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AN INTRODUCTION
TO
INDUSTRIAL DEVELOPMENT AGENCIES
IN NEW YORK STATE

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AN INTRODUCTION TO INDUSTRIAL DEVELOPMENT AGENCIES IN NEW YORK STATE

I. Introduction

A. General. An Industrial Development Agency (each, an "Agency") is a public benefit corporation of the State of New York (the "State"). An Agency is formed by special act of the New York State Legislature (the "Special Act") adopted by the State following a "home rule" request from the sponsoring municipality (i.e., a city, town, village or county, the "Sponsor"). An Agency is created for the benefit of the Sponsor. The Special Act will provide that for the method of appointment of the members of the Agency. Usually, the Special Act provides that either the governing body (i.e., legislative body) or the chief executive officer of the Sponsor appoints the members of the Agency. The Special Act also provides that the Agency is subject in all respects to the provisions of the general act (the New York State Industrial Development Agency Act, codified as Title 1 of Article 18-A of the New York General Municipal Law, hereinafter called the "Act"), except as otherwise provided in the Special Act.

B. Composition and Control. Under §856(2) of the Act, an industrial development agency may have a minimum of 3 members and a maximum of 7 members, unless a greater number is specified in the Special Act. Pursuant to §856(2) of the Act, the members of the Agency serve at the pleasure of the appointing authority.

C. Powers. The Special Act usually provides that the Agency shall have all the powers set out in the Act. The Act grants to an Agency extensive powers, including the following: the power to own real and personal property for its corporate purposes; the power to condemn real property; to lease, sell or otherwise dispose of its properties; to accept gifts, grants or loans from the federal, state or local government or agency or any corporation or other legal entity; and to borrow money and issue debt.

D. Types of Agency Projects. The Agency undertakes projects either on its own behalf ("Agency Projects"), or for the benefit of an applicant ("Applicant Projects"). Applicant Projects may be either "bond" projects (i.e., involving Agency debt) or "straight-lease" projects (i.e., not involving Agency debt). Under the Act, the Agency can undertake the following types of projects: (1) manufacturing; (2) industrial; (3) warehousing; (4) research; (5) commercial; (6) industrial pollution control; (7) recreation; (8) horse racing; (9) railroad; (10) a facility implementing a state designated urban cultural park management plan; (11) a state certified continuing care retirement facility; and (12) a civic facility (i.e., most facilities owned or operated by a not-for-profit corporation).

E. Nature of Agency Debt. Pursuant to §870 of the Act, bonds or notes of the Agency are not debt of the Sponsor, and neither the State of New York nor the Sponsor shall be liable thereon. Pursuant to §864(1) of the Act, except as otherwise expressly provided by the Agency, each issue of Agency bonds is a special obligation of the Agency payable solely from revenues derived from the leasing, sale or other disposition of a project.

F. Federal and State Income Tax Exemption for Interest on Bonds. When an Agency issues debt in the form of bonds or notes, interest on that debt is exempt from personal income taxes imposed by the State of New York and all political subdivisions thereof. As discussed below, interest on debt of the Agency **may** also be exempt from gross income for federal income tax purposes. This exemption of interest from certain income taxation allows the Agency to borrow at lower interest rates, thus lowering the cost of borrowing for a project.

