Opinion notes that Tax Law § 1116(a)(4) does not explicitly include "public purposes." Nonetheless, the Commissioner in that case interpreted the exemption definition to match LDC purposes.

The GSBDC Advisory Opinion notes two distinct means by which an entity that has been granted an Exempt Organization Certificate may secure the exemption from sales and use taxes for purchases of otherwise taxable items. They are: (1) the agency contract exemption, and (2) the Capital Improvement Exemption (discussed, below).

1. Agency Contract Exemption

First, an exempt organization may appoint a contractor or agent to purchase taxable items on its behalf where an agency contract between the exempt entity and the contractor conforms to the requirements set forth within 20 NYCRR Part 541.3(d)(4) (the "Agency Contract Exemption"). This regulation states that all purchases pursuant to a qualifying agency contract are exempt as long as the property and services are purchased by the contractor or subcontractor as agent for the exempt organization. In order to create a principal/agent relationship all of the following conditions must be met:

(1) purchases must be billed or invoiced by the vendor to the exempt organization, or to the contractor specifying that the contractor is acting as agent for the exempt organization (e.g., X contractor, as agent for Y, name of exempt organization), and identify the place of delivery; and

(2) payment must be made by the exempt organization, or by the contractor acting as agent, directly to the vendor from a special fund created by the exempt organization for this specific purpose; and

(3) deliveries must be made to the job site; or under certain circumstances (such as where the materials require additional fabrication before installation on the job site or for storage to protect the materials from theft or vandalism prior to installation at the job site) deliveries may be made to a site other than the job site, providing the ultimate delivery of the materials is made to the job site. Where delivery is made to a site other than the job site the purchases must be billed or invoiced by the vendor to the exempt organization or to the contractor as agent, identify the place of delivery, the exempt organization's full name and address and the job site location where the materials will ultimately be delivered for installation; and

(4) the contractor must furnish the vendor with the exempt organization certification when acting as agent for such organization. A statement signed by a responsible officer of the exempt organization which identifies the contract and the contractor, as agent for the exempt organization, must be either made on the exempt organization certification or appropriately attached thereto. (See 20 NYCRR Part 541.3(d)(4).)

The contract with the agent must completely comply with these requirements. If it is subsequently determined that the contract does not qualify as an agency contract, the contractor will be liable for the relevant sales tax. (See 20 NYCRR Part 541.3(d)(4)(iii).) However, the purchase of materials that are incorporated into the structure of the real property would be exempt (with proper documentation) under the Capital Improvement Exemption.

2. Capital Improvement Exemption

Second, the Commissioner noted that whether or not an exempt organization enters into a qualified Agency Contract, the purchase of materials incorporated into real property owned by the exempt organization as a capital improvement is exempt from sales and use tax, providing proper exemption documentation is given to the vendor of the materials (the "Capital Improvement Exemption"). Pursuant to Tax Law

§ 1115(a)(15) and (16), tangible personal property sold to a contractor, subcontractor or repairman for use in altering, improving, erecting or adding to a structure or building, or in maintaining, servicing or repairing real property, property or land of an organization that has secured an Exempt Organization Certificate is not subject to sales and use tax where such tangible personal property becomes an integral component part of such structure, building or real property. Where a sales tax exemption is sought using this Capital Improvement Exemption, contractors are required to issue a properly completed contractor exempt purchase certificate (Form ST-120.1) to affected suppliers when making purchases.

Therefore, if the LDC were to establish an exemption under Tax Law § 1116(a)(4), tangible personal property sold to a contractor, subcontractor or repairman for incorporation into the project would not be subject to sales and use tax if the LDC owns the project at the time the personal property is acquired and installed. It is important to note that purchases will not qualify for exemption under § 1115(a)(15) or § 1115(a)(16) if an exempt organization has only a leasehold interest. (See 20 NYCRR Part 528.16, Ex. 3.) Therefore, fee title will have to be conveyed to the LDC in order to obtain a sales tax exemption.

Section 528.16 of the New York Taxation and Finance Regulations (the "Regulations") notes that in order for the materials to be exempt, the exempt organization must own the land and (the rights to) the structure prior to the construction or improvement project. A contractor is not eligible for the exemption if the structure is first built and then sold it to an exempt organization, even if such sale is pursuant to a pre-construction contract. (See 20 NYCRR 528.16, Ex. 2 & 4.) Equipment rentals are subject to tax, as are materials used to build forms that do not become part of the structure. (See 20 NYCRR 528.16, Ex. 5 & 6.)

Section 528.17 of the Regulations concerns the exemption for tangible personal property sold to contractors, subcontractors, or repairmen for use in the repair of an exempt organization's real property. In order for such property to be exempt from sales tax, it must become "an integral component of such structure, building, or real property." (See 20 NYCRR 528.17.) The Regulations illustrate this principle by using the example of a painter who uses masking tape to line a building's windows before painting. Because the tape will not become an integral part of the real property, it is subject to tax.

It is possible that a court could impose a limited interpretation on an LDC's power to construct, acquire, rehabilitate and improve facilities for use by others. N-PCL § 1411(c) states that these powers are specifically conferred in connection with industrial or manufacturing plants only. Likewise, the companion powers granted to LDCs are similarly limited to industrial or manufacturing plants. If literally interpreted, LDC powers may not be broad enough to construct, acquire, rehabilitate and improve general commercial, retail or housing facilities. However, N-PCL § 1411(i) states that:

> Corporations incorporated or reincorporated under this section shall be organized and operated exclusively for the purposes set forth in paragraph (a), shall have, in addition to the powers otherwise conferred by law, the powers conferred by paragraph (c) and shall be subject to all the restrictions and limitations imposed by paragraph (e) and paragraph (g). In so far as the provisions of this section are inconsistent with the provisions of any other law, general or special, the provisions of this section shall be controlling as to corporations incorporated or reincorporated hereunder.

Because it refers to the purposes in § 1411(a), which (unlike the powers in § 1411(c)) are not limited to industrial and manufacturing plants, the catch-all provision in N-PCL § 1411(i) may be sufficient to allow LDCs to undertake the construction, acquisition, rehabilitation and improvement to facilities other than industrial and manufacturing facilities. If LDC powers to construct, acquire, rehabilitate and improve facilities are limited to industrial and manufacturing projects, the Agency Contract Exemption would not be available to the company for a non-manufacturing or non-industrial project. If an LDC is not properly empowered to undertake the project, then an LDC would not be empowered to appoint a company to do the same on its behalf. However, the Capital Improvement Exemption may still be available where an LDC simply owns the project, but grants a license or lease to the company allowing the improvements to be constructed by the company on its own behest and behalf. Under this scenario, an LDC with an Exempt Organization Certificate would simply own the land and have title to the improvements. This simple arrangement should be sufficient to secure both the mortgage recording tax exemption and the sales tax exemption via the Capital Improvement Exemption.

Where a municipality, IDA, developer, or any combination thereof, pursues economic development on a proactive basis (for example, the creation of an industrial park and/or taking over existing facilities) we often recommend the formation of a new LDC to shield the municipality and/or IDA from unknown liabilities. This option is essential where an IDA either is not available or is unwilling to undertake a particular project. Where an IDA is available, we then consider whether an IDA straight lease transaction (or even a tax-exempt bond transaction) should be employed to supplement or replace the financial assistance that is available through the LDC.

III. PUBLIC AUTHORITIES ACCOUNTABILITY ACT OF 2005 ("PAAA")

A. SUMMARY

The Public Authorites Accountability Act of 2005 ("PAAA") was signed into law by Governor Pataki on January 13, 2006 as Chapter 766 of the Laws of 2005. The primary purposes of PAAA, as set forth within the Introducer's Memorandum in Support, are to ensure greater efficiency, openness and accountability for New York's public authorities. The PAAA seeks to accomplish these purposes by establishing comprehensive reporting, auditing, governance, and property disposition requirements. The provisions of PAAA are in addition to and do not supersede any other existing requirements for public authorities. In addition, PAAA mandates the governor to establish an Authority Budget Office to be effective on April 1, 2006 to: (i) review and analyze the operations, practices and reports of the authorities to assess their compliance with this law; (ii) maintain an inventory of the authorities and subsidiaries; (iii) assist the authorities in improving their management practices and financial disclosure procedures; (iv) recommend to the governor and legislature opportunities to improve performance, reporting, reformation, structure and oversight of the authorities; (v) provide additional information and analysis requested by the comptroller; and (vi) issue annual reports to the governor and legislature starting in July 2007. Since there are many ambiguities contained in PAAA, it is anticipated that an Authority Budget Office will provide interpretation and guidance to the regulated community concerning compliance with PAAA.

B. SCOPE AND APPLICABILITY

Definitions (Public Authorities Law § 2).

The PAAA is applicable to "local authorities," defined as:

(1) a local IDA or authority or other local public benefit corporation.

(2) a not-for-profit corporation affiliated with, sponsored by, or created by a county, city, town or village government.

(3) a public authority or public benefit corporation created by or existing under the Public Authorities Law ("PAL") or any other law of the State of New York whose members do not hold a civil office of the State, are not appointed by the governor or are appointed by the governor specifically upon the recommendation of the local government or governments.

(4) an affiliate of such local authority.[5]

C. REPORTING REQUIREMENTS

1. Annual Reports (PAL § 2800(2))[6]

Within 90 days after the end of its fiscal year, the authority must submit to the CEO, CFO, chairperson of the legislative body of the local government or local governments, and the Authority Budget Office an annual report that must include:

(1) operations and accomplishments; and

(2) receipts and disbursements, or revenues and expenses, during such fiscal year in accordance with the categories or classifications established by such authority for its own operating and capital outlay purposes; and

(3) assets and liabilities at the end of its fiscal year including the status of reserve, depreciation, special or other funds and including the receipts and payments of these funds; and

(4) a schedule of its bonds and notes outstanding at the end of its fiscal year, together with a statement of the amounts redeemed and incurred during such fiscal year as part of a schedule of debt issuance that includes the date of issuance, term, amount, interest rate and means of repayment. The required debt schedule shall also include all refinancings, calls, refundings, defeasances and interest rate exchanges or other such agreements, and for any debt issued during the reporting year the schedule shall also include a detailed list of costs of issuance for such debt; and

(5) a compensation schedule that shall include, by position, title and name of the person holding such position or title, the salary, compensation, allowance and/or benefits provided to any officer, director or employee in a decision-making or managerial position of such authority whose salary is in excess of $100,000; and

(6) the projects undertaken by such authority during the past year; and

(7) a list of: (i) all real property owned by such authority having an estimated fair market value ("FMV") in excess of $15,000 that the authority intends to dispose of; (ii) all such property held by the authority at the end of the period covered by the report; and (iii) all such property disposed of during such period. This report is required to contain an estimate of FMV for all such property held by the authority at the end of the period and the price received by the authority and the name of the purchaser for all such property sold by the authority during such period; and

(8) such authority's code of ethics; and

(9) an assessment of the effectiveness of its internal control structure and procedures.

[5] An "affiliate" or "affiliated with" is defined as a corporate body having substantially the same ownership or control as another corporate body.

[6] Effective Date: Immediately unless the authority fiscal year begins after January 1, 2006.

2. Website Publication

To the extent practicable, the authority must post its mission, current activities, most recent annual financial report, current year budget and its most recent independent audit report unless such information is exempt from disclosure pursuant to § 87 of the Public Officers Law (FOIL).

Every financial report submitted under § 2800 must be approved by the board and must be certified in writing by the CEO and the CFO of such authority that, based on that officer's knowledge: (i) the information is accurate, correct and does not contain any untrue statement of material fact; (ii) the report does not omit any material fact which, if omitted, would cause the financial statements to be misleading in light of the circumstances under which the statements are made; and (iii) the report fairly presents, in all material respects, the financial condition and results of operations of the authority as of, and for, the periods presented in the financial statements.

3. Budget Reports (PAL § 2801(2)) [7]

At least 60 days prior to the commencement of its fiscal year the authority must submit to the CEO, CFO, chairperson of the legislative body of the local government or local governments, and the Authority Budget Office an annual report that must include:

(10) budget information on operations and capital construction setting forth the estimated receipts and expenditures for the next fiscal year and the current fiscal year, and

(11) actual receipts and expenditures for the last completed fiscal year.

D. AUDIT REQUIREMENTS (PAL § 2802(2)) [8]

1. Report

Within 30 days after receipt, the authority must submit a copy of the annual independent audit report (performed by a certified public accounting firm in accordance with generally-accepted government auditing standards), a management letter, and any other external examination of the books and accounts of the authority, other than examinations made by the State Comptroller to the CEO, CFO, chairperson of the legislative body of the local government or local governments, and the Authority Budget Office.

The CPA firm preparing the audit report must report on certain enumerated matters to a newly-required audit committee of the board.

2. Exemption From Disclosure

The authority may exempt from disclosure any information exempted pursuant to § 87 of the Public Officers Law (FOIL).

3. Auditor

The lead audit partner or the audit partner responsible for reviewing the audit cannot have performed audit services for the authority in each of the five previous fiscal years.

[7] Effective Date: authority fiscal year ending on or after December 31, 2007.

[8] Effective Date: authority fiscal year ending on or after December 31, 2007.

The CPA firm performing the audit is prohibited from performing any non-audit services to the authority contemporaneously with the audit, unless prior approval is granted by the audit committee (See paragraph 5(a), below.)

The CPA firm is prohibited from performing any audit service if the CEO, comptroller, CFO, chief accounting officer, or any other person serving in an equivalent position for such authority, was employed by the CPA firm and participated in any capacity in the audit of the authority during the one year preceding the date of the initiation of the audit.

E. BOARD MEMBER REQUIREMENTS (PAL § 2824)[9]

1. Responsibilities

(1) execute direct oversight of the authority's chief executive and other senior management in the effective and ethical management of the authority;

(2) understand, review and monitor the implementation of fundamental financial and management controls and operational decisions of the authority;

(3) establish policies regarding the payment of salary, compensation and reimbursements to, and establish rules for the time and attendance of, the chief executive and senior management;

(4) adopt a code of ethics applicable to each officer, director and employee that, at a minimum, includes the standards established in § 74 of the Public Officers Law;

(5) establish written policies and procedures on personnel including policies protecting employees from retaliation for disclosing information concerning acts of wrongdoing, misconduct, malfeasance, or other inappropriate behavior by an employee or board member of the authority, investments, travel, the acquisition of real property and the disposition of real and personal property and the procurement of goods and services; and

(6) adopt a defense and indemnification policy and disclose such plan to any and all prospective board members.

2. Training

Board members must participate in State-approved training regarding their legal, fiduciary, financial and ethical responsibilities as directors of the authority within one year of appointment to the board. Board members must participate in continuing training as may be required to remain informed of best practices, and regulatory and statutory changes relating to effective oversight of management and financial activities of authorities.

3. Separation of Board and Management

No board member can serve as an authority's CEO, executive director, CFO, comptroller, or hold any other equivalent position while also serving as a board member.

[9] Effective Date: Immediately unless the authority fiscal year begins after January 1, 2006.

4. Extension of Credit

The board is prohibited from extending or maintaining credit, arranging for the extension of credit, or renewing an extension of credit, in the form of a personal loan to or for any officer, board member or employee of the authority.

5. Establishment of Committees

Audit Committee. An audit committee must be established and comprised of independent members. To the extent practicable, members of the audit committee should be familiar with corporate financial and accounting practices. The audit committee must recommend to the board the hiring of a CPA firm, establish compensation to be paid to the CPA firm and provide direct oversight of the performance of the independent annual audit performed by the CPA firm.

Governance Committee. Must establish a governance committee to be comprised of independent members. The governance committee must keep the board informed of current best governance practices, review corporate governance trends, update the authority's governance principles, and advise appointing authorities on the skills and experiences required of potential board members.

F. INDEPENDENCE AND FINANCIAL DISCLOSURE (PAL § 2825)

1. Independence[10]

Except for board members who serve as members by virtue of holding a civil office of the State, the majority of the remaining members who are appointed on or after January 13, 2006 must be independent. An independent member is one who:

(1) is not, and in the past two years has not been, employed by the public authority or an affiliate in an executive capacity;

(2) is not, and in the past two years has not been, employed by an entity that received remuneration valued at more than $15,000 for goods and services provided to the public authority or received any other form of financial assistance valued at more than $15,000 from the public authority;

(3) is not a relative of an executive officer or employee in an executive position of the public authority or an affiliate; and

(4) is not, and in the past two years has not been, a lobbyist registered under a State or local law and paid by a client to influence the management decisions, contract awards, rate determinations or any other similar actions of the public authority or an affiliate. The new audit committee would be required to make recommendations to the board concerning the engagement of a certified independent accounting firm, compensation to be paid for same, and to provide direct oversight of the engagement.

2. Financial Disclosure[11]

Board members, officers, and employees must file annual financial disclosure statements with the county board of ethics for the county in which the local public authority has its primary office pursuant to Article 18 pursuant to the Act.

[10] Effective for board members appointed on or after January 13, 2006.

[11] Effective Date: Immediately unless the authority fiscal year begins after January 1, 2006.

G. DISPOSITION OF PROPERTY[12]

1. Definitions (PAL § 2895)

(1) "Dispose" or "Disposal" means the "transfer of title or any other beneficial interest in personal or real property," and

(2) "Property" means "personal property in excess of $5,000 in value, real property, and any inchoate or other interest in such property, to the extent that such interest may be conveyed to another person for any purpose, excluding an interest securing a loan or other financial obligation of another party."

2. Duties of the Authority (PAL § 2896)

Adopt Guidelines. Adopt by resolution, guidelines which must: (i) detail the authority's policy and instructions regarding the use, awarding, monitoring and reporting of contracts for the disposal of property; and (ii) designate a contracting officer who shall be responsible for the authority's compliance with, and enforcement of, such guidelines. The guidelines must be consistent with the provisions of the PAAA, the authorities enabling legislation, and any other applicable law for the disposal of property, except that the guidelines may be stricter than the aforementioned if the authority determines that additional safeguards are necessary. The guidelines must be annually reviewed and approved by the governing body of the authority.

On or before the 31st of March in each year, the authority must file with the comptroller a copy of the guidelines most recently reviewed and approved by the authority, including the name of the designated contracting officer. The guidelines must be posted on the authority's website and maintained on such site until the procurement guidelines for the following year are posted.

(a) maintain adequate inventory controls and accountability systems for all property under its control.

(b) periodically inventory such property to determine which property shall be disposed.

(3) transfer or dispose of such property as promptly as possible.

(4) publish not less frequently than annually, a report listing all real property of the public authority. The report must consist of a list and full description of all real and personal property disposed of during the reporting period. The report must contain the price received by the authority and the name of the purchaser for all property sold by the authority during the reporting period. The report must be delivered to the comptroller, the director of the budget, the commissioner of general services, and the legislature.

3. Disposal Requirements (PAL § 2897)

(a) The contracting officer must have supervision and direction over the disposition of property.

(b) The custody and control of the property, pending its disposition, and the disposal of such property must be performed by the authority in possession thereof.

(c) A deed, bill of sale, lease, or other instrument executed by or on behalf of any public authority, purporting to transfer title or any other interest in the property under the provisions of the PAAA

[12] Effective Date: Immediately unless the authority's fiscal year begins after January 1, 2006.

shall be conclusive evidence of compliance with the provisions of PAAA insofar as it concerns title or other interest of any bona fide grantee or transferee who has given valuable consideration for such title or other interest and has not received actual or constructive notice of a lack of such compliance prior to closing.

(d) The authority must not transfer property for less than FMV (with exception as is set forth in 4(e) and (f), below) and if such property is not subject to fair market pricing due to its unique nature, an appraisal of the value of such property must be made by an independent appraiser and included in the record of the transaction.

4. Procedures for Disposal

(a) All disposals or contracts for disposal of property must be made after publicly advertising for bids (with exceptions as discussed, below).

(b) The advertisement for bids must be made at such time prior to the disposal or contract through such methods and on such terms and conditions as shall permit full and free competition consistent with the value and nature of the property.

(c) All bids would have to be publicly disclosed at the time and place stated in the advertisement.

(d) The award of bids shall be made with reasonable promptness by notice to the responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State. Price and other factors may be considered, and all bids may be rejected when it is in the public interest to do so.

(5) Exceptions to publicly advertising: The disposal and contracts for disposal of property may be negotiated or made by public auction subject to obtaining such competition as is feasible under the circumstances if:

(1) the personal property involved is of a nature and quantity which, if disposed of using public bidding advertisement and disclosure, would adversely affect the State or local market for such property, and the estimated FMV of such property and other satisfactory terms of disposal can be obtained by negotiation;

(2) the FMV of the property does not exceed $15,000;

(3) bid prices after advertising are not reasonable, either as to all or some part of the property, or have not been independently arrived at in open competition;

(4) the disposal will be to the State or any political subdivision, and the estimated FMV of the property and other satisfactory terms of disposal are obtained by negotiation; or

(5) such action is otherwise authorized by law.

(6) Exception to publicly advertising and obtaining FMV: The disposal is for an amount less than the estimated FMV of the property, the terms of such disposal are obtained by public auction or negotiation, disposal of the property is intended to further the public health, safety or welfare or an economic development interest of the State or a political subdivision (to include but not be limited to, the prevention or remediation of a substantial threat to public health or safety, the creation or retention of a substantial number of job opportunities, or the creation or retention of a substantial source of revenues, or where the authority's

enabling legislation permits), the purpose and the terms of such disposal are documented and approved by the board of the public authority;

(7) Ninety-day notice of a negotiated disposal [13]: An explanatory statement would have to be prepared and transmitted to the comptroller, the director of the budget, the commissioner of general services, and the legislature at least 90 days in advance of such disposal in instances of disposal by negotiation where:

(1) any personal property has an estimated FMV in excess of $15,000;

(2) any real property that has an estimated FMV in excess of $100,000, except in instances where real property is disposed of by lease or exchange unless such lease or exchange includes:

(i) any real property disposed of by lease for a term of five years or less, if the estimated fair annual rent is in excess of $100,000 for any of such years;

(ii) any real property disposed of by lease for a term of more than five years, if the total estimated rent over the term of the lease is in excess of $100,000; or

(iii) any real property or real and related personal property disposed of by exchange, regardless of value, or any property any part of the consideration for which is real property.

H. INVESTMENT GUIDELINES (PAL § 2925)[14]

The PAAA requires all authorities to annually adopt and review comprehensive investment guidelines which detail the authority's operative policy and instructions to officers and staff regarding the investing, monitoring and reporting of funds.

I. REQUIREMENTS

For purposes of complying with PAAA, IDAs and LDCs should be aware of the following requirements:

Annual Report. Within 90 days after the end of its fiscal year, the authority must submit to the CEO, CFO, chairperson of the legislative body of the local government or local governments and the Authority Budget Office, an Annual Report.

Certification of Financial Reports. Every financial report submitted in the annual report must be approved by the board and must be certified in writing by the CEO and the CFO of such authority.

Web site. To the extent practicable, the authority must post its mission, current activities, most recent annual financial report, current year budget and its most recent independent audit report on its website.

Budget Report. At least 60 days prior to the commencement of its fiscal year, the authority must submit to the CEO, CFO, chairperson of the legislative body of the local government or local governments, and the Authority Budget Office, a budget report starting in fiscal years ending on or after December 31, 2007.

[13] A copy of the statement must be preserved in the files of the authority making the disposal.
[14] Effective Date: Immediately unless the authority fiscal year begins after January 1, 2006.

Audit Report. Within 30 days after receipt, the authority must submit a copy of the annual independent audit report (performed by a certified public accounting firm in accordance with generally-accepted government auditing standards), a management letter, and any other external examination of the books and accounts of the authority, other than examinations made by the State Comptroller, to the CEO, CFO, chairperson of the legislative body of the local government or local governments, and the Authority Budget Office starting in fiscal years ending on or after December 31, 2007.

Auditor Qualifications. A CPA firm is prohibited from performing any non-audit function contemporaneously with the audit, unless prior approval by audit committee; CPA firm is prohibited from performing the audit if senior management of the authority was employed by the CPA firm within one year prior to the commencement of the audit; the lead audit partner or the audit partner responsible for reviewing the audit cannot have performed audit services for the authority in each of the five previous fiscal years.

Property Disposition. Must appoint a contracting officer; dispose of property for at least FMV after publicly advertising with exceptions; must provide 90 days' prior notice to the comptroller, the director of the budget, the commissioner of general services and the legislature for negotiated disposals.

Board Members. Cannot serve in a senior management position of the authority; majority of board members appointed on or after January 13, 2006 must be independent (not including ex-officio); must receive training within one year of appointment.

Board Committees. Must establish an audit and governance committee comprised of independent members.

Financial Disclosure. Board members, officers and employees must file annual financial disclosure statements with the county board of ethics for the county in which the local public authority has its primary office pursuant to Article 18 pursuant to the Act.

Codes, Policies and Guidelines. The board must:

(1) Establish policies regarding the payment of salary, compensation and reimbursements to, and establish rules for, the time and attendance of the CEO and senior management.

(2) Adopt a code of ethics applicable to each officer, director and employee that, at a minimum, includes the standards established in § 74 of the Public Officers Law.

(3) Establish written policies and procedures on personnel including policies protecting employees from retaliation for disclosing information concerning acts of wrongdoing, misconduct, malfeasance or other inappropriate behavior by an employee or board member of the authority, investments, travel, the acquisition of real property and the disposition of real and personal property and the procurement of goods and services.

(4) Adopt a defense and indemnification policy and disclose such plan to any and all prospective board members.

(5) Adopt by resolution, guidelines which must (a) detail the authority's policy and instructions regarding the use, awarding, monitoring and reporting of contracts for the disposal of property and (b) designate a contracting officer who shall be responsible for the authority's compliance with, and enforcement of, such guidelines.

(6) Annually adopt and review comprehensive investment guidelines which detail the authority's operative policy and instructions to officers and staff regarding the investing, monitoring and reporting of funds of the authority.

J. COMPLIANCE REVIEW

The Authority Budget Office ("ABO") is authorized by the PAAA to conduct reviews and analyses of the operations, practices and reports of public authorities to assess compliance with the provisions of the PAAA and other applicable laws.

The ABO has commenced governance reviews of public authorities and has specifically reviewed the following:

(a) Board duties and committee involvement

(b) Board member participation in State-approved training

(c) Policies and procedures required under the PAAA, PAL, GML and POL

(d) Policies and procedures indicative of good governance practices

(e) Cash and investments, and asset management practices

(f) Independent financial audits and other reporting

(g) Adherence with reporting requirements

(h) Project review, approval and monitoring processes

In addition to reviewing records and documentation, the ABO will attend board meetings and interview management.

The ABO in its compliance reviews has identified where the authorities failed to be in compliance with any applicable statutory provision and/or where the authorities are not following their own procedures. The ABO has also provided specific comments recommending certain procedures or activities that the ABO believes will improve the overall good governance of the authorities.

IV. PROCUREMENT LOBBYING LAW

A. SUMMARY

Chapter 1 of the Laws of 2005, as amended by Chapter 596 of the Laws of 2005, generally referred to as the "Procurement Lobbying Law" ("PLL") significantly changes procurement contracting with governmental entities. The PLL affects: (i) activities by the lobbying community seeking procurement contracts by amending the Legislative Law, and (ii) the activities of governmental entities seeking to enter into procurement contracts by amending the State Finance Law ("SFL"). As such, PLL provides that contacts made to governmental entities regarding procurements are covered under the Lobby Law and limits communications on governmental procurements to contacts between contractors and procurement professionals in contracting entities.

Additionally, PLL established an Advisory Council on Procurement Lobbying ("Advisory Council"). Among other things, the Advisory Council is charged with developing model guidelines and forms for use by governmental entities regarding the restrictions on contacts during the procurement process. A website link to the Advisory Council information can be found on the NYS Office of General Services website at www.OGS.state.ny.us.

The PLL restricts contacts by an offerer, which are intended to influence the governmental procurement, at the point in time when the governmental entity issues its first written document soliciting a response from offerers that is intended to result in a procurement contract. Such contacts must only be made to specifically designated persons at the governmental entity.

The PLL requires the governmental entity to collect and record certain information pertaining to those who contact the governmental entity to influence a governmental procurement. Such information must be made part of the procurement record. In addition, PLL requires governmental entities to notify offerers of the permissible contacts provisions in its solicitation materials and to obtain prior non-responsibility determinations from the offerer.

Furthermore, PLL requires governmental entities to make a determination of non-responsibility if it is found that the offerer knowingly and willfully made an impermissible contact or failed to timely disclose accurate and complete information or otherwise cooperate in providing the required information. Such a determination of non-responsibility precludes the governmental entity from awarding a procurement contract to such offerer. In addition, offerers that are determined to be non-responsible for a second time within a four-year period are rendered ineligible to submit a proposal on or be awarded any procurement contract for a period of four years from the date of the second final determination.

Lastly, the governmental entity must report all such findings of non-responsibility to the Office of General Services, which will maintain a publicly available list.

B. APPLICABILITY (SFL § 139-J(1)(A))

The following "governmental entities" are required to comply with the new SFL provisions when conducting procurements:

(1) State Agencies (includes boards, commissions, divisions, offices, councils and committees)

(2) NYS Legislature

(3) Unified Court System

(4) IDAs in jurisdictions with a population of 50,000 or more

(5) Local public benefit corporations

(6) Public authorities and public benefit corporations and any subsidiary or affiliate thereof.

Note: In general, the provisions of PLL apply to procurements of governmental entities; however, in regard to real property, disposals are included.

The provisions of SFL as set forth herein are effective on January 1, 2006; however, procurement contracts for which bid solicitations have been issued prior to the effective date (August 23, 2005) of the PAAA shall be awarded pursuant to the provisions of law in effect at the time of issuance.

C. KEY DEFINITIONS

Contacts. Any oral, written, or electronic communication with a governmental entity under circumstances wherein a reasonable person would infer that communication was intended to influence a governmental procurement.

Governmental Procurement. (i) the preparation or terms of the specifications, bids, requests for proposals ("RFPs") or evaluation criteria for a procurement contract; (ii) solicitation for a procurement contract; (iii) evaluation of the procurement contract; (iv) award or denial of a procurement contract; or (v) approval or denial of an assignment, amendment (other than amendments that were authorized under the terms of the procurement contract approved by the comptroller), renewal or extension of a procurement contract or any other material change that results in a financial benefit to the offerer.

Procurement Contract. Any contract or other agreement for an article of procurement involving an estimated annualized expenditure in excess of $15,000. Grants and contracts providing for payments to not-for-profit organizations under a program appropriation pursuant to Article 11-B of SFL are exempted from the definition of "procurement contract." In addition, intergovernmental agreements, railroad and utility force accounts, utility relocation agreements or orders and eminent domain transactions are also exempted.

Article of Procurement. A commodity, service, technology, public work, construction, revenue contract, the purchase, sale or lease of real property or an acquisition or granting of other interest in real property that is the subject of a governmental procurement.

Offerer. The individual or entity, or any employee, agent or consultant or person acting on the behalf of such individual or entity, that contacts a governmental entity about a governmental procurement during the restricted period of such governmental procurement.

Restricted Period. The period of time commencing with the earliest written notice, advertisement or solicitation of a RFP, invitation for bids, or solicitation of proposals, or any other method for soliciting a response from offerers intending to result in a procurement contract with a governmental entity with the final contract award and approval by the governmental entity and, where applicable, the State comptroller.

D. RESTRICTIONS ON CONTACTS DURING THE PROCUREMENT PROCESS (SFL § 139-J)

1. Governmental Entity Requirements (SFL § 139-j(2), (5-11))

Each government entity:

(a) shall designate a person or persons who may be contacted by offerers related to a procurement.

(b) shall make any determinations on any procurement consistent with the authorities' procurement guidelines and free from any conduct that would be prohibited by Public Officers Law 73(5) and 74 or any other applicable code of ethics.

(c) may consult model guidelines that may be established by the Advisory Council on procurement lobbying.

(d) must incorporate a summary of the policy and prohibitions regarding permissible contacts during a procurement as well as copies of all rules, regulations and guidelines concerning permissible contacts into the authority's solicitation of proposals or bid documents or specifications for all procurements.

(e) must seek written affirmation from all offerers as to the offerer's understanding of and agreement to comply with the authority's procedures relating to permissible contacts.

(f) must make a final determination of responsibility of the proposed awardee in accordance with the authority's procurement guidelines.

(g) must, if any member of the procuring governmental entity becomes aware that an offerer violated the permissible contacts provision, immediately notify the ethics officer, the New York State Inspector General (the "IG,") if any, or other official of the governmental entity responsible for reviewing and investigating such matters.

(h) must, if any member of another governmental entity becomes aware that an offerer violated the permissible contacts provision, immediately notify the ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating such matters and such person must immediately notify the equivalent person at the procuring governmental entity.

(i) must establish a process for review by the ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating any allegations of violations of the permissible contacts provisions.

(j) must establish a process for the imposition of sanctions if such violations have been found to exist.

(k) must, upon notification of an alleged violation, the governmental entity's ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating such matters must immediately investigate such allegation, and if sufficient cause exists to believe that the allegation is true, must give the offerer reasonable notice that an investigation is ongoing and an opportunity to be heard in response to the allegation.

(l) may make a finding that an offerer has knowingly and willfully violated the permissible contact provisions which must result in a determination of non-responsibility for such offerer and such offerer must not be awarded the procurement contract unless the governmental entity finds that the award is necessary to protect public property or public health or safety, and that the offerer is the only source capable of supplying the required article of procurement within the necessary time frame. The governmental entity must include in the procurement record a statement describing the basis of the finding. Any subsequent finding of non-responsibility due to a violation of the permissible contacts provisions within four years of a determination must result in the offerer being rendered ineligible to submit a proposal on or be awarded any procurement contract for a period of four years from the date of the second final determination for any procurement contract.

(m) must require offerers to disclose findings of non-responsibility due to violations of the permissible contacts provisions or the intentional provision of false or inaccurate information to a governmental entity within the previous four years in the entity's solicitations for proposals. (See also SFL § 139-k(2).)

(n) must consider in its determination of responsibility, any failure of an offerer to timely disclose accurate and complete information or otherwise cooperate with the governmental entity. (See also SFL § 139-k(3).)

(o) must not award a contract to an offerer who fails to timely disclose accurate and complete information or otherwise cooperate with the governmental entity unless the governmental entity finds that the award is necessary to protect public property or public health or safety, and that the offerer is the only source capable of supplying the required article of procurement within the necessary timeframe. The governmental entity must include in the procurement record, a statement describing the basis of the finding. (See also SFL § 139-k(3).)

(p) must, upon a finding of non-responsibility or debarment, the governmental entity must notify the OGS, which shall keep a list and make it publicly available.

If an employee of the governmental entity is found to have knowingly and willfully violated the governmental entity's requirements in relation to the permissible contacts provisions, then the ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating such matters must report such instances to the governmental entity's head.

A procurement contract award must contain a certification by the offerer that all information provided to the governmental entity is complete, true and accurate and such procurement contract must contain a provision authorizing the governmental entity to terminate the contract in the event such certification is found to be intentionally false or intentionally incomplete. The governmental entity shall include in the procurement record a statement describing the basis for any action taken pursuant to such termination provision. (See SFL § 139-k(5).)

2. Offerer Responsibilities (SFL § 139-j(3) & (4))

Must contact only the person or persons designated by the governmental entity with respect to a governmental procurement. Violations of this provision also include any contacts during the restricted period of a governmental procurement between the offerer and any member, officer or employee of any governmental entity other than the entity conducting the governmental procurement. However, this does not prohibit an offerer from communicating with a member of the State legislature or legislative staff about a governmental procurement being conducted by a governmental entity other than the State legislature, or a member of the State legislature. In addition, this does not prohibit a member of the legislature or legislative staff member from contacting a governmental entity other than the State legislature about a procurement being conducted by that entity as long as the legislative member or staff person is acting in their official capacity.[15]

[15] Exemptions from the restrictive contacts provision in this section include: (1) the submission of written proposals in response to a RFPs, invitation for bids or any other method of soliciting a response from offerers intending to result in a procurement contract; (2) the submission of written questions to a designated contact set forth in a RFP, or invitation for bids, or any other method of soliciting a response from offerers intending to result in a procurement contract, when all written questions and responses are to be disseminated to all offerers who have expressed an interest in the RFPs, or invitation for bids, or any other method of soliciting a response from offerers intending to result in a procurement contract; (3) participation in a conference provided for in a RFP, invitation for bids, or any other method of soliciting a response from offerers intending to result in a procuring contract; (4) complaints by an offerer regarding the failure of the person or persons designated by the procuring governmental entity pursuant to this section to respond in a timely manner to authorized offerer contacts made in writing to the office of general counsel of the procuring governmental entity, provided that any such written complaints shall become a part of the procurement record; (5) Offerers who have been tentatively awarded a contract and are engaged in communications with a governmental entity solely for the purpose of negotiating the terms of the procurement contract after being notified of tentative award; (6) contacts between designated governmental entity staff of contacts, the procuring governmental entity and an offerer to request the review of a procurement contract award; and (7) (a) contacts by offerers in protests, appeals or other review proceedings (including the apparent successful bidder or proposer and his or her representatives) before the governmental entity conducting the procurement seeking a final administrative determination, or in a subsequent judicial proceeding; or complaints of alleged improper conduct in a governmental procurement to the attorney general, inspector general, district attorney, or court of competent jurisdiction; or (b) complaints of alleged improper conduct in a governmental procurement to the attorney general, inspector general, district attorney, or court of competent jurisdiction; or (c) written protests, appeals or complaints to the State Comptroller's office during the process of contract approval, where the State Comptroller's approval is required by law, and where such communications and any responses thereto are made in writing and shall be entered in the procurement record pursuant to section one hundred sixty-three of the SFL; or (d) complaints of alleged improper conduct in a governmental procurement conducted by a municipal agency or local legislative body to the State Comptroller's office.

Must not attempt to influence the governmental procurement in a manner that would result in a violation or an attempted violation of Public Officers Law 73(5) and 74 or any other applicable code of ethics.

E. DISCLOSURE BY GOVERNMENTAL ENTITIES (SFL § 139-K)

Upon any contact in the restricted period, the governmental entity must obtain the name, address, telephone number, place of principal employment and occupation of the person or organization making the contact and inquire and record whether the person or organization making such contact was the offerer or was retained, employed or designated by or on behalf of the offerer to appear before or contact the governmental entity about the governmental procurement. All recorded contacts shall be included in the procurement record for the procurement contract.

Any communications received by a governmental entity from members of the State legislature, or legislative staffs, when acting in their official capacity, shall not be considered to be a "contract" and shall not be recorded by a governmental entity.

F. REQUIREMENTS

Per the PLL, local public authorities, including IDAs, need to comply with the following requirements:[16]

(a) Designate, with regard to each governmental procurement, a person or persons who may be contacted by offerers. (See SFL § 139-j(2)(a).)

(b) Upon any contact in the restricted period, the governmental entity must obtain the name, address, telephone number, place of principal employment and occupation of the person or organization making the contact and inquire and record whether the person or organization making such contact was the offerer or was retained, employed or designated by or on behalf of the offerer to appear before or contact the governmental entity about the governmental procurement. All recorded contacts shall be included in the procurement record for the procurement contract. (See SFL § 139-k(4).)

(c) Incorporate a summary of the Governmental Entity's policy and prohibitions regarding permissible contacts during a governmental procurement in its solicitation materials. (See SFL § 139-j(6).)

(d) Must seek written affirmation from all offerers as to the offerer's understanding of and agreement to comply with the authority's procedures relating to permissible contacts. (See SFL § 139-j(6)(b).)

(e) Must require offerers to disclose findings of non-responsibility due to violations of the permissible contacts provisions or the intentional provision of false or inaccurate information to a governmental entity within the previous four years in the entity's solicitations for proposals. (See SFL §139-k(2).)

(f) A procurement contract award must contain a certification by the offerer that all information provided to the governmental entity is complete, true and accurate and such procurement contract must contain a provision authorizing the governmental entity to terminate the contract in the event such certification is found to be intentionally false or intentionally incomplete. The governmental entity shall include in the procurement record a statement describing the basis for any action taken pursuant to such termination provision. (See SFL § 139-k(5).)

---

[16] Note: An offerer must only contact the person or persons designated as the contact person(s) by the governmental entity during the Restrictive Period of a governmental procurement.

(g) Any member of the procuring governmental entity that becomes aware that an offerer violated the permissible contacts provision must immediately notify the ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating such matters. (See SFL § 139-j(8).)

(h) Must establish a process for review by ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating any allegations of violations of the permissible contacts provisions. (See SFL § 139-j(9).)

(i) Upon notification of an alleged violation, the governmental entity's ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating such matters must immediately investigate such allegation and if sufficient cause exists to believe that the allegation is true, must give the offerer reasonable notice that an investigation is ongoing and an opportunity to be heard in response to the allegation. (See SFL § 139-j(10)(a).)

A finding that an offerer has knowingly and willfully violated the permissible contact provisions or the disclosure provisions must result in a determination of non-responsibility for such offerer, and such offerer must not be awarded the procurement contract unless the governmental entity finds that the award is necessary to protect public property or public health or safety, and that the offerer is the only source capable of supplying the required article of procurement within the necessary timeframe. The governmental entity must include in the procurement record a statement describing the basis of the finding. Any subsequent finding of non-responsibility due to a violation of the permissible contacts or disclosure provisions within four years of a determination must result in the offerer being rendered ineligible to submit a proposal on or be awarded any procurement contract for a period of four years from the date of the second final determination for any procurement contract (debarment). (See SFL § 139-j (10)(b) & 139-k(3).)

Upon a finding of non-responsibility or debarment, the governmental entity must notify Office of General Services, which shall keep a list and make it publicly available. (See SFL § 139-j (10)(b).)

If an employee of the governmental entity is found to have knowingly and willfully violated the governmental entity's requirements in relation to the permissible contacts provisions, then the ethics officer, the IG, if any, or other official of the governmental entity responsible for reviewing and investigating such matters must report such instances to the governmental entity's chairperson or highest official. (See SFL § 139-j(10)(c).)

STATE AGENCIES, INCENTIVES AND LAWS

I. EMPIRE STATE DEVELOPMENT ("ESD")

A. FINANCIAL ASSISTANCE

Empire State Development ("ESD") is the trade name under which New York State offers benefits that have been statutorily authorized under the Office of Economic Development, Job Development and Urban Development Corporation (d/b/a Empire State Development Corporation). Through ESD, the State can provide direct loans, capital grants, or interest rate subsidy grants that result in low-cost financing for the acquisition, construction, renovation, or improvement of real estate, including both land and buildings, as well as the acquisition of machinery and equipment and related soft costs. Direct loans are provided at below-market rates to provide a lower overall blended rate with conventional sources. Interest rate subsidy grants that reduce the costs of borrowing from a conventional lender are also available.

Eligible recipients of these loans and grants include industrial companies such as manufacturers, service providers, assemblers, and distributors, and local development entities on their behalf, as well as headquarter facilities for a broader spectrum of businesses.

Along with direct loans and interest rate subsidy grants, the State will often work with a municipality or county wherein the project is located to access local incentives that can coordinate with State resources and significantly lower project costs. For example, a project will often be partially or wholly financed with IDA bonds, which may also be a vehicle for reducing the company's real property tax liability. In such a case, an ESD interest subsidy grant could be used to lower the costs of the bonds or a direct loan could be provided in conjunction with bonds.

B. TRAINING ASSISTANCE

New York State can provide training assistance in the form of grants and other financial assistance to partially defray the costs of companies that seek to upgrade the skills of current workers or train new employees. Grant funds are available from ESD's Economic Development Fund. In many cases, State staff can also access Federal dollars to augment these sources.

Funds from these sources can be used for classroom or, in certain circumstances, on-the-job training for new hires, including the costs of materials and supplies used directly in training and the cost of hiring outside instructors to train employees. Training can be provided both for specific job skills as well as high-performance work organization techniques and advanced technologies and equipment. State staff can provide references to local networks of training providers in the area where the project is located and will help assemble the most comprehensive and appropriate type of training assistance package in each case.

C. INFRASTRUCTURE LOANS AND GRANTS

Through a variety of sources, the State can provide assistance for any necessary construction, modification or improvements needed in the infrastructure serving an eligible company. Infrastructure improvements include, but are not limited to, water and sewer lines, access roads, docks, wharfs, power lines, and rail enhancements that are outside of the walls of any existing or proposed building at the site.

Note: These areas of assistance are described in summary form for information only. Any specific offer of assistance will be made after discussions with ESD officials and agreement with a company on its project parameters.

Assistance is generally provided in the form of a combination of loans and grants. Two of the most frequently used sources for infrastructure grants and loans are ESD's Economic Development Fund and the State Department of Transportation's Industrial Access Program ("DOT-IAP").

D. INDUSTRIAL EFFECTIVENESS PROGRAM ("IEP")

The Industrial Effectiveness Program ("IEP") encourages State manufacturing firms to undertake productivity and other operational improvements to remain competitive and profitable. Grants are available to partially underwrite the costs of private sector consultants to conduct a variety of productivity assessments to diagnose competitive problems, identify opportunities for improvement and develop strategies for remedial action. The regional staff of ESD will work with each company to access IEP dollars. Funds are available for both preliminary and full productivity assessments.

E. STATE AND LOCAL TAX CREDITS

New York offers some of the most generous credits for a new capital investment of any state in the country.

A credit against the corporation franchise tax on business corporations is available for up to 7% if eligible new investments in buildings and/or depreciable tangible personal property is used primarily in production by manufacturing, processing, assembling and certain other types of activities. A new business may elect to receive, as a refund, any unused part of the tax credit earned. All businesses may carryforward any unused portions of the credit for up to 15 years.

An additional credit, an Employment Incentive Credit, of 1.5% to 2.5% for the same new capital investment (production facilities and equipment only) is deductible by corporations, from the tax payable in each of the next two years succeeding the year of the original investment, provided the firm meets an employment standard which requires that the firm's average number of employees in the State (excluding general executive officers) in each such taxable year to be at least 101% of the comparable average in the year immediately preceding the year of investment. The 1.5% credit applies if employment is at least 101% but less than 102% of the employment base year. A 2% credit applies if employment is at least 102% but less than 103% of the employment base year, and a 2.5% credit applies to employment of 103% or greater than the comparable average.

A corporate taxpayer which was not subject to tax and does not have a taxable year immediately proceeding the taxable year in which the investment is made, may determine its eligibility by using the year the investment is made as the base period for calculating the employment change in each of the three succeeding years. Any excess of this credit may be carried forward for up to 15 years.

There are other credits available for research and development facilities (9% Corporate Tax Credit) and investments in air pollution or industrial waste facilities. Additional credits are available in connection with the expansion of emerging technology businesses, including a $1,000 per employee job creation credit and a capital credit for qualified investments. In addition, it is expected that local real property taxes may be reduced significantly based on a payment-in-lieu-of-taxes agreement ("PILOT Agreement"), which may use the IDA bond financing mechanism mentioned in the Financial Assistance section, above, or simply involve the assistance of the IDA.

State staff will work with the company and its financial advisors to detail the total tax savings based on any project's specific investment plans.

F. SMALL BUSINESS TECHNOLOGY INVESTMENT FUND ("SBTIF")

The Small Business Technology Investment Fund ("SBTIF") provides start-up, high-tech companies throughout the State with a source of venture capital to promote new job creation and economic growth. The Fund makes early stage equity investments in companies that have developed innovative technology products or services and that display significant competitive advantages. It also offers technical and managerial services to growing technology-based business ventures.

G. SEMICONDUCTOR MANUFACTURING INITIATIVE-NEW YORK ("SEMI-NY")

SEMI-NY is a comprehensive effort to encourage semiconductor manufacturing in New York State. The State has facilitated the pre-permitting of industrial sites across the State specifically for chip fabrication. Each site is a minimum of 200 acres and can handle the demanding infrastructure requirements of a chip fabrication site. In addition, each site provides access to a skilled workforce, superior highway access, and incentives to help offset both the up front and ongoing costs of operating these capital intensive facilities.

H. CENTERS OF EXCELLENCE ("Centers")

The Centers of Excellence ("Centers") support high technology ventures through a collaborative approach among the State, academia, private venture capital companies, and other private and public sector parties. Established to encourage rapid commercialization of scientific breakthroughs, the Centers specialize in nanoelectronics, bioinformatics, photonics, environmental systems, wireless applications, and information technology. Examples include the Center of Excellence in Bioinformatics in Buffalo, Infotonics in Rochester, Nanoelectronics in Albany, Information Technology on Long Island, and Environmental Systems in Syracuse.

I. INTERNATIONAL INVESTMENT

ESD comprises a network of offices around the world. ESD's international trade specialists help businesses relocate to or establish a presence in the State, expand existing operations, and compete more effectively and profitably in domestic and international markets. ESD's technical and financial assistance services help businesses grow and prosper by furnishing site selection and logistical assistance, demographic, wage, tax and utility cost data, quality of life facts, networking with local government officials and private businesses.

J. RESTORE NEW YORK

The Restore New York program was established in 2006 to encourage economic development and restore economically-distressed areas by providing municipalities with financial assistance for ongoing revitalization and community housing improvements.

Any New York State city, town or village can apply for funding in any given round. Eligible projects include demolition or deconstruction of residential properties, demolition or deconstruction of commercial properties, rehabilitation or reconstruction of residential properties, and rehabilitation or reconstruction of commercial properties. At least 10% local matching funds (cash, in-kind or combination) have been required in prior years. The maximum grant award per property/project will vary by type of project.

Round 2 grant recipients were announced in January 2008. As of the date of publishing of this Handbook, the commencement of Round 3 was not yet announced. (For additional information, see www.nylovesbiz.com/restoreNY.)

K. OTHER AREAS OF ASSISTANCE

Given the wide range of programs and services offered by the State to its business community, it is impossible to describe all the areas of assistance which might be important to a company seeking to locate or expand in the State. However, just as a sampling, other areas of assistance include recycling market assistance, government procurement, women and minority business enterprises, film industry, and ownership transition services.

Again, State staff will be pleased to work with any company to identify the scope and character of these services based on a prospect company's requirements.

II. NEW YORK STATE EMPIRE ZONE TAX BENEFITS[17]

In 1986 the New York State Economic Development Zone (now known as Empire Zone or "EZ") statute was created to assist businesses in locating to distressed economic areas. The following outlines the procedures for applying for Empire Zone designation and the tax incentives available if designated.

Prior to April 2005, Empire Zone acreage was often provided to businesses located both in and out of economically distressed inner-city or urban areas. Statutory changes eliminated this "spot zoning" approach and provided that as of January 1, 2006, every Investment Zone[18] be re-designated to be contained entirely within three or four separate and distinct contiguous areas, and every Development Zone[19] be re-designated to be contained entirely within six or seven separate and distinct contiguous areas. This was a one-time reconfiguration. Any certified business entity located outside of the Empire Zone's distinct and separate contiguous areas will be grandfathered in under the tax laws that were in effect when the entity was first certified until expiration of the Tax Benefit Period.

Any new project that is not located within these newly-designated areas, but is seeking Empire Zone acreage designation outside of these areas, must qualify as a "regionally significant project" in order to be eligible for Empire Zone certification. A regionally significant project's zone acreage footprint does not count against an Empire Zone's acreage total. There are four categories of regionally significant projects including: (i) manufacturing creating 50 or more jobs; (ii) agri-business, high tech, or biotech business making a capital investment of $10 million and creating 20 or more jobs; (iii) financial or insurance or distribution center creating 300 or more jobs; and (iv) other (to be defined in future Rules and Regulations). A fifth regionally significant project category has been established for a Clean Energy Research and Development Enterprise as defined in § 957 of GML.[20]

[17] The Empire Zone program is very complex. Further, a project that is eligible for Empire Zone benefits may also be eligible for other State, local or Federal tax benefits. Attorneys in the Harris Beach Public Finance & Economic Development Practice Group have significant experience with the Empire Zone program on projects of all sizes. Please feel free to contact Robert Murray (bmurray@harrisbeach.com), Justin Miller (jmiller@harrisbeach.com), Shawn Griffin (sgriffin@harrisbeach.com), Timothy Frateschi (tfrateschi@harrisbeach.com) or Robert Ryan (rryan@harrisbeach.com) at their respective e-mail addresses or through the toll-free number as indicated below.

[18] Investment Zones are Empire Zones based on census tract data.

[19] Development Zones are Empire Zones established as county-wide zones.

[20] New York GML § 957(r) defines a "Clean Energy Research and Development Enterprise" as "any electric generating facility that used pulverized coal technology, circulating fluidized bed technology or integrated gasification combined cycle technology and that is capable of capturing carbon dioxide for sequestration or capable of being retrofitted to capture carbon dioxide for sequestration". GML § 960(a-1) provides that the Empire Zone Designation Board may consider designating Empire Zone acreage for certain categories of regionally significant projects as set forth in § 957 of GML, including designating such acreage for a clean energy research and development enterprise.

The tax benefits that were added to the program in 2000, commonly called the "QEZE Benefits,"[21] tend to be the most powerful in providing incentives to businesses. These benefits can: (i) effectively eliminate a business's real property taxes (the QEZE Credit for real property tax); (ii) eliminate a business's State income or franchise tax (the QEZE Tax Reduction Credit); and (iii) eliminate its State sales tax (the QEZE Sales Tax Exemption). The QEZE benefits compliment the pre-2000 Program tax benefits, including the Empire Zone Investment Tax Credit, the Empire Zone Employment Incentive Credit, the Empire Zone Wage Tax Credit, and the Empire Zone Capital Tax Credit (collectively, these benefits are referred to herein as the "Other Benefits" under the program). Below please find a brief description of the QEZE benefits (drafted to reflect post April 1, 2005 statutory changes) as well as the "other" Empire Zone benefits.

A. APRIL 2009 EMPIRE ZONE PROGRAM MODIFIED IN BUDGET BILL

New York State's recently adopted budget bill (S.57-B/A.157-B) modified the Empire Zones program which will impact business entities certified on or after April 1, 2009 as well as all currently certified entities. This information is separated into three sections to highlight changes impacting (1) existing businesses, (2) businesses certified on or after April 1, 2009, and (3) general provisions affecting both existing and newly certified businesses.

1. Existing Empire Zone Certified Entities

<u>2009 Review of I to I Cost-Benefit Test and "Shirt Changers".</u> The Bill requires ESD to conduct a review in 2009 of all currently Empire Zone ("EZ") certified businesses to determine whether such businesses should be decertified or remain certified through the issuance of a retention certificate. First, the bill requires ESD to determine whether the currently certified businesses "failed to provide economic returns to the State in the form of total remuneration to its employees (i.e., wages and benefits) and investments in its facility greater in value to the tax benefits the businesses used and had refunded to it." This is commonly referred to as the "I to I Cost-Benefit Test." The determination by ESD will be based upon data contained in "at least three business annual reports filed by the business enterprise." It is unclear which three years or even what number of years will be used by ESD for its review. Given this uncertainty, caution should be used in claiming benefits for the 2008 tax year if potential exists for not satisfying the I to I Cost-Benefit Test. ESD may also consider other economic, social and environmental factors when evaluating the I to I Cost Benefit Test and whether a business should remain EZ certified. Secondly, for businesses EZ certified prior to August 1, 2002 and as part of the 2009 review, the bill require ESD to determine "whether the business enterprise caused individuals to transfer from existing employment with another business enterprise with similar ownership and located in New York State to similar employment with the certified business enterprise or if the enterprise acquired, purchased, leased, or had transferred to it real property previously owned by an entity with similar ownership, regardless of form of incorporation or organization." This provision targets what are commonly referred to as "Shirt Changers"; however, the language is broad and may capture many valid business transactions. It is important to note that existing statutory language states "the date determined to be the earliest event constituting grounds for revoking certification shall be the effective date of decertification." Thus, the implementation of the effective date of decertification may have a retroactive impact on previous tax years. Lastly, it is unknown at this time how long it will take ESD to conduct its 2009 mandated review and how long it will take to issue retention certificates.

<u>Appeals Process for Decertification from 2009.</u> Any business decertified based upon ESD's 2009 review concerning the I to I Cost-Benefit Test and/or Shirt Changers may appeal to the Empire Zone Designation Board ("EZDB") within 15 days from ESD's revocation notification. The business will then have 60 days from ESD's revocation notification to present a written submission to the EZDB. The EZDB may only reverse ESD's determination if the EZDB unanimously finds that there was insufficient evidence

[21] QEZE means "Qualified Empire Zone Enterprise."

demonstrating that ESD's determination of a Shirt Changer was in error or that extraordinary circumstances occurred which would justify the continued certification of the business although such business did not satisfy the I to I Cost-Benefit Test.

Tax Credits/Benefits. For taxable years commencing on or after January 1, 2008, any carry over of a credit from prior taxable years will not be allowed if an Empire Zone Retention Certificate is not issued.

For a taxable year beginning on or after January 1, 2008 and before January 1, 2009, no petition may be filed by a taxpayer claiming a refund of an Empire Zone tax credit until six months have expired after the date on which an Empire Zone Retention certificate was issued.

2. Newly Certified Businesses

Cost-Benefit Test. First, the bill allows manufacturing enterprises that are EZ certified on or after April 1, 2009 to meet a 10 to 1 cost benefit ratio rather than the previous regulatory provision of 20 to 1. All other businesses are subject to a ratio of 20 to 1, which is the same as the previous regulatory provision. Secondly, the cost-benefit calculation is now based upon the first three years of EZ certification rather than the first five. Lastly, the calculation is based on the estimated amount of total EZ benefits that "may be used and may be refunded" rather than the tax benefits "claimed."

Real Property Tax Credit. The real property tax credit for businesses EZ certified on or after April 1, 2009, will be 75 percent of the amount calculated pursuant to the Tax Law.

QEZE Sales Tax Rebate - formerly the QEZE Sales Tax Exemption. For businesses EZ certified on or after April 1, 2009, a credit or refund of the State share of any sale or use taxes on tangible personal property used predominately in the Zone will not be allowed unless the county or city provides for the exemption of the local share (i.e., opted in).

3. General Provision - Existing and Newly Certified Businesses

Additional Criteria for Decertification. In addition to the I to I cost-Benefit Test and Shirt Changer provisions, which ESD must use for the 2009 review, the bill also added whether the "business enterprise has changed ownership or moved its operations out of the empire zone" as a basis for decertification. Lastly, the bill removed the exception from decertification based on the failure to create employment to the extent indicated on the business's EZ application due to "circumstances beyond the business' control."

Please take note as mentioned above, existing statutory language provided the "date determined to be the earliest event constituting grounds for revoking certification shall be the effective date of decertification." Thus, a decertification for any reason, including a change in ownership, Shirt Changers and the I to I Cost Benefit Test, could potentially have a retroactive impact on tax credits although such activities were previously permissible at the time the credits were claimed. It is unclear at this time how the State is going to interpret and implement the effective date of decertification provision as well as the "change in ownership," "Shirt Changers," and the "I to I Cost-Benefit" provisions.

Tax Credits/Benefits. The QEZE Sales Tax Exemption has been eliminated and combined with the Empire Zone Sales Tax Rebate. The sales tax refund can be claimed no more frequently than quarterly with first refund paid at least 270 days from the date the budget bill becomes law.

Program Administration. ESD may promulgate regulations which may be adopted on an emergency basis. The Commissioner of ESD is the sole EZ certifier. The role of the local Empire Zone Administrative Board changed from EZ application approval to recommendation. The local zone certification officer has been eliminated.

Program Sunset. The expiration of the program was amended from June 30, 2011 to June 20, 2010.

B. THE QEZE BENEFITS

1. QEZE Credit for Real Property Taxes (the "CRPT")

The QEZE CRPT is a refundable New York income/franchise tax credit that can be equal to as much as 100% of a QEZE's eligible real property taxes. Because it is a refundable credit, QEZEs that generate no taxable income in New York may still take advantage of the CRPT by claiming any unused portion thereof as a tax refund.

Pre-April 1, 2005 QEZE Credit for Real Property Taxes. Prior to April 1, 2005, the CRPT was based on the real property taxes assessed on real property owned by a QEZE and located within an EZ (referred to as "Eligible Real Property Taxes"). Eligible Real Property Taxes also included Payment In Lieu of Tax ("PILOT") payments under certain circumstances. Prior to April 1, 2005, the Tax Benefit Period of the CRPT consisted of fourteen consecutive tax years, beginning with the first tax year during which the taxpayer is certified. The CRPT was available at up to 100% of eligible real property taxes for the first ten years of the Tax Benefit Period, then phased out in 20% increments over years eleven through fourteen (i.e., the CRPT is limited to 80% of Eligible Real Property Taxes in year eleven, 60% in year twelve, etc.). To claim the CRPT, the taxpayer must meet the QEZE Employment Test on an annual basis. The QEZE Employment Test requires an eligible business's employment level, both (i) in an Empire Zone and (ii) in the State but outside any EZ, to be at least equal to its employment level during its "Base Period" within those same two areas. The Base Period was defined as the five tax years preceding the taxpayer's "Test Year", which was defined as the tax year immediately prior to the year the taxpayer first became eligible for Empire Zone tax benefits.

The amount of the pre-April 1, 2005 CRPT was limited based on job creation or tax basis in the subject real property. Specifically, the CRPT limit was the greater of either the Employment Increase Limitation or the Capital Investment Limitation as described below:

(1) Employment Increase Limitation is the product of $10,000 multiplied by the excess of the QEZE's Employment Number in the Empire Zones in which it is certified over the QEZE's Test Year Employment Number in such zones; or

(2) Capital Investment Limitation is the product of:

(i) 10% of the greater of either: (a) the cost or other basis for Federal income tax purposes (determined on the later of January 1, 2001 or the effective date of the QEZE's certification) of real property, including buildings, owned by the QEZE and located in an Empire Zone in which the QEZE is certified; or (b) the cost or other basis for Federal income tax purposes of such real property described in (a), above, on the last day of the taxable year; and

(ii) the greater of either: (a) the percentage of the realty which is physically occupied and used by the QEZE or by a related person of the QEZE; or (b) the percentage of such cost or other basis which is attributable to the construction, expansion or rehabilitation of the property, rather than the acquisition of such real property, by the QEZE. If the percentage of said construction, expansion, or rehabilitation equals or exceeds fifty percent, then the percentage shall be deemed to be 100%.

First Certification after April 1, 2005: New Definitions. First and foremost, for taxpayers first certified on or after April 1, 2005, a QEZE is defined as a business enterprise which annually meets the Employment Test during the Tax Benefit Period. The Tax Benefit Period consists of the first ten (10) taxable years starting with the first taxable year in which the business is certified.

For the CRPT and Tax Reduction Credit ("TRC"), the Base Period for those entities first certified on or after April 1, 2005 is now limited to the four taxable years (or such smaller set of years) prior to the first taxable year in which the business is certified. For the QEZE Sales Tax Exemption ("STE"), the Base Period consists of the three years prior to the Test Year. (Note that for the CRPT and the TRC, the Test Year is now included in the Base Period).

The Employment Test will now be met for a taxable year if (i) the business enterprise's employment number in New York State for the taxable year *exceeds* its employment number in the State for the Base Period, and (ii) the business enterprise's employment number in all Empire Zones for the taxable year *exceeds* its employment number in all Empire Zones for the Base Period. Note that a taxpayer must now exceed, rather than equal or exceed, its Base Period employment number. Also note that this new Employment Test eliminates the prior Employment Test that considered both in-Zone and out-of-Zone employment numbers separately.

The term Test Date, with respect to taxpayers first certified on or after April 1, 2005, is the date prior to July 1, 2011 on which such taxpayer was first certified. The term Test Year means the last taxable year of the business enterprise ending before the test date.

Although the definition of the term Employment Number remains the same, individuals employed in New York State by a related person within the immediately preceding 60 months cannot be included. Effective as of January 1, 2002, a related person also includes an entity which would have qualified as a related person of the QEZE if it had not been dissolved, liquidated, or merged with another entity or otherwise ceased to exist or operate.

A business enterprise seeking its first certification on or after April 1, 2005, with a Base Period of zero years, *or*, with zero employment in the Base Period, is now subject to additional employment test requirements, such that it will only meet the Employment Test if it qualifies as a New Business.

A New Business is any business entity which is not substantially similar in operation and in ownership to a business entity taxable, or previously taxable, under Article 9, 9-A, 23, 32, or 33, or has or had income or losses which are or were includable under Article 22 of the New York Tax Law. For tax years beginning on or after January 1, 2005, a business which is identical in ownership and operation to an existing taxpayer will qualify as a new business if the two businesses are operating in different counties in the State, however, the new business will use the remaining Tax Benefit Period of the existing QEZE to which it is identical.[22]

[22] April 2005 statutory changes with respect to the Employment Test also affect taxpayers that were first certified prior to August 1, 2002. For these entities, if the Base Period is zero years or the Base Period employment is zero and the enterprise is similar in ownership and operation to an existing or previously existing taxpayer, then the enterprise will be able to continue to access QEZE benefits for taxable years beginning on or after January 1, 2005 only if the enterprise was formed for a valid business purpose and not solely to gain Empire Zone benefits. A Valid Business Purpose means one or more business purposes, other than the avoidance or reduction of taxation, which alone or in combination constitutes the primary motivation for some business activity or transaction, which activity or transaction changes in a meaningful way, apart from tax effects, the economic position of the taxpayer. The economic position of the taxpayer includes an increase in the market share of the taxpayer or the entry by the taxpayer into new business markets.

Finally, significant changes were made to the CRPT for entities first certified on or after April 1, 2005, specifically with respect to the term Eligible Real Property Taxes. Specifically, a QEZE landlord, a non-QEZE tenant, and a QEZE tenant can now all make Eligible Real Property Tax payments.

In the first instance, with respect to a QEZE landlord, Eligible Real Property Taxes now mean taxes imposed on realty which is owned by the QEZE and located in an Empire Zone with respect to which the QEZE is certified, provided such taxes are paid by the QEZE which is the owner of the realty.

In the second instance, with respect to a non-QEZE tenant, the term Eligible Real Property Taxes includes those that are paid by a non-QEZE tenant which: (i) does not meet the eligibility requirements to qualify as a QEZE; or (ii) cannot treat such payment as Eligible Real Property Taxes and (iii) such taxes become a lien on the real property during the taxable year in which the owner of the real property is both a QEZE and certified under Article 18-B of the New York General Municipal Law.

In the last instance, with respect to a QEZE tenant, the term Eligible Real Property Taxes also includes taxes paid by a QEZE tenant which is a lessee of real property if (i) the taxes must be paid by the lessee pursuant to explicit requirement in a written lease executed or amended after June 1, 2005, (ii) such taxes become a lien on the realty during the tax year in which the lessee is a QEZE, and (iii) the lessee has made direct payment to the taxing jurisdiction and has received a receipt for the same such payment.

Newly Designated Empire Zones or Boundary Changes. With respect to newly designated EZ acreage, or if the boundaries of an existing Empire Zone have been revised, the Employment Number in the Base Period and Test Year are determined as if the new zone or the boundaries of the revised zone existed during the Base Period and Test Year and the taxpayer had been located in the new or revised zone. If a new Empire Zone or a revised Empire Zone boundary now encompasses a business entity, that business entity will be treated as if the new zone or revised zone existed during both the Base Period and Test Year and as if the business enterprise had been located in the new or revised zone.

QEZE Credit For Real Property Taxes: Post April 1, 2005. The post-April 1, 2005 CRPT for taxpayers first certified on or after April 1, 2005 largely depends on whether the taxpayer is located in an Investment Zone or a Development Zone. To claim the CRPT, a taxpayer must first pass the Employment Test as described in (b) above. The CRPT is no longer based on the amount of the Eligible Real Property Tax expense; it is instead capped at an amount equal to the taxes imposed on real property owned by the QEZE, or an amount equal to the payment made under a PILOT Agreement.

Specifically, the amount of the CRPT for taxpayers first certified on or after April 1, 2005 is the greater of either the Credit Amount or the Capital Investment Amount, further dependent upon whether the QEZE is located in an Investment Zone or a Development Zone. In either case, the amount of the CRPT cannot exceed the Eligible Real Property Tax expense. The Investment Zone and Manufacturing Entity CRPT formula and the Development Zone (excluding Manufacturing Entities) CRPT formulas are provided below as follows:

(3) Investment Zone and Manufacturing Entity CRPT. The Credit Amount for a QEZE, which is a manufacturer, or is certified only in an area or areas designated as an *Investment Zone*, is the product of, (A) 25%; and (B) the total wages, health and retirement benefits of Net New Employees for the taxable year (where the compensation package for each Net New Employee cannot exceed $40,000.) The term Net New Employees means the excess of the QEZE's Employment Number in the Empire Zones with respect to which the QEZE is certified for the taxable year, over the QEZE's Employment Number in such zones for the Base Period.

The Capital Investment Amount for a QEZE certified only in an area or areas designated as an *Investment Zone, or which is a manufacturer*, is the product of (i) and (ii), below:

(i) 10 % of the greater of either:

a. the cost or other basis (including acquisition basis) for Federal income tax purposes determined on the effective date of the QEZE's certification or real property and buildings owned by the QEZE and located in Empire Zones in which the QEZE is certified, or

b. the cost or other basis for Federal income tax purposes of such real property on the last day of the taxable year; and

(ii) The greater of either:

a. the percentage of the real property referenced above physically occupied and used by the QEZE or by a related person of the QEZE, or

b. the percentage of the cost or other basis attributable to the construction, expansion or rehabilitation of the same real property, as opposed to its acquisition, by the QEZE. If such percentage is 50% or more, then the percentage shall be deemed 100%.

Development Zone CRPT. Again, the CRPT is the greater of either the Credit Amount or the Capital Investment Amount.

(4) The Credit Amount for a QEZE certified in an area designated as a Development Zone with the exception of manufacturers, or a QEZE which is certified in both a Development Zone and an Investment Zone with the exception of a manufacturer, is the product of (i), (ii) and (iii), below:

(i) 25%; and

(ii) the total wages, health and retirement benefits of Net New Employees for the taxable year (where the compensation package for each Net New Employee cannot exceed $40,000); and

(iii) the Development Zone Employment Increase Factor of 0.25 for one to ten Net New Employees; of 0.50 for 11 to 49 Net New Employees, of 0.75 for 50 to 75 Net New Employees; of the quotient of Net New Employees divided by 100; and up to 1.0 for 76 or more Net New Employees.

(5) The Capital Investment Amount for a QEZE certified in an area designated as a Development Zone with the exception of Manufacturers, or a QEZE which is certified in both a Development Zone and an Investment Zone with the exception of Manufacturers, is the product of (i), (ii) and (iii), below:

(i) 10%; and

(ii) the amount of such cost or other basis attributable to the construction, expansion or rehabilitation (*not including acquisition basis*) of the real property and building owned by the QEZE located in an Empire Zone in which the QEZE is certified; and

(iii) the percentage of the real property physically occupied and used by the QEZE or by a related person of the QEZE. If 50% or more of the cost or other basis is attributable to the construction, expansion or rehabilitation of the real property, as opposed to the acquisition, then the occupancy percentage is deemed to be 100%.

2. QEZE Tax Reduction Credit ("TRC")

The TRC is a New York income/franchise tax credit that can shield up to 100% of a QEZE's taxable income generated from its operations within an Empire Zone from taxation by the State. The Tax Benefit Period for taxpayers first certified on or after April 1, 2005, is the same as that of a CRPT: ten years.

The amount of the TRC is a function of employment increases. If a QEZE experiences a 100% increase in employment, or a net increase of 100 new full-time jobs in the tax year over its test year employment number in an Empire Zone, it may be entitled to the TRC in an amount up to 100% of the New York income/franchise tax attributable to its operations within an Empire Zone. If a QEZE has business operations both within and outside of an Empire Zone, its TRC will be pro-rated to reflect the ratio of its operations within an Empire Zone vis-à-vis its Statewide operations. This ratio is a function of the QEZE's payroll and assets.

The TRC is only available to taxpayers who satisfy the Employment Test on an annual basis, as described in § 1(b), above. Other than the new Tax Benefit Period and the new Employment Test, the TRC formula remains unchanged for taxpayers first certified on or after April 1, 2005, such that the TRC is equal to the product of the (i) the Tax Benefit Period Factor; (ii) the Employment Increase Factor; (iii) the Zone Allocation Factor; and (iv) the Tax Factor. Note that the Tax Factor for a sole proprietor is the portion of the taxpayer's income tax liability in the taxable year attributable to the income of the QEZE partnership. The Tax Factor for a shareholder of a New York S-Corporation which is a QEZE is that portion of the taxpayer's income tax liability in the taxable year attributable to the income of the QEZE S-corporation. The Tax Factor for corporate taxpayers is the larger of the tax on the entire net income base or the minimum table income base for Article 9-A taxpayers, the larger of the tax on entire net income or the alternative entire net income for Article 32 taxpayers life insurance filers, and the larger of the tax on entire net income or entire net income plus compensation as calculated on a pro-forma return calculating a tax on income for the year for Article 33 non-life insurance filers. In addition, note that any amount of the TRC not deductible in the current taxable year may not be carried over or refunded.

3. QEZE Sales Tax Exemption ("STE")

The STE applies to most purchases subject to sales tax, including vehicles and utilities. Like the CRPT and the TRC, an eligible business needs to satisfy the Employment Test, as described in Section 1(b) above. Note that the STE can be used for both construction and operations.

For purposes of the STE, the term Base Period for a business enterprise first certified on or after April 1, 2005 means the three taxable years immediately preceding said business enterprise's Test Year.

C. OTHER BENEFITS

1. Empire Zone Investment Tax Credit ("ITC")

The ITC rewards capital investments made by an eligible business in tangible personal property and other tangible property in an Empire Zone with a State income or franchise tax credit of either 8% or 10% of the amount of the investment, depending on what Article of the New York Tax Law under which a taxpayer is subject. The ITC is separate and distinct from the non-Empire Zone investment tax credit that is available under New York Tax Law, which is more limited in its availability and is one-half the amount of the Empire Zone ITC.

The ITC is available for investments in facilities located in an EZ used for: (i) manufacturing, (ii) industrial waste treatment or air pollution control, (iii) research and development; (iv) broker/dealer operations, (v) investment advisory services; and (vi) securities exchange operations. A taxpayer that is a "new business" may elect to treat half of its unused ITC as an overpayment of taxes and receive a refund therefor.

2. Employment Incentive Credit ("EIC")

The EIC is available to an eligible business that is entitled to the ITC and that minimally increases its historic employment level. Specifically, a taxpayer who, in years 2, 3, or 4 (where said taxpayer was entitled to the ITC in year 1) has an in-Zone employment level of at least 101% of its average employment level for year 0 (or year 1 if it did not exist in year 0), may claim the EIC for each such year in an amount equal to 30% of the ITC.