G. Real Property Tax Exemption. Pursuant to §874(1) of the Act and §412-a of the Real Property Tax Law of the State of New York, if the Agency determines to file a form with the local assessor claiming such exemption, real property owned or leased by the Agency is exempt from certain real property taxes until the date that the Agency terminates its ownership or leasehold interest. Pursuant to §874(4) of the Act, each Agency is required to adopt a "uniform tax exemption policy" providing guidelines for claiming real property tax exemptions, as well as mortgage recording and sales tax exemptions. Such guidelines must include procedures for payments in lieu of taxes, as well as a procedure for deviating from said uniform policy. §854(16) of the Act provides that each municipality or school district in which a project is located is an "affected tax jurisdiction", and §874(3) of the Act requires that any payments in lieu of taxes collected by the Agency be remitted to the affected tax jurisdictions within 30 days of receipt. §858(15) requires that, unless otherwise agreed by the affected taxing jurisdictions, a payment in lieu of tax agreement must provide that payments in lieu of taxes be allocated among the affected tax jurisdictions in proportion to the amount of real property tax and other taxes which would have been received by each affected tax jurisdiction had the project not been tax exempt due to the involvement of the Agency in the project. In practice, with respect to an Applicant Project, the Agency will generally enter into a payment in lieu of tax agreement which in effect fixes the project beneficiary's tax liability with respect to such Applicant Project by contract. This exemption from real property taxes allows the Agency to lower the operating costs of a project. **Note that an Agency is not exempt from special assessments or special ad valorem levies.**

H. Sales Tax Exemption. Pursuant to §874(1) of the Act, purchases by the Agency are exempt from New York State and local sales and use taxes. This exemption from state and local sales taxes enables the Agency to lower the cost of acquiring and constructing a project.

I. Other State Tax Benefits. The Agency is generally also exempted from certain other taxes imposed in New York State. For example, mortgages granted by the Agency are generally exempt from the New York State mortgage recording tax, and property transfers to the Agency are exempt from the New York State deed transfer tax. These additional exemptions from state and local taxes enable the Agency to lower the cost of undertaking and financing a project.

J. Additional Powers. In addition, the Agency may possess other powers that can facilitate projects. For example, the Agency can condemn property for a project and can exempt a project from certain local governmental laws and regulations.

K. Summary. In summary, New York State has given the Agency significant incentives and powers to accomplish its purposes, which are to advance the job opportunities, health, general prosperity and economic welfare of the people of the Sponsor and the State of New York.

II. Parties Involved in an Agency Financing.

A. Agency: The Agency (a), during the construction period, takes title to (or a leasehold or license interest in) the portions of a project intended to be exempted from state and local sales taxes, (b) thereafter, during the period of any intended exemption from real property taxes, holds either title to or a leasehold interest in the portion of said project intended to be exempted from real property taxes (subject to the obligation of the project occupant to make payments in lieu of taxes), and (c) if the project involves agency debt financing, the Agency finances said project by issuing debt instruments ("bonds") which are purchased by either a financial institution (bank, insurance company or mutual fund) or by an underwriter for resale to the general public.

B. **Bond Purchaser:** A bank, insurance company or municipal investment fund which agrees to purchase the bonds from the Agency. In some transactions, an underwriter will purchase the bonds and resell the bonds to the general public.

C. **Project Occupant or Borrower:** The person, partnership, corporation, limited liability company or other entity which is the beneficial owner of a project assisted by the Agency, either through a "straight-lease" transaction or through the issuance and sale of bonds and for whose benefit the bonds are issued and sold.

D. **Trustee:** If Agency bonds are to be sold to more than one entity, a trustee is generally appointed by the Agency to protect the interests of the multiple owners of the bonds.

E. **Special Counsel or Bond Counsel:** Delivers the opinion concerning (a) the legality of the transaction, (b), if Agency bonds are the part of the transaction, the validity of the bonds and (c), when Agency bonds are intended to be tax-exempt, the exclusion of the interest payable on the bonds from gross income for federal income tax purposes. Generally prepares all documents and closing certificates relating to the transaction.

III. State Restrictions on Agency Transactions.

A. **General.** Every transaction undertaken by the Agency must comply with the requirements of the Act. In addition, under federal tax law, debt issued by the Agency will **not** be treated as Tax-Exempt Debt unless such debt is validly issued under the Act and the other laws of the State of New York.

B. **Restrictions in the Act.** The following are several of the provisions of the Act governing the issuance of bonds by the Agency:

1. **Must Qualify as a "Project":** Only facilities which qualify as a "project", as defined in the Act, may be financed by the Agency. "Project" is defined by the Act to include land, buildings and other improvements, and includes machinery, equipment and other facilities suitable for purposes of a project. As indicated above, under the Act the Agency can undertake the following types of projects: manufacturing, warehousing, research, commercial, industrial, industrial pollution control, recreation, horse racing, railroad and civic facility.