3. Wage Tax Credit ("WTC")

The WTC rewards an eligible business's creation of jobs in an EZ with a State income tax credit of either $1,500 (non-targeted employee) or $3,000 (targeted employee including certain economically-disadvantaged persons as specifically defined in the New York Tax Law and honorably discharged members of the armed forces) per job created. Note that for businesses located in Investment Zones only, the WTC increases by $500 for employees with wages in excess of $40,000 ($2000 for non-targeted employees and $3,500 for targeted employees). The WTC is available for a discrete five-year period, which is essentially the first five years a taxpayer operates in an EZ.

If a taxpayer creates one full-time, non-officer job in an EZ and retains that position for this five-year period, that taxpayer will be entitled to the WTC in the aggregate amount of $7,500, or $15,000 if the employee retained is an economically-disadvantaged person. Like the CRPT and the TRC, in order to claim the WTC for any given tax year, a taxpayer must first satisfy an Employment Test, which requires that the taxpayer maintain its historic employment level both in an Empire Zone and in the State but outside any EZ. Like the ITC, the WTC may be partially refundable for a "new business."

4. Empire Zone Capital Tax Credit ("CTC")

The CTC is designed to reward: (i) qualified investments or contributions to a Zone Capital Corporation; (ii) qualified investments in zone-certified businesses; and (iii) contributions of money to Community Development Projects. The CTC is equal to 25% of the amount of the qualified investment or contribution. The CTC has limitations both at the taxpayer level and the EZ level, and requires Empire State Development's pre-approval to claim the credit.

The CTC can be used by a zone-certified business seeking to attract outside investment by allowing such a business to offer a potential investor a State income tax credit equal to 25% of its investment in the zone-certified business. The CTC can also be used by a tax-exempt entity that has been designated as a Community Development Project to encourage contributions to it by offering a potential contributor a State income tax credit equal to 25% of its contribution in addition to the tax-deductibility of the contribution. The CTC can also be used to encourage qualified investments in, or contributions to, Zone Capital Corporations, which are economic development entities established to assist Zone-businesses with growing their operations.

As of April 1, 2005, new Zone Capital Credit Corporations are no longer permitted. Existing Zone Capital Credit Corporations are not affected; however, contributions from January 1, 2005 and onward are no longer eligible for the 25% tax credit.

5. Utility Discounts

In addition to the State tax incentives available under the Program, some utilities provide discounts to Zone-certified businesses. These discounts generally are available only available for "new load" or increases in utility usage. An EZ certified business that is interested in these discounts should make inquiry with its utility service provider.

D. REGIONALLY SIGNIFICANT PROJECTS

A business entity, which has a project that is located outside of existing Empire Zone ("EZ") boundaries may apply for EZ certification; provided, such project qualifies as a regionally significant project ("RSP").

An RSP must be located within the zone applicant's municipal boundaries. Provided, however, if the investment zone is located in a county that does not have a development zone, such project may be located within the county's boundaries. (See GML 957§ (d)(i)&(ii).) Furthermore, RSPs are exempt from the two-square mile acreage limitation placed on all designated Empire Zones. (See GML §958(a)(C)(iii).)

The five categories of RSP are as followings:

(1) A manufacturer projecting the creation of fifty more jobs; or

(2) An agri-business or high tech or biotech business making a capital investment of $10 million and creating twenty or more jobs; or

(3) A financial or insurance services or distribution center creating three hundred or more jobs; or

(4) A clean energy research and development enterprise as determined by the local zone administrative board ("ZAB") and the Commissioner; or

(5) "Other" projects considered by the zone designation board.

1. Empire Zone Designation Board Approval

Empire Zone Designation Board ("EZDB") approval is required for all categories of RSPs except for Manufacturing. (See GML § 960(a-1) and (a-2).)

An application for EZDB must include proof of a public hearing and a publication of findings. The findings must be published once a week for four successive weeks in two newspapers of the county in which the RSP is to be located. If no newspaper is published in the county, the newspaper nearest thereto will suffice. Findings shall consider factors including, but not limited to: the creation and retention of a regionally significant number of skilled or otherwise quality jobs; substantial capital investment; or the export of a substantial amount of goods or services beyond the immediate region, in addition to further finding as to why such project cannot be accommodated within the existing zone area. The EZDB cannot act on any RSP applications until thirty days subsequent to the final publication of the findings. (See GML §960(a)(1).)

2. Clean Energy Research and Development Enterprise

A "clean energy research and development enterprise" is defined as "any electric generating facility that used pulverized coal technology, circulating fluidized bed technology or integrated gasification combined cycle technology and that is capable of capturing carbon dioxide for sequestration or capable of being retrofitted to capture carbon dioxide for sequestration." (See GML §957(r).)

3. Manufacturers

The "Manufacturer" category of RSP is not subject to EZDB approval or the above stated findings or newspaper publication requirements. Manufacturers are treated as if they are located in an Investment Zone. ESD defines a manufacturer as a taxpayer which during the taxable year is principally engaged in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing or a business engaged in emerging technologies pursuant to § 3102-e of the PAL.

Administrative Items

RSP effective date is the later of the following:

(a) The date the local law was enacted included the RSP within its zone;

(b) The date the last concurring resolution was adopted, if any; or

30 days after a public hearing, if required.

(c) RSP designation is of a specific project on specific land; other businesses at same location cannot be certified.

RSP located in a Development Zone and which are not manufacturers would be subject to the reduced benefit of the Credit for Real Property Taxes and the enhanced Wage Tax Credit would not be available.

4. Other

The "Other" category of RSP are to be further defined in rules and regulations promulgated by the commissioner of ESD after approval by the EZDB. The approval of such "Other" RSPs and the related regulations require an affirmative vote by at least five voting members of the EZDB. (See GML §960(a)(2).) Please note: as of April 15, 2008, the State has not implemented this provision by the promulgation of regulations.

E. MEGA PROJECTS

1. Definitions

"Qualified Investment Project" is a project (i) located within an EZ, (ii) at which 500 or more jobs will be created, provided such jobs are new to the State and are in addition to any jobs previously created by the owner of such project in the State, and (iii) which will consist of tangible personal property and other tangible property, including buildings and structural components of buildings[23], the basis of which for Federal income tax purposes will equal or exceed $750,000,000. Provided, however, the owner of such project does

[23] As described in Tax Law §210(12-B)(b)(i),(ii),(iii), and (iv), and Tax Law §210(12-B)(v)(A) or (C).

not employ more than 200 persons in the State at the time of such projected is commenced. (See GML § 957(s))

"Significant Capital Investment Project" is a project (i) located within an EZ, (ii) which will be either a newly constructed facility or a newly constructed addition to or expansion of a "Qualified Investment Project", consisting of tangible personal property and other tangible property, including buildings and structural components of buildings24, the basis of which for Federal income tax purposes will equal or exceed $750,000,000, (iii) which is constructed after the basis for Federal income tax purposes of the property comprising such "Qualified Investment Project" equals or exceeds $750,000,000, and (iv) at which 500 or more jobs will be created, provided such jobs are new to the State and are in addition to any other jobs previously created by the owner of such project in the State. (See GML §957(t).)

2. Application

The Commissioner of the ESD is statutorily charged with approving applications of business enterprises for the qualification as owners of Qualified Investment Projects or as owners of Significant Capital Investment Projects. As a condition of approval of such application, the Commissioner is authorized to specify certain requirements to be satisfied as the Commissioner deems necessary to ensure that the project will make a substantial contribution to the economic development of the State. An application for qualification of a business enterprise as the owner of a Qualified Investment Project must be submitted to ESD by December 31, 2007. No application submitted after such date may be approved. (See GML §959(w).

3. Benefits

QEZE Tax Benefit Period

(1) Qualified Investment Project. The ten (10) taxable year QEZE Benefit Period commences with the taxable year in which the business enterprise's Benefit Period Commencement Date occurs. The Benefit Period Commencement Date is either (i) the date of EZ certification at the location of the Qualified Investment Project or (ii) the date when property constituting a Qualified Investment Project is first placed in service. The Benefit Period Commencement Date must be determined by an election made by the business enterprise in the taxable year that the business enterprise becomes EZ certified at the location of the Qualified Investment Project. Provided no election is made, the Benefit Period Commencement Date will be the date of EZ certification at the location of the Qualified Investment Project. The business's QEZE Benefit Period allowed pursuant to the Benefit Period Commencement Date will supercede any other QEZE Benefit Period of the business entity. (See Tax Law 14(1-A.)

(2) Significant Capital Investment Project. The business's QEZE Benefit Period will be increased to include 10 taxable years starting with the taxable year in which property comprising the Significant Capital Investment Project is first placed in service, provided that the property is placed in service during the business's QEZE Benefit Period. (See Tax Law 14(1-B).)

QEZE New Business Test. A business enterprise which is approved by the Commissioner of ESD as the owner of a Qualified Investment Project or a Significant Capital Investment Project, has a base period of zero years and places in service property, which comprises such Qualified Investment Project or Significant Capital Investment Project, will be deemed to be a new business under § 14 of Tax Law (i.e. the QEZE New Business Test).

---

[24] As described in Tax Law §210(12-B)(b)(i),(ii),(iii), and (iv), and Tax Law §210(12-B)(v)(A) or (C).

F. CLEAN ENERGY ENTERPRISE

Chapter 109 of the Laws of 2006, Part W-1, §§ 17 and 18, amended GML and the Tax Law to provide Clean Energy Enterprises the ability to access EZ benefits anywhere in New York State without the need to be located within an existing EZ. The bill was effective immediately and took effect on June 23, 2006. A Clean Energy Enterprise is defined in GML § 959-b(a) as any business primarily engaged in research, development or manufacturing of renewable energy or energy efficiency technologies or products. In addition, clean coal electric generating facilities capable of capturing carbon dioxide for sequestration or capable of being retrofitted to capture carbon dioxide for sequestration shall also constitute an eligible Clean Energy Enterprise.

A business is primarily engaged in research, development or manufacturing of renewable energy or energy efficiency technologies or products if eighty percent or more of its property in New York is utilized for such purposes.

Specifically, GML § 959-b(b) requires the commissioner of the New York State Department of Economic Development ("DED") to promulgate regulations, after consultation with the Executive Director of NYSERDA, governing (i) criteria of eligibility for designation of a Clean Energy Enterprise, (ii) the application process, and (iii) the certification by the commissioner of DED as to the eligibility of the business for benefits referred to in GML § 966 (i.e. the EZ benefits). In addition, the commissioner of DED will serve as the sole certification officer and such certified businesses will be deemed to be eligible for EZ benefits as if they were located in an "investment zone."

Tax Law § 14 was amended to make conforming changes to certain references in various sections of the Tax Law relating to qualified empire zone enterprises ("QEZE") and EZ benefits.

Note: As of April 15, 2009, the State has not implemented this provision by the promulgation of regulations.

EMPIRE ZONES PROGRAM

TIME LINE

FOR

CREDIT FOR REAL PROPERTY TAXES

AND

TAX REDUCTION CREDIT

BASE PERIOD					TEST YEAR	BENEFIT PERIOD													
1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
						100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	80%	60%	40%	20%
						TEST DATE IN 2003													

FOR TAXPAYERS CERTIFIED PRIOR TO APRIL 1, 2005

EMPIRE ZONES PROGRAM

TIME LINE

FOR

CREDIT FOR REAL PROPERTY TAXES

AND

TAX REDUCTION CREDIT

BASE PERIOD				**BENEFIT PERIOD**									
2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
				100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
			TEST YEAR	TEST DATE IN 2006									

FOR TAXPAYERS CERTIFIED ON OR AFTER APRIL 1, 2005

I. TAX CREDITS UNDER NEW YORK'S BROWNFIELD CLEANUP PROGRAM

New York State's Brownfield Cleanup Program ("BCP"), signed into law on October 9, 2003 and subsequently amended on October 5, 2004, was established to encourage voluntary remediation and redevelopment of brownfield sites. From a business perspective, the most significant component of the BCP is the creation of three new refundable State tax credits made available to State taxpayers[25] who voluntarily clean up and develop brownfield sites[26] under the BCP. From an economic development perspective, BCP tax credits can be utilized to facilitate lending and deal structure to encourage the remediation and development of contaminated properties.

A. INTRODUCTION

The first new BCP tax credit is the refundable Brownfield Redevelopment Tax Credit ("BRTC"). The BRTC equals 10 to 22% of all capital costs related to remediating and developing a brownfield site. The BRTC begins at 10% for individual taxpayers, 12% for corporate taxpayers, and increases by an additional 8% for Brownfield sites located in an environmental zone, and it further increases by an additional 2% if the site is cleaned up to an unrestricted use standard. The second new BCP tax credit is the refundable Tax Credit for Remediated Brownfields ("TCRB"), producing a tax credit equal to up to 100% of a brownfield site's real property tax expense. The third new BCP tax credit is the refundable Environmental Remediation Insurance Credit ("ERIC") equal to a certain percentage of environmental remediation insurance costs for projects where such insurance may be required.

The new BCP tax credits are discussed in detail, below. Note that BCP tax credits rival, and in most cases exceed, similarly-designed tax benefits offered under New York's EZ Program because: (i) all BCP tax credits are refundable in cash; (ii) BCP tax credits are not limited in geographic application to designated zones; (iii) property leased to third parties does not result in BCP tax credit recapture; and (iv) BCP tax credits broadly apply to all capitalized soft and hard costs related to developing a remediation plan and cleaning up the site and to all tangible personal property costs, including buildings, placed on the site for any commercial, industrial, recreational, conservation or residential housing purpose.

B. AUGUST 2008 AMENDMENTS TO THE NEW YORK STATE BROWNFIELD CLEANUP PROGRAM

On July 21, 2008, Governor Paterson signed Chapter 390 of the Laws of 2008 into law, thereby, amending the New York State Brownfield Cleanup Program (BCP). This Chapter, in part, and most significantly, amends certain tax credit provisions related to the refundable New York State Brownfield Redevelopment Tax Credit (BRTC).

---

[25] Eligible taxpayers include business/franchise and income tax taxpayers taxed under Articles 9, 9-A, 22, 32, or 33 of the New York Tax Law. Eligible taxpayers include participants and volunteers. Participants are: (i) taxpayers who owned the brownfield site at the time of the disposal of the contamination; or (ii) are otherwise responsible according to statutory or common law principles. Volunteers are applicants other than participants, including, without limitation, a person whose liability arises solely as a result of the ownership or operation or involvement with the brownfield site subsequent to the disposal of the contamination. Eligible taxpayers do not include those subject to a State/Federal enforcement action regarding the site or those subject to an outstanding claim by the New York Spill Fund at the project site.

[26] Brownfield sites eligible for inclusion in the BCP include any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant, except: (i) sites listed as Class 1 or 2 in the Registry of Inactive Hazardous Waste Disposal Sites (Class 2 sites owned by a Volunteer are eligible until 7/1/05); (ii) sites on the USEPA National Priorities List (NPL); (iii) hazardous waste treatment, storage, or disposal facilities (TSDF's) permitted under New York Environmental Conservation Law (ECL) § 27-0901; (iv) sites subject to a clean up order under Article 12 of the New York Navigation Law (oil spill prevention, control, and compensation) or under Title 10 of ECL Article 17 (control of the bulk storage of petroleum) except such property is not ineligible if it is subject to a stipulation agreement; or (iv) sites subject to any ongoing State or Federal enforcement actions regarding contamination.

The BCP was amended to protect the integrity of the BCP by capping tax credits related to Brownfield Redevelopment costs and to increase tax credits related to Brownfield remediation activities. The BCP amendments do not affect site eligibility for BCP participation or any other public participation requirements related to the BCP application process. This section is intended to inform our clients and friends of the more significant amendments made to the BCP, particularly those related to the BRTC.

1. BCP Background and Tax Credits

By way of background, the BCP has been regarded as one of the more aggressive voluntary brownfield remediation programs of all 50 states. Property eligible for the BCP is any realty where the redevelopment or reuse of the property may be complicated by the presence or potential presence of contaminants, excluding certain listed sites or sites already subject to enforcement action. Businesses and individuals who voluntarily enroll contaminated realty into the BCP receive liability relief from New York State and also receive generous, refundable, New York State tax credits based on both remediation and redevelopment costs, real property taxes, and environmental insurance costs.

In effect, the BCP consists of three New York State tax credit incentives: (i) the BRTC, which is a investment incentive type tax credit; (ii) the Tax Credit for Remediated Brownfields, which is a tax credit based off of brownfield site's real property taxes; and (iii) the Environmental Remediation Insurance Credit, which is a credit based off of environmental remediation insurance premiums, if any. The most significant of these credits is the BRTC, which is the focus of this Legal Alert, and was the focus of these most recent BCP amendments.

The BRTC is a fully refundable investment incentive tax credit available to taxpayers who have satisfactorily cleaned up a brownfield site and received a Certificate of Completion with respect to such remediation activities. The BRTC is applied against a taxpayer's income/franchise tax and is equal to the sum of the following three components: (i) the applicable percentage of the Site Preparation Credit Component (capitalized costs paid in connection with remediating the site and preparing the site for erection of building or establishing the site as usable for its end use); (ii) the applicable percentage of the Tangible Property Credit Component (costs paid for new tangible property placed upon the site including buildings; and (iii) the applicable percentage of the On-site Groundwater Remediation Credit Component (costs paid or incurred for on-site ground water remediation, if any). Prior to the BRTC amendments, the applicable percentage for each of the three components could range anywhere from 10% to 22% of such costs.

2. BCP Amendments

The BRTC amendments affect the applicable percentage amount of the Site Preparation Credit and Tangible Property Component, and establish a tax credit cap on the amount of BRTC (via limiting the amount of credit claimed pursuant to calculating the Tangible Property Credit Component) that taxpayers can claim.

Specifically, the applicable percentage for the BRTC Site Preparation Credit Component and the BRTC On-site Ground Water Remediation Credit Component were amended and increased from 10 percent to 22 percent of eligible costs to new percentages based on the level of cleanup as follows:

Site Preparation and Ground Water Remediation Component
Applicable Percentage

Level of Cleanup	Applicable Percentage
Soil cleanup for Unrestricted Use	50%
Soil cleanup for Residential Use	40%
Soil cleanup for Residential Use -Track 4	28%
Soil cleanup for Commercial Use	33%
Soil cleanup for Commercial Use-Track 4	25%
Soil cleanup for Industrial Use	27%
Soil cleanup for Industrial Use-Track 4	22%

In effect, the applicable percentages for purposes of calculating the BRTC related to site preparation and ground water remediation costs (if any) now range between 22 percent to 50 percent of such costs, increased from 10 percent to 22 percent under the old BCP law. These changes increase the size of tax credits generated for site preparation and groundwater remediation activities, and incentivize taxpayers to undertake "cleaner" cleanups. Note that these more generous percentages are only available to BCP applicants who receive notice of acceptance of their request for participation in the BCP after June 23, 2008.

The applicable percentage for the Tangible Property Credit Component has also been slightly incrased by permitting an additional two percent to be claimed for tangible property costs expended for a site redeveloped in conformance with the goals and priorites as established within a Brownfield Opportunity Areaq (BOA) plan. Thus, the applicable percentages for the Tangible Property Credit Component remain unaffected, as described in the table below (base level component, increased by cleanup level and sites in an Environmental Zone,) but further increased by an additional two percent as follows:

Tangible Property Credit Component Applicable Percentage

Taxpayer	Base Percentage	Unrestricted Use Percentage (+2%)	Environmental Zone Percentage (+8%)	BOA Consistency (+2%)
Individual	10%	12%	18% or 20%	20% or 22%
All Others	12%	14%	20% or 22%	22% or 24%

Recall that the Tangible Property Credit Component is calculated by multiplying the appropriate applicable percentage by the amount of investment made in tangible property, including buildings, at the Brownfield site. Under the BCP amendments, the Tangible Property Credit Component amount is still calculated in the same manner; however, the amount of credit that can actually be claimed is now capped, or limited. The cap is based on whether the ultimate end use of the remediated site is for manufacturing activities or for non-manufacturing end uses, as described below.

For manufacturing activities, the Tangible Property Credit Component, as calculated above, cannot exceed the lesser of $45 million or six times the costs included in the calculation of the Site Preparation Credit Component and the On-site Groundwater Remediation Credit Component. For all other non-manufacturing activities, the Tangible Property Credit Component, as calculated above, cannot exceed the lesser of $35 million or three times the costs included in calculation of the Site Preparation Credit Component and the On-site Groundwater Remediation Credit Component. Note that this cap is only applicable to BCP applicants who receive notice of acceptance of their request for participating in the BCP after June 23, 2008.

Note that the term "manufacturing activities" is broadly defined as the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing, and also includes the activities of a Qualified Emerging Technology Company (QETC), regardless of the $10 million limitation expressed in the QETC definition. A QETC is defined as a business engaged in emerging technology or certain research and development activities as defined under the PAL. As such, the more generous Tangible Property Credit Component Cap (the cap that applies to manufacturing activities) truly extends to more types of activities than just traditional manufacturing.

Lastly, the BCP amendments also add new reporting obligations requiring developers and lessees of BCP benefited projects to submit an annual "Brownfield Redevelopment Report" containing amounts or estimates of certain income/franchise taxes and real property taxes paid or generated on or on behalf of such a Brownfield site and generated from activities conducted by the businesses operating at the Brownfield site.

In sum, the New York State BCP program, which ahs always been more appropriately characterized as an economic development tool rather than an environmental contamination remediation program, remains an incentive laden and important investment and job creation tool despite these most recent BCP amendments. The BCP tax credits are still potent even thought they have historically been almost the sole consideration that encourages volunteers to remediate and develop contaminated property. Under the BCP amendments, 22 percent to 50 percent of all soft and hard capitalized costs related to remediation, site preparation, and groundwater remediation can be refunded, in cash, to a taxpayer who voluntarily enrolls in the BCP. Further, an additional amount, equal to between 10 percent to 24 percent of all tangible property costs, but not exceeding the lesser of (i) three time the remediation and site preparation and ground water remediation costs or $35mm for a non-manufacturing activity type site, or (ii) six time the remediation and site preparation and ground water remediation cots or $45mm for a manufacturing activity type site, can also be refunded, in cash, to the same taxpayer as well. The BCP should still be promoted by economic development officials and hotly pursued by taxpayers interested in obtaining significant tax benefits and liability relief in return for remediating and developing otherwise attractive, but contaminated property.

C. OCTOBER 2004 TECHNICAL AMENDMENTS

Several technical amendments were made to the BCP and signed into law in October 2004. The four most significant changes for taxpayers are briefly described, below. These changes will facilitate the development of brownfield sites.

1. Brownfield Redevelopment Tax Credit ("BRTC")

When a Certificate of Completion ("COC") is issued in a tax year that began prior to one beginning on or after April 1, 2005, or when a building is placed in service prior to a tax year beginning on or after April 1, 2005, then the effective date of the COC and the date the property is placed in service shall be treated as if such date occurred in the first taxable year occurring on or after April 1, 2005. Thus, the Brownfield Redevelopment Tax Credit ("BRTC") will not be lost for projects where the COC is issued, or a building is placed in service, in a tax year beginning prior to one beginning on or after April 1, 2005.

2. BRTC Benefit Period

Tangible property placed into service within 10 years after the issuance of a COC is now eligible for the BRTC. This change allows for phased development to qualify for the BRTC.

3. Transfer of the COC

Successors and assigns of an applicant's COC who obtain the COC upon the transfer or sale of the site or upon a sale of an ownership interest in a partnership, an LLC, or a corporate entity that has been issued a COC, are eligible to claim the BRTC.

4. BRTC Recapture

BRTC amounts related to tangible property are no longer subject to BRTC recapture upon the sale of that property, provided the property remains in qualified use. Similarly, a sale of a partnership or LLC membership interest or the sale of stock in a corporate entity no longer results in BRTC recapture.

D. DRAFT BROWNFIELD CLEANUP PROGRAM GUIDE

In May 2004, the New York State Department of Environmental Conservation (the "DEC") published its draft Brownfield Cleanup Program Guide. The DEC is currently utilizing this draft guidance in implementing the BCP. Of importance to taxpayers, the draft guidance, as exemplified below, attempts to limit the number and size of brownfield sites that the DEC will accept into the BCP.

Of particular relevance, the draft guidance provides that the DEC can limit the boundary of a brownfield site to the actual area where contamination and redevelopment are issues, which may be smaller than the overall project site boundary. The draft guidance attempts to more precisely define the term "brownfield site" by parceling out the two elements that define a brownfield site: (i) that such a site have confirmed contamination or a reasonable basis to believe that contamination is likely to be present on the property, and (ii) that the contamination or potential presence of contamination may be complicating the development or re-use of the property. In doing so, the DEC may determine that only a portion of any overall project meets the definition of a brownfield, such that the entire area subject to the overall project may or may not be an eligible brownfield site for BCP purposes.

In addition, the draft guidance also proposes a methodology by which the DEC will evaluate applications to determine if the public interest will be served by accepting a project into the BCP. It is noteworthy that the DEC has not limited itself to the statutory criteria[27] here, as it has expanded the factors that it will consider, on a case by case basis, in determining whether to accept or reject an application. As such, the DEC will now consider the following factors in addition to the statutory factors: (i) whether the project will reduce contaminant exposure or threat of exposure; (ii) whether contaminants are present at levels that exceed guidance values, standards, or criterion; (iii) whether contamination on the proposed site exceeds historic/background levels; (iv) whether the proposed site is idled, abandoned, or underutilized; (v) whether the proposed site is unattractive for redevelopment due to the presence or perception of the presence of contamination; (vi) whether participation in the BCP is likely to spur redevelopment in surrounding areas; (vii) whether the area of the site shows indicators of economic distress including low resident incomes, high unemployment, high commercial vacancy rates, or depressed property values; (viii) whether a health advisory has been issued for the site; (ix) whether the estimated cost of any necessary cleanup is likely to be disproportionate to the value of the property/project; (x) whether there were industrial or commercial

[27] Under ECL § 27-1407(9), the DEC may reject an application if: (i) the applicant requesting participation has been determined in any administrative, civil, or criminal proceeding to have violated any provision of ECL Article 27, any order or determination issued thereunder, any regulations promulgated thereunder, or any similar statute or regulation; (ii) the applicant has previously been denied entry into the BCP or a similar program in another state; (iii) the applicant has been found in a civil proceeding to have committed a negligent or intentionally tortuous act or been convicted of a criminal act or involving contaminants; (iv) the applicant has been convicted of a criminal offense which involves a violent felony offense, fraud, bribery, perjury, theft, or an offense against public administration; (v) the applicant knowingly falsified or concealed a material fact or knowingly submitted or made use of a false statement in connection with the application, and (vi) the applicant committed an act or failed to act in a manner that could be the basis for a permit denial.

operations at the site which may have resulted in environmental contamination; and (xi) whether the proposed project is likely to re-contaminate the site. These additional factors are not necessarily listed in order of importance, as it is not known whether certain factors have greater weight or influence than other factors or combination of factors.

E. BCP TAX CREDITS

The BCP tax credits available to State taxpayers are described, below. With careful tax planning, BCP tax credits may significantly reduce a company's State income (franchise) tax and real property tax and produce significant cash refunds equal to credit amounts that cannot be otherwise claimed. The BCP tax credits may also be used, to a certain extent, in conjunction with EZ tax credits and exemptions, thereby producing even greater tax savings or refunds.

1. Brownfield Redevelopment Tax Credit

The BRTC is a fully refundable investment incentive tax credit available to taxpayers who have satisfactorily cleaned up a brownfield site and who have been issued a COC with respect to that brownfield site (the "qualified site"). The BRTC can be applied against a taxpayer's income/franchise tax and is based on the sum of the following three components: (i) the applicable percentage of the site preparation credit component (costs paid or incurred for preparing a qualified brownfield site for remediation); (ii) the applicable percentage of the tangible property credit component (costs paid or incurred for new tangible property placed upon such a qualified brownfield); and (iii) the applicable percentage of the on-site groundwater remediation credit component (costs paid or incurred for on-site groundwater remediation at a qualified brownfield site).

2. Definitions

Qualified Site. A "qualified site" is a brownfield site with respect to which a COC has been issued to the taxpayer by the Commissioner of Environmental Conservation pursuant to § 27-1419 of the New York State Environmental Conservation Law ("ECL").[28]

Site Preparation Cost. The term "site preparation cost" means all amounts properly chargeable to a capital account (presumably, architectural and engineering fees; legal and professional fees), which are:

(a) paid or incurred in connection with a site's qualification for a COC; and

(b) all other site preparation costs paid or incurred in connection with preparing/improving a site for the erection of a building or a component of a building, or otherwise to establish a site for useable industrial, commercial (including the commercial development of residential housing), recreational or conservation purposes. Site preparation costs include, for example, the costs of excavation, temporary electric wiring, scaffolding, demolition costs, and the costs of fencing and securing facilities.

Site preparation costs do not include the cost of acquiring the site or amounts included in the costs or other basis for Federal income tax purposes of qualified tangible property.

Qualified Tangible Property. "qualified tangible property" is property, including buildings and structural components thereof, which:

[28] New York Environmental Conservation Law § 27-1419 provides for certification by the applicant that the remedial requirements have been achieved for a brownfield site. Upon the satisfaction of the Commissioner of the NYSDEC that the remediation requirements have been or will be achieved in accordance with the time frames, if any, established in the remediation plan, the Commissioner shall issue a written Certificate of Completion.

(a) is depreciable pursuant to § 167 of the Code;

(b) has a useful life of four more years;

(c) has been acquired by purchase pursuant to § 179(d) of the Code;

(d) is situated within a qualified site in the State; and

(e) is principally used by the taxpayer for industrial, commercial, recreational or environmental conservation purposes including the commercial development of residential housing.

On-Site Groundwater Remediation Costs. "On-site groundwater remediation costs" include all amounts properly chargeable to a capital account which are paid or incurred in connection with qualifying for a COC and include costs paid or incurred in connection with the remediation of on-site groundwater contamination to implement a requirement of the remediation work plan or an interim remedial measure work plan for a qualified site imposed pursuant to § 27-1411 of ECL.

Certificate of Completion. A "Certificate of Completion" ("COC")is issued to the applicant by the Commissioner of Environmental Conservation pursuant to § 27-1419 of the ECL.

Environmental Zones ("EN Zones"). An EN Zone is an area designated as such by the New York State Commissioner of Economic Development.

Applicable Percentage. For purposes of determining the site preparation credit component, the tangible property credit component, and the on-site groundwater remediation credit component of the BRTC, the "applicable percentage" shall be 12% in the case of credits claimed under Articles 9, 9-A, 32 or 33 of the Tax Law, and 10% in the case of credits claimed under Article 22 of the Tax Law.

Where at least 50% of the area of the qualified site relating to the credit is located in an EN Zone, the applicable percentage shall be increased by an additional 8%, (or to 20% and 18%, respectively). If the COC indicates that the qualified site has been remediated to Track 1 as that term is described in § 27-1415(4) of ECL, the applicable percentage as originally set forth shall be increased an additional 2%.

The BRTC Applicable Percentage amounts are summarized in the following table.

BRTC Applicable Percentage

Taxpayer	Base Percentage	Unrestricted Use Percentage (+2%)	Environmental Zone Percentage (+8%)
Individual	10%	12%	18% or 20%
All Others	12%	14%	20% or 22%

Site Preparation Credit Component. The "site preparation credit component" of the BRTC shall be equal to the applicable percentage of the site preparation costs paid or incurred by the taxpayer with respect to a qualified site.

The credit component amount so determined *with respect to a site's qualification for a COC* shall be allowed for the taxable year in which the effective date of the COC occurs. Thus, costs paid or incurred for purposes of obtaining a COC are eligible site preparation costs. These costs presumably include architectural and engineering fees, legal and professional fees. Note that typically such costs would be amortized over the life of the building placed on the site (39 years for nonresidential property and 27-1/2 years for residential rental property).

The credit component amount *so determined other than with respect to such costs for qualification for a COC* shall be allowed for the taxable year in which the improvement to which the applicable costs apply is placed in service, provided the improvement is placed into service within up to five taxable years after the date of issuance of such COC.

In all cases, site preparation costs paid or incurred by the taxpayer shall include only costs paid or incurred by the taxpayer on or after the date of execution of the Brownfield Site Cleanup Agreement between the taxpayer and the DEC.

Tangible Property Credit Component. The "tangible property credit component" shall be equal to the applicable percentage of the cost, or other basis for Federal income tax purposes, of tangible personal property and other tangible property, including buildings and structural components of buildings, which constitute qualified tangible property.

The credit component amount so determined shall be allowed for the taxable year in which such qualified tangible property is placed in service on a qualified site with respect to which a COC has been issued to the taxpayer, for up to 10 taxable years after the date of the issuance of the COC.

The tangible property credit component shall be allowed with respect to property leased to a second party but only if such second party is a non-responsible party (a party not responsible for the disposal of hazardous waste or the discharge of petroleum at the site), or an innocent land owner (a responsible party wherein such party's liability arises solely from operation of the site subsequent to the disposal of the hazardous waste or petroleum discharge, as certified by the commissioner of the DEC).

In all cases, the cost or other basis for Federal income tax purposes of tangible personal property and other tangible property, including buildings and structural components thereof which constitute qualified tangible property, shall include only costs paid or incurred by the taxpayer on or after the date of execution of the Brownfield Site Cleanup Agreement (defined below) between the taxpayer and the DEC.

On-Site Groundwater Remediation Credit Component. The "on-site ground water remediation credit component" shall be equal to the applicable percentage of the on-site groundwater remediation costs paid or incurred by the taxpayer with respect to a qualified site (to the extent that such groundwater remediation costs are not included in the determination of the site preparation credit or the tangible property credit component).

The credit component so determined for costs incurred and paid with respect to and prior to the issuance of a COC shall be allowed for the taxable year in which the effective date of a COC occurs.

The credit component amount determined in taxable years after the effective date of a COC shall be allowed in the taxable year such qualified costs are incurred and paid for up to five taxable years after the issuance of such COC.

In all cases, on-site groundwater remediation costs paid or incurred by the taxpayer shall only include costs paid or incurred by the taxpayer on or after the date of execution of the Brownfield Site Cleanup Agreement between the taxpayer and the DEC.

Brownfield Site Cleanup Agreement. A "Brownfield Site Cleanup Agreement" is an agreement executed in accordance with § 27-1409 of the New York Environmental Conservation Law by an applicant and the DEC for the purpose of completing a Brownfield Site Remedial Program. A "Brownfield Site

Remedial Program" means all remedial activities or actions undertaken to eliminate, remove, treat, abate, control, manage or monitor hazardous waste or petroleum at or emanating from a Brownfield site.[29]

3. Computation of the BRTC

The BRTC shall only be allowed with respect to a qualified site. The amount of the credit in a taxable year shall be the sum of: (i) the site preparation credit component; (ii) the tangible property credit component; and (iii) the on-site groundwater remediation credit component.

Note that the amount of any Federal, State or local government grant money or any grant received from an instrumentality thereof used by the taxpayer to pay for any costs associated with the site preparation credit component, the tangible property credit component, or the on-site groundwater remediation credit component, which was not included in the Federal gross income of the taxpayer, shall be subtracted in computing each of the credit components. In addition, with respect to property that qualifies for the BRTC and also for either the investment tax credit or the EZ investment tax credit, only one of the credits may be claimed.

For Article 9 taxpayers, the BRTC will not be allowed in an amount that will reduce the tax payable to less than the applicable minimum tax. If the BRTC reduces the tax to such amount, any amount of BRTC not deductible in such taxable year shall be treated as an overpayment of tax and shall be refunded.

For Article 9-A taxpayers, the BRTC shall not reduce the tax due for such tax year to less than the higher of, (i) the minimum taxable income base, or (ii) the fixed dollar minimum. However, if the BRTC for any taxable year reduces the tax to such amount, any amount of credit that is not deductible in such taxable year shall be treated as an overpayment of tax and shall be credited or refunded.

For Article 22 taxpayers, if the amount of the BRTC for any taxable year exceeds the taxpayer's tax for such year, the excess shall be treated as an overpayment of tax to be credited or refunded to the taxpayer.

For Article 32 taxpayers, the BRTC for any taxable year shall not reduce the tax due for such year to less than the minimum tax. However, if the amount of the BRTC reduces the tax to such amount, any amount of BRTC that is not deductible shall be treated as an overpayment of tax to be credited or refunded to the taxpayer.

For Article 33 taxpayers, the BRTC shall not reduce the tax due for such tax year to less than the minimum tax. However, amounts of BRTC in excess of the minimum tax shall be credited or refunded to the taxpayer.

4. Transfer of the COC

A COC issued under the BCP can be transferred to the applicant's successors or assigns upon transfer or sale of the brownfield site. Consequently, subsequent owners can continue to claim the BRTC.

[29] ECL § 27-1409 of the describes the provisions to be included in a brownfield site cleanup agreement. The agreement must describe the boundaries of the realty that is subject to the agreement. The agreement must require the applicant to pay for State costs incurred for overseeing and reviewing the agreement. An agreement may contain a provision that allows the applicant to offset against the State's costs any technical assistance grant, as provided under ECL § 27-1316, for a site that the DEC has determined poses a significant threat to the public health and the environment. The agreement must also include, but is not limited to, provisions concerning dispute resolution, State indemnification, brownfield site cleanup agreement termination, State permit exemptions, and cost recovery as well as a provision requiring any work at the affected site to be conducted pursuant to one or more work plans which are approved by the DEC. The agreement must also provide for the preparation and implementation of a community participation plan, require a waiver of any rights the applicant may have under Article 12 of the New York Navigation Law with respect to the brownfield site, and other conditions considered necessary by the DEC for the effective and efficient implementation of the site clean up.

5. BRTC Recapture

Under the October 2004 technical amendments, BRTC recapture provisions no longer automatically apply to a disposition of the underlying asset upon which the BRTC was claimed, provided it remains in qualified use, or to a disposition of an equity interest in a partnership, LLC or corporation.

F. TAX CREDIT FOR REMEDIATED BROWNFIELDS ("TCRB")

The Tax Credit for Remediated Brownfields ("TCRB") is a refundable credit based on the amount of real property taxes imposed on a qualified site and the number of employees (employment number factor) at the site, and can be claimed by a taxpayer (developer) who is an owner of a qualified site and applied against the tax imposed under Articles 9, 9-A, 22, 32 or 33 of the Tax Law.

1. Definitions

Qualified Site. Note that for purposes of the TCRB, a "Qualified Site" is a site with respect to which a COC has been issued by the Commissioner of Environmental Conservation pursuant to § 27-1419 of the Environmental Conservation Law.

Developer. A "developer" is a taxpayer under Articles 9, 9-A, 22, 32 or 33 of the Tax Law who, (i) has been issued a COC with respect to a qualified site, or (ii) has purchased or has otherwise obtained all or any portion of a qualified site from a taxpayer or any other party who or which has been issued a COC with respect to such site, provided such purchase or conveyance occurs within seven years of the effective date of the COC issued with respect to such qualified site.

Note that a taxpayer who is purchasing all or any portion of a qualified site and a taxpayer who has been issued a COC with respect to such site may not be related persons as such term is defined under the Code § 465(b)3(C). Partners in partnerships, or shareholders in an S corporation, where the partnership or the S corporation has been issued a COC or has purchased or has otherwise obtained all of or a portion of a qualified site from a taxpayer who was issued a COC with respect to the site, are also developers for purposes of the TCRB.

Benefit Period Factor. The "benefit period factor" is a numerical value corresponding with a TCRB benefit period of 10 consecutive taxable years beginning in the tax year during which the COC is issued or the taxpayer's first tax year commencing after March 31, 2005, whichever is later. The benefit period factor is 1.0 for each year of the ten-year benefit period.

Employment Number Factor. The "employment number factor" is based on the average number of full-time employees, excluding executive officers, employed by the developer of a qualified site, plus the average number of full-time employees employed by a lessee or lessees of a portion of such a qualified site, where such employees are employed at such site during a taxable year.

When the average number of full-time employees as expressed above is at least 25 but less than 50, the employment number factor is .25. When the average number of full-time employees as expressed above is at least 50 but less than 75, the employment number factor is .50. When the average number of full-time employees as expressed above is at least 75 but less than 100, the employment number factor is .75. Finally, when the average number of full-time employees is at least 100 or more, the employment number factor is 1.

Average Number of Full-Time Employees. The "average number of full-time employees" employed by a developer and the lessee at a qualified site during a taxable year shall be computed by ascertaining the number of such employees employed by the developer and such lessee or lessees (excluding general executive officers) on the 31st day of March, the 30th day of June, the 30th day of September, and the 31st day of December during each taxable year and dividing the sum so obtained by the number of such dates occurring within such taxable year.

Eligible Real Property Taxes. "Eligible real property taxes" means taxes imposed on real property which consists of a qualified site owned by the developer, provided such taxes become a lien on the real property in a period during which the real property is a qualified site. Payments in lieu of taxes with respect to a qualified site by the developer to the State, a municipal corporation or a public benefit corporation shall also be included in the term eligible real property taxes, subject to certain limitations.

Credit Limitation. The TCRB is subject to a credit limitation which is the product of, (i) $10,000, and (ii) the average number of full-time employees employed by the developer of a qualified site and the lessee or lessees of a portion of such qualified site during the tax year.

2. Computation of the TCRB

The TCRB shall be allowed for 10 consecutive years to a developer of a qualified site wherein the amount of the credit shall be 25% of the product of: (i) the benefit period factor; (ii) the employment number factor; and (iii) the eligible real property taxes paid or incurred by the developer of the qualified site during a taxable year.

If the real property which is subject to the TCRB is a qualified site located in an EN Zone then the amount of the credit shall be 100% of the aforementioned product. However, in any case, the amount of the TCRB may not exceed the credit limitation.

Note that if the qualified site is located in an area designated as an EZ, and a taxpayer qualifies for both the TCRB and the QEZE Real Property Tax Credit, the taxpayer shall be required, in the first taxable year said taxpayer is allowed to claim the TCRB, to elect to claim either the TCRB or the QEZE Real Property Tax Credit. A taxpayer who has been allowed the QEZE Real Property Tax Credit in a taxable year proceeding the first taxable year the taxpayer is allowed to claim the TCRB, shall not be precluded from making an election to claim the TCRB.

For Article 9 taxpayers, the TCRB will not be allowed in an amount which will reduce the tax payable to less than the applicable minimum tax. If the TCRB reduces the tax to such amount, any credit not deductible in the tax year shall be treated as an overpayment of tax and refunded.

For Article 9-A taxpayers, the TCRB shall not reduce the tax due for such year to less than the higher of the minimum taxable income base or the fixed dollar minimum. However, if the amount of the TCRB reduces the tax to such amount, any amount of credit that is not deductible in such taxable year shall be treated as an overpayment of tax and shall be credited or refunded.

For Article 22 taxpayers, if the amount of the TCRB for any taxable year exceeds the taxpayer's tax for such year, the excess shall be treated as an overpayment of tax to be credited or refunded.

For Article 32 taxpayers, the TCRB for any taxable year shall not reduce the tax due for such year to less than the minimum tax. However, if the amount of the TCRB reduces the tax to such amount, any amount of TCRB that is not deductible shall be treated as an overpayment of tax to be credited or refunded to the taxpayer.

For Article 33 taxpayers the TCRB shall not reduce the tax due for such tax year to less than the minimum tax. However, amounts of TCRB in excess of the minimum tax shall be credited or refunded to the taxpayer.

G. ENVIRONMENTAL REMEDIATION INSURANCE CREDIT ("ERIC")

The Environmental Remediation Insurance Credit ("ERIC") is a credit equal to the lesser of $30,000 or 50% of the premiums paid by a taxpayer for environmental remediation insurance issued with respect to a qualified site, provided such premium or premiums are paid on or after the date of execution of the Brownfield Site Cleanup Agreement. The ERIC can be applied by the taxpayer against the amount of tax imposed under Articles 9, 9-A, 22, 32 or 33 of the Tax Law.

1. Definitions

Qualified Site. A "qualified site" is a brownfield site with respect to which a COC has been issued to the taxpayer (the applicant) by the Commissioner of Environmental Conservation.

Environmental Remediation Insurance. The term "environmental remediation insurance" shall mean that type of insurance described in § 3447 of the New York Insurance Law, and includes insurance containing any of the following coverage or substantially similar coverages for: (i) the costs of on-site clean up of pre-existing pollution conditions from the insured property which are outside the scope of the remedial work plan pursuant to issuance of a COC for such insured property; (ii) third-party claims for on-site bodily injury and property damage resulting from pre-existing pollution conditions outside the scope of the remedial work plan pursuant to issuance of a COC for the insured property; (iii) coverage which caps clean-up costs relating to the remedial work plan; and (iv) coverage for the costs of State re-openers pursuant to fill any gap in any liability limitation provided by the State.

2. Computation of the ERIC

The ERIC shall equal the lesser of $30,000 or 50% of the premiums paid by a taxpayer for environmental remediation insurance issued with respect to a qualified site.

The ERIC shall be allowed in the tax year in which the COC is issued to the taxpayer, and shall be allowed only once with respect to a particular COC.

For Article 9 taxpayers, the amount of the ERIC will not be allowed in an amount that will reduce the tax payable to less than the applicable minimum tax. Any excess amounts shall be treated as an overpayment of tax and shall be credited or refunded to the taxpayer.

For Article 9-A taxpayers, the ERIC allowable for any taxable year shall not reduce the tax due for such year to less than the higher of the minimum taxable income base or the fixed dollar minimum. Excess amounts shall be treated as an overpayment of tax and shall be credited or refunded.

For Article 22 taxpayers, if the amount of the ERIC for any taxable year exceeds the taxpayer's tax for such year, the excess shall be treated as an overpayment of tax to be credited or refunded to the taxpayer.

For Article 32 taxpayers the ERIC for any taxable year shall not reduce the tax due for such year to less than the minimum tax. However, if the amount of the ERIC tax credit reduces the tax to such amount, any amount of ERIC tax credit that is not deductible shall be treated as an overpayment of tax to be credited or refunded to the taxpayer.

For Article 33 taxpayers, the ERIC shall not reduce the tax due for such tax year to less than the minimum tax. However, amounts of ERIC tax credit in excess of the minimum tax shall be credited or refunded to the taxpayer.

H. EMPIRE STATE FILM PRODUCTION TAX CREDIT PROGRAM

The Empire State Film Production Tax Credit Program (the "Program") was originally created by Chapter 60 of the Laws of 2004. The Program offers tax credits, tax exemptions and investment tax credits for filming commercials, televisions episodes, TV pilots and TV movies or miniseries and movies in New York State. For a feature film or television project to be eligible, the production must take place on a set, a stage, or at a Qualified Film Production Facility within the State. If the filming takes place on location, or is post-production must spend at least $3 million on work at a qualified facility.

1. Film and Television

The Program was amended in 2008 to increase the tax credits available from 10% to 30% of qualified costs of feature films, TV episodes, pilots, and television movies or miniseries. The State has allocated $75 million for this credit in 2009, $85 million in 2010, $90 million in 2011 and 2012, and $110 million in 2013. These credits are provided on a "first come, first served" basis. An applicant may rollover credits into the following years if the annual allocation has been reached. Should the credit exceed any tax liability, the excess amount of the credit will be refunded to the applicant.

In order to apply for the tax credit, a production company must first submit an Initial Application to the New York State Office For Motion Picture and Television Development which leads to conditional approval of the project. (A copy of the application is available online at http://www.nylovesfilm.com/tax/.) As a part of the Initial Application, an applicant must provide the estimated total budget, estimated expenditures, estimated number of shooting days and expenditures in New York State and outside New York State. Within 60 days of filming completion, a Final Application must also be submitted to the New York State Office For Motion Picture and Television Development.

Investment Tax Credit Program ("ITC"). A Qualified Film Production Facility may be eligible for the Investment Tax Credit Program "ITC"). The credit applies to property (including buildings and structural components) which have a useful life of at least four years, and are both purchased and located within the State. The ITC for a corporation is 5% of the first $350 million investment credit base, and 4% for all amounts above $350 million. For individuals, LLCs, and partnerships, the ITC is 4% for all amounts. This credit is in addition to the 30% tax credit but is subject to the State allocation referenced above.

Employment Incentive Tax Credit ("EITC") For those corporations, individuals, LLCs or partnerships that qualify for the ITC, there is also an additional Employment Incentive Tax Credit the ("EITC"). The EITC applies to the same new capital investment as the ITC and is available in the succeeding two years following a claimed ITC. If employment in those two years is at least 101% (in each of the two years) but under 102% (in each of the two years), but under 103% of the previous year, the credit is 2% and if greater than 103% (in each of the two years) the credit is 2.5%.

2. Commercial Tax Credits ("CTC")

For a company filming a commercial in New York State, there is the Empire State Commercial Production Tax Credit. The CTC is available to companies that are in the business of producing commercials including the payment of production expenses, payroll, vendors within the State. At least 75% of the costs of production must be paid or incurred directly in connection with the filming or recording of the qualified commercial and must have occurred within the State. A "qualified commercial" is defined as advertisements recorded on film, audiotape, videotape or digital medium in New York for multi-market distribution by way of radio, television networks, cable, satellite or motion picture theaters. However, news or current affairs programs, interview or talk programs, network promos, "how-to" (instructional) commercials or programs, commercials or programs consisting primarily of stock footage, trailers promoting theatrical films, sporting events, game shows, award ceremonies, daytime dramas, reality programs and music videos are specifically excluded from the Program. It is important to note that these credits would expire after December 31, 2011.

The State has created both a Downstate and an Upstate program for filming commercials, with Downstate included the City of New York and the counties of Nassau, Suffolk, Westchester, Rockland, Putnam, Orange and Dutchess. Upstate program requirements apply to all other areas.

The Downstate program provides a 5% tax credit on qualified costs in excess of $500,000 within the calendar year. The State has allocated $3 million a year for this credit. In the event that there are more qualified costs than the program has allocated in a calendar year, then the credit allocated to each applicant will be computed according toe their relative share of the total annual allocation for the program.

The Upstate program provides a 5% tax credit on qualified costs in excess of $200,000 within the calendar year. The State has allocated $1 million a year for this credit. As with the Downstate credit, in the that there are more qualified costs than the program has allocated in a calendar year, then the credit allocated to each applicant will be computed according to their relative share of the total annual allocation for that program.

3. Sales Tax Exemption

Additionally, certain sales tax exemptions are available for those who produce films in the State. The exemption, originally authorized pursuant to a change in the New York State Tax Law in 2000, applies to the purchases of machinery, equipment, parts, tools and supplies used in production, and covers services such as installation, repair and maintenance of production equipment, as well as fuel and utility services used in production. Only registered vendors may access this credit. To become a registered vendor, Form DTF-17 must be submitted to the New York State of Taxation and Finance Department (a copy of the application is available online at http://www.rjcom.com/production-center/downloads/dtf17_407.pdf). The State Tax Department requires the application be submitted at least 20 business days in advance.

II. QUALIFIED EMERGING TECHNOLOGY COMPANIES

In 1998, New York State enacted new legislation providing for the Qualified Emerging Technology Company ("QETC") Employment Credit and for the QETC Capital Tax Credit. Subsequently, in 2005, the legislation was amended to include the QETC Facilities, Operations and Training Credit. The intent of this legislation was to encourage economic growth, create jobs and keep technology businesses in New York State competitive.

The QETC Employment Credit and the QETC Capital Tax Credit have been available to Article 9-A taxpayers (business corporations) since tax years beginning on or after January 1, 1999, and for Article 22 taxpayers (i.e. individuals, including sole proprietors, partners of partnerships, shareholders of New York S corporations, members of a limited liability company (LLC), beneficiaries of estates and trusts, and estates and trust) since tax years beginning on or after January 1, 2000. The Facilities, Operations and Training Credit has been available for tax years beginning on or after January 1, 2005 for both Article 9-A and Article 22 taxpayers.

Pursuant to § 3102-e of PAL, a qualified emerging technology company is a company located in New York State that has total annual product sales of $10,000,000 or less, and meets either of the following criteria:

(a) its primary products or services are classified as emerging technologies under § 3102-e(1)(b) of PAL; or

(b) it has research and development facilities in New York State and its ratio of research and development funds to net sales equals or exceeds the average ratio for all surveyed companies classified (as determined by the National Science Foundation (NSF) in the most recently published results form its survey, Research and Development in Industry: 1998, or a comparable successor survey as determined by the New York State Department of Taxation and Finance).

A. QETC EMPLOYMENT CREDIT (FORM DTF-621)

A refundable credit of $1,000 per new full-time employee[30] (defined as employees in excess of 100% of base-year[31] employment level) is available for three consecutive years to eligible taxpayers provided that eligibility requirements continue to be met.

Any amount of the credit not deductible in the current tax year may be carried over for an unlimited number of tax years, or in lieu of a carryover, a taxpayer that qualifies as the owner of a new QETC business or as a new QETC business may elect to have the carryover refunded. (See Tax Law § 606(q).) In no case can the credit and the carryover of the credit deducted for the tax year reduce the tax to an amount less than the tax due on the minimum taxable income base or the fixed dollar minimum, whichever is higher. Additionally, the credit may not be applied against the metropolitan business tax surcharge.

B. QETC CAPITAL TAX CREDIT (FORM DTF-622)

There are two QETC capital tax credits available:

(a) a ten percent (10%) tax credit on all qualified investments, providing the taxpayer certifies to the Commissioner of Taxation and Finance32 that the qualified investment will not be sold, transferred, traded, or disposed of during the four years following the year in which the credit is first claimed; and

(b) a twenty percent (20%) tax credit on qualified investments provided the taxpayer certifies to the Commissioner of Taxation and Finance that the qualified investment will not be sold, transferred, traded, or disposed of during the nine years following the year in which the credit is first claimed.

---

[30] Full-time employment means a job consisting of at least 35 hours per week, or two or more jobs that together constitute the equivalent of a job of at least 35 hours per week. A seasonal job that meets these requirements constitutes full-time employment if the job is continuous for at least three months.

[31] Base-year employment is defined as the average number of individuals employed full-time by the taxpayer in New York State during the three taxable years immediately proceeding the first taxable year in which the credit is claimed. In those situations where the taxpayer provided full-time employment within the State during only a portion of the three year period, then the first effective date for the company to take advantage of this credit will be the next year following the first full taxable year that the company had full-time employment in New York State.

[32] To be certified, QETC must annually apply to the NYS Department of Taxation & Finance, using Form DTF-620. If the QETC is not certified by the Commissioner of Tax and Finance, taxpayers who make a qualified investment will not be able to claim the QETC capital tax credit.

The total amount of credit allowable to a taxpayer for all years may not exceed \$150,000 for a credit computed at the rate of 10% of qualified investments, and \$300,000 for a credit computed at the rate of 20% of qualified investments. Other special limitations apply to investments made by a married couple or an estate or trust.

The Capital Tax Credits are only available to an owner-taxpayer at the start of an emerging technology business. Qualified investments do not include investments made by or on behalf of an owner (i.e. any entity that owns more than a ten percent interest) of the qualified emerging technology company, including, but not limited to, a stockholder, partner, sole proprietor or any related person as defined in § 465(b)(3)(C) of the Internal Revenue Code.

The QETC Capital Credit is not refundable, but any amount of the credit not deductible in the current tax year may be carried over for an unlimited number of tax years. Additionally, in the event that the qualified business is not held for the requisite period, the amount of the credit previously claimed in subject to recapture. (See Tax Law § 606(r).)

C. QETC FACILITIES, OPERATIONS AND TRAINING CREDIT (FORM DTF-619)

The 2005/06 New York State Budget enacted a new, refundable credit for eligible qualified emerging technology companies (either Article 9-A or Article 22), based on qualifying expenditures in research and development and training for tax years beginning on or after January 1, 2005 and before January 1, 2012. The maximum total dollar amount of the credit that may be claimed in any one year is \$250,000. The credit is refundable and may be used for up to four (4) consecutive years with the option for a fifth year if a qualified taxpayer is relocating from an academic incubator facility. In that case, the taxpayer may elect to defer the credit to the first tax year after the relocation. For corporate taxpayers, the credit can reduce tax to the higher of the AMT or fixed dollar minimum.

There are three different tax credits available for a qualifying taxpayer:

Research and Development Property (18% Credit). Research and development property acquired by the taxpayer by purchase and placed in service during the tax year is eligible for an 18% credit. Property used in the testing or inspection of materials and products, or any property associated with quality control of the research and development, fees for use of sophisticated technology facilities and processes, and fees for the production or eventual commercial distribution of materials and products from the company would be eligible. However, all costs used in the calculation of the 18% credit may not be used in the calculation of any other credit.

Research Expenses (9% Credit). There is also a 9% credit for qualified research expenses paid or incurred during a taxable year. Qualified research expenses include expenses associated with in-house research, use of sophisticated technology facilities and processes, costs associated with obtaining a patent, or costs publishing the results from a qualified company's research and development in a non-promotional or retail approach, but not outside consultant fees and patent litigation expenses.

High-Technology Training Expenditures (100% Credit). A taxpayer may take a credit equal to 100% of qualified training expenditures paid or incurred by the taxpayer, up to \$4,000 per employee per taxable year. Qualified high-technology training involves taking and completing courses at an accredited, degree-granting post-secondary college or university in New York State that is directly related to one of the categorized emerging technologies that includes instruction on techniques, theories, practical knowledge or ethical considerations of emerging technological activities. General business management, accounting or law courses do not qualify. The credit covers all tuition, mandatory fees and required software minus any scholarships and tuition or fee waivers, and does not include room and board, computer hardware and software not assigned for the course, or any late fees, fines or membership dues. Employees for whom the credits are disbursed must be working at a full-time position at the company's location throughout the training course and must continue the same for 180 days after the completion of the course. However, if a taxpayer relocates from an academic incubator facility, exceptions are made. For instance, training expenditures paid or incurred by a taxpayer during the previous two years when the company was located at an academic incubator facility may be claimed. The credit may also be collected if the taxpayer reimburses a qualified employee after the move for the prior two years. (See Tax Law § 606 (nn).)

III. TAX CREDITS FOR EMERGING TECHNOLOGY COMPANIES

In 1998, New York State enacted new legislation providing for the Qualified Emerging Technology Company Tax Credit ("QETC") and for the Qualified Emerging Technology ("QETC") Capital Tax Credit. Subsequently, in 2005, the legislation was amended to include the Qualified Emerging Technology Company (QETC) Facilities, Operations and Training Credit. The intent of all of this legislation was to encourage economic growth, create jobs and keep technology businesses in New York State competitive.

The QETC Tax Credit and the QETC Capital Tax Credit have been available to Article 9-A taxpayers (business corporations) since tax years beginning on or after January 1, 1999, and for Article 22 taxpayers (that is, individuals, including sole proprietors, partners of partnerships, shareholders of New York S corporations, members of a limited liability company (LLC), beneficiaries of estates and trusts, and estates and trust) since tax years beginning on or after January 1, 2000. The Facilities, Operations and Training Credit has been available for tax years beginning on or after January 1, 2005 for both Article 9-A and Article 22 taxpayers.

A qualified emerging technology company is, as defined in § 3102-e of the Public Authorities Law ("PAL"), a company located in New York State that has total annual product sales of $10 million or less, and meets either of the following criteria: (i) its primary products or services are classified as emerging technologies under § 3102–e(1)(b) of the PAL; or (ii) it has research and development facilities in New York State and its ratio of research and development funds to net sales equals or exceeds the average ratio for all surveyed companies classified (as determined by the National Science Foundation (NSF) in the most recently published results form its survey, Research and Development in Industry: 1998, or a comparable successor survey as determined by the New York State Department of Taxation and Finance). Taxpayers can consult the most current version of for DTF-620-I, Application for Certification of a Qualified Emerging Technology Company, to obtain current ratios in effect.

A. QETC EMPLOYMENT CREDIT

A refundable credit of $1,000 per new full-time employee[33] (defined as employees in excess of 100% of base-year34 employment level) is available for three consecutive years to eligible taxpayers provided that eligibility requirements continue to be met.

Any amount of the credit not deductible in the current tax year may be carried over for an unlimited number of tax years, or in lieu of a carryover, a taxpayer that qualifies as the owner of a new QETC business

[33] Full-time employment means a job consisting of at least 35 hours per week, or two or more jobs that together constitute the equivalent of a job of at least 35 hours per week. A seasonal job that meets these requirements constitutes full-time employment if the job is continuous for at least three months.

[34] Base-year employment is defined as the average number of individuals employed full-time by the taxpayer in New York State during the three taxable years immediately proceeding the first taxable year in which the credit is claimed. In those situations where the taxpayer provided full-time employment within the State during only a portion of the three year period, then the first effective date for the company to take advantage of this credit will be the next year following the first full taxable year that the company had full-time employment in New York State.

or as a new QETC business may elect to have the carryover refunded. In no case can the credit and the carryover of the credit deducted for the tax year reduce the tax to an amount less than the tax due on the minimum taxable income base or the fixed dollar minimum, whichever is higher; neither is the credit allowed against the metropolitan business tax surcharge.

B. QETC CAPITAL TAX CREDIT

There are two QETC capital tax credits available:

(a) The first is a 10% tax credit on all qualified investments, providing the taxpayer certifies to the Commissioner of Taxation and Finance[35] that the qualified investment will not be sold, transferred, traded, or disposed of during the four years following the year in which the credit is first claimed.

(b) The second is a 20% tax credit on qualified investments provided the taxpayer certifies to the Commissioner of Taxation and Finance that the qualified investment will not be sold, transferred, traded, or disposed of during the nine years following the year in which the credit is first claimed.

(c) The total amount of credit allowable to a taxpayer for all years may not exceed $150,000 for a credit computed at the rate of 10% of qualified investments, and $300,000 for a credit computed at the rate of 20% of qualified investments. Other special limitations apply to investments made by a married couple or an estate or trust.

(d) The Capital Tax Credits are only available to an owner-taxpayer at the start of an emerging technology business. Otherwise, any qualified investment made afterwards must not be made by or on behalf of an owner, defined as any entity that owns more than a 10% interest in the QETC. Qualified investments do not include investments made by or on behalf of an owner of the qualified emerging technology company, including, but not limited to, a stockholder, partner, sole proprietor or any related person as defined in § 465(b)(3)(C) of the Code.

The QETC Capital Credit is not refundable, but any amount of the credit not deductible in the current tax year may be carried over for an unlimited number of tax years. An additional provision exists which allows for the recapture of a pro-rata share of the credit in an event the qualified business is not held for the requisite period.

C. QETC FACILITIES, OPERATIONS AND TRAINING CREDIT

The 2005/06 New York State Budget enacted a new, refundable credit for eligible qualified emerging technology companies (either Article 9-A or Article 22), based on qualifying expenditures in research and development and training for tax years beginning on or after January 1, 2005. The maximum total dollar amount of the credit that may be claimed in any one year is $250,000.The credit is refundable and may be used for up to four (4) consecutive years with the option for a fifth year if a qualified taxpayer is relocating from an academic incubator facility. In that case, the taxpayer may elect to defer the credit to the first tax year after the relocation. For corporate taxpayers, the credit can reduce tax to the higher of the AMT or fixed dollar minimum.

There are three different tax credits available for a qualifying taxpayer:

<u>Research and Development Property (18% Credit).</u> Research and development property acquired by the taxpayer by purchase and placed in service during the tax year is eligible for an 18% credit. Property used

[35] To be certified, QETC must annually apply to the NYS Tax Department (Form DTF-620). If the QETC is not certified by the Commissioner of Tax and Finance, taxpayers who make a qualified investment will not be able to claim the QETC capital tax credit.

in the testing or inspection of materials and products, or any property associated with quality control of the research and development, fees for use of sophisticated technology facilities and processes, and fees for the production or eventual commercial distribution of materials and products from the company would be eligible. However, all costs used in the calculation of the 18% credit may not be used in the calculation of any other credit.

Research Expenses (9% Credit). There is also a 9% credit for qualified research expenses paid or incurred during a taxable year. These expenses may include in-house research, use of sophisticated technology facilities and processes, costs associated with obtaining a patent, or costs publishing the results from a qualified company's research and development in a non-promotional or retail approach, but not outside consultant fees and patent litigation expenses.

High-technology Training Expenditures (100% Credit). A taxpayer may take a credit equal to 100% of qualified training expenditures paid or incurred by the taxpayer, up to $4,000 per employee per taxable year. Qualified training involves taking and completing courses at an accredited, degree-granting post-secondary college or university in New York State that is directly related to one of the categorized emerging technologies that includes instruction on techniques, theories, practical knowledge or ethical considerations of emerging technological activities. General business management, accounting or law courses do not qualify. The credit covers all tuition, mandatory fees and required software minus any scholarships and tuition or fee waivers, and does not include room and board, computer hardware and software not assigned for the course, or any late fees, fines or membership dues.

Employees for whom the credits are disbursed must be working at a full-time position at the company's location throughout the training course and must continue the same for 180 days after the completion of the course. However, if a taxpayer relocates from an academic incubator facility, exceptions are made. For instance, training expenditures paid or incurred by a taxpayer during the previous two years when the company was located at an academic incubator facility may be claimed. The credit may also be collected if the taxpayer reimburses a qualified employee after the move for the prior two years.

IV. NEW YORK STATE ENVIRONMENTAL QUALITY REVIEW ACT "SEQRA" OR "SEQR"

Most actions taken by public and quasi-public agencies, including IDAs, URAs, LDC and State agencies, are subject to the New York State Environmental Quality Review Act ("SEQRA" or "SEQR"). (See Appendix C, attached hereto for excerpts from SEQRA.) Before an agency can undertake or approve an "action" or provide financial or other benefits, it must comply with SEQRA or make a determination that the action is exempt from SEQRA as a Type II action. If an agency concludes that the action is not a Type II action, the agency must then determine if the project constitutes a Type I Action (typically a larger project involving significant land acreage and construction work) or an Unlisted Action (the majority of projects will fall within this category). (See Appendix C, attached hereto for definitions.)

If the project constitutes a Type I Action or an Unlisted Action, an environmental assessment form ("EAF") must be prepared by the agency (where an IDA is involved, the company may prepare the form and submit it to the agency). A short environmental assessment form may be used if the project constitutes an Unlisted Action. An uncoordinated review of the action may also be conducted for Unlisted Actions. If the project constitutes a Type II Action, the agency merely identifies it as such and no further action is required under SEQRA before proceeding (these projects typically consist of equipment purchases, replacements, internal buildouts and refinancings with no new construction or other small projects with no environmental impact). Before proceeding with a Type I Action or an Unlisted Action, the agency must complete Part 2 and Part 3 (if necessary) of the EAF and determine whether or not an environmental impact statement ("EIS") is required. If the agency concludes an EIS is not required, it may proceed by demonstrating that the project will not have a negative impact on the environment (the "Negative Declaration").

SEQRA was drafted to accommodate all types of projects. As an example, a project constitutes a Type II Action when the agency is assisting the company with an equipment acquisition. Once the project is identified as a Type II Action, the agency may act without delay. When the agency is involved with the development of a project involving the physical alteration of less than 10 acres or the acquisition or lease of less than 100 acres, the project will generally constitute an Unlisted Action. With an Unlisted Action, an agency can make a Negative Declaration if after completing Part 2 and Part 3 (if necessary) of either the long or short EAF, the agency finds that the action does not pose a significant potential adverse environmental impact. If the project involves the physical alteration of 10 or more acres or the acquisition of more than 100 acres, the project will constitute a Type I Action and the agency is required to use the long EAF form in making its findings and determination. If, upon completing Part 2 and Part 3 (if necessary) of the long EAF, the agency has issued a Negative Declaration, no further actions are required under SEQRA.

If the agency determines that the action poses at least one potential significant adverse environmental impact (a "Positive Declaration") for a Type I Action or Unlisted Action, the agency will ask the company to complete an EIS. The issues to be addressed in the EIS will be established by a scoping procedure and the issues will be addressed according to the procedures and timeframes set forth in SEQRA. These procedures involve public hearings and notices that should be rigorously adhered to.

SEQRA attempts to minimize the burdens of compliance by encouraging agencies and other involved agencies to designate a "lead agency." When a lead agency is used, the review is referred to as a "coordinated review." Such a procedure eliminates the prospect that different involved agencies will require different forms of remediation. A coordinated review is required for a Type I Action and optional for an Unlisted Action. Any involved agency, including an IDA, can act as the lead agency. SEQRA generally requires the agency desiring to act as lead to give 30 days written notice to all the other involved agencies of its intent and to proceed thereafter if no objection from the other involved agencies is received. If an objection is received, SEQRA has a procedure for resolving the dispute as to which agency shall act as the lead. Another method for determining the lead is to have each involved agency send a written letter to the proposed lead agency indicating that they consent to that entity acting as the lead. This procedure eliminates the need to wait 30 days after sending out notice of a desire to act as the lead.

Agencies should work closely with their counsel when taking actions under SEQRA. SEQRA provides fertile ground for plaintiff groups or parties to slow or disrupt the project by bringing a cause of action.

V. OPEN MEETINGS LAW; FOIL

Public agencies (including some LDCs, as detailed within the Local Agencies and Incentives section, above) must hold their meetings in compliance with the Open Meetings Law. (See Appendix D hereof for excerpts from the Open Meetings Law, including the limited circumstances under which an agency can go into executive session and exclude the public from its deliberations.) An agency should be aware that any time a quorum of its members are discussing agency business, they are subject to the Open Meetings Law. This would include inadvertent gatherings where a quorum is present and agency business is being discussed. In addition, the Open Meetings Committee has said that the Open Meetings Law does not permit a member of a public body to participate in a meeting via conference call.

Records of public agencies (including some LDC's, as detailed within the Local Agencies and Incentives section, above) are subject to public inspection under the Freedom of Information Law ("FOIL"). (See Appendix E hereof.) These records include the application and related materials submitted by a company to an agency. The company should be advised to separately identify proprietary and/or information that the company does not want disclosed publicly. The agency should appoint a records officer who will maintain the records and respond to requests for information from the public. In addition, the agency should designate an appeals officer or panel to address appeals made by parties denied access to records by the records officer.

FEDERAL INCENTIVES

I. TAX-EXEMPT BOND TRANSACTIONS

This section briefly describes the structure of an IDA-assisted tax-exempt bond transaction, assuming such an elaborate structure will be used only when the company is receiving the benefits of a lower interest rate because the bondholder is able to exclude the interest income when calculating its Federal income tax. For a complete analysis of whether a specific project qualifies for tax-exempt financing, contact should be made with qualified bond counsel.

A. HISTORY/OVERVIEW

1. History of "Municipal Bonds" and "IRBs"

The term "Municipal Bonds" has historically meant bonds backed by the full faith and credit of the jurisdiction and its taxpayers. The proceeds were used for public purposes. In the 1800s, in an attempt to secure financing for railroad lines and spurs, many railroad companies offered service only when the municipality paid for construction costs for the rail line. The municipality assumed revenues would be generated to repay the bonds. As a result, many railroad lines were originally constructed from bonds backed by municipalities and their taxpayers.

When revenues from many of these rail lines were insufficient to pay debt services on bonds, bondholders began to look to the municipality for payment. Some municipalities failed to pay, and certain municipalities challenged the authority of their prior legislative bodies to issue the bonds. The New York State Constitution now prohibits municipalities from loaning or providing private parties with tax dollars or using such municipalities' credit to benefit any private party. In other words, the New York State Constitution does not allow for a structure wherein a bond is issued for the benefit of a private party and the payment for such bond is backed by a municipality. Partially as a result of these failed railroad financings, bondholders began to insist on opinions of qualified bond counsel for municipal debt financings. From this beginning came the concept of qualified bond counsel being listed in what has become known as the "Red Book."

Following the Great Depression, the 1933/1934 securities laws attempted to bring some order to the process of securities offerings, generally through an emphasis on disclosure with "Rule 10b-5" under the Securities Regulations, which is an anti-fraud/disclosure provision. Although municipal securities and tax-exempt industrial revenue bonds are generally exempt from the registration requirements of these securities laws, the anti-fraud provisions do apply. For this reason, issuers like IDAs should review any offering documents.

In the 1960s, Mississippi law allowed a municipality to borrow on behalf of a private company and pay debt service with revenue from the project financed. These transactions were generally non-recourse to the municipality (i.e., not full faith and credit), but there was enough of a public purpose found in the structure that the Internal Revenue Service (the "IRS") treated the interest paid to the bondholder as exempt from Federal income tax. Mississippi also exempted interest income from their state and local income tax. From this point, the industrial revenue bond ("IRB") became a recognized economic development tool. By 1969, most states had adopted some form or structure to allow such a bond transactions as an economic development tool. Given the inability of New York municipalities to offer such bond issue, IDAs were formed under Article 18-A of the New York State General Municipal Law (the "GML"), as amended (the "Act"). IDAs were first authorized in New York State in 1969 and, by 1984, 176 IDAs had been formed.

By 1986, the United States Congress recognized that the government was losing tax revenue on the interest earned on IRBs, and attempted to limit the use of tax-exempt bond proceeds to certain "qualified" private activities. As a result, amendments to the Internal Revenue Code of 1986, as amended (the "Code") limited the types of projects that could be financed on a tax-exempt basis (giving rise to the term "qualified private activity bond"). Congress further limited this type of activity by imposing bond volume caps for certain types of projects. (See Section C, below.) The following sections provide a summary of certain key sections of the Code.

The Code was further amended to limit a financial institution's ability to hold tax-exempt bonds while deducting their cost of capital to Bank Qualified Bonds. (See below.) For this reason, financial institutions generally do not buy tax-exempt bonds, but rather provide a letter of credit or other credit enhancement to enable the company to sell the bonds to bond funds and investors.

2. Overview

An IDA-assisted transaction will generally be structured as a straight-lease transaction unless the project qualifies for tax-exempt financing. (See Appendix A hereto for schematics of each structure.) Occasionally, a transaction will be financed with proceeds of a bond, the interest of which is not excluded from Federal income taxation – a "taxable bond." There are usually minimal additional benefits to structuring a transaction as a taxable bond transaction as opposed to a straight-lease transaction with traditional/commercial financing. In fact, the additional costs associated with documenting a taxable bond transaction generally are not justified. Exceptions to this general rule are: (i) transactions requiring access to a public market; (ii) a taxable issue that is part of a tax-exempt issue (to pay certain costs of issuance and other non-qualifying costs); and (iii) in order to meet the requirement that the IDA must maintain at least one outstanding bond or note at all times or it is automatically dissolved as an entity. (See GML § 882.)

Projects that generally qualify for tax-exempt bond financing (or refinancing in certain instances) are:

(a) a manufacturing facility within the meaning of § 144(a)(12) of the Code;

(b) a facility for a 501(c)(3) charitable entity under § 145 of the Code (in New York referred to as "Civic Facility"[36] bonds pursuant to the GML definition for this type of project); or[37]

(c) an exempt facility under § 142 of the Code (e.g., airport, docks and wharfs, mass commuting facility, facilities for the furnishing of water, sewage facilities, solid waste disposal facilities, qualified residential rental projects, facilities for the local furnishing of electric energy or gas, local district heating or cooling facilities, hazardous waste facility, high-speed intercity rail facilities or environmental enhancements of hydroelectric facilities).