2. **Public Purpose:** The project must be shown to serve a public purpose, by creating or retaining employment.

3. **Public Hearing:** Pursuant to §859-a of the Act, prior to issuing any debt and/or granting any tax exemptions (collectively, "financial assistance") equaling in the aggregate more than $100,000, the Agency must hold a public hearing on 30 days notice. Such notice must be both published and given to the chief executive officer of each "affected tax jurisdiction". In addition, such financial assistance must be consistent with the Agency's Uniform Tax Exemption Policy, unless the Agency gives

the chief executive officer of each affected tax jurisdiction at least 30 days notice of the meeting of the Agency at which the Agency will consider whether to approve a deviation from such Uniform Tax Exemption Policy.

4. **Retail Restriction:** In 1993, the Act was amended to restrict the participation by the Agency in a "retail facility"--i.e., a facility that is primarily used in making retail sales of goods or services to customers who personally visit the premises to obtain such goods or services. Exceptions are permitted for (a) "tourist destination facilities" (projects that attract a significant number of visitors from outside the economic development region), (b) projects operated by a not-for-profit corporation and (c) certain projects that create or preserve permanent, private sector jobs and are confirmed by the chief executive officer of the Sponsor if (1) the project occupant would, but for the project, locate the related jobs outside the state, or (2) the project is located in a highly distressed area (an economic development zone, New York City, or a census tract with a 20% poverty rate or 20% of households receiving public assistance and an unemployment rate at least 1.25 times the statewide unemployment rate), or (3) the predominant purpose of the project is to make available goods or services which would not, but for the project, be reasonably accessible to the residents of the city, town or village within which the project would be located because of a lack of reasonably accessible retail trade facilities offering such goods or services.

5. **Removal and/or Abandonment Restriction:** The Agency may not finance a project which results in the removal of a plant or facility of a proposed occupant of the new project from one area of the state to another area of the state, or in the abandonment of a plant or facility of a proposed occupant of the new project located in the state, unless the Agency determines that such removal or abandonment is reasonably necessary to (a) discourage such project occupant from removing such other plant or facility to a location outside New York State or (b) preserve the competitive position of such project occupant in its industry.

6. **Civic Facilities:** In 1986, the Act was amended to expand the definition of "project" to include facilities owned or operated by New York State not-for-profit corporations ("civic facilities"). Civic facilities may not include convention centers, housing facilities, dormitories for educational institutions, medical facilities which are predominantly used for the delivery of medical services, or roads, buildings, water systems, sewer systems, or any public facility for use by a municipality in the performance of its governmental functions. However, notwithstanding the foregoing restrictions, a civic facility project may include (a) habilitation centers, (b) hospices, and (c) the following facilities, if the total cost of the project including such facilities does not exceed $20 million: (1) dormitories for educational facilities; (2) housing facilities primarily designed to be occupied by individuals 60 years of age or older; and (3) facilities as defined in Article 28 of the Public Health Law (most non-profit hospital, nursing home and clinic facilities fit this definition). This power is scheduled to sunset on **July 1, 2005**, unless renewed by subsequent legislation.

7. **Equal Employment Opportunities.** Both §858-b of the Act and the annual state volume cap legislation described below require that (a) new employment opportunities created as a result of a project the New York State Department of Labor Community

Services Division and the administrative entity of the service delivery area created by the federal job training partnership act (P.L. No. 97-300) in which the project is located and (2) that the project beneficiary agree, where practicable, to first consider for such new employment opportunities persons eligible to participate in federal job training partnership programs who shall be referred by the entities described in (b).