As with any IDA transaction, the company's first step is to complete an application for submission to the IDA. The application should specifically and completely describe the project and the types of benefits sought and include a commitment from the company to pay all costs incurred by the IDA in pursuing the transaction. The application should also include a cost/benefit analysis. At the same time, the IDA representative should confer with counsel to determine if the project qualifies for a tax-exempt bond issue. If

[36] "Civic facility" has been defined by GML § 854(13) as "any facility which shall be owned or occupied by a not-for-profit corporation organized and existing under the laws of this State or authorized to conduct activities in this State." However, there are some restrictions as to the types of facilities included in the definition, most of which relate to public facilities used by municipalities for governmental functions, medical facilities, and certain housing facilities. (See GML § 854(13).)

[37] Current law does not permit IDAs to issue bonds for civic facilities, due to a sunset in certain legislation. However, this provision is expected to be re-enacted in the future.

the project on its face appears to qualify, the IDA's bond counsel will send the company a detailed questionnaire to confirm that the project, as proposed, does in fact qualify for a tax-exempt bond issue.

B. QUALIFICATIONS

The following is a brief summary of some of the more common limitations imposed on a tax-exempt bond issue. Bonds issued for manufacturing are referred to as "small issue bonds."

1. Manufacturing Facilities

Definition. A manufacturing facility is one which is used in the manufacturing or production of tangible personal property (including the processing resulting in a change in the condition of such property). The 1986 amendments to the Code expanded the definition of a manufacturing facility to include facilities which are "directly related and ancillary" to a manufacturing facility if, (i) such facilities are located on the same site as the manufacturing facility, and (ii) not more than 25% of the net proceeds of the bonds are used to provide for directly related and ancillary facilities. These "directly related and ancillary facilities" include office and warehouse space. Ancillary activities must also be subordinate to and integral to the manufacturing process. The American Recovery & Reinvestment Act of 2009 ("ARRA") has amended these provisions. For qualified small issue bonds issued in 2009 and 2010, the definition of manufacturing facility is expanded to include facilities used for the creation or production of certain intangible property, including patents, copyrights, formulas and processes. Specifically, the expanded definition covers the development of computer software and intellectual property associated with bio-tech and pharmaceutical facilities. In addition, for bonds issued in 2009 and 2010, the 25% of net proceeds limitation applicable to ancillary facilities is eliminated. Instead, any "functionally related and subordinate facilities" that are located on the same site as a manufacturing facility are treated as a qualifying manufacturing facility. Thus, under this temporary rule, up to 100% of the net proceeds of a qualified small issue bond can be applied to finance functionally related and subordinate facilities, such as warehouse space, loading docks, training facilities, office space, or R&D facilities, among others, so long as these facilities are located at the same site as the actual manufacturing operations to which they relate.

Volume Cap. Manufacturing facilities are subject to the statewide volume cap allocation (see Section C, below).

$10 Million Limitation (local test). The bond size is limited to $10 million per issue. This $10 million limitation includes the aggregate of: (i) the principal amount of the bonds to be issued; and; (ii) prior outstanding bonds for the same company and its affiliates within the same municipality.

$20 Million Limitation (local test). The following three items cannot excess $20,000,000 in the aggregate: (i) the principal amount of the bonds to be issued; and (ii) prior outstanding bonds for the same company and its affiliates within the same municipality; and (iii) the company's capital expenditures within the same municipality for a six-year period, looking three years back and three years forward from the date the bonds are to be issued. (See § 144 of the Code.)

$40 Million Limitation (nationwide test). Code § 144(a)(10) provides that if the face amount of the bonds plus the aggregate face amount of all other small issue bonds of the company and its affiliates exceeds $40 million, tax-exempt manufacturing bonds for the benefit of the company cannot be issued.

Limitation on Land Acquisition. Section 147(c) of the Code limits the amount of tax-exempt bond proceeds that can be used for land acquisition to less than 25%.

Acquisition of Existing Property. Section 147(d) of the Code generally prohibits the use of tax-exempt bond proceeds for the acquisition of property (including equipment) unless the first use of such property is pursuant to such acquisition (i.e., "new" property). There is an exception to this general prohibition of acquisition of existing buildings (including equipment located therein as part of an integrated operation) if the rehabilitation cost of such building is at least 15% of the portion of the cost of acquisition of such property that is paid for out of bond proceeds. In the case of structures other than buildings, the rehabilitation costs must equal 100% of the purchase price paid with bond proceeds. For example, if a building is being acquired for $100,000 and all of such purchase price is paid for out of bond proceeds, at least $15,000 must be expended for the rehabilitation of such building before bond proceeds can be used. If the building includes equipment, the cost of replacing or upgrading such equipment can be counted toward satisfying this 15% requirement. If you are only dealing with equipment, the rehabilitation costs must match or exceed the acquisition costs.

2. Qualified 501(c)(3) Bonds (Issued for the Benefit of a "501(c)(3) Organization")

Organizations that are exempt from Federal income taxation under the Code, commonly referred to as "501(c)(3) organizations," are generally permitted to finance their exempt activities on a tax-exempt basis. There are certain limitations on 501(c)(3) tax-exempt bond financings, including:

(a) the property that is to be provided by the net proceeds of the bonds must be owned by a 501(c)(3) organization (such entity can be the company or an affiliated entity so long as such entity is a 501(c)(3) organization);

(b) at least 95% of the net proceeds of the bonds must be used by a 501(c)(3) organization in furtherance of its exempt (i.e. charitable) purpose;

$150 Million Limitation: A 501(c)(3) organization cannot generally be the beneficiary of more than a total of $150 million of outstanding bonds (issued for the benefit of the company and its affiliates anywhere in the country) which are not "qualified hospital bonds" (as defined in the Code). However, the 1997 amendments to the Code repealed this $150 limitation for non-hospital bonds issued after August 5, 1997 to finance capital expenditures incurred after such date;

Volume Cap: Qualified 501(c)(3) bonds are not subject to volume cap allocation; and

$10 Million Limitation ("Bank Qualified Bonds"): In certain instances, a bank (or other qualified financial institution) can deduct its carrying cost with respect to a qualified 501(c)(3) bond. Such "Bank Qualified Bonds" require that, (i) the issuing IDA not issue more than a total of $10 million of 501(c)(3) bonds in the calendar year, and (ii) the municipality for whose benefit the IDA was formed must count the aggregate amount of qualified 501(c)(3) bonds issued by the IDA toward the municipality's own $10 million limit. Note: If the IDA fails this test, the bonds will still be tax-exempt, just not "bank qualified bonds" and if the municipality fails the test, the bonds are still tax-exempt and "bank qualified bonds." However, the inability of the municipality to issue "bank qualified bonds" may cause it not to approve the bond issuance. (See below.) For tax-exempt bonds issued in 2009 and 2010, the $10 million limitation on qualified small issuers is raised to $30 million. Further, in the case of conduit financings (which include almost all IDA financings) the determination of whether the $30 million limitation is satisfied is made at the conduit borrower level, rather than at the issuer level. Thus, during 2009 and 2010, a 501(c)(3) borrower can qualify to have bank qualified bonds issued on its behalf, so long as it reasonably anticipates that the aggregate tax-exempt bonds to be issued for its benefit in the current calendar year will not exceed $30 million. In addition, during these 2 years, the actual issuer of the conduit bonds will generally be able to issue bank qualified bonds for multiple qualifying 501(c)(3) borrowers, without any aggregate limitation.

3. Restriction on Cost of Issuance

Section 147(g) of the Code restricts the amount of costs of issuance that can be financed out of the proceeds of a tax-exempt bond to 2% of the principal amount of the bonds being issued. The types of fees and costs that fall within this 2% cap include: underwriter's spread, counsel fees, financial advisor fees, rating agency fees, trustee fees, paying agent fees, accounting fees, printing costs, publication fees, engineering and feasibility fees. Bond insurance fees, certain letter of credit fees, title insurance premiums and IDA administrative fees, however, generally do not count toward the 2% cap. In transactions where the costs of issuance exceed this 2% limitation, the company will be required to pay such excess out of equity or from the proceeds of other taxable financing (including a "taxable bond," as discussed above).

4. Reimbursement

The use of bond proceeds to reimburse expenditures that were paid prior to the date of issuance of the bonds is governed by certain "reimbursement" regulations. Generally, the IDA (and/or the company in the case of a 501(c)(3) bond) must declare an "official intent" to reimburse prior expenditures with bond proceeds not later than 60 days after the original expenditure was incurred; and the bonds must be issued not later than 18 months after the later of, (i) the date the payment is made, or (ii) the date the project financed with such payment is placed in service (but in no event later than three years after the payment is made).

5. Bond Issuance Charge

Pursuant to PAL § 2976, the payment of a "bond issuance charge" to the State is required for any bonds issued by public benefit corporations, including IDAs. This bond issuance charge will typically be passed on to and paid by the company. This is in addition to any issuance fee charged by the IDA. The amount of the bond issuance charge is calculated by multiplying the principal amount of the bonds by the following schedule as of March 31, 2009:

Principal Amount	Percent Charged
$1,000,000 or less	.168%
$1,000,001 to $5,000,000	.336%
$5,000,001 to $10,000,000	.504%
$10,000,001 to $20,000,000	.672%
More than $20,000,000	.84%

In addition to the State bond issuance charge described above, a fee must be paid to the New York State Commissioner of Health for bonds or notes issued to finance certain health care facilities (typically facilities that require the approval of the Commissioner of Health) in an amount equal to 0.9% (90 basis points) of the principal amount of such bonds or notes. This fee is reduced to 0.5% (50 basis points) when such bonds or notes are issued to refund or refinance existing indebtedness. (See PAL § 2976-a.) An additional annual charge equal to 0.3% (30 basis points), payable in monthly installments, must be paid to the Department of Health for inspection, regulation, supervision and audit costs. (See 10 NYCRR § 400.24.)

C. STATEWIDE VOLUME CAP ALLOCATION

Section 146 of the Code imposes an annual limit on the aggregate principal amount of private activity bonds that may be issued in each state, commonly referred to as the "statewide volume cap." Under § 146(d) of the Code, the volume cap for any particular state is equal to the greater of $225 million or an amount determined by multiplying the state's population by $75. However, for calendar years beginning in 2008, the volume cap will be determined by multiplying the State population by $85; the applicable volume cap will be the greater of the resulting number or $262,095,000. (See Rev. Proc. 2007-66.)

Certain types of private activity bonds are exempted from the volume cap requirements. These include:

(a) qualified veterans' mortgage bonds;

(b) qualified 501(c)(3) bonds;

(c) exempt facility bonds issued to finance airport facilities or dock and wharf facilities and environmental enhancements of hydroelectric generating facilities;

(d) exempt facility bonds issued to finance solid waste disposal facilities that are owned for Federal income tax purposes by a governmental unit; and

(e) of any exempt facility bond issued to finance high speed intercity rail facilities, or 100% of such bond issue if those facilities are owned for Federal income tax purposes by a governmental unit.

In addition, bonds that are issued to refund outstanding private activity bonds and are issued in an amount not exceeding the outstanding principal amount of the bonds being refunded are also generally excluded from the volume cap allocation requirement.

While the Code provides a formula for allocating the statewide volume cap among state and local governmental issuers, it also allows states to provide, by statute, their own formula that supersedes the formula set forth in the Code. The New York State Legislature has on an annual basis adopted an allocation statute for this purpose (the "Private Activity Bond Act"). The statute has been re-adopted largely unchanged each year but in each case has had an expiration date of December 31.

Under the annual Private Activity Bond Act, the statewide volume cap is generally allocated in equal thirds to local industrial development agencies (the "local agency set-aside"), certain state agencies (the "state agency set-aside") and to the statewide bond reserve. The local agency set-aside is then divided among the various local IDAs based upon the ratio of the population of the jurisdiction served by each IDA to the population of the entire state. If a town, village or city is served by both a county IDA and a local town, village or city IDA, then the local agency set-aside for the municipality is further divided, with one-half to the county IDA and the other half to the local IDA. If there is a village IDA located within a town that has its own IDA, the village IDA receives an allocation of the local agency set-aside based upon the population of the village. The town IDA receives an allocation of the local agency set-aside based upon the population of the town, minus village residents. Finally, the statute allows a local IDA to surrender all or part of its local agency set-aside to another IDA in an overlapping jurisdiction.

Once an IDA has used up its local agency set-aside for a particular year, it must apply to the statewide bond reserve for any additional allocation for further private activity bonds to be issued that year. The statewide bond reserve is administered jointly by the Director of the Division of the Budget, for state agencies, and by the New York State Department of Economic Development for local agencies.

Local agency set-asides that have not been committed to projects as of October 15 of each year are recaptured by the State and reallocated to the statewide bond reserve. The statute mandates that each IDA must report the amount of its unused local agency set-aside to the Department of Economic Development by

October 1st of each year. After October 15, an IDA that did not previously commit its local agency set-aside to a particular project or projects must apply to the Department of Economic Development for an allocation from the statewide bond reserve.

Under the Code, certain types of private activity bonds are eligible for a "carryforward allocation" of the annual volume cap, if the State has not used up its entire statewide volume cap. The types of bonds that qualify for this carryforward allocation include exempt facility bonds, which include bonds issued for airports, docks and wharfs, mass commuting facilities, facilities for the furnishing of water, sewage facilities, solid waste disposal facilities, qualified residential rental projects, facilities for the local furnishing of electric energy or gas, local district heating or cooling facilities, qualified hazardous waste facilities, high speed intercity rail facilities, and environmental enhancements of hydro-electric generating facilities. Qualified small issue bonds (i.e., bonds to be issued for manufacturing facilities) are not eligible to apply for a carryforward election. Once made for a particular project, a carryforward election remains effective for up to three years.

Under the State's Private Activity Bond Act, a local IDA cannot make a carryforward election for any unused portion of its local agency set-aside or for an allocation received from the statewide bond reserve without first obtaining the approval of the Commissioner of Economic Development. An IDA seeking a carryforward election for a qualifying project should, therefore, apply to the Department of Economic Development.

As indicated above, the Private Activity Bond Act has been readopted by the State Legislature each year, with a sunset of December 31 of that year. Until each year's Private Activity Bond Act is adopted, the State must abide by the allocation formula set forth in the Code. The Department of Economic Development and the Division of the Budget have in the past adopted an interim procedure by which an IDA can apply for a volume cap allocation before the adoption of the applicable year's Private Activity Bond Act statute. In essence, in those circumstances where a volume cap allocation has been awarded before the adoption of the statute, the State has made a direct assignment of its allocation under the Code to the local agency for that project. Once the annual allocation statute is enacted into law, any amount previously allocated to an IDA will be offset against the local agency set-aside allocated to that IDA under the statute.

D. UNDERWRITERS

Except for Bank Qualified Bonds issued for the benefit of a 501(c)(3) entity (and, in some instances, bonds with a small principal amount), banks will generally not purchase a tax-exempt bond because the bank cannot deduct its cost of capital as other investors can. For public policy purposes, the Code still offers banks an incentive to hold certain bonds issued for the benefit of a 501(c)(3) entity. (See the limitations described, above, for a "Bank Qualified Bond.") An underwriter may not be needed if the project qualifies for the issuance of a Bank Qualified Bond. In other cases, an underwriter is generally engaged early on in the process to provide information on any necessary credit enhancements and to identify potential bond purchasers. The underwriter and its counsel will take an active role in assisting the company in structuring the transaction with appropriate credit enhancement and financial covenants so that, at the time of closing, the underwriter will be successful in selling the bonds in the desired market.

E. PRIVATE PLACEMENT MEMORANDA/OFFICIAL STATEMENTS

Bonds issued by public issuers, including IDAs, are generally exempt from registration under both Federal and State securities laws (as well as most other State securities laws). These bonds are generally referred to as industrial revenue bonds since the debt is repaid from the revenue from the project and not from the IDA's resources. The offer and sale of such securities does, however, remain subject to certain disclosures and anti fraud provisions of both Federal and State securities laws. In order to offer the bonds for sale, the underwriter and its counsel will prepare a private placement memorandum ("PPM") when the bonds are to be privately placed (with generally less than five financial institutions) or an official statement ("OS") when the bonds are to be sold publicly. A PPM or OS is used to describe the company, the project, any credit enhancement and to provide financial information to the prospective bond purchaser. This is an issuer disclosure document that the IDA should approve and confirm adequate disclosure under an anti-fraud review by counsel to the IDA.

F. BOND MARKETS

Although bond transactions generally fall into certain categories, each transaction has its own unique specifications based on the type of project involved, whether a credit enhancement is being used, whether there are one or more bondholders, and the type of market into which the bonds are being sold. The company can choose to sell the bonds at a fixed rate, a variable rate, a "low floater" or a combination of differing rate structures. If the bond issue is meant to cover 100% of the cost of the project, the underwriter or holders of the bonds may require a debt service reserve fund or other reserve. In addition, certain costs may not qualify for use of the tax-exempt bond proceeds. As a result, the company may have to pay the costs at closing out of equity or borrow additional amounts on a taxable basis (the "Taxable Portion" or "Taxable Tail").

As described above, the bond can generally be a fixed-rate instrument, a variable-rate instrument or a low-floater. With a fixed-rate instrument or a variable-rate instrument, the underwriter receives a fee and sells the bonds in the public market at the time of closing.

A bond issued as a "low floater" is sold at the time of closing and resold by the underwriter on a periodic basis. The bond is usually purchased by entities looking for short-term investments. This type of investor demands liquidity and, therefore, will demand a direct pay letter of credit as a credit enhancement. Selling bonds as a short-term investment is, however, risky because a market for those bonds may no longer exist when the investor chooses to sell. Without a market, the underwriter will be unable to resell the bond. In such an event, the last bondholder would draw upon the letter of credit and the letter of credit issuer would demand payment from the company for the entire outstanding principal amount. If the company does decide to pursue a "low floater," this issue should be raised at an early stage and the company should negotiate a provision in the reimbursement agreement whereby the letter of credit issuer agrees to a repayment schedule over time if the underwriter cannot resell the bond.

This scenario does not exist with a fixed-rate instrument or a variable-rate instrument because the maturity date is generally 15 to 30 years. If, however, the fixed-rate or variable-rate instrument is issued with a letter of credit as a credit enhancement, the letter of credit will normally expire in 5, 7, or 10 years. In the event that the company fails to negotiate an extension to the letter of credit or fails to identify a replacement letter of credit before the termination date of the original letter of credit, a similar event occurs. The bondholders can make a draw on the letter of credit and the letter of credit issuer will demand payment for all outstanding principal.

G. CREDIT ENHANCEMENTS

The interest rate on the bonds and the terms and conditions of the transaction depend heavily on the creditworthiness of the company sponsoring the project because the debt service is paid from revenues generated by the project. Certain companies have creditworthiness that allows them to borrow money at or below prime. Other companies have creditworthiness that requires an interest rate in excess of prime when borrowing money. By structuring the transaction as a tax-exempt issue, however, the savings should be roughly two to three percentage points below what the company would pay if it borrowed the money directly from a commercial lender.

If the company involved is a start-up company or does not qualify for a credit rating by a rating agency such as Standard & Poor's or Moody's, the bond issue is called an "unrated issue." In order to sell an unrated issue, the market will generally demand a higher interest rate. If the company is a start-up or does not have sufficient creditworthiness, it may have to obtain a credit enhancement in order to sell the bonds. In its broadest sense, a credit enhancement is a commitment from a third party with strong creditworthiness to pay off the bond if the company is unable to do so. The credit enhancement will generally come in the form of a letter of credit issued by a bank or other financial institution. In addition, State and/or Federal agencies may have programs that provide guarantees that can act as the credit enhancement. The underwriter will assist the company in determining if and what type of credit enhancement is needed.

As noted above, the most common type of credit enhancement is a letter of credit issued by a bank or other financial institution. The letter of credit can be issued as either, (i) a standby letter of credit that is drawn upon by the bondholders or the trustee on behalf of the bondholders when the company fails to make the agreed upon payments or, in most instances, (ii) a direct pay letter of credit where the bondholders draw upon the letter of credit each time a payment is due under the bonds and the company reimburses the letter of credit issuer as those payments are made. A direct pay letter of credit will be required if the company and the underwriter decide to structure the transaction as a "low floater."

H. TRUSTEE

When bonds are sold to multiple bondholders, a trustee will be appointed to receive payments on behalf of the bondholders and to hold the collateral security interests for the benefit of the bondholders. The trustee is generally a trust company authorized to perform such services in the State where the transaction occurs. The IDA and the trustee will enter into an Indenture of Trust that sets forth the terms of the bonds and the trustee's rights and responsibilities on behalf of the bondholders.

I. PUBLIC APPROVAL REQUIREMENTS

Under § 147(f) of the Code, certain public approvals are required before an IDA can issue a tax-exempt bond. The Code and the regulations require that the "applicable elected representative" consent to the issuance of the bond after a public hearing is held "on reasonable public notice." The applicable elected representative is usually the popularly elected CEO of the Benefited Municipality – the county executive, mayor, or town supervisor. If there is no popularly elected CEO, the elected legislative body of the municipality – the county legislature, city council, town or village board – becomes the applicable elected representative. Reasonable public notice requires the notice to be published at least 14 days before the public hearing. Note, the public hearing required under § 147(f) of the Code is in addition to the public hearing required by § 859-a of GML, which hearing requires a 30-days' notice period. However, if the required hearings are carefully scheduled, one hearing can be held to satisfy both § 147(f) of the Code and § 859-a of GML.

J. SUMMARY

The complexity and costs involved in a bond transaction vary from the relatively simple structure of a Bank Qualified Bond (which may not require an underwriter, credit enhancement, trustee or their various counsel to participate), to the complex structure of a transaction where bonds are issued in the "low floater" market. The "low floater" market is complex because it requires a public market for bondholders, therefore requiring an underwriter. The underwriter's counsel has to prepare a PPM or OS. A credit enhancement is needed in the form of a direct pay letter of credit or similar instrument, and a trustee and its counsel will be involved. Each one of these parties brings added cost and complexity to the transaction. A cost benefit analysis should be performed at each step to determine if the additional party and the related costs are necessary.

In addition, the foregoing discussion is intended only to highlight certain key aspects of the Code and the types of projects that may qualify for tax-exempt financing. Contact with qualified bond counsel should be made as early on in the process as possible to raise any potential problems or limitations imposed by the Code or otherwise.

II. EMPOWERMENT ZONES, ENTERPRISE COMMUNITIES AND RENEWAL COMMUNITIES

In 1988, the Federal government created the Enterprise Zone Development statute, found in Title 42 of the United States Code Annotated ("U.S.C.A."), Section 11501-11505 and in the Code of Federal Regulations ("CFR"), at 24 CFR § 596. It was designed to combat high crime rates and poverty by allowing certain areas to be designated enterprise zones, and thereby allow them to receive certain benefits. However, 42 U.S.C.A. Sections 11501-11505 never referenced the benefits available to enterprise zones. It was not until the Revenue Reconciliation Act of 1993 that the Federal tax incentives available within an enterprise zone were established. The Act created 26 U.S.C.A. § 1391-1397, which designated two forms of enterprise zones, empowerment zones and enterprise communities. The difference between the two forms of an enterprise zone is the type of tax incentives available to taxpayers under each form. Taxpayers located in enterprise communities are only eligible for tax-exempt private activity bonds, while taxpayers in empowerment zones are eligible for those bonds, as well as an expensing allowance and a tax credit. In 1995, the Economic Zone Development law was supplanted by the empowerment zone and enterprise community law, when 24 CFR § 596 was eliminated from Title 24 because it was ruled an obsolete part. Instead, 24 CFR § 597 was enacted to govern empowerment zones and enterprise communities. The Taxpayer Relief Act of 1997 expanded the number of empowerment zones and modified the eligibility criteria. The Act also, for the first time, allowed Indian reservations to be nominated as a zone. The Act is codified in 24 CFR § 598.

In 2000, the Federal government passed the Community Renewal Tax Relief Act of 2000 (the "2000 Act") which modified existing laws regarding empowerment zones and enterprise communities. The Act also added a new type of community, called a Renewal Community. Renewal Communities do not have access to tax-exempt bond financing, but they do have access to various tax incentives such as tax credits and capital gain reductions.

With the enactment of the 2000 Act, the benefits available for the empowerment zones, enterprise communities and renewal communities were altered. For an empowerment zone, bond financing is still available, but for any bonds issued in an empowerment zone after December 31, 2001 and issued prior to January 1, 2002 in an empowerment zone designated under what is known as Round II, they are known as "Empowerment Zone Facility Bonds." In addition, the tax incentives available in an empowerment zone include employment wage credit, an increased § 179 deduction, non-recognition of gain on rollover of empowerment zone investments and a partial exclusion of gain on the sale of empowerment zone stock. Renewal communities do not have access to bond financing, but do have other tax incentives. A renewal community has access to the same increased § 179 deduction as in an empowerment zone, but a renewal community also has access to a commercial revitalization deduction and a zero percent capital gains rate for renewal community assets. Lastly, the only tax benefit available in an enterprise community is bond financing, and any bonds issued in an enterprise community are referred to as Enterprise Zone Facility Bonds.

Currently, in New York State, there are three empowerment zones, which include Syracuse, Yonkers and New York City, and one enterprise community, Newburgh. Additionally, there are five renewal communities in the State, which include Buffalo-Lackawanna, Jamestown, Niagara Falls, Rochester, and Schenectady.

The following outlines the various tax incentives available for empowerment zones, enterprise communities and renewal communities.

A. EMPOWERMENT ZONE FACILITY BONDS

1. Introduction

The 2000 Act changed the name of bonds issued in an empowerment zone after December 31, 2001 and issued before January, 2002 in an empowerment zone designated under what is known as Round II from Enterprise Zone Facility Bonds to Empowerment Zone Facility Bonds. Bonds issued in an enterprise community and bonds issued in an empowerment zone prior to January 1, 2002 are still called Enterprise Zone Facility Bonds.

An enterprise zone facility, consisting of qualified zone property and an enterprise zone business, can be funded with enterprise zone facility bonds. Qualified zone property must satisfy three requirements, two of which are waived if the enterprise zone business renovates the property. An enterprise zone business must satisfy eight requirements; however, in no instance will a gambling facility and certain other activities qualify as an enterprise zone business. Compliance with the eight requirements is waived for a startup period. After that period, the business must meet all eight requirements during the testing period. After the testing period, the business need only comply with the residency requirement. There are various methods available for determining compliance with the residency requirement. Another requirement is that enterprise zone facility bonds must comply with certain restrictions on their issue amount based on whether they are located in an Empowerment Zone or an Enterprise Community.

<u>Enterprise Zone Facility.</u> An enterprise zone facility is defined as any qualified zone property used primarily by an enterprise zone business, and any land functionally related and subordinate to such property.

<u>Qualified Zone Property.</u> Property is considered a qualified zone property when the borrower satisfies three requirements. The three requirements are: (i) the borrower purchases the property after the Empowerment Zone or Enterprise Community (collectively, the "Zone") designation took effect; (ii) the original use of the property in the Zone commences with the borrower; and (iii) the borrower's substantial use of the property is in Zone and the use is consistent with an enterprise zone business.

The first two requirements for classification as a qualified zone property will be deemed to be satisfied if the borrower undertakes a "substantial renovation" of the property. For this purpose a property will be considered substantially renovated if, within any 24-month period after Zone designation, the borrower makes additions to its basis in the property that exceed the greater of 15% of the borrower's adjusted basis in the property as of the beginning of such 24-month period or $5,000. If the borrower enters into a sale or leaseback arrangement within three months after the date the property is originally placed in service, the date of the leaseback becomes the date the property was originally placed in service, which is relevant with regard to determining compliance with the second requirement.

<u>Enterprise Zone Business.</u> An enterprise zone business is defined as a qualified business entity or qualified proprietorship. A business is considered a qualified business entity when the business satisfies eight requirements.

<u>Requirements</u>. The eight requirements are: (1) the business operates within the Zone as a qualified business, meaning any trade or business with certain restrictions (detailed hereinafter); (2) 50% of the income is derived from such operations; (3) a substantial portion of the use of the tangible property is within the Zone; (4) a substantial portion of the business' intangible property is used for such business; (5) a substantial portion of the business' employees' activities are performed within the Zone; (6) at least 35% of the employees are residents of the Zone; (7) less than 5% of the property owned by the business is attributable to collectibles not held for sale, such as art; and (8) less than 5% of the business' property is attributable to non-qualified financial property.

Non-qualified financial property means debt, stock, partnership interests, options, futures contracts, forward contracts, warrants, national principal contracts, annuities, and other similar property, except that such term shall not include (1) reasonable amounts of working capital held in cash, cash equivalents, or debt instruments with a term of 18 months or less, or (2) debt instruments such as accounts or notes receivable acquired in the ordinary course of a trade or business for services rendered or from the sale of stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business.

In addition, an enterprise zone business also includes a business located in a Zone that would qualify as an enterprise zone business if it were separately incorporated. For example, a business that is part of a national chain could qualify as an enterprise zone business, provided that the business would satisfy the enterprise zone business definition if it were separately incorporated. The business must consistently allocate income and activities attributable to its operations within the Zone using a reasonable allocation method and it must have evidence of its allocation sufficient to establish compliance with the enterprise zone business requirements.

Restrictions. The restrictions applied to the definition of a qualified business mentioned in the preceding paragraph include liquor stores, golf courses, massage parlors, hot tub facilities, suntan facilities, racetracks, gambling facilities, country clubs (collectively "144 Business"); and, residential property, a business that holds or develops intangibles for sale or license or certain farming activities ("2032 Farm"). 2032 Farms are farms that engage in activities such as cultivating the soil or raising or harvesting any agricultural or horticultural commodity, including raising and management of animals on a farm and handling, drying, packing, grading or storing on a farm any agricultural or horticultural commodity in its pre-manufactured state, if the owner, operator or tenant of the farm regularly produces more than one-half of the commodity so treated. The farming activities listed in the preceding sentence will be qualified businesses if the sum of the aggregate unadjusted bases (or, if greater, the FMV) of the assets owned by the taxpayer which are used in the farming activities and the aggregate value of assets leased by the taxpayer which are used in the farming activities exceeds $500,000.

Rental Property. The rental of real property or tangible personal property is allowed if, for real property, the property is not residential real property and 50% or more of the gross rental income is from an enterprise zone business and, for personal property, 50% or more of the rental of such property is by an enterprise zone businesses or by residents of the Zone. In addition, for the rental of real property, if real property is financed with enterprise zone facility bonds, but the owner is not an enterprise zone business, then the proceeds of such bonds must only be allocated to expenditures for lessees who are enterprise zone businesses.

Qualified Proprietorship. A qualified proprietorship must satisfy seven of the eight requirements listed for the qualified business definition. The only requirement not listed is the first requirement, which states that the business must operate within the Zone as a qualified business.

2. Compliance

Startup Period. The compliance requirements for a business seeking classification as an enterprise zone business are waived for the startup period, provided that at the beginning of the startup period, it is reasonably expected that such business will be an enterprise zone business at the end of the startup period and such business makes bona fide efforts to be such a business. The startup period is the period before the first taxable year beginning more than two years after the date of the bond issuance or the date the property is first placed in service after the bond issuance, whichever is later, except in no event can the startup period be later than three years after the date of the bond issuance.

Testing Period. After the startup period, the business must meet all the requirements of an enterprise zone business for three tax years, known as the testing period. After the testing period, the business needs only to meet the requirement that 35% of the employees of such business are residents of the Zone. Compliance with the residency requirement may be determined on any reasonable basis, such as a per-employee (including those employees who work at least 15 hours per week and who are employed for at least 90 days) or on the basis of employee actual work hours. The method of determination must be consistently applied throughout the compliancy.

If an employee leaves the zone and such departure would cause non-compliance, the employee may be treated as still residing in the zone if: (i) the employee was a *bona fide* resident of the zone at the time of the certification; (ii) the employee continues to provide services for the principal user in an enterprise zone business and substantially all of the services performed in the zone; and (iii) the business hires a resident of the zone for the next available comparable or lesser position.

3. Averaging

Although compliance with the enterprise zone business requirements is usually tested annually, a five year averaging approach enables businesses that exceed the requirements to provide a cushion for future unanticipated non-compliance. The average takes into account only immediately preceding years going back to the tax year that includes the initial testing date. This means the startup period cannot be used in the averaging calculation. In addition, a tax year is disregarded if a part of the year that falls in a required compliance period is not over 90 days. For instance, the residency requirement can be calculated by averaging the then taxable year with the four prior taxable years to determine if the business has met the 35% mark. If a business discovers that it is not in compliance, it has one year from the date of discovery to ensure compliance.

4. Bond Sizing

Limitations on the use of tax-exempt enterprise zone facility bonds are based on whether the enterprise zone facility is located in an enterprise community or an empowerment zone. If an enterprise zone business is located in an enterprise community, the bond amount cannot exceed $3,000,000 per enterprise zone business. If the enterprise zone business has facilities in other enterprise communities, total outstanding bond financing cannot exceed a total of $20,000,000 for the enterprise zone business. Bonds issued in an enterprise community are also subject to State volume cap allocations.

For bonds issued in an empowerment zone after December 31, 2001, regardless of when they received their designation (Round I, Round II or Round III), there are no limitations on issue size and there are no volume cap requirements. These bonds are known as "Empowerment Zone Facility Bonds." Included in the definition of Empowerment Zone Facility Bonds are bonds issued before January 1, 2002 in an empowerment zone designated under what is known as Round II. Notwithstanding, there is a limitation on the total amount of bonds issued for each empowerment zone. For instance, for an empowerment zone with a population of 100,000 or more within the empowerment zone boundary, the aggregate fact amount of bonds cannot exceed $230,000,000 for the term of the empowerment zone designation.

5. District of Columbia Enterprise Zone

Special rules and restrictions that apply to the issuance of bonds in the District of Columbia Enterprise Zone. For more information on these rules and restrictions, visit the IRS website at www.irs.gov.

B. RECOVERY ZONE FACILITY BONDS

ARRA creates a new type of tax-exempt exempt facility bond, termed "recovery zone facility bonds". In order to qualify as a recovery zone facility bond, (i) the bond has to be issued in 2009 or 2010, (ii) the bond has to be designated as such by the issuer and (iii) at least 95 percent of the net proceeds of to the bond must be used for "recovery zone property". "Recovery zone property" is defined as property subject to depreciation, which was constructed, reconstructed, renovated or purchased from an unrelated party after the date on which the "recovery zone" designation took effect. Additionally, the original use of such property in the recovery zone must commence with the taxpayer, and substantially all of the use of such property must be in the recovery zone and must be in the active conduct of a "qualified business" within the recovery zone. A qualified business is one which (i) does not involve the rental of residential real property (defined for this purpose as real property at least 80 percent of the rental income of which is from dwelling units), and (ii) does not include the operation of a private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store of which the principal purpose is the sale of alcoholic beverages for off-site consumption.

The national limitation on the amount of recovery zone facility bonds that can be issued is $15 billion. This limitation is allocated among the states based upon the reduction in employment in each state between December 31, 2007 and December 31, 2008 (referred to as the "2008 employment decline"), with each state being allocated a minimum of 0.9% of the national limitation ($135 million). Each state must then reallocate all of its allocation among its counties and "large municipalities" (defined as municipalities with populations of more than 100,000) in proportion to the 2008 employment declines in such counties and municipalities.

"Recovery zones" are defined as including: (i) any area designated by an issuer as having significant poverty, unemployment, rate of home foreclosures or general distress, (ii) any area designated by the issuer as economically distressed due to the closure or realignment of a military installation pursuant to the Defense Base Closure and Realignment Act of 1990, or (iii) any area which has been designated as an empowerment zone (e.g. Syracuse, Yonkers and New York City) or a renewal community (e.g. Buffalo-Lackawanna, Jamestown, Niagara Falls, Rochester, and Schenectady). Since the designation of recovery zones is largely to be made by each individual issuer, there is a fair amount of flexibility. (See IRC §1400U-1, 1400U-3.)

C. TAX INCENTIVES

1. Introduction

For empowerment zones, the tax incentives include an employment wage credit, an increased § 179 deduction, non-recognition of gain on rollover of empowerment zone investments and a partial exclusion of gain on the sale of empowerment zone stock. For renewal communities, the tax incentives include an employment wage credit, an increased § 179 deduction, a commercial revitalization deduction and a zero percent capital gains rate for renewal community assets. As for enterprise communities, the new legislation has essentially removed the need for an area to seek designation as enterprise community except in instances of issuing enterprise zone facility bonds.

2. Increased Section 179 Deduction (Form 4562)

The first tax incentive involves the increase in the deduction under Code § 179 and is available in both renewal communities and empowerment zones.

Under § 179, certain types of property, principally equipment and machinery, can be deducted in the year in which it was placed in service, instead of capitalizing the costs and claiming depreciation deductions over time. The § 179 deduction is limited to a maximum of $250,000 for the 2009 tax year. The maximum deductible amount is reduced on a dollar-for-dollar basis by the amount by which the cost of the depreciable property is placed in service during the tax year that exceeds $800,000 (for the 2009 tax year). For example, if a taxpayer purchases depreciable property at a value of $810,000, the amount over $800,000 is $10,000. The $10,000 is used to reduce the maximum deductible amount, which would be $250,000 in 2009. Thus, the maximum deduction in this case would be $240,000.