C. Other State Restrictions affecting the Agency. The following are several other state law provisions affecting the issuance of bonds by the Agency:

1. **State Environmental Quality Review Act.** Under Article 8 of the Environmental Conservation Law of the State of New York, and the statewide regulations issued thereunder (collectively, "SEQR"), the Agency cannot issue debt before first complying with certain procedures mandated by SEQR. If the project to be financed with the proceeds of said debt **might** have a significant effect on the "environment" (as defined in SEQR), the debt may not be issued prior to the completion of an environmental impact statement relating to said project and the satisfaction of certain other procedures mandated by SEQR.

2. **Conflict of Interest Law.** Under Article 18 of the General Municipal Law of the State of New York (the "Conflict of Interest Law"), the existence of certain conflicts of interest may renders all documents relating to the transaction in question (including the bonds) null, void and wholly unenforceable. In addition, violation of the Conflict of Interest Law is a misdemeanor.

3. **Public Officers Law.** The Public Officers Law of the State of New York requires that all meetings of the Agency must be open to the public, that notice of all meetings must be given to the public and the news media, and that most records in the possession of the Agency must be made available for public inspection and copying. In addition, members of the Agency must be residents of the Sponsor, and must take the required oath of office.

4. **General Construction Law.** The General Construction Law of the State of New York requires that no action may be taken by the Agency except at a meeting of the Agency at which a majority of the whole number of the members of the Agency are present, and at which a majority of the whole number of the members of the Agency vote to take such action.

IV. Federal Restrictions on Agency Transactions.

A. General. In order for the interest on Agency bonds to be excludable from gross income for federal income tax purposes, the requirements of Sections 103 and 141-150 of the Internal Revenue Code of 1986, as amended (the "Code") must be satisfied, including the following:

1. **Private Activity vs. Governmental Bonds:** Under Sections 103 and 141 of the Code, bonds issued by the Agency are split for federal purposes into two categories: (a) private activity bonds and (b) all other bonds ("governmental bonds"). A bond is potentially a private activity bond if any entity other than a state or local governmental entity benefits directly or indirectly from the issuance of the bonds. For example, if

bonds are issued to finance a new elementary school and a private food service company will manage the cafeteria in the new school, the bonds are potentially private activity bonds. Also note that bonds issued to benefit the federal government are potentially private activity bonds.

2. **Tax-Exempt Status of Governmental Bonds:** Interest on governmental bonds is exempt from gross income for federal income tax purposes if the bonds meet the requirements of Section 148 (relating to arbitrage) and Section 149 (must be registered, no federal guarantee, and limits on advance refunding).

3. **Tax-Exempt Status of Private Activity Bonds:** If Agency bonds are private activity bonds, interest on such bonds will be exempt from gross income for federal income tax purposes only if (a) such bonds are qualified bonds as below defined, (b) such bonds meet the requirements of Code Sections 148 and 149 described above, (c) such bonds either meet or are exempted from the volume cap requirements of Code Section 146 described below, (d) the public hearing and public approval provisions of Code § 147 described below are met with respect to such bonds, and (e) such bonds meet the additional requirements of Code Section 147 (120% limitation on maturity; 25% limitation on land acquisition; limitations on acquisition of existing building and equipment; financing of airplanes, skyboxes, health clubs, gambling and liquor stores prohibited; approval by elected governmental officials required; and issuance costs in excess of 2% cannot be financed).

4. **Public Hearing and Public Approval:** Pursuant to §147(f) of the Code, interest on Agency bonds which are private activity bonds will be exempt from gross income for federal income tax purposes only if, prior to issuing any such bonds, (1) the Agency holds a public hearing on 14 days published notice on such bonds (but note that the Act requires a hearing on 30 days published notice), and (2) either the elected legislative body or the elected chief executive officer of the Sponsor approves the issuance of such bonds following such hearing.

5. **Volume Cap:** Pursuant to §146 of the Code, interest on most Agency bonds which are private activity bonds will be exempt from gross income for federal income tax purposes only if, prior to issuing any such bonds, the Agency has received from New York State and allocates to such bonds sufficient "volume cap" for the calendar year in which such bonds are issued. This volume cap is administered early each year by the New York State Division of the Budget, and after the effective date of a yearly state statute regulating volume cap (usually between April and June), each Agency receives a small amount of volume cap, and can request additional volume cap from NYSDED (ESD). The following types of Agency bonds do **not** require volume cap: (a) taxable bonds; (b) governmental bonds; (c) 501(c)(3) bonds; (d) airport bonds; (e) port bonds; (f) bonds issued to finance governmentally-owned solid waste disposal facilities; and (g) refunding bonds.