For businesses that qualify as an enterprise zone business (as defined earlier in this Section) or renewal community business (same as enterprise zone business, but located in a renewal community), they can increase their § 179 deduction by the lesser of, (i) $35,000, for property acquired after December 31, 2001, or (ii) the cost of § 179 property that is qualified zone property (as defined earlier in this Section) or qualified renewal property (same as enterprise zone business, but located in a renewal community), placed in service during the year. If qualified zone property or qualified renewal property does not meet the criteria as depreciable property under § 179, then the property would not be eligible for the § 179 deduction. If the property meets the requirements of § 179 for depreciable property and the requirements for qualified zone and renewal property, then the total maximum amount allowed as an expense election is $285,000 for the 2009 tax year.

In addition to increasing the maximum deductible amount, property which is either qualified zone or renewal property impacts the $800,000 limit by effectively increasing the amount of the depreciable property which is subject to depreciation.

3. Empowerment Zone Tax Incentives

Tax incentives exclusive to empowerment zones include empowerment zone employment credit, non-recognition of gain on rollover of empowerment zone assets and partial exclusion of gain on sale of empowerment zone stock.

<u>Empowerment Zone Employment Credit (Form 8844).</u> Employers that locate operations in empowerment zones can receive a 20% credit against income tax liability. The 20% credit is available for the first $15,000 of qualified wages paid to full or part-time qualified zone employees. The calculation results in a maximum credit per employee of $3,000 per year. Prior to January 1, 2002, the employment credit was not available to all empowerment zones and was subject to a decrease in the amount of the credit over time. Currently, the 20% credit is available for all empowerment zones and is not subject to any decreases. Qualified zone wages do not include any wages taken into account determining the work opportunity credit under Code § 51. If an employer claims the empowerment zone employment credit for an employee, the work opportunity credit may not be claimed. (<u>See</u> discussion concerning Work Opportunity Credit, below.)

Qualified zone employees are, (i) employees who perform substantially all of their services within an empowerment zone in a trade or business of the employer, and (ii) employees whose principal place of abode while performing such services is within the empowerment zone.

In calculating the first requirement, the location of services requirement mentioned above, there are two methods available, pay period method and calendar year method. Under the pay period method, the relevant period for applying for the location of services requirement is each pay period in which an employee provides services to the employer during the calendar year with respect to which the credit is being claimed. If an employer has one pay period for certain employees and a different pay period for other employees, such as biweekly and weekly, then the period actually applicable to the particular employee is a relevant pay period for that employee. For example, Company A pays Employee X weekly and pays Employee Y biweekly. Company A can claim the credit with respect to X's wages only for the weekly pay periods for which X is a qualified zone employee because those are X's only qualified zone wages. Company A must use Y's biweekly pay periods in which Y is a qualified zone employee and may claim the credit with respect to Y's wages for the biweekly pay periods for which Y is a qualified zone employee. Under the calendar year method, the relevant period for an employee is the entire calendar year with respect to which the credit is being claimed. However, for any employee who is employed for less than the entire calendar year, the relevant year is the portion of the calendar year, which that employee is employed. If an employee does not perform substantially all his or her services within the empowerment zone, then the employee is not considered a qualified zone employee and the company cannot claim the credit.

There are certain restrictions on who is qualified as a zone employee. The restrictions include: (i) related individuals described in Code § 51; (ii) any 5% owner; (iii) any individual employed by the employer for less than 90 days; (iv) any individual employed by an employer at any 144 Business; and (v) any individual employed in a 2032 Farm.

In addition, if an employee is employed for less than 90 days, the employee cannot be considered a qualified zone employee. There are four exceptions to that rule. The following exceptions apply: (i) the employee becomes disabled; however, the exception does not apply if a disabled employee is removed before the close of the 90 day period and the taxpayer fails to offer re-employment to the disabled employee; (ii) the employee was terminated due to the misconduct of the employee as determined under New York State Unemployment Compensation Law; (iii) the employee was terminated by a corporate acquisition, if the employee continues to be employed by the acquiring corporation; and (iv) the employee is terminated by reason of a mere change in the form of conducting the trade or business of the taxpayer, if the employee continues to be employed in the trade or business and the taxpayer retains a substantial interest in the trade or business.

The empowerment zone employment credit is included as part of the general business credit allowed under Code § 38. No unused portion of the credit may be carried back to any tax year ending before January 1, 1994. However, like the work opportunity credit, an amount is allowed as a deduction for the first tax year following the last tax year for which the credit could, under the carryover rules of Code § 39, have been allowed as a credit. The empowerment zone employment credit may offset up to 25% of alternative minimum tax liability.

For purposes of the empowerment zone employment credit, various rules applicable to the work opportunity credit also apply. Provisions incorporated by the reference include the successor employer provision, the provision regarding employees who perform services for other persons, the disallowance of the credit for tax-exempt organizations, rules regarding allocation of the credit between estates and trusts and their beneficiaries, and limitations with respect to various organizations.

Empowerment Zone Asset Gain Rollover. In general, gain or loss is recognized on any sale, exchange, or other disposition of property. If a taxpayer realizes capital gain, the taxpayer must report those gains in that tax year. If a taxpayer realizes capital gains on a qualified empowerment zone asset, the taxpayer can elect to rollover or defer the recognition of the capital gain to a later tax year. The qualified empowerment zone asset must be purchased after December 21, 2000, held for more than one year, and the taxpayer uses the proceeds from the sale of the original empowerment zone asset to purchase a replacement empowerment zone asset in the same zone within 60 days of the sale of the original empowerment zone asset. (See Code § 1397B and Rev. Proc. 2002-62.)

Depending on the amount of the sale of the original asset and the price of the replacement asset, not all of the gain can be rolled over. If the taxpayer purchases a replacement asset at a cost equal to or higher than the sale price of the original asset, then the taxpayer can rollover all of the capital gain. In that instance, the recognition of the rollover gain is deferred until the sale of the replacement asset. The basis of the replacement asset is determined by subtracting from the basis of the replacement asset the amount of the capital gain which is not recognized. For example, taxpayer A purchases asset B for $10,000. A then sells B for $50,000 after more than a year's worth of use in the empowerment zone. Within 60 days from the sale, A purchases asset C for $100,000. A's rollover gain is $40,000, which is B's cost of $10,000 subtracted from B's sale price of $50,000. C's basis is 60,000, which is the rollover gain of $40,000 subtracted from C's basis of $100,000. If more than one replacement asset is acquired, the basis for the replacement assets is reduced in order in which the replacement assets are acquired.

The calculation for basis is altered if the taxpayer purchases a replacement asset with a value less than the sale price of the original asset. First, the taxpayer must pay for a portion of the gain on the sale of the original asset. The taxpayer's recognized gain is calculated by subtracting the value of the replacement asset from the sale amount of the original asset. Using the example above, if A had purchased asset C for $45,000 dollars, then A would have had to recognize gain of $5,000 for that tax year, which is B's sale price of $50,000 minus C's value of $45,000. In order to determine the basis for the replacement asset, the sale formula above is used, but sale price of the original asset is reduced by the amount of gain to be recognized. Again, using the same example, B's sale price would be reduced from $50,000 to $45,000 because of the recognized gain of $5,000. Then the rollover gain is determined by subtracting B's basis of $10,000 from B's modified sale price of $45,000, which is $35,000. The rollover gain of $35,000 is then subtracted from C's basis of $45,000 to equal C's new basis, which is $10,000.

Qualified empowerment zone assets can include stock, partnership interest and business property. Stock as an asset must be stock in a domestic corporation that is an empowerment zone business. Stock must be acquired at original issue for cash after December 31, 2001 and before January 1, 2010. The corporation must qualify as an empowerment zone business at the time stock was issued and during substantially all of the taxpayer holding period for the stock. New corporations must have been organized for the purpose of being an empowerment zone business. For a partnership interest, the interest can be any capital or profit interest in a domestic partnership that is an empowerment zone business. The interest must be acquired from the partnership for cash after December 31, 2001 and before January 1, 2010. For tangible property as an asset, the property must be used in an empowerment zone business and purchased after December 31, 2001 and before January 1, 2010. The original use of the property in the empowerment zone must begin with the taxpayer. Further, during substantially all of the taxpayers holding period for the property, substantially all of the use of the property must be in the taxpayer's empowerment zone business. The first two requirements are deemed satisfied if the property is substantially improved.

<u>Certain gain, however, is not eligible for rollover.</u> Gain that is treated as ordinary income is not eligible for rollover treatment. Thus, for example, rollover treatment does not apply to the extent that gain is recaptured as ordinary income under the depreciation recapture rules. Also ineligible is gain that is attributable to real property or an intangible asset that is not an integral part of the enterprise zone business.

The gain on the replacement asset may also be rolled over but only if the actual holding period of the replacement asset is more than one year.

If the empowerment zone asset meets the qualifications as a qualified small business stock, then the rules for the rollover of gain on qualified small business stock found in Code § 1045 will apply.

<u>Partial Exclusion of Gain on Sale of Small Business Empowerment Zone Stock.</u> In general, gross income does not include 50% of gain from the sale or exchange of qualified small business stock. The stock must be held for more than five years and the taxpayer can not be a corporation. The definition of a qualified stock is found in Code § 1202(c), but small companies are generally C corporations with gross assets of $50,000,000 or less. The amount of gross income that does not include gain on small business stock is increased from 50% to 60%, if the small business satisfies the definition of enterprise zone businesses and is located in an empowerment zone.

The 60% of the gain from the sale of qualified small business stock is not recognized if the stock is acquired after December 21, 2000, the stock is a corporation that is a qualified business entity during substantially all of the taxpayer's holding period for such stock, and the stock is held for more than five years. This increased exclusion does not apply to gain attributed to periods after December 31, 2014. If a corporation ceases to be a qualifying business after the five-year holding period for the stock has ended, the exclusion only applies to the gain that accrued up to the point that the corporation ceased to be a qualifying business.

4. Renewal Community Tax Incentives

Tax incentives exclusive to renewal communities include renewal community employment credit, commercial revitalization deduction and renewal community zero percent capital gain.

Renewal Community Employment Credit (Form 8844). Similar to the empowerment zone employment credit, the renewal community employment credit allows employers doing business in renewal communities to receive a credit that is equal to 15% of the first $10,000 of the qualified wages paid to its employees ($1,500 total credit amount). This is in contrast to the empowerment zone employment credit which had a credit equal to 20% for the first $15,000 of qualified wages. In order to be entitled to the credit, qualified full-time or part-time wages must be paid to employees who work and live in the renewal communities. Other than the amount of the credit, the renewal communities are treated as empowerment zones for purposes of the employment credit. (Refer to the empowerment zone employment credit section hereof for specifics.)

The renewal community employment credit is first available for wages paid in 2002 since this is the beginning of the period during which the renewal community designations are effective. The designation is effective until December 31, 2009.

Commercial Revitalization Deduction. A commercial revitalization deduction ("CRD") allows taxpayers in a renewal community to deduct expenditures relating to a "qualified revitalization building" pursuant to an accelerated schedule. Code § 1400I and Revenue Procedure 2003-38 are instructive with respect to the CRD, as well as IRS Publication 954 (1/2004). A taxpayer who elects to take this deduction cannot take a standard depreciation deduction for the same amounts. Additionally, it is important to note that the commercial revitalization deduction will not apply to any building placed in service after December 31, 2009.

Section 1400I(a) states that a taxpayer can elect to either (1) deduct one-half of the total "qualified revitalization expenditures" with respect to a "qualified revitalization building" in the tax year in which a building is placed into service, or (2) ratably deduct all such expenditures over a 120-month period, "beginning with the month in which a building is placed into service."

A qualified revitalization building is a building plus its structural components that are placed in service in a renewal community. The original use of the building must begin with the taxpayer or the building must be substantially rehabilitated by the taxpayer and placed in service after rehabilitation. In general, a building is substantially rehabilitated if the QREs, for a 24-month period selected by the taxpayer and ending in the tax year, exceed the greater of the adjusted basis of the building and its structural components, or $5,000. A substantial rehabilitation is treated as a separate building for purposes of the deduction.

No depreciation is allowed for amounts claimed under the commercial revitalization deduction. Thus, regardless of whether the taxpayer elects the immediate deduction of one-half of the QREs or the 120-month ratable deduction of all of the QREs, the taxpayer may not claim a standard depreciation deduction on any amount of the expenditures. The adjusted basis of the property is reduced by the amount of the commercial revitalization deduction. The commercial revitalization deduction is treated as a depreciation deduction in applying the depreciation recapture rules of Code § 1250. The commercial revitalization deduction is allowed in computing a taxpayer's alternative minimum taxable income.

QREs are defined as amounts chargeable to a capital account for depreciable non-residential real property and Code § 1250 property that is functionally related and subordinate to the non-residential real property. Code § 1250 property is any real property, other than Code § 1245 such as personal property and property, other than buildings and its structural components, used in the manufacturing or production of transportation or energy services, which is or has been property used in a trade or business or held for the production of income.

If the taxpayer is rehabilitating an existing building, its acquisition cost is treated as a QRE only to the extent that it does not exceed 30% of the aggregate QREs for the building, excluding the acquisition cost. For example, if the building costs $500,000 to acquire and the renovations eligible for QREs were $1 million, up to $300,000 of the acquisition costs could qualify as a QRE. QREs do not include amounts that the taxpayer may take into account in computing any credits, unless the taxpayer elects to take the amount into account only for purposes of the commercial revitalization deduction. For example, costs that could be used to compute the rehabilitation credit of Code § 47 cannot be included in QREs unless the taxpayer elects to use them only for that purpose.

The amount that may be treated as QREs for a building cannot exceed the lesser of $10 million or the amount allocated to the building by the commercial revitalization agency for the state in which the building is located. A commercial revitalization agency is any agency authorized by the State to carry out the commercial revitalization deduction rules. The commercial revitalization agency is limited in the amount of commercial revitalization expenditures that it may allocate. The total amount of commercial revitalization expenditures that the agency can allocate is the state commercial revitalization expenditure ceiling for the calendar year. The commercial revitalization expenditure ceiling is $12 million for each renewal community in the state per calendar year after 2001 and before 2010 and $0 thereafter. Allocations are made at the same time in the same manner as they are for purposes of the low-income housing credit under Code §§ 42(h)(1) and 42(h)(7).

State commercial revitalization agencies are required to develop a plan for allocating QREs. (New York State has appointed ESD as its commercial revitalization agency.) The plan must be approved by the governmental unit of which the agency is a part. If the QRE amount for a building is not allocated according to an approved qualified allocation plan, the QRE amount is treated as zero. The QRE amount for a building is also treated as zero unless the agency notifies the CEO of the local jurisdiction where the building is located of the allocation and provides the officer with a reasonable opportunity to comment on the allocation.

Revenue Procedure 2003-38 notes that, in addition to making a "placed-in-service year allocation," a State agency may make a "carryover allocation," defined as "an allocation that is made with respect to a qualified revitalization building that is placed in service by a taxpayer not later than the close of the second calendar year following the calendar year in which the allocation is made, provided the taxpayer's basis in the project of which the building is a part (as of the later of the date that is six months after the date that the allocation is made or the close of the calendar year in which the allocation is made) is more than 10% of the taxpayer's reasonably expected basis in the project as of the close of the second calendar year following the calendar year in which the allocation is made." Such an allocation "reduces the commercial revitalization expenditure ceiling for the calendar year in which the allocation is made." (See Rev. Proc. 2003-38, § 6.)

A qualified allocation plan must set forth the selection criteria to be used to determine the priorities of the commercial revitalization agency that are appropriate to local conditions. The plan must also consider the degree to which a project contributes to the implementation of a strategic plan that is devised for a renewal community through a citizen participation process, the amount of which any increase in permanent, full-time employment by reason of any project, and the active involvement of residents and non-profit groups within the renewal community. Finally, the plan must provide a procedure that the commercial revitalization agency or its agent will follow in monitoring the compliance with rules of the revitalization deduction.

Additionally, Revenue Procedure 2006-16 details how a State agency may retroactively allocate amounts from years 2002 through 2005 for "certain buildings located in the expanded area of a renewal community pursuant to § 1400E(g)" (dealing with HUD's ability to expand a renewal community based on census data from the year 2000). Thus, if a qualified building is in such an expanded area,[38] it may qualify for retroactive amounts of commercial revitalization deduction. A taxpayer claims such amounts by either: (1) filing an amended return for the year placed in service, as well as all subsequent years, or (2) obtaining the IRS Commissioner's consent for a change of accounting method (by filing Form 3115). In making its allocations, the agency is limited to previously unallocated amounts. Additionally, the amounts for 2003 are increased by amounts not allocated in 2002. Therefore, a building that was placed into service in 2002 may receive a retroactive allocation for the year 2003. (See Rev. Proc. 2006-16, § 3.04(1).)

Passive Loss Rules. The CRD is treated in the same manner as the low-income housing credit in applying the passive loss rules. Generally, up to $25,000 of passive activity losses from rental real estate activities can be applied by an individual against non-passive income if the individual actively participates in the rental real estate activity. However, the rehabilitation credit, low-income housing credit, and the CRD are allowed under the $25,000 rule regardless of whether the taxpayer actively participates in the rental real estate activity that generates the credit or deduction. The $25,000 amount is phased out by 50% of the amount by which the taxpayer's adjusted gross income ("AGI") exceeds $100,000. However, the phase out does not apply to the portion of the individual's passive activity loss that is attributable to the CRD. The phase out also does not apply to the portion of the individual's passive activity credit that is attributable to the low-income housing credit. If any portion of the individual's passive activity credit is attributable to the rehabilitation credit, then the $25,000 amount is phased out by 50% of the amount by which the taxpayer's AGI exceeds $200,000.

If special phase out rules for the CRD, low-income housing credit, or rehabilitation credit apply, then the remaining portion of the $25,000 is applied in the following order: (i) to the portion of the passive activity loss to which the CRD deduction does not apply; (ii) to the portion of the passive activity credit to which the rehabilitation credit or the low-income housing credit does not apply; (iii) to the portion of such credit which the rehabilitation credit applies, (iv) to the portion of such loss to which the CRD applies, and (v) to the portion of such credit to which the low-income housing credit applies.

Renewal Community Zero Percent Capital Gain. Beginning in 2002, a zero percent capital gain rate applies to qualified capital gain from the sale of certain assets used in renewal communities and held for more than five years. The gain exclusion applies to capital gain from the sale or exchange of corporate and partnership interest in a renewal community business and tangible property used in renewal community business. Qualified capital gain is any gain recognized on the sale of a capital asset or property used in the trade or business under Code § 1231(b) (for example, depreciable property and real property used in the business and not held for sale to customers). Qualified gain does not include gain attributable to periods before January 1, 2002 or after December 31, 2014. (See Code § 1400F.)

Qualified community stock, qualified community partnership interests and qualified community business property, with regard to renewal communities, must meet the same requirements mentioned earlier in this Section under the Non-recognition of Gain on Rollover of Empowerment Zone Investments. Qualified community stock and qualified community partnership interests are subject to redemption rules. Stock and

[38] The expansion of the renewal community must be approved by HUD.

interest acquired by the taxpayer may not be treated as qualified community stock or interest if the corporation redeemed stock or interest from the taxpayer or person related to the taxpayer within two years before or after the stock or interest was issued, or if the corporation engaged in significant redemptions of its stock or interest within one year before or after the stock or interest was issued. This includes redemptions of stock through later corporations.

A renewal community business is any entity or proprietorship that would be a qualified business entity or qualified proprietorship under the definition of enterprise zone business, if references to renewal communities were substituted for references to empowerment zones. Termination of the renewal community designation will not, by itself result in property failing to be treated as a qualified community asset for purposes of the zero percent capital gains rate. However, even though the property may continue to be treated as qualified community asset, any gain attributable to the period after December 31, 2014, will be ineligible for exclusion. Stock, partnership interests and property will continue to be qualified community assets if sold or transferred to a subsequent purchaser provided that the qualified community assets continue to be qualified in the hands of a subsequent purchaser, during substantially all of the subsequent purchaser's holding period, for stock and partnership interests, the corporation or partnership was a renewal community business, and for property, substantially all of the use of the property is in a renewal community business.

Safe Harbor. If property or ownership interests cease to be considered a qualified community asset after the five-year period beginning the date the taxpayer acquired the property because the property is no longer used in a renewal community business or because the corporation or partnership no longer qualifies as a renewal community business, such property interests will continue to be treated as a qualified community asset. However, the amount of gain eligible for the zero percent capital gains rate upon the sale or exchange of the property cannot exceed the amount that will be qualified capital gain had the property been sold on the date the property ceased to be a qualified community asset.

With respect to the sale or exchange of an interest in a partnership or stock in an S corporation that is a renewal community business during substantially all of the period the taxpayer held the interest or stock, the amount of the qualified capital gain is determined without regard to, (i) gain attributable to real property or an intangible asset that is not an integral part of the renewal community business, and (ii) gain attributable to periods before January 1, 2002 or after December 31, 2014. Rules similar to those relating to the treatment of past-through entities, relating to certain tax-free and other transfers, relating to the treatment of certain contributions to capital, and relating to the treatment of certain short positions, apply for purposes of the zero percent capital gains provisions. Thus, the zero percent capital gains rate may apply to gain from qualified community assets held by past-through entity and passed through to the entity's owner or to gain from qualified community assets acquired through gift or inheritance.

Gain from sale of qualified community assets may not be eligible for zero percent capital gains rate if the taxpayer or a related person holds an offsetting short position with respect to the assets. The IRS has been instructed to issue regulations that are appropriate to carry out the purposes of the capital gains rules for a renewal community property. The regulations may include ways to prevent taxpayers from avoiding the purpose of these capital gains rules. Qualified capital gain does not include gain attributable to real property or an intangible asset that is not an integral part of a renewal community business. Also, gain that would be treated as ordinary income under Code § 1245 or § 1250 depreciation recapture provisions, if Code § 1250 applied to all depreciation rather than the additional depreciation, is not treated as qualified capital gain.

Related Parties. Gain from related party transactions is also ineligible for the zero percent capital gains rate. This rule applies to gain attributable, directly or indirectly, in whole or in part, to a transaction with a related party. Some of the persons treated as related parties include: (i) family members; (ii) corporation and an individual who owns more than 50% in value of the corporation either directly or indirectly; (iii) two corporations that are members of the same controlled group; (iv) a partnership and a person owing more than 50% capital or profits interest in the partnership; (v) two partnerships in which the same persons own more than 50% of the capital or profits interest, either directly or indirectly; (vi) a corporation and a partnership in which the same persons own more than 50% in value of the corporation and more than 50% of capital or profits interest in the partnership; (vii) two S corporations which the same persons own more than 50% in value of each corporation; (viii) an S corporation and a C corporation which the same persons own more than 50% in value of each corporation; (ix) a grantor and a fiduciary of a trust; and (x) a fiduciary and beneficiary of a trust.

III. NEW MARKET TAX CREDITS ("NMTC")

The New Market Tax Credit ("NMTC") Program was instituted as part of the Community Renewal Tax Relief Act of 2000. This Federal tax credit program is unique because unlike other low income community tax programs that address purely housing issues, this tax credit is aimed at businesses. The NMTC Program is designed to bring new investment capital to low income communities over a seven-year period. The source of capital is generated from lenders and private investors. The goal of the program is to provide a direct means to channel this investment capital to businesses in low income communities. The primary incentive offered to investors is a credit against their Federal income taxes equal to 39% over the seven-year investment period.

A. THE NMTC (FORM 8874)

The NMTC is equal to 39% of the qualified equity investment ("QEI") made by a taxpayer/investor to a CDE, to be taken over a seven-year period, beginning in the year the QEI is first made. The NMTC is taken 5% in the first three years and 6% in the last four years. As first authorized the national, annual limitations on the amount of investments to be used to claim the NMTC $15.0 billion. Subsequent legislation authorized an additional $15.0 billion in 2008 & 2009. The investment authority is allocated as follows:

Year	Limitation	Cumulative
2001-02	$2.5 billion	$ 2.5 billion
2003-04	$3.5 billion	$ 6.0 billion
2005	$2.0 billion	$ 8.0 billion
2006	$3.5 billion	$ 11.5 billion
2007	$3.5 billion	$ 15.0 billion
2008	$5.0 billion	$ 20.0 billion
2009	$5.0 billion	$ 25.0 billion

Priority as to allocation of NMTCs will be granted to any CDE which:

(1) has a record of having successfully provided capital or technical assistance to disadvantaged businesses of communities; or

(2) intends to make QLICIs in businesses in which persons unrelated to the CDE hold the majority interest; where the term "unrelated" means ownership or control of more than 50%.

If an NMTC allocation to a CDE is not used within five years of its initial equity investment, the CDE loses the unused balance of the allocation. The Secretary is then authorized to reissue the unused allocation.

If the yearly allocation limitation is not totally allocated by the Secretary, the unallocated amount is carried over and the limitation for the next succeeding year is increased, until the entire limitation is allocated; provided, that no amount can be carried beyond the year 2015.

B. COMMUNITY DEVELOPMENT ENTITIES ("CDE")

A Community Development Entity ("CDE") is any domestic, for-profit or not-for-profit corporation or partnership certified as such following application for certification, which satisfies the following two tests (note that an existing SSBIC or CDFI are treated as meeting these tests):

1. Primary Mission Test

The primary mission of the CDE must be to serve, or provide investment capital for, low-income communities ("LICs") or low income persons ("LIPs"). To satisfy this test:

(1) the CDE's organizational documents must evidence a clear mission of so serving or providing investment capital to LICs and LIPs; and

(2) the CDE must demonstrate that, at a minimum, 60% of the CDE's activities are dedicated to serving LICs or LIPS. Examples of activities satisfying this test are:

(a) Investing in, lending to or providing technical assistance to businesses located in LICs and/or owned by LIPs;

(b) Lending to LIPs or residents of LICs;

(c) Investing in or providing loans to support commercial properties located in LICs; or

(d) Investing in, lending to or providing technical assistance to organizations (other CDEs, CDFIs, etc.) engaged in activities that promote community development; or the CDE must demonstrate that it otherwise meets this test (other than as set forth above) in a manner that meets the intent and purpose of the test.

2. Accountability Test

The CDE must maintain accountability to residents of LICs through their representation on CDE governing or advisory boards. To satisfy this test, the following must be evident:

First, select a service area from the following:

(1) Local (i.e., neighborhood(s), a city or town, a county, a metro area). If the CDE intends to serve multiple LICs within a single local service areas (i.e., several neighborhoods within one city), select the larger, more encompassing jurisdiction;

(2) Multiple local service areas (i.e., Syracuse and Rochester);

(3) Statewide area (i.e., State of New York);

(4) Multi-state (i.e., New England);

(5) National service area.

Second, the CDE must be show that it is accountable to residents of the LICs in each of its designated service area(s) by:

(1) requiring that at least 20% of its members of its board of directors or its advisory board(s) be representative of the LIC, where being representative means that a board member must either, (i) be a LIP residing in the LIC in the selected service area, or (ii) be persons who otherwise represent the interests of the residents of the LIC (such as a business owner in the LIC, or a director of a community-based or charitable organization in the LIC); and

(2) if accountability is maintained through advisory board(s), by demonstrating that the viewpoints of the members of the advisory board(s) are given sufficient consideration and attention by the board of directors.

Applications for certification as a CDE are accepted and processed on a rolling basis. However, an entity seeking certification must file a Certification Application with the CDFI Fund prior to the submission of an application for a NMTC allocation. The timing of certification prior to allocation application is set forth in a Notice of Allocation Availability ("NOAA") published by the CDFI Fund each year.

C. CDE SUBSIDIARIES/MULTIPLE FUNDS

An applicant CDE and its subsidiary applicants may apply under one Certification Application, if the following is evident:

(1) Each subsidiary is a legally formed entity;

(2) Each subsidiary must satisfy the primary mission and accountability tests, to be shown by either:

(i) the applicant CDE must attest to the satisfaction of these tests; or

(ii) all establishing documents for each subsidiary are made a part of the application.

Should a CDE have multiple or series of funds that are properly classified for Federal tax purposes as a single corporation or partnership, the CDE may apply for certification as a single entity.

Should a CDE have multiple or series of funds that are properly classified for Federal tax purposes as multiple corporations or partnerships, the CDE may submit a single application on behalf of the entire series of funds, and each fund must satisfy the primary mission and accountability tests.

The CDE may, upon certification, transfer any of the NMTC allocation it receives to one or more of its subsidiaries or funds, if the transfer is pre-approved by the Fund.

Related CDEs may not file multiple applications for an allocation of NMTC authority.

D. ALLOCATION APPLICATION AND AGREEMENT

1. Allocation Application

There are four (4) sections to the NMTC Allocation Application, summarized as follows:

Business Strategy. In this section, an applicant will score well to the extent it articulates with clarity and specificity its strategy for using an NMTC allocation, including the types of products and services to be offered in structuring QLICIs and the types of business activities it intends to engage in. It is important for an applicant to demonstrate a successful track record of providing products and services to the business and development community.

Capitalization Strategy. In this section, an applicant that can demonstrate a high level of investor commitment to make QEIs will score well. An applicant should also be able to articulate a strategy for obtaining further investor commitments to make QEIs. There must be a consistency between an applicant's requested allocation amount, the degree of investor commitments, and the applicant's strategy of deploying QEIs.

Management Capacity. In this section, an applicant will score well to the extent it can demonstrate that it has adequate, effective and experienced personnel in deploying investments or otherwise providing financing assistance in LICs. The scoring process examines experience in raising capital, asset and risk management experience, government program compliance experience, and low income community financing activity experience.

Community Impact. In this section, an applicant will score well to the extent that its business and overall strategies in using an NMTC allocation will have positive community development and economic impact on the community(s) it serves. It is helpful if such strategies show a targeting of LICs with greater economic distress.

2. Allocation Agreement

Upon achieving an allocation of NMTCs, the CDE and the CDFI must enter into an Allocation Agreement. This Agreement will include specific provisions consistent with the responses set forth in the CDE's Allocation Application.

E. QUALIFIED EQUITY INVESTMENTS ("QEI")

A qualified equity investment ("QEI") is an investment of cash by a taxpayer for stock in a corporation or a capital interest in a partnership that is certified as a CDE, but only if:

(1) the investment is acquired at its original issue solely for cash;

(2) the QEI is designated by the CDE on its books and records for purposes of § 45D using any reasonable method; and

(3) substantially all of the QEI are used to make qualified low income community investments ("QLICIs"), where "substantially all" means that practice which the CDE commits to in its Allocation Application, but in no event less than 85%. This standard must be satisfied for each of the seven-year credit period using either of the following two methods, either of which must be performed semi-annually and averaged:

(1) Direct tracing calculation: The substantially all requirement is satisfied if at least 85% (75% in year seven of the credit period) of the QEI is directly traceable to QLICIs. This calculation is a fraction:

(i) the numerator of which is the CDE's aggregate cost basis (including worthless QLICIs) in all QLICIs that are directly traceable to the taxpayer's QEI; and

(ii) the denominator of which is the amount of the taxpayer's QEI; or

(2) Safe harbor calculation: the substantially all requirement is satisfied if at least 85% (75% in year seven of the credit period) of the aggregate gross assets of the CDE are invested in QLICIs. This calculation is a fraction:

(i) the numerator of which is the CDE's aggregate cost basis (including worthless QLICIs) in all of its QLICIs; and

(ii) the denominator of which is the CDE's aggregate cost basis in all of its assets.

F. QUALIFIED LOW-INCOME COMMUNITY INVESTMENTS ("QLICI")

A qualified low-income community investment ("QLICI") is:

(1) any capital or equity investment in, or loan to, any qualified active low-income community business ("QALICB");

(2) the purchase from another CDE of any loan made by the other CDE, which loan is a QLICI either at the time, (i) the selling CDE made the loan, or (ii) the purchasing CDE purchased the loan;

(3) financial counseling or other services (i.e., advice provided by the CDE relating to the organization or operation of a trade or business) to any QALICB, or to any residents of LICs; or

(4) any equity investment in, or loan to, another CDE, but only if that other CDE uses the proceeds in a manner set forth in (a) or (c) above, and that would constitute a QLICI if it were made directly by the CDE making such investment or loan.

A taxpayer's QEI received by a CDE is treated as invested in a QLICI only to the extent that the QEI is so invested within 12 months after the date the QEI is made.

G. QUALIFIED ACTIVE LOW-INCOME COMMUNITY BUSINESS ("QALICB")

A qualified active low-income community business ("QALICB") is any corporation (including a nonprofit corporation) or partnership (or proprietorship or portion of a business which would meet these requirements if separately incorporated) which, for the tax year, satisfies the following:

(1) Use of Tangible Property Test: at least 40% of the use of the tangible property of the entity (owned or leased) is within a LIC (the calculation is a fraction, the numerator of which is the average value of tangible property owned (at cost basis) or leased (as reasonably valued by the entity) by the entity during the taxable year in a LIC, and the denominator of which is the average value of all tangible property owned (at cost basis) or leased (as reasonably valued by the entity) by the entity during the taxable year);

(2) Services Performed Test: at least 40% of the services performed for such entity by its employees are performed in a LIC (the calculation is a fraction, the numerator of which is the total amount paid by the entity for employee services in an LIC during the taxable year, and the denominator of which is total amount paid by the entity for employee services anywhere during the taxable year; and

(3) Gross Income Test: at least 50% of its total gross income is derived from the active conduct of a qualified business ("QB") within a LIC. This test is met if either of the two foregoing tests is met after substituting 50% for the 40% minimum set forth above, or if it is otherwise met based on all the facts and circumstances.

(4) Collectibles Test: less then 5% of the average of the aggregate unadjusted basis of its property is attributable to collectibles (art, coins, etc.)

(5) Non-Qualified Financial Property Test: Less then 5% of the average of the aggregate unadjusted basis of its property is attributable to non-qualified financial property. Such property includes cash and equivalents with a term in excess of 18 months. However, there is an exception for construction loans: The proceeds of a QLICI held for the purpose of expending the proceeds for construction of real estate with 12 months after the date of the QLICI are treated as reasonable amounts of working capital.

A qualified business is any trade or business, except for the following (note that there is no requirement that employees of the qualified business be residents of a LIC):

(6) wholly residential real property projects;[39]

(7) the rental of unimproved real property;

(8) farming businesses whose aggregate assets owned and leased, valued at the higher of FMV or unadjusted basis, exceeds $500,000; or

(9) any business consisting of a private or public golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises.

An entity will be treated as an "active business" if the CDE reasonably expects the business will generate revenues within three years after the QLICI is made. Non-profits will be considered active if the CDE reasonably expects it will engage in an activity that furthers its non-profit purpose within a three-year period after the QLICI is made.

An entity will be treated as a QALICB:

(1) for the duration of the CDE's investment therein if the CDE can demonstrate that it has a "Resonable Expectation", at the time of its QLICI investment that the entity will satisfy the requirements of a QALICB throughout the entire period of the investment or loan; or

(2) if a CDE controls, or gains control of, the entity at any time during the 7-year credit period, the entity must satisfy the requirements to be a QALICB throughout the entire period the CDE controls the entity. Control is defined as direct or indirect ownership (based on value) or control (based on voting or management rights) of more than 50%, where management rights means the power to influence the management policies or investment decisions of the entity.

H. LOW-INCOME COMMUNITY ("LIC")

A low-income community ("LIC") means any population census tract that:

(1) has a poverty rate of at least 20%; or

(2) if the tract is located outside of a metropolitan area, the median family income does not exceed 80% of statewide median family income; or

[39] Although businesses cannot be involved in only residential real estate projects, they may be involved in mixed use projects. There is an 80%/20% limitation on residential real estate as a qualified business. The business cannot receive greater than 80% of its revenue from the rental of residential real estate. Additionally, lessees of the property cannot be sin businesses, as listed in G(b)(4).

(3) if the tract is located within a metropolitan area, the median family income does not exceed 80% of the greater of, (i) statewide median family income, or (ii) the metropolitan median family income.

The Secretary of the Treasury is given the authorization to target areas for qualification and designation as a LIC that might not otherwise meet the above requirements by satisfying the "targeted populations" rules contained in revised Treasury Regulations.

I. REINVESTMENTS

Amounts received by a CDE in re-payment of capital, equity or principal with respect to a QLICI in excess of the "substantially are" test described under E(c) above, must be reinvested by the CDE in another QLICI no later than 12 months from the date of receipt to continue to be treated as continuously invested in a QLICI; except, amounts so received during the seventh year of the seven-year credit period do not have to be reinvested by the CDE in a QLICI to be treated as continuously invested in a QLICI.

Tracing. The basic tracing rules to determine whether reinvestment is satisfied are, as follows:

> (1) For amounts received by the CDE the cost basis of the original QLICI, and the amount reinvested is the cost basis of the original QLICI, then the amount equal to the cost basis of the original QLICI is treated as continuously reinvested in a QLICI;
>
> (2) For amounts received by the CDE the cost basis of the original QLICI, and the amount reinvested is equal the cost basis of the original QLICI, then only the amount so reinvested is treated as continuously reinvested in a QLICI;
>
> (3) For amounts received by the CDE the cost basis of the original QLICI, and the CDE reinvests an amount, then the amount treated as continuously reinvested in a QLICI will equal the excess of the original cost basis over the amount received by the CDE not so reinvested.

Tracing Example. The regulations set forth the following example of these tracing rules:

On 4-1-03, A, B and C each pay $100,000 to acquire a capital interest in X Partnership, which is a CDE. These three investments are treated as one investment.

On 8-1-03, X makes a QLICI.

On 8-1-05, the QLICI is redeemed for $250,000.