6. **Bank-Eligible Bonds:** Banks are discouraged from purchasing tax-exempt bonds by Code Section 265, which denies banks any deduction for the cost of borrowing money which is invested in tax-exempt bonds. If (a) the Agency possesses the power of condemnation (i.e., the Special Act does not deny to the Agency the condemnation

power contained in §858(4) of the Act) and (b) the Agency can certify that the Agency does not expect that the Agency will be issuing more than $10 million in qualified 501(c)(3) bonds and governmental bonds during the current calendar year, then the Agency can designate up to $10 million of qualified 501(c)(3) bonds and governmental bonds as "bank eligible bonds". This designation will allow a bank which purchases a bond so designated to deduct 80% of the cost of borrowing money which is invested in such bonds. **See item V below.**

7. **Alternative Minimum Tax:** Private activity bonds other than qualified 501(c)(3) bonds issued as Tax-Exempt Debt (and some refundings of older tax-exempt bonds) are subject to the federal alternative minimum tax on individuals. In addition, interest on all tax-exempt bonds (including governmental bonds) is subject to a federal alternative minimum tax on corporations - but interest income from private activity bonds (other than qualified 501(c)(3) bonds and refundings of certain older tax-exempt bonds) is taxed at a higher rate.

B. **Private Activity Bond Tests.** Bonds are private activity bonds if the issuer reasonably expects, as of the issue date, that the bonds will meet either (1) the private business use and private security or payment tests of §141(b) of the Code (collectively, the "Private Business Tests") or (2) the private loan financing test of §141(c) of the Code (the "Private Loan Test"). In addition, bonds are private activity bonds if the issuer takes a deliberate action subsequent to the issue date that causes the conditions of either the Private Business Tests or the Private Loan Financing Test to be met.

1. **Private Business Tests.** Generally, the Private Business Tests are met if (1) more than 10% of the proceeds of an issue of bonds is used in a trade or business carried on by a nongovernmental person (the "Private Business Use Test") and (2) the payment of principal or interest on more than 10% of the issue of bonds is directly or indirectly (a) secured by property used or to be used for a private business use or payments in respect of such property or (b) to be derived from payments in respect of property used for a private business use (the "Private Payments or Security Test"). For this purpose, the use of financed property is treated as the use of proceeds. For the purposes of the Private Business Use Test, a person uses bond proceeds if it (1) owns financed property, (2) leases financed property, (3) manages the financed property under a nonqualifying management contract, (4) purchases or agrees to purchase the output of an output facility under a nonqualifying arrangement, (5) sponsors a nonqualifying research arrangement that relates to the financed property, (6) otherwise enjoys special legal entitlements for the beneficial use of the financed facility, or (7) solely in the case of financed property that is not available for use by the general public, receives special economic benefit from the financed property. Both indirect use and the ultimate and intermediate uses of proceeds are considered in determining whether an issue meets the private business use test. Payments for a use of proceeds include payments (whether or not to the issuer) in respect of property financed (directly or indirectly) with those proceeds, even if not made by a private business user (e.g., parking fees paid by members of the general public for use of a parking garage that is managed under a nonqualifying management agreement constitute payments taken into account). These 10% limitations are reduced to 5% for private business uses that are not related or disproportionate to the governmental uses financed by the issue of bonds and for payments or security relating to such uses.