On 2-1-06, X reinvests $230,000 of the $250,000 redemption proceeds in a second QLICI. The remaining $20,000 is used for operating expenses.

Result: $280,000 is treated as continuously invested. The amount received by the CDE on the redemption ($250,000) was less than its original cost basis ($300,000). By the tracing rule under (b)(iv) above, the amount treated as continuously reinvested equals the excess of its original cost basis ($300,000) over the amount received by the CDE not so reinvested ($20,000).

On 12-1-08, the second QLICI is redeemed for $400,000.

On 3-1-09, X reinvests $320,000 of the $400,000 redemption proceeds in a third QLICI.

Result: $280,000 is treated as continuously invested. The amount received by the CDE on the redemption ($400,000) was greater than its original cost basis ($250,000). By the tracing rule under (b)(i) above, the amount treated as continuously reinvested equals the original cost basis ($280,000). The additional $40,000 reinvested in this third QLICI is treated as another QLICI originally made on 3-1-09.

Basis. A CDE's basis in the QLICI is reduced by the amount by which its original cost basis exceeds the amount determined to be continuously invested in a QLICI.

Loan Repayments. Periodic amounts received during a calendar year as a repayment of principal on a loan that is a QLICI will be treated as continuously invested in a QLICI if these amounts are reinvested in another QLICI by the end of the calendar year following the year in which such principal was repaid.

Reserves. Reserves not in excess of 5% of the QEI maintained by the CDE for loan losses or for additional investments in existing QLICIs are treated as invested in a QLICI.

J. RECAPTURE

The tax basis of any QEI is reduced by the amount of the tax credit taken with respect to the investment.

If during the seven years from the original issue date of the QEI in a CDE, a recapture event occurs, then the tax credit is recaptured. A recapture event occurs when: (i) the entity ceases to be a CDE; (ii) the proceeds of the QEI cease to remain QLICIs; or (iii) there is a redemption of the investment or repayment of a loan without a reinvestment.

The recaptured credit will increase the tax for the year the recapture event occurs in an amount equal to the amount of the credits claimed, plus interest on the resulting underpayment from the due date of the return for the year in which the credit was initially taken. The interest is non-deductible, and the resulting tax cannot be reduced by any other available credits in that year.

K. CLAIMING NMTC; NOTICES

The NMTC is claimed by filing Form 8874 with the taxpayer's Federal income tax return.

The CDE must give notice (essentially a legal opinion) within 60 days of the investment by a taxpayer to the CDE that the investment is a QEI, indicating the amount of the QEI and providing the CDE's tax identification number.

The CDE must provide notice to the investor-taxpayer of a recapture event within 60 days of first becoming aware of the occurrence of a recapture event.

L. REGULATORY AMENDMENTS

The Department of the Treasury issued certain amendments to the NMTC regulations on March 11, 2004 dealing with the following matters:

1. Substantially All Requirement

Testing for the 85% Test: Under original regulations, a CDE must use "substantially all" of a QEI to make a QLICI, where "substantially all" means 85%(or such high percentage to which a CDE committed under its Allocation Application) (75% in year seven of the credit period). This standard must be satisfied for each of the seven-year credit period using either of the following two methods, either of which must be performed semi-annually and averaged, and must result in at least 85%:

Direct tracing calculation (Regs. § 1.45D-1T(c)(5)(ii). the substantially all requirement is satisfied if at least 85% (75% in year seven of the credit period) of the QEI is directly traceable to QLICIs. This calculation is a fraction:

(1) the numerator of which is the CDE's aggregate cost basis (including worthless QLICIs) in all QLICIs that are directly traceable to the taxpayer's QEI; and

(2) the denominator of which is the amount of the taxpayer's QEI; or

Safe harbor calculation (Regs. § 1.45D-1T(c)(5)(iii). the substantially all requirement is satisfied if at least 85% (75% in year seven of the credit period) of the aggregate gross assets of the CDE are invested in QLICIs. This calculation is a fraction:

(3) the numerator of which is the CDE's aggregate cost basis (including worthless QLICIs) in all of its QLICIs; and

(4) the denominator of which is the CDE's aggregate cost basis in all of its assets.

By the amended regulations, a CDE can use the direct tracing (or safe harbor) calculation one year, and switch to the safe harbor (or direct tracing) calculation in subsequent annual periods.

2. QLICIs

Purchase of Loans Made by another CDE: Under the original regulations, a QLICI includes the purchase from another CDE (1st CDE) of any loan made by the 1st CDE that is a QLICI. By the amended regulations, a QLICI includes the purchase of a loan from an entity that is not a CDE at the time it first originated its loan, so long as it is a CDE at the time it sells the loan.

3. Notice 2003-68

The amended regulations formalize this Notice, which allowed for the purchase of a loan by a CDE (the ultimate holder) from a 2nd CDE, who acquired the loan from a 3rd CDE, who was the loan originator; however, to maintain QLICI status as the loan changes hands, the loan must be a QLICI either, (i) at the time the loan was first made by the CDE who originated the loan, or (ii) at the time the ultimate holder CDE purchases the loan from the 2nd CDE.

4. Advance Commitments

This addresses a CDE's purchase of a loan from another CDE under an advance commitment agreement. The amended regulations provide that a loan is treated as made by a CDE to the extent the CDE purchases the loan from the originator (whether or not the originator is a CDE) within 30 days after the date the loan is made IF at such date there is a written agreement between the originator and the CDE-purchaser which requires the CDE to, (i) accept the loan as structured or by other specific underwriting criteria, and (ii) purchase the loan within 30 days after the loan is made.

5. Notice 2003-64

The amended regulations establish the rule of this Notice. Current Regs. § 1.45D-1T(d)(1)(iv) provides that a QLICI includes equity or loans by a CDE to another CDE, as long as the recipient CDE uses the proceeds to make a QLICI to a QALICB. This Notice allows such QLICI transactions through multiple tiers of CDEs.

6. QALICBs

Gross Income Test. The former regulations required QALICBs to satisfy the 50% gross income test (50% of its gross income must be derived from the active conduct of business within in a LIC).

The amended regulations make clear that this 50% test will be deemed satisfied if, at the time the CDE makes a QLICI, the CDE reasonably expects that the business will generate revenues within three years after the date of the QLICI.

Services Test. The former regulations required QALICBs to satisfy the 40% services test (40% of its services are performed by employees within in a LIC).

The amended regulations address circumstances where there are no employees. If there are no employees, this 40% services test will be deemed satisfied (as will the 50% gross test) if at least 85% of the use of the tangible personal property (owned or leased) by the business is within the LIC.

QALICB Control. The former regulations treated a business as a QALICB if the CDE reasonably expects at the time of the QLICI that the business will satisfy all of the requirements of being a QALICB throughout the entire period of the QLICI. If the CDE acquired control of the business during the seven-year credit period, the business will be treated as a QALICB only if it satisfies the requirements of being one throughout the entire seven-year credit period. Control for this purpose was set at 33%. The amended regulations increase this control standard to more than 50%.

The amended regulations also provide a 12-month period during which a CDE’s acquisition of control (50% or more, under the new rule) is disregarded if, (i) the CDE’s investment in the business otherwise meets the reasonable expectations test when the QLICI was originally made, and (ii) its acquisition of control is due to unforeseen financial difficulties of the business.

7. CDE Bankruptcy

The amended regulations clarify that a taxpayer can still claim the NMTC even if the CDE in which the taxpayer made its QEI becomes a bankrupt entity.

8. Incorporation of Other Notices

The amended regulations adopt Notice 2003-9 and Notice 2003-56 (both of which allow for QEIs to a CDE prior to its allocation receipt under certain conditions). The amended regulations also adopt Notice 2003-64, which deals with the coupling of other Federal tax benefits, such as the historic tax credit. There is not allowed a coupling of NMTCs with the LIHC.

9. Final Regulations

Final regulations were published on December 28, 2004, which included two key provisions:

(a) one was a correcting amendment making it clear that the rental of real estate is a qualified business if (i) it is not wholly residential real estate and (ii) there are substantial improvements located on the real estate. The correction was to delete the requirement that such substantial improvements be made AFTER the date the QLICI is made, which would have precluded the ability of a CDE to provide permanent financing of a construction loan.

(b) the other was in the preamble to the regulations that discussed limitations of NMTCs in the context of investments that are directly subsidized by other Federal tax benefits, stating that the "final regulations do not prohibit a CDE from purchasing tax-exempt bonds because tax-exempt financing provides a subsidy to borrowers and not bondholders. Further to this is Regulations § 1.45D-1(d)(8) which provides that a loan is treated as being made by a CDE to the extent the CDE purchases the loan from the loan originator (whether or not the originator is a CDE) within 30 days after the date the originator makes the loan if, at the time is loan is made there is a legally enforceable written agreement between the originator and the CDE which (i) requires the CDE to approve the making of the loan either directly or through imposition of the CDE's underwriting criteria and (ii) requires the CDE to purchase the loan within 30 days after the date the loan is made. Based on these rules, we feel a tax-exempt bond is a loan originated by an issuer which, if acquired by a CDE consistent with the requirements of Regulations § 1.45D-1(d)(8), would be a QLICI. An investor could acquire the bond and make a QEI entitling the bond buyer to NMTCs.

10. Targeted populations (Notice 2006-60)

On June 30, 2006, the IRS and Treasury Department released Notice 2006-60, which announced that the NMTC regulations would be amended to provide rules relating to hoe an entitiy meets the requirements to be a QALICB when its activities involve certain targeted populations under IRC § 45D(e)(2). Proposed Regulations were issued, but are not yet final, which follow the rules of Notice 2006-60. The CDFI also issued further guidance through a FAQ document in September 2008 which provides some additional guidance. Until those regulations are finalized, taxpayers may rely on Notice 2006-60 and the CDFI guidance for any QLICIs made on or after October 22, 2004.

Under the Notice and Guidance relating to "Targeted Populations", a QALICB must meet one of the following 3 tests:

(a) Gross income: at least 50% is derived from sales, rentals, services or other transactions with LIPs;

(b) Employees: at least 40% of entity's employees are LIPs (determined at the time of hire, even if the employee's income [Family income standard applies] takes him/her out of LIP status during the 7 year credit period); or

(c) Ownership: at least 50% of ownership of the entity is owned by LIPs (determined at the time of the QLICI, even if the owner's income takes him/her out of LIP status during the 7 year credit period).

IV. OTHER FEDERAL CREDITS, INCENTIVES AND CLASSIFICATIONS

A. WORK OPPORTUNITY CREDIT AND WELFARE TO WORK CREDIT

The Work Opportunity Credit and Welfare to Work Credit are Federal tax credits available to employers as an incentive to hire certain groups of employees. These credits are not conditioned on an employer's presence in an Empowerment Zone or Renewal Community nor are most of the qualifying employees required to live in the Empowerment Zone or Renewal Community. In certain circumstances, successor employers may claim a pro-rated portion of these credits for employees hired by a previous employer. However, the definition of "successor employer" appears to be limited to situations where an asset purchase has taken place, rather than a merger.

Despite the fact that these credits are relatively easy to access, both credits only apply to individuals who begin work before September 1, 2011. It is extremely important to note that under the current structure, these credits may only be secured where employees are properly certified prior to, in conjunction with, or immediately after being hired. (See IRS Form 8850.) Additionally, wages claimed for either of these credits may not be used to claim the Empowerment Zone Employment Credit (described above).

1. Work Opportunity Credit (IRS Form 5884)

The Work Opportunity Credit provides an incentive to hire individuals from groups that have high unemployment rates or other special employment needs. Employers may claim a credit for "qualified first year wages" to targeted groups of employees, including certain low-income workers, veterans, long-term family assistance recipients, ex-felons and others. The qualified first year wages must be paid within the first year worked and each employee must be certified within a target group prior to, in conjunction with, or immediately after being hired. The amount of credit available is 40% of the first $6,000.00 of wages paid to employees working more than 400 hours, or $2,400.00. Employees working between 120 and 400 hours result in a 25% credit, or a maximum of $1,500.00.

Additionally, the Small Business and Work Opportunity Tax Credit Act expanded the definitions of certain targeted groups. The qualified veterans group was expanded to include veterans entitled to compensation for a service-connected disability and who, during the one-year period ending on the hiring date, were (a) discharged or released from active duty in the U.S. Armed Forces or (b) unemployed for a period or periods totaling at least 6 months. The first-year wages taken into account for these disabled veterans is $12,000. Additionally, the high-risk youth group has been renamed "designated community residents" and was expanded to include individuals who are at least age 18 but not yet age 40. In addition, residents of rural renewal counties have been added to this group. (See Instructions to Form 5884.)

2. Welfare to Work Credit

Effective January 1, 2007, the Welfare-to-Work credit was unified with the Work Opportunity Credit. Therefore, to calculate a credit for any employee hired after December 31, 2006, Form 5884 should be used.

B. HUBZONE CLASSIFICATIONS

The Small Business Reauthorization Act of 1997 created the HUB Zone Empowerment Contracting Program in order to "provide Federal contracting assistance for qualified SBCs40 located in historically underutilized business zone in an effort to increase employment opportunities, investment, and economic development in such areas." (63 FR 31896, § 126.100.)

A "HUBZone" is a Historically Underutilized Business Zone. In order to qualify as a HUBZone SBC, a business must: (1) qualify as a small business under the applicable Small Business Administration ("SBA") regulations, (2) be at least wholly owned and controlled by US citizens, (3) maintain its principal office in a HUBZone, and (4) maintain a workforce, at least 35% of which reside in a HUBZone. HUBZones include qualified census tracts, qualified non-metropolitan counties with median household incomes of less than 80% of the State median household income or with an unemployment rate of at least 140% of the statewide average, and lands within the boundaries of Federally recognized Indian reservations. In order to be

[40] Small Business Concerns

awarded contracts under the program, an SBC must first be certified by the SBA. (The application is available online at www.sba.gov.) The Small Business Reauthorization Act set goals for HUBZone Federal prime contract awards to small businesses at three percent.

Eligible SBCs can receive the following types of contracts: (1) set-aside contracts, (2) sole source HUBZone contracts, and (3) full and open competition contracts.

Entities who receive Federal grant moneys to complete a project in a HUBZone should be aware that they may be required to hire HUBZone SBCs or other federally preferenced businesses as a certain percentage of the employed contractors.

C. EB-5 IMMIGRANT INVESTOR - IMMIGRATION THROUGH INVESTMENT

1. Overview

Under § 203(b)(5) of the Immigration and Nationality Act (INA), 10,000 immigrant visas per year are available to "eligible individuals" seeking permanent resident status on the basis of their investment (direct or indirect) in a new commercial enterprise. U.S. citizenship and Immigration Services (USCIS) created the "Regional Center" program (also called the EB-5 Immigrant Investor Pilot Program) in an effort to attract greater foreign investment in the U.S. businesses (both new and expansion of existing).

If the foreign national investor invests through a designated Regional Center, the investor is relieved of the need to directly manage or own the business. Instead, the investor becomes a limited partner and the Regional Center owns and operates the business (and must satisfy the program's requirements). An important Regional Center benefit allows the required job creation (discussed below) to include a mix of direct and indirect jobs.

Of the 10,000 investor visas available annually, 3,000 are set aside for those who apply under a federally designated Regional center. A Regional Center: (i) is an entity, organization or agency that has been approved as such by USCIS, (ii) focuses on a specific geographical area within the United States, and (iii) seeks to promote economic growth through increased export sales, improved regional productivity, creation of new jobs, and increased domestic capital investment. Investors must demonstrate: (i) that a "qualifying investment" is being made in a new commercial enterprise located within an approved Regional Center (as further described below), and (ii) that ten or more jobs are actually created either directly or indirectly by the new commercial enterprise through revenues generated from increased exports, improved regional productivity, job creation, or increased domestic capital investment resulting from the enterprise. To prove that jobs are actually created indirectly by the business, reasonable methodologies may be used, such as multiplier tables, feasibility studies, analyses of foreign and domestic markets for the goods or services to be exported, and other economically or statistically valid forecasting tools which support the likelihood that the business will result in increased employment.

2. Eligibility

Permanent resident status based on EB-5 eligibility is available to investors, either alone or with their spouse and unmarried children. Eligible investors are those who have invested, or are actively in the process of investing, the required amount of capital into a new commercial enterprise that they have established (or through a Regional Center). They must further demonstrate that this investment will benefit the United States economy and create the requisite number of full-time jobs for qualified persons within the United States.

Generally, eligible individuals include those: (i) who establish a new commercial enterprise by, (a) creating an original business, (b) purchasing an existing business and simultaneously or subsequently restructuring the business such that a new commercial enterprise results or (c) expanding an existing business by 140 percent of the pre-investment number of jobs or net worth, or retaining all existing jobs in a trouble business that has lost 20 percent of its net worth over the past 12 to 24 months; (ii) who have invested, or are actively in the process of investing, in a new commercial enterprise, (a) at least $1,000,000 or (b) at least $500,000 where the investment is being made in a "targeted employment area", which is an area that thas experienced unemployment of at least 150 per cent of the national average rate or a rural area as designated by a state government; (iii) whose engagement in a new commercial enterprise will benefit the United States economy by creating full-time employment for not fewer than ten qualified individuals or maintain the number of existing employees at no less than the pre-investment level for a period of at least two years, where the capital investment is being made in a "troubled business," which is a business that has been in existence for at least two years and that has lost 20 percent of its net worth over the past 12 to 24 months.

In order to seek status as an immigrant investor, you must file "Form I-526, Immigrant Petition by Alien Entrepreneur". Form I-526 must be filed with supporting documentation which clearly demonstrates that the individual's investment meets all program requirements including, (i) establishing a new commercial enterprise, (ii) investing the requisite capital amount, (iii) proving the investment comes from a lawful source of funds, (iv) creating the requisite number of jobs, (v) demonstrating that the investor is actively participating in the business; and, (vi) where applicable, creating employment within a targeted employment area. Upon approval of the I-526 petition, the investor and direct family members apply to be admitted as conditional permanent residents for two years.

In order to become an unconditional lawful permanent resident, eligible investors must file "Form I-829, Petition by Entrepreneur to Remove Conditions." Form I-829 must be filed within 90 days before the second anniversary of the investors' admission to the United States as a conditional resident. The investor may apply for U.S. citizenship five years after entering the U.S. as a conditional permanent resident.

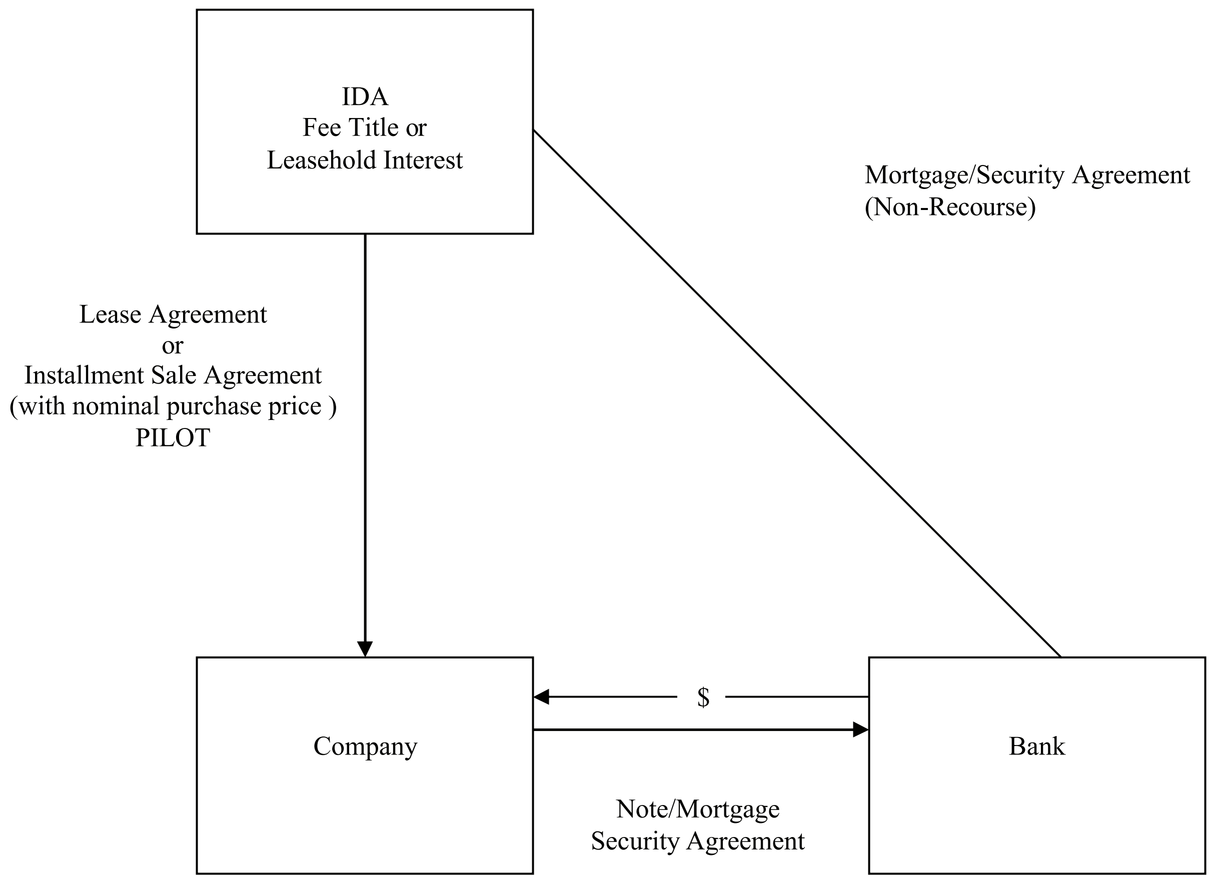
3. Alternatives For Foreign Nationals

Foreign nationals who want to enter the U.S. but do not wish to invest $500,000 or $1,000,000 may qualify as E visa treaty investors or traders. Furthermore, a foreign business may establish an office in the U.S. with management entering as intra-company transferees under the L visa category.

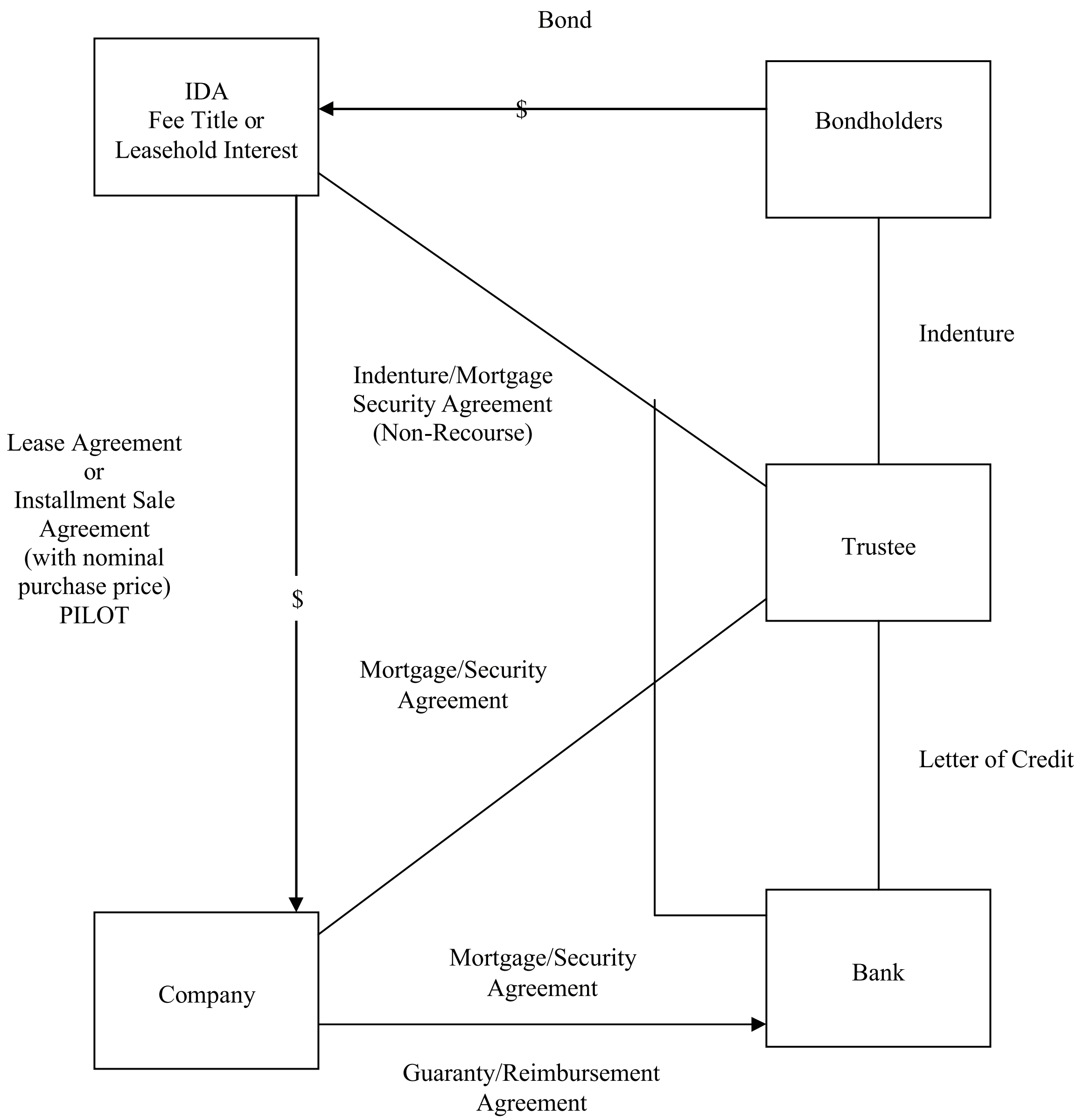
APPENDIX A

STRAIGHT LEASE AND TAX-EXEMPT BOND TRANSACTIONS

STRAIGHT LEASE TRANSACTION



BOND TRANSACTIONS



APPENDIX B

SECTION 1411 OF THE NEW YORK NOT-FOR-PROFIT CORPORATION LAW

Section 1411. Local Development Corporations

Purposes. This section shall provide an additional and alternate method of incorporation or reincorporation of not for profit corporations for any of the purposes set forth in this paragraph and shall not be deemed to alter, impair or diminish the purposes, rights, powers or privileges of any corporation heretofore or hereafter incorporated under this section or under the stock or business corporation laws. Corporations may be incorporated or reincorporated under this section as not for profit local development corporations operated for the exclusively charitable or public purposes of relieving and reducing unemployment, promoting and providing for additional and maximum employment, bettering and maintaining job opportunities, instructing or training individuals to improve or develop their capabilities for such jobs, carrying on scientific research for the purpose of aiding a community or geographical area by attracting new industry to the community or area or by encouraging the development of, or retention of, an industry in the community or area, and lessening the burdens of government and acting in the public interest, and any one or more counties, cities, towns or villages of the State, or any combination thereof, or the New York job development authority in exercising its power under the public authorities law to encourage the organization of local development corporations, may cause such corporations to be incorporated by public officers or private individuals or reincorporated upon compliance with the requirements of this section, and it is hereby found, determined and declared that in carrying out said purposes and in exercising the powers conferred by paragraph (b) such corporations will be performing an essential governmental function.

Type of corporation. A local development corporation is a Type C corporation under this chapter.

Powers. In furtherance of its purposes set forth in paragraph (a) but not for any other purposes, a local development corporation incorporated or reincorporated under this section shall have the following powers: to construct, acquire, rehabilitate and improve for use by others industrial or manufacturing plants in the territory in which its operations are principally to be conducted, to assist financially in such construction, acquisition, rehabilitation and improvement, to maintain such plants for others in such territory, to disseminate information and furnish advice, technical assistance and liaison with Federal, State and local authorities with respect thereto, to acquire by purchase, lease, gift, bequest, devise or otherwise real or personal property or interests therein, to borrow money and to issue negotiable bonds, notes and other obligations therefore, and notwithstanding § 510 (Disposition of all or substantially all assets) without leave of the court, to sell, lease, mortgage or otherwise dispose of or encumber any such plants or any of its real or personal property or any interest therein upon such terms as it may determine and, in connection with loans from the New York job development authority, to enter into covenants and agreements and to comply with all the terms, conditions and provisions thereof, and otherwise to carry out its corporate purposes and to foster and encourage the location or expansion of industrial or manufacturing plants in the territory in which the operations of such corporation are principally to be conducted, provided, however, that no such corporation shall attempt to influence legislation by propaganda or otherwise, or participate or intervene, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.

Purchase or lease of real property owned by a county, city, town or village.

(i) The local legislative body of a county, city, town or village or, if there is a board of estimate in a city, then the board of estimate, may by resolution determine that specifically described real property owned by the county, city, town or village is not required for use by such county, city, town or village and authorize the county, city, town or village to sell or lease such real property to a local development corporation incorporated or reincorporated under this article; provided, however, that title to such land be not declared inalienable as a forest preserve or a parkland.

(ii) Notwithstanding the provisions of any general, special or local law, charter or ordinance to the contrary, such sale or lease may be made without appraisal, public notice, (except as provided in subparagraph (4)) or public bidding for such price or rental and upon such terms as may be agreed upon between the county, city, town or village and said local development corporation; provided, however, that in case of a lease the term may not exceed ninety nine years and provided, further, that in cities having a population of one million or more, no such sale or lease shall be made without the approval of a majority of the members of the borough improvement board of the borough in which such real property is located.

(iii) Before any sale or lease to a local development corporation incorporated or reincorporated under this article shall be authorized, a public hearing shall be held by the local legislative body, or by the board of estimate, as the case may be, to consider the proposed sale or lease.

(iv) Notice of such hearing shall be published at least 10 days before the date set for the hearing in such publication and in such manner as may be designated by the local legislative body, or the board of estimate as the case may be.

(v) A local development corporation, incorporated or reincorporated under this section, which purchases or leases real property from a county, city, town or village, shall not, without the written approval of the county, city, town or village, use such real property for any purpose except the purposes set forth in the certificate of incorporation or reincorporation of said local development corporation. In the event such real property is used in violation of the restrictions of this paragraph, the attorney general may bring an action or special proceeding to enjoin the unauthorized use.

Certificate of Incorporation. In addition to the requirements of § 402 (Certificate of incorporation; contents) the certificate of incorporation or reincorporation of a local development corporation incorporated or reincorporated under this article shall state: (i) that all income and earnings of such corporation shall be used exclusively for its corporate purposes or accrue and be paid to the New York job development authority; (ii) that no part of the income or earnings of such corporation shall inure to the benefit or profit of, nor shall any distribution of its property or assets be made to any member or private person, corporate or individual, or any other private interest, except that the certificate of incorporation or reincorporation may authorize the repayment of loans and may also authorize the repayment of contributions (other than dues) to the local development corporation but only if and to the extent that any such contribution may not be allowable as a deduction in computing taxable income under the Internal Revenue Code of 1954; and (iii) that if such corporation accepts a mortgage loan or loans from the New York job development authority, such corporation shall be dissolved in accordance with the provisions of paragraph (g) upon the repayment or other discharge in full by such corporation of all such loans.

Exemption of income from taxation. The income and operations of corporations incorporated or reincorporated under this section shall be exempt from taxation.

Dissolution. Upon the dissolution of any local development corporation incorporated or reincorporated under this section no member or private person, corporate or individual, or other private interest, shall be entitled to any distribution or division of its remaining funds and other property and rights and interests in property, and the balance thereof, after the payment of all debts and liabilities of the corporation of whatsoever kind and nature, (including the payment of loans and contributions the repayment of which has been authorized in its certificate of incorporation or reincorporation) shall be distributed to one or more counties, cities, towns or villages within the territory designated in its certificate of incorporation or reincorporation as the territory in which its operations are principally to be conducted, for furtherance of the purposes set forth in paragraph (a), or to the New York job development authority, as shall be provided by said corporation or by order of the supreme court of the State of New York pursuant to § 1008 (Jurisdiction of supreme court to supervise dissolution and liquidation).

Corporations heretofore incorporated. Any corporation heretofore incorporated under the membership corporations law or this chapter, or under the stock or business corporation law for any of the purposes set forth in paragraph (a) of this section may amend its certificate of incorporation and be reincorporated as a local development corporation organized under this section by making and filing in the office of the secretary of state a certificate, stating the name of such corporation, and, if it has been changed, the name under which it was originally incorporated, the date of its incorporation, the names and post office addresses of its members or of the holders of record of all of the outstanding shares of such corporation entitled to vote with relation to the proceedings provided for in the certificate and that such corporation has elected to become and be a local development corporation organized and operated under and by virtue of this section. Such certificate shall be either: (i) subscribed in person or by proxy by all of the members or the holders of record of all of the outstanding shares of such corporation entitled to vote with relation to such proceedings and shall have annexed an affidavit of the secretary or an assistant secretary that the persons who have executed the certificate, in person or by proxy, constitute all of the members or the holders of record of all of the outstanding shares of the corporation entitled to vote with relation to the proceedings provided for in the certificate; or (ii) subscribed by the president or a vice president and the secretary or an assistant secretary and shall have annexed an affidavit of such officers stating that they have been authorized to execute and file such certificate by the votes, cast in person or by proxy, of all of the members or of the holders of record of all of the outstanding shares of such corporation entitled to vote with relation to such proceedings at the meeting at which such votes were cast, and that such votes were cast at a meeting of members or stockholders held on a date specified, upon notice pursuant to § 605 (Notice of meeting of members) or to § 605 of the Business Corporation Law. Every certificate filed under this paragraph shall have endorsed thereon or annexed thereto the approval of a justice of the supreme court of the judicial district in which the office of the corporation is to be located. A reincorporation pursuant to this paragraph shall not effect a dissolution of the corporation, but shall be deemed a continuation of its corporate existence, without affecting its then existing property rights or liabilities, or the liabilities of its members or officers as such, but thereafter it shall have only such rights, powers and privileges, and be subject only to such other duties and liabilities, as a corporation created for the same purposes under this article.

Effect of section. Corporations incorporated or reincorporated under this section shall be organized and operated exclusively for the purposes set forth in paragraph (a), shall have, in addition to the powers otherwise conferred by law, the powers conferred by paragraph (c) and shall be subject to all the restrictions and limitations imposed by paragraph (e) and paragraph (g). In so far as the provisions of this section are inconsistent with the provisions of any other law, general or special, the provisions of this section shall be controlling as to corporations incorporated or reincorporated hereunder.

APPENDIX C

EXCERPTS FROM THE STATE ENVIRONMENTAL QUALITY REVIEW ACT

Section 617.2 Definitions

As used in this Part, unless the context otherwise requires:

"Type I Action" means an action or class of actions identified in § 617.4 of this Part, or in any involved agency's procedures adopted pursuant to § 617.14 of this Part.

"Type II Action" means an action or class of actions identified in § 617.5 of this Part. When the term is applied in reference to an individual agency's authority to review or approve a particular proposed project or action, it shall also mean an action or class of actions identified as Type II Actions in that agency's own procedures to implement SEQR adopted pursuant to § 617.14 of this Part. The fact that an action is identified as a Type II Action in any agency's procedures does not mean that it must be treated as a Type II Action by any other involved agency not identifying it as a Type II Action in its procedures.

"Unlisted Action" means all actions not identified as a Type I or Type II Action in this Part, or, in the case of a particular agency action, not identified as a Type I or Type II Action in the agency's own SEQR procedures.

Section 617.3 General Rules

No agency involved in an action may undertake, fund or approve the action until it has complied with the provisions of SEQR. A project sponsor may not commence any physical alteration related to an action until the provisions of SEQR have been complied with. The only exception to this is provided under paragraphs 617.5(c)(18), (21) and (28) of this Part. An involved agency may not issue its findings and decision on an action if it knows any other involved agency has determined that the action may have a significant adverse impact on the environment until a final EIS has been filed. The only exception to this is provided under subparagraph 617.9(a)(5)(i) of this Part.

SEQR does not change the existing jurisdiction of agencies nor the jurisdiction between or among State and local agencies. SEQR provides all involved agencies with the authority, following the filing of a final EIS and written findings statement, or pursuant to subdivision 617.7(d) of this Part to impose substantive conditions upon an action to ensure that the requirements of this Part have been satisfied. The conditions imposed must be practicable and reasonably related to impacts identified in the EIS or the conditioned negative declaration.

An application for agency funding or approval of a Type I or Unlisted Action will not be complete until:

(1) a negative declaration has been issued; or

(2) until a draft EIS has been accepted by the lead agency as satisfactory with respect to scope, content and adequacy. When the draft EIS is accepted, the SEQR process will run concurrently with other procedures relating to the review and approval of the action, if reasonable time is provided for preparation, review and public hearings with respect to the draft EIS.

The lead agency will make every reasonable effort to involve project sponsors, other agencies and the public in the SEQR process. Early consultations initiated by agencies can serve to narrow issues of significance and to identify areas of controversy relating to environmental issues, thereby focusing on the impacts and alternatives requiring in-depth analysis in an EIS.

Each agency involved in a proposed action has the responsibility to provide the lead agency with information it may have that may assist the lead agency in making its determination of significance, to identify potentially significant adverse impacts in the scoping process, to comment in a timely manner on the EIS if it has concerns which need to be addressed and to participate, as may be needed, in any public hearing. Interested agencies are strongly encouraged to make known their views on the action, particularly with respect to their areas of expertise and jurisdiction.

No SEQR determination of significance, EIS or findings statement is required for actions which are Type II.

Actions commonly consist of a set of activities or steps. The entire set of activities or steps must be considered the action, whether the agency decision-making relates to the action as a whole or to only a part of it.

(1) Considering only a part or segment of an action is contrary to the intent of SEQR. If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance, and any subsequent EIS, the supporting reasons and must demonstrate that such review is clearly no less protective of the environment. Related actions should be identified and discussed to the fullest extent possible.

(2) If it is determined that an EIS is necessary for an action consisting of a set of activities or steps, only one draft and one final EIS need be prepared on the action provided that the statement addresses each part of the action at a level of detail sufficient for an adequate analysis of the significant adverse environmental impacts. Except for a supplement to a generic environmental impact statement (<u>See</u> subdivision 617.10(d) of this Part), a supplement to a draft or final EIS will only be required in the circumstances prescribed in paragraph 617.9(a)(7) of this Part.

Agencies must carry out the terms and requirements of this Part with minimum procedural and administrative delay, must avoid unnecessary duplication of reporting and review requirements by providing, where feasible, for combined or consolidated proceedings, and must expedite all SEQR proceedings in the interest of prompt review.

Time periods in this Part may be extended by mutual agreement between a project sponsor and the lead agency, with notice to all other involved agencies by the lead agency.

<u>Section 617.4 Type I Actions</u>

The purpose of the list of Type I Actions in this section is to identify, for agencies, project sponsors and the public, those actions and projects that are more likely to require the preparation of an EIS than Unlisted Actions. All agencies are subject to this Type I list.

(i) This Type I list is not exhaustive of those actions that an agency determines may have a significant adverse impact on the environment and require the preparation of an EIS. However, the fact that an action or project has been listed as a Type I Action carries with it the presumption that it is likely to have a significant adverse impact on the environment and may require an EIS. For all individual actions which are Type I or Unlisted, the determination of significance must be made by comparing the impacts which may be reasonably expected to result from the proposed action with the criteria listed in subdivision 617.7(c) of this Part.

(ii) Agencies may adopt their own lists of additional Type I Actions, may adjust the thresholds to make them more inclusive, and may continue to use previously adopted lists of Type I Actions to complement those contained in this section. Designation of a Type I Action by one involved agency requires coordinated review by all involved agencies. An agency may not designate as Type I any action identified as Type II in § 617.5 of this Part.

The following actions are Type I if they are to be directly undertaken, funded or approved by an agency:

(1) the adoption of a municipality's land use plan, the adoption by any agency of a comprehensive resource management plan or the initial adoption of a municipality's comprehensive zoning regulations;

(2) the adoption of changes in the allowable uses within any zoning district, affecting 25 or more acres of the district;

(3) the granting of a zoning change, at the request of an applicant, for an action that meets or exceeds one or more of the thresholds given elsewhere in this list;

(4) the acquisition, sale, lease, annexation or other transfer of 100 or more contiguous acres of land by a state or local agency;

(5) construction of new residential units that meet or exceed the following thresholds:

(i) units in municipalities that have not adopted zoning or subdivision regulations;

(ii) units not to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewerage treatment works;

(iii) in a city, town or village having a population of less than 150,000, 250 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewerage treatment works;

(iv) in a city, town or village having a population of greater than 150,000 but less than 1,000,000, 1,000 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works; or

(v) in a city or town having a population of greater than 1,000,000, 2,500 units to be connected (at the commencement of habitation) to existing community or public water and sewerage systems including sewage treatment works;

(6) activities, other than the construction of residential facilities, that meet or exceed any of the following thresholds; or the expansion of existing nonresidential facilities by more than 50% of any of the following thresholds:

(i) a project or action that involves the physical alteration of 10 acres;

(ii) a project or action that would use ground or surface water in excess of 2,000,000 gallons per day;

(iii) parking for 1,000 vehicles;

(iv) in a city, town or village having a population of 150,000 persons or less, a facility with more than 100,00 square feet of gross floor area;

(v) in a city, town or village having a population of more than 150,000 persons, a facility with more than 240,000 square feet of gross floor area;

(7) any structure exceeding 100 feet above original ground level in a locality without any zoning regulation pertaining to height;

(8) any Unlisted Action that includes a nonagricultural use occurring wholly or partially within an agricultural district (certified pursuant to Agriculture and Markets Law, article 25-AA, § 303 and 304) and exceeds 25% of any threshold established in this section;

(9) any Unlisted Action (unless the action is designed for the preservation of the facility or site) occurring wholly or partially within, or substantially contiguous to, any historic building, structure, facility, site or district or prehistoric site that is listed on the National Register of Historic Places, or that has been proposed by the New York State Board on Historic Preservation for a recommendation to the State Historic Preservation Officer for nomination for inclusion in the National Register, or that is listed on the State Register of Historic Places (The National Register of Historic Places is established by 36 CFR Parts 60 and 63, 1994 (See § 617.17 of this Part);

(10) any Unlisted Action, that exceeds 25% of any threshold in this section, occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space, including any site on the Register of National Natural Landmarks pursuant to 36 CFR Part 62, 1994 (See § 617.17 of this Part); or

(11) any Unlisted Action that exceeds a Type I threshold established by an involved agency pursuant to § 617.14 of this Part.

Section 617.5 Type II Actions

Actions or classes of actions identified in subdivision (c) of this section are not subject to review under this Part. These actions have been determined not to have a significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8. The actions identified in subdivision (c) of this section apply to all agencies.

Each agency may adopt its own list of Type II Actions to supplement the actions in subdivision (c) of this section. No agency is bound by an action on another agency's Type II list. An agency that identifies an action as not requiring any determination or procedure under this Part is not an involved agency. Each of the actions on an agency Type II list must:

(1) in no case, have a significant adverse impact on the environment based on the criteria contained in subdivision 617.7(c) of this Part; and

(2) not be a Type I Action as defined in § 617.4 of this Part.

(3) The following actions are not subject to review under this Part:

(4) maintenance or repair involving no substantial changes in an existing structure or facility;

(5) replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings to meet building or fire codes, unless such action meets or exceeds any of the thresholds in § 617.4 of this Part;

(6) agricultural farm management practices, including construction, maintenance and repair of farm buildings and structures, and land use changes consistent with generally accepted principles of farming;

(7) repaving of existing highways not involving the addition of new travel lanes;

(8) street openings and right-of-way openings for the purpose of repair or maintenance of existing utility facilities;

(9) maintenance of existing landscaping or natural growth;

(10) construction or expansion of a primary or accessory/appurtenant, non residential structure or facility involving less than 4,000 square feet of gross floor area and not involving a change in zoning or a use variance and consistent with local land use controls, but not radio communication or microwave transmission facilities;

(11) routine activities of educational institutions, including expansion of existing facilities by less than 10,000 square feet of gross floor area and school closings, but not changes in use related to such closings;

(12) construction or expansion of a single-family, a two-family or a three-family residence on an approved lot including provision of necessary utility connections as provided in paragraph (11) and the installation, maintenance and/or upgrade of a drinking water well and a septic system;

(13) construction, expansion or placement of minor accessory/appurtenant residential structures, including garages, carports, patios, decks, swimming pools, tennis courts, satellite dishes, fences, barns, storage sheds or other buildings not changing land use or density;

(14) extension of utility distribution facilities, including gas, electric, telephone, cable, water and sewer connections to render service in approved subdivisions or in connection with any action on this list;

(15) granting of individual setback and lot line variances;

(16) granting of an area variance(s) for a single-family, two-family or three-family residence;

(17) public or private best forest management (silvicultural) practices on less than 10 acres of land, but not including waste disposal, land clearing not directly related forest management, clear-cutting or the application of herbicides or pesticides;

(18) minor temporary uses of land having negligible or no permanent impact on the environment;

(19) installation of traffic control devices on existing streets, roads and highways;

(20) mapping of existing roads, streets, highways, natural resources, land uses and ownership patterns;

(21) information collection including basic data collection and research, water quality and pollution studies, traffic counts, engineering studies, surveys, subsurface investigations and soils studies that do not commit the agency to undertake, fund or approve any Type I or Unlisted Action;

(22) official acts of a ministerial nature involving no exercise of discretion, including building permits and historic preservation permits where issuance is predicated solely on the applicant's compliance or noncompliance with the relevant local building or preservation code(s);

(23) routine or continuing agency administration and management, not including new programs or major reordering of priorities that may affect the environment;

(24) conducting concurrent environmental, engineering, economic, feasibility and other studies and preliminary planning and budgetary processes necessary to the formulation of a proposal for action, provided those activities do not commit the agency to commence, engage in or approve such action;

(25) collective bargaining activities;

(26) investments by or on behalf of agencies or pension or retirement systems, or refinancing existing debt;

(27) inspections and licensing activities relating to the qualifications of individuals or businesses to engage in their business or profession;

(28) purchase or sale of furnishings, equipment or supplies, including surplus government property, other than the following: land, radioactive material, pesticides, herbicides, or other hazardous materials;

(29) license, lease and permit renewals, or transfers of ownership thereof, where there will be no material change in permit conditions or the scope of permitted activities;

(30) adoption of regulations, policies, procedures and local legislative decisions in connection with any action on this list;

(31) engaging in review of any part of an application to determine compliance with technical requirements, provided that no such determination entitles or permits the project sponsor to commence the action unless and until all requirements of this Part have been fulfilled;

(32) civil or criminal enforcement proceedings, whether administrative or judicial, including a particular course of action specifically required to be undertaken pursuant to a judgment or order, or the exercise of prosecutorial discretion;

(33) adoption of a moratorium on land development or construction;

(34) interpreting an existing code, rule or regulation;

(35) designation of local landmarks or their inclusion within historic districts;

(36) emergency actions that are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance, practicable under the circumstances, to the environment. Any decision to fund, approve or directly undertake other activities after the emergency has expired is fully subject to the review procedures of this Part;

(37) actions undertaken, funded or approved prior to the effective dates set forth in SEQR (See Chapters 228 of the Laws of 1976, 253 of the Laws of 1977 and 460 of the Laws of 1978), except in the case of an action where it is still practicable either to modify the action in such a way as to mitigate potentially adverse environmental impacts, or to choose a feasible or less environmentally damaging alternative, the commissioner may, at the request of any person, or on his or her own motion, require the preparation of an environmental impact statement; or, in the case of an action where the responsible agency proposed a modification of the action and the modification may result in a significant adverse impact on the environment, an environmental impact statement must be prepared with respect to such modification;

(38) actions requiring a certificate of environmental compatibility and public need under articles VII, VIII or X of the Public Service Law and the consideration of, granting or denial of any such certificate;

(39) actions subject to the class A or class B regional project jurisdiction of the Adirondack Park Agency or a local government pursuant to § 807, 808 and 809 of the Executive Law, except class B regional projects subject to review by local government pursuant to § 807 of the Executive Law located within the Lake George Park as defined by subdivision one of § 43-0103 of the Environmental Conservation Law; and

(40) actions of the Legislature and the Governor of the State of New York or of any court, but not actions of local legislative bodies except those local legislative decisions such as rezoning where the local legislative body determines the action will not be entertained.

APPENDIX D

A. EXCERPTS FROM THE OPEN MEETINGS LAW*

Section 102 Definitions

As used in this article:

"Meeting" means the official convening of a public body for the purpose of conducting public business including the use of videoconferencing for attendance and participation by the members of the public body.

"Public body" means any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in § 66 of the general construction law, or committee or subcommittee or other similar body of such public body.

"Executive session" means that portion of a meeting not open to the general public.

Section 103 Open Meetings and Executive Sessions

Every meeting of a public body shall be open to the general public, except that an executive session of such body may be called and business transacted thereat in accordance with Section 95* of this article.

Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of § 50 of the public buildings law.

A public body that uses videoconferencing to conduct its meetings shall provide an opportunity for the public to attend, listen and observe at any site at which a member participates.

Section 104 Public Notice

Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting.

Public notice of the time and place of every other meeting shall be given to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

The public notice provided for by this section shall not be construed to require publication as a legal issue.

If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that the videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations.

*** This information is taken from the New York State handbook entitled "Your Right to Know: New York State's Open Government Laws."**

B. INFORMATION ON THE OPEN MEETINGS LAW*

The Open Meetings or "Sunshine" Law went into effect in New York in 1977. Amendments that clarify and reaffirm your right to hear the deliberations of public bodies became effective on October 1, 1979. In brief, the law gives the public the right to attend meetings of public bodies, listen to the debates and watch the decision making process in action. As stated in the legislative declaration in the Open Meetings Law (Section 100): "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this State be fully aware of and able to observe the performance of public officials and attend listen to the deliberations and decisions that go into the making of public policy."

1. What is a "Meeting"?

Although the definition of "meeting" was vague as it appeared in the original law, the amendments to the law clarify the definition in conjunction with expansive interpretations of the law given by the courts. "Meeting" is defined to mean "the official convening of a public body for the purpose of conducting public business including the use of video conferencing for attendance and participation by the members of the public body." As such, any time a quorum of a public body gathers for the purpose of discussing public business, the meeting must be convened open to the public, whether or not there is an intent to take action, and regardless of the manner in which the gathering may be characterized.

Since the law applies to "official" meetings, chance meetings or social gatherings are not covered by the law. Also, the law is silent with respect to public participation. Therefore, a public body may permit you to speak at open meetings, but is not required to do so.

2. What is Covered by the Law?

The law applied to all public bodies. "Public body" is defined to cover entities consisting of two or more people that conduct public business and perform a governmental function for the State, for an agency of the State, or for public corporations, including cities, counties, towns, villages and school districts, for example. In addition, committees and subcommittees are specifically included within the definition. Consequently, city councils, town boards, village boards of trustees, school boards, commissions, legislative bodies and committees and subcommittees of those groups all fall within the framework of the law.

3. Notice of Meetings

The law requires that notice of the time and place of all meetings be given prior to every meeting. If a meeting is scheduled at least a week in advance, notice must be given to the public and the news media not less than 72 hours prior to the meeting. Notice to the public must be accomplished by posting in one or more designated public locations. When a meeting is scheduled less than a week in advance, notice must be given to the public and the news media "to the extent practicable" at a reasonable time prior to the meeting. Again, notice to the public must be given by means of posting.

4. When Can a Meeting be Closed?

The law provides for closed or "executive" sessions under circumstances prescribed in the law. It is important to emphasize that an executive session is not separate from an open meeting, but rather is defined as a portion of an open meeting during which the public may be excluded.

*** This information is taken from the New York State handbook entitled "Your Right to Know: New York State's Open Government Laws."**

To close a meeting for executive session, the law requires that a public body take several procedural steps. First, a motion must be made during an open meeting to enter into executive session; second, the motion must identify "the general area or areas of the subject or subjects to be considered"; and third, the motion must be carried by a majority vote of the total membership of a public body.

Further, a public body cannot close its doors to the public to discuss the subject of its choice, for the law specifies and limits the subject matter that may appropriately be discussed in executive session. The eight subjects that may be discussed behind closed doors include:

(1) matters which will imperil the public safety if disclosed;

(2) any matter which may disclose the identity of a law enforcement agency or informer;

(3) information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;

(4) discussions regarding proposed, pending or current litigation;

(5) collective negotiations pursuant to Article 14 of the Civil Service Law (the Taylor Law);

(6) the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation;

(7) the preparation, grading or administration of examinations; and

(8) the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

These are the only subjects that may be discussed behind closed doors; all other deliberations must be conducted during open meetings. It is important to point out that a public body can never vote to appropriate public monies during a closed session. Therefore, although most public bodies may vote during a properly convened executive session, any vote to expend public monies must be taken in public. The law also states that an executive session can be attended by members of the public body and any other persons authorized by the public body.

5. After the Meeting – Minutes

If you cannot attend a meeting, you can still find out what actions were taken, because the Open Meetings Law requires that minutes of both open meetings and executive sessions must be compiled and made available. Minutes of an open meeting must consist of "a record or summary of all motions, proposals, resolutions and any matter formally voted upon and the vote thereon." Minutes of executive sessions must consist of "a record or summary of the final determination" of action that was taken, "and the date and vote thereon." Therefore, if, for example, a public body merely discusses a matter during executive session, but takes no action, minutes of an executive session need not be compiled. However, if action is taken, minutes of the action taken must be compiled and made available.

It is also important to point out that the Freedom of Information Law requires that a voting record must be compiled that identifies how individual members voted in every instance in which a vote is taken.

Consequently, minutes that refer to a four to three vote must also indicate who voted in favor, and who voted against.

6. Enforcement of the Law

What can be done if a public body holds a secret meeting? What if a public body makes a decision during an executive session that should have been open? Any "aggrieved" person can bring a lawsuit. Since the law says that meetings are open to the general public, you would be aggrieved if you feel that you have been improperly excluded from a meeting or if you believe that an executive session was held that should have been open.

Upon the judicial challenge, a court has the power to nullify action taken by a public body in violation of the law "upon good cause shown." In addition, a court also has the authority to award reasonable attorney fees to the successful party. This means that if you go to court and you win, a court may (but need not) reimburse you for your expenditure of legal fees.

It is noted that an unintentional failure to fully comply with the notice requirements "shall not alone be grounds for invalidating action taken at a meeting of a public body."

7. The Site of Meetings

As specified earlier, all meetings of a public body are open to the general public. Moreover, the law requires that public bodies make reasonable efforts to insure that meetings are held in facilities that permit "barrier free physical access" to physically handicapped persons.

8. Exemptions from the Law

The Open Meetings Law does not apply to:

(1) judicial or quasi-judicial proceedings, except proceedings or zoning boards of appeals;

(2) deliberations of political committees, conference and caucuses; or

(3) matters made confidential by Federal or State law.

Stated differently, the law does not apply to proceedings before a court or before a public body that acts in the capacity of a court, to political caucuses, or to discussions concerning matters that might be made confidential under other provisions of law. For example, Federal law requires that records identifying students be kept confidential. As such, a discussion of records by a school board regarding a particular student would constitute a matter made confidential by Federal law that would be exempt from the Open Meetings Law.

APPENDIX E

A. INFORMATION CONCERNING THE FREEDOM OF INFORMATION LAW*

The Freedom of Information Law, effective January 1, 1978, reaffirms your right to know how your government operates. If provides rights of access to records reflective of governmental decisions and policies that affect the lives of every New Yorker. The law preserves the Committee on Open Government, which was created by enactment of the original Freedom of Information Law in 1974. Legislation approved by Governor Paterson and effective August 7, 2008 (Chapter 223) amended the Freedom of Information Law (FOIL) and clarified several of its provisions. The amendments reflect the realities of advances in information technology, as well as judicial determinations and advisory opinions prepared by the Committee on Open Government. The 2008 amendments also provide guidance to agencies and the public concerning the costs associated with providing access to information that is maintained electronically.

1. Scope of the Law

The law defines ‘agency” to include all units of State and local government in New York State, including any State or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the State or anyr one or more units of local government (§ 86(3)).

The term “agency” does not include the State Legislature or the courts. As such, for purposes of clarity, “agency” will be used hereinafter to include all entities of government in New York, except the State Legislature and the courts, both of which will be discussed later.

2. What is a Record?

The law defines “record” as “any information kept, held, filed, produced or reproduced by, with or for an agency of the State Legislature, in any physical form whatsoever...” (§ 86(4)). Thus it is clear that items such as tape recordings, microfilm and computer discs fall within the definition of “record.”

3. Accessible Records

The original statute granted rights of access to nine specified categories of records to the exclusion of all others. Therefore, unless a record conformed to one of the categories of accessible records, it was presumed deniable.

The current law, reversing that presumption, states that all records are accessible, except records or portions of records that fall within one of nine categories of deniable records (§ 87(2)).

Deniable records include records or portions thereof that:

(1) are specifically exempted from disclosure by State or Federal statute;

(2) would if disclosed result in an unwarranted invasion of personal privacy;

(3) would if disclosed impair present or imminent contract awards or collective bargaining negotiations;

(4) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;

(5) are compiled for law enforcement purposes and which if disclosed would:

(1) interfere with law enforcement investigations or judicial proceedings;

*** This information is taken from the New York State handbook entitled "Your Right to Know: New York State's Open Government Laws."**

(2) deprive a person of a right to a fair trial or impartial adjudication;

(3) identify a confidential source or disclose confidential information relative to a criminal investigation; or

(4) reveal criminal investigative techniques or procedures, except routine techniques and procedures, if disclosed could endanger the life or safety of any person, are inter-agency or intra-agency communications materials which are not:

(1) statistical or factual tabulations or data;

(2) instructions to staff that affect the public;

(3) final agency policy or determinations; or

(4) external audits, including but not limited to audits performed by the comptroller and the Federal government; or

(5) are examination questions or answers that are requested prior to the final administration of such questions; or,

(6) if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or

(7) are photographs, microphotographs, videotape or other recorded images prepared under authority of § 1111-a of the vehicle and traffic law [Eff. Until Dec. 1, 2009].

The categories of deniable records are generally directed to the effects of disclosure. They are based in great measure upon the notion that disclosure would in some instances "impair," "cause substantial injury," "interfere," "deprive," "endanger," etc. This represents a significant change from the thrust of the original enactment.

One category of deniable records that does not deal directly with the effects of disclosure is the exception, which deals with inter-agency and intra-agency materials. The intent of the exception is twofold. Memoranda or letters transmitted from an official of one agency to an official of another or between officials within an agency may be denied, so long as the communications (or portions thereof) are advisory in nature and do not contain information upon which the agency relies in carrying out its duties. For example, an opinion prepared by staff which may be rejected or accepted by the head of an agency need not be made available. However, the facts, policies and determinations upon which an agency relies in carrying out its duties should be made available.

There are also special provisions in the law regarding the protection of trade secrets. Those provisions pertain only to State agencies and enable a person submitting records to State agencies to request that records be kept separate and apart from all other agency records on the ground that they constitute trade secrets. In addition, when a request is made for records characterized as trade secrets, the submitter of such records is given notice and an opportunity to justify a claim that the records would if disclosed result in substantial injury to his or her competitive position. A member of the public requesting records characterized as trade secrets or a State agency at any time may challenge a claim that records constitute trade secrets.

Generally, the law provides access to existing records. Nevertheless, each agency must compile the following records (§ 87(3)):

a record of the final vote of each member in every agency proceeding in which the member votes;

a record setting forth the name, public office address, title and salary of every officer or employee of the agency; and,

a reasonably detailed current list by subject matter of all records in possession of an agency, whether or not the records are accessible.

4. Production of Records

With respect to the production of records, § 87 (5)(a) now requires an agency to furnish records in the medium requested and precludes the agency from any encrypting records provided in computer format. Further, amendments to § 89(3)(a) of FOIL state that an agency shall not deny a request due to insufficient staff or other basis, if an outside service can be retained to accommodate the requestor, and if the requestor agrees to pay the actual cost of reproducing the records. Newly added § 87(5) requires an agency to "provide records on the medium requested…if the agency can reasonably make such a copy." It also specifies that records provided in computer format shall not be encrypted.

Section 89(3) of FOIL had historically provided that FOIL pertains to existing records and does not require that an agency create a record in response to a request. Section 89(3) now provides that "any programming necessary to retrieve a record maintained in a computer storage system and to transfer that record to the medium requested…or to allow the transferred record to be read or printed shall not be deemed to be the preparation or creation of a new record." Therefore, if a request reasonably describes records or data maintained electronically, and when extracting the data with new programming is more efficient than manual retrieval or redactions from non-electronic records, the agency is required to do so. Section 87(5)(b) also prohibits an agency from entering into or renewing a contract to create or maintain records if such a contract will impair public inspection or copying.

5. Protection of Privacy

One of the exceptions to rights of access, referred to earlier, states that records may be withheld when disclosure would result in "an unwarranted invasion of personal privacy" (§ 87(2)(b)). Unless otherwise deniable, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy when identifying details are deleted, when the person to whom a record pertains consents in writing to disclosure, or when upon presenting reasonable proof of identity, a person seeks access to records pertaining to him or her. Section 89(2)(b) includes examples of instances in which records or portions of records may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." Section 89(2)(c) declares that inspecting or copying property record inventory (as it relates to the right, title, or interest in real property) is not an invasion of privacy. In addition, when a list of names and addresses is sought, an agency may require the applicant for such a list to "provide a written certification" that the list will not be used or made available to any other person for the purpose of engaging in solicitation or fund-raising.

6. How To Obtain Records

Subject Matter List. As noted earlier, each agency must maintain a "subject matter list." The list is not a compilation of every record an agency has in its possession, but rather is a list of the subjects or file categories under which records are kept. It must make reference to all records in possession of an agency, whether or not the records are available. You have a right to know the kinds of records agencies maintain. The subject matter list must be compiled in sufficient detail to permit you to identify the file category of the records sought. Furthermore, § 87(3)(c) now requires agencies to update annually the subject matter list and the date shown on the most recent update. Section 87(3)(c) also directs each agency having a website to post the subject matter list on the website, and those without a website to arrange to have the subject matter list posted on the website of the Committee on Open Government.

Regulations. Each agency must adopt standards based upon general regulations issued by the committee. These procedures describe how you can inspect and copy records. The committee will provide a copy of its regulations on request.

Designation of Records Access Officer. Under the regulations, a records access officer (or officers) must be appointed to coordinate an agency's response to public requests for records. The records access officer is responsible for keeping the subject matter list up to date, assisting you in identifying records sought, making the records promptly available or denying access, providing copies of records or permitting you to make copies, certifying that a copy is a true copy and, if the records cannot be found, certifying either that the agency does not have possession of the requested records or that the agency does have the records, but they cannot be found after diligent search. The regulations also state that the public shall continue to have access to records through officials who have been authorized previously to make information available.

Requests for Records. An agency may ask you to make your request in writing. The law merely requires you to "reasonably describe" the record in which you are interested (§ 89(3)). The responsibility of identifying and locating records sought rests to an extent upon the agency. However, if possible, you should supply dates, titles, file designations, or any other information that will help to find requested records.

Within five business days of the receipt of a written request for a record reasonably described, the agency must make the record available, deny access in writing giving the reasons for denial, or furnish a written acknowledgment of receipt of the request and a statement of the approximate date when the request will be granted or denied.

Fees. Copies of records must be made available on request. Except when a different fee is prescribed by statute, an agency may not charge for inspection, certification or search for records, or charge in excess of 25 cents per photocopy up to 9 by 14 inches (§ 87(1)(b)(iii)). Fees for copies of other records may be charged based upon the actual cost of reproduction. If an agency has no photocopying equipment, a transcript of records can be made on request. However, you may be charged for the clerical time involved.

A new § 87(1)(c) for the first time defines the basis for determining the actual cost of reproducing records maintained electronically.

However, where substantial time is needed to prepare a copy (defined in the statute as at least two hours of an employee's time) the FOIL permits an agency to now charge a fee based on the cost of the storage medium used, as well the hourly salary of the lowest paid employee who has the skill needed to do so. Specifically, § 87(1)(b)(iii) of FOIL now requires the agency to prescribe the "actual cost" of reproducing the records. Section 87(c) excludes from "actual cost" any search time or administrative time and precludes charging a fee for preparing the copy unless it takes at least two hours. Section 87(c) also requires the agency to inform the requestor of the estimated cost of preparing a copy of a record if more than two hours of employee time are needed or if the agency engages outside assistance in preparing the record.

Additionally, § 89(3) precludes an agency from claiming the records are voluminous or that it lacks adequate staff if the agency may engage outside professional services to provide copying, programming or other services required to provide the copy, the costs of which the agency may recover as "actual cost."

Denial of Access and Appeal. A denial of access must be in writing, stating the reason for the denial and advising you of your right to appeal to the head or governing body of the agency or the person designated to hear appeals by the head or governing body of the agency. You may appeal within 30 days of a denial.

Upon receipt of the appeal, the agency head, governing body or appeals officer has 10 business days to fully explain in writing the reasons for further denial of access or to provide access to the records. Copies of all appeals and the determinations thereon must be sent by the agency to the Committee on Open Government (§ 89(4)(a)). This requirement will enable the committee to monitor compliance with the law and intercede when a denial of access may be improper.

You may seek judicial review of a final agency denial by means of a proceeding initiated under Article 78 of the Civil Practice Law and Rules. When a denial is based upon one of the exceptions to rights of access that were discussed earlier, the agency has the burden of proving that the record sought falls within one or more of the exceptions (§ 89(4)(b)).

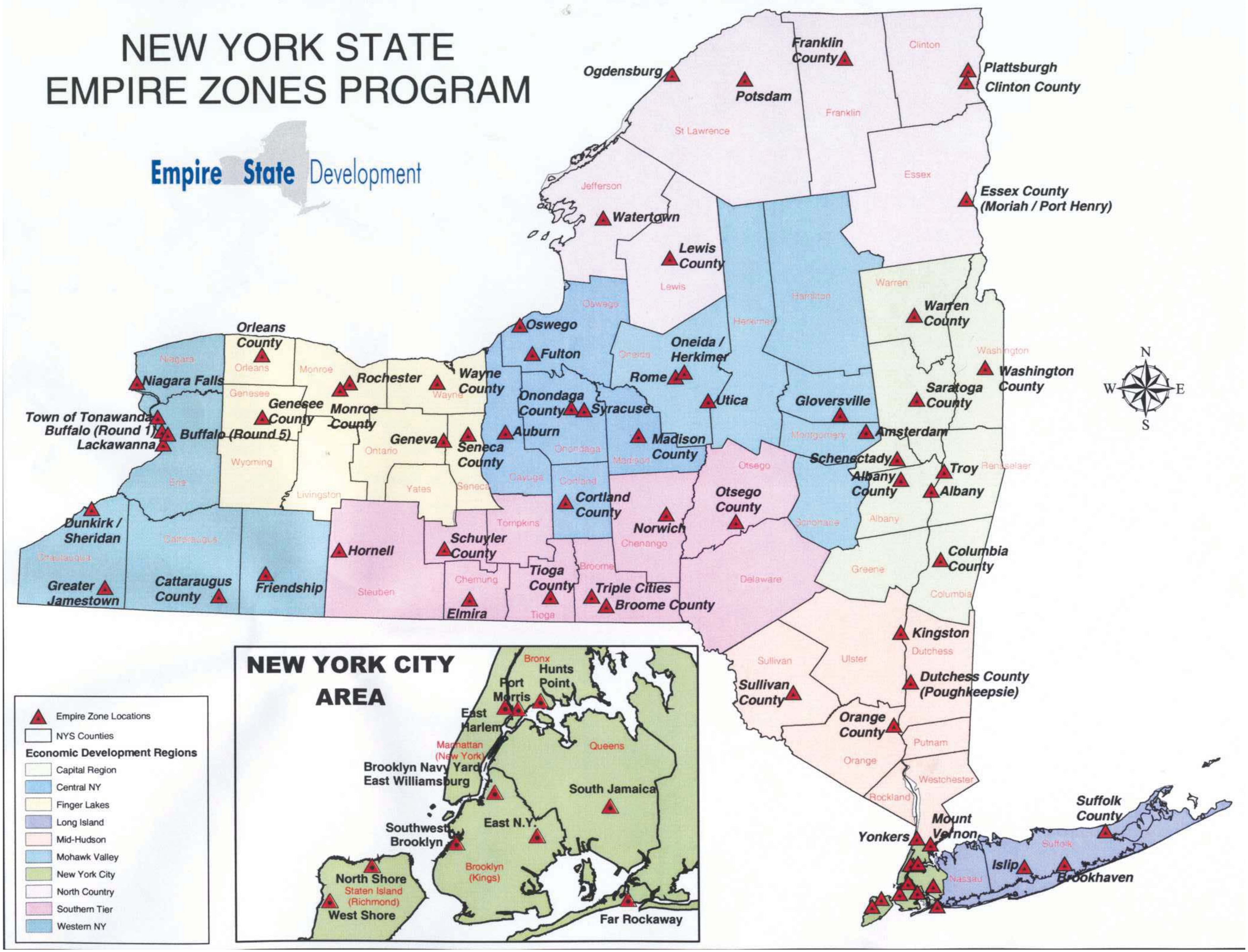
The Freedom of Information Law permits a court, in its discretion, to award reasonable attorney's fees when a person challenging a denial of access to records in court substantially prevails. To award attorney's fees, a court must find that the record was of "clearly significant interest to the general public" and that the agency "lacked a reasonable basis of law for withholding the record." While a court may award attorney's fees, such an award is not mandatory.

Public Notice. The regulations require that each agency post conspicuously and/or publicize in a local newspaper:

(1) locations where records are made available;

(2) the name, title, business address and telephone number of the records access officer; and

(3) the right to appeal a denial of access and the name and business address of the person or body to whom appeals should be directed.


NEW YORK STATE
EMPIRE ZONES PROGRAM
Empire State Development
Ogdensburg
Potsdam
Franklin County
Plattsburgh
Clinton County
Essex County (Moriah / Port Henry)
Watertown
Lewis County
Warren County
Washington County
Saratoga County
Oswego
Fulton
Oneida / Herkimer
Rome
Utica
Gloversville
Amsterdam
Schenectady
Albany County
Troy
Albany
Orleans County
Niagara Falls
Rochester
Wayne County
Genesee County
Monroe County
Onondaga County
Syracuse
Town of Tonawanda
Buffalo (Round 1)
Lackawanna
Buffalo (Round 5)
Geneva
Seneca County
Auburn
Madison County
Cortland County
Norwich
Otsego County
Columbia County
Dunkirk / Sheridan
Greater Jamestown
Cattaraugus County
Friendship
Hornell
Schuyler County
Elmira
Tioga County
Triple Cities
Broome County
Kingston
Dutchess County (Poughkeepsie)
Sullivan County
Orange County
Yonkers
Mount Vernon
Suffolk County
Islip
Brookhaven
NEW YORK CITY AREA
Bronx
Hunts Point
Port Morris
East Harlem
Manhattan (New York)
Queens
Brooklyn Navy Yard
East Williamsburg
South Jamaica
Southwest Brooklyn
East N.Y.
North Shore
Staten Island (Richmond)
West Shore
Brooklyn (Kings)
Far Rockaway
Empire Zone Locations
NYS Counties
Economic Development Regions
Capital Region
Central NY
Finger Lakes
Long Island
Mid-Hudson
Mohawk Valley
New York City
North Country
Southern Tier
Western NY
N
S
E
W

HARRIS BEACH PLLC
ATTORNEYS AT LAW

ALBANY
677 Broadway, Suite 1101
Albany, NY 12207
(518) 427-9700

Joseph Amicone
Kevin Bezio
Brendan F. Chudy
William M. Flynn
Justin S. Miller
Hal C. Patrick
Robert J. Ryan
Karl J. Sleight

George E. Leveille *(Fiscal and Community Advisor)*

BUFFALO
Larkin at Exchange
726 Exchange Street, Suite 1000
Buffalo, NY 14210
(716) 200-5050

Gerald J. Greenan
Timothy J. Greenan
Shawn M. Griffin
Herbert J. Heimerl, Jr.
Pietra G. Lettieri
Robert Murray
R. J. Stapell

Marybeth Clark *(Paralegal)*
Mary Beth Doyle *(Paralegal)*

ITHACA
119 East Seneca Street
Ithaca, NY 14850
(607) 273-6444

Edward C. Hooks
Mark G. Masler
Mark B. Wheeler

LOCKPORT
172 East Avenue
P.O. Box 1230
Lockport, NY 14095
(716) 438-0488

John J. Ottaviano

NEW YORK CITY
100 Wall Street
New York, NY 10005
(212) 687-0100

Doron M. Bar-Levav
H. Todd Bullard
Governor Hugh L. Carey
Michael G. Carey
Kevin T. Hyland

NIAGARA FALLS
800 Main Street, 4th Floor, Suite B
P.O. Box 712
Niagara Falls, NY 14302
(716) 285-1535

Kyle Andrews
Mark J. Gabriele

Melinda I. Boesken *(Paralegal)*

ROCHESTER
99 Garnsey Road
Pittsford, NY 14534
(585) 419-8800

Christopher A. Andreucci
Gunther K. Buerman
H. Todd Bullard
Marybeth E. Frantz
Russell E. Gaenzle
Shawn M. Griffin
Patrick M. Malgieri
Linda Oldfield
Munesh Patel
Frank C. Pavia
Joseph D. Picciotti
Charles I. Schachter
Philip G. Spellane
Michael J. Townsend

Roberta Jordans *(Mgr. Economic Development)*
Richard E. Rising *(Mgr. Economic Development)*

Amy Abbink *(Paralegal)*
Mary Beth Doyle *(Paralegal)*
Alex Neubert *(Paralegal)*
Lori A. Palmer *(Paralegal)*

The Granite Building
130 East Main Street
Rochester, NY 14604
(585) 419-8800

SARATOGA
358 Broadway, Suite 307
Saratoga Springs, NY 12866
(518) 587-0551

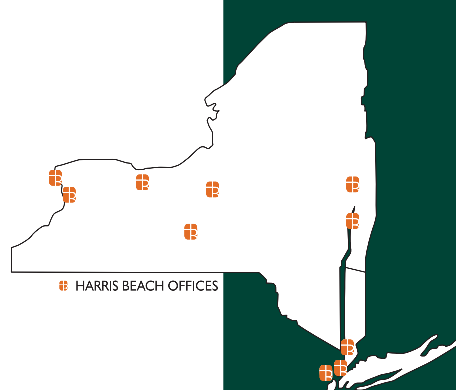
Joseph Amicone
Justin S. Miller
Brendan F. Chudy

SYRACUSE
300 South State Street
Syracuse, NY 13202
(315) 423-7100

Timothy A. Frateschi
Anthony P. Marshall

YONKERS
470 Nepperhan Avenue, Suite 320
Yonkers, NY 10701
(914) 729-0263

Shawn M. Griffin
David M. Rothman



PublicFinBook rev. 7.1.2009