Another special rule modifies the Private Business Tests where the "nonqualified amount" of the issue of bonds exceeds $15 million but does not exceed the amount which would cause the issue to be an issue of private activity bonds under the general limitations described above. The "nonqualified amount" of an issue of bonds is defined as the lesser of the proceeds of an issue that are to be used for private business uses and the proceeds of the issue with respect to which there are private payments or security. This special rule effectively caps the maximum amount of allowable private use and private payments with respect to an issue of bonds at $15 million, unless the issuer allocates volume cap to the issue in an amount equal to the excess of the nonqualified amount over $15 million. **For the sole purpose of determining whether private activity bonds qualify as "qualified 501(c)(3) bonds" as described below, (a) 501(c)(3) organizations are treated as governmental units with respect to their activities which do not constitute unrelated trades or businesses, determined by applying Section 513(a), and (b) the private activity bond tests described above are modified by substituting 5% for 10%, and by substituting "net proceeds" for "proceeds".**

2. **Private Loan Financing Test.** The Private Loan Financing Test generally is met if more than the lesser of 5% or $5 million of the issue is to be used to make or finance loans to nongovernmental persons. Any transaction that is generally characterized as a loan for federal income tax purposes is a loan for the purposes of the private loan financing test. A loan may arise from the direct lending of bond proceeds as well as transactions in which the indirect benefits are the economic equivalent of a loan. For instance, a lease or other contractual arrangement may in substance constitute a loan if the arrangement transfers tax ownership of the facility to a nongovernmental person.

3. **General Public Use.** Private business use does not include use as a member of the general public. Use of financed property by nongovernmental persons in their trades or businesses is treated as general public use only if the property is intended to be available and in fact is reasonably available for use by natural persons not engaged in a trade or business. Use of the financed facility under an arrangement that conveys priority rights or other preferential benefits is not use on the same basis as the general public. Rates that are generally applicable and uniformly applied do not convey priority rights.

4. **Certain Short-term Arrangements.** Certain arrangements for the use of bond financed property not involving the ownership of the property by a nongovernmental person will not result in private business use. An arrangement for the use of bond financed property by a nongovernmental person will be permitted for a period of up to 30 days (including renewal options), if the arrangement is a negotiated arm's length arrangement, the compensation is at fair market value and the property was not financed for the purpose of providing the property to that nongovernmental person.

5. **Incidental Use.** Nonpossessory uses of a financed facility that in the aggregate do not involve more than 2.5% of the facility may be disregarded for the purposes of determining private business use if the nonpossessory use is not functionally related to some other use of the facility by the same person.

6. **<u>Measurement of Private Business Use</u>.** The amount of private business use of property is determined according to the *average percentage of private business* use during the *measurement period*. In general, the *measurement period* begins on the later of the issue date or the date the property is placed in service and ends on the earlier of the last date of the reasonably expected economic life of the property or the latest maturity date of any bond of the issue financing the property. The *average percentage of private business use* is the average of the percentages of private business use during the 1-year periods within the measurement period. (If the private business use arises from ownership by a nongovernmental person, the amount of private business use is the greatest percentage of private business use in any 1-year period.). For property used for private business use and governmental use at different times, the average amount of private business use generally is based on the amount of time that the property is used for private business use as a percentage of total time for all actual use. "Dark time" is disregarded.

7. **<u>Measurement of Private Payments and Security</u>.** The present value of any payments or property taken into account is compared to the present value of the debt service to be paid over the term of the issue. Debt service on the issue does not include any amount paid or to be paid from sale proceeds or investment proceeds of the issue (e.g., capitalized interest, earnings on a debt service reserve fund applied to the payment of debt service, etc.). Debt service on the issue is adjusted to take into account payments and receipts that adjust the yield on the issue for the purposes of § 148(f) (e.g., qualified guarantee fees). The yield on the issue is used as a discount rate for the purposes of computing present values. In general, yield is determined on the issue date and is not adjusted to take into account subsequent events. For a variable issue yield, the issuer may assume that the future interest rate on the variable yield bonds will be the then current interest rate on such bonds, except that, in the case of a deliberate action, the issuer must use the yield determined as of the date of the deliberate action for the purposes of determining the present value of payments under the arrangement causing the deliberate action. Property securing a payment of debt service on an issue is valued at fair market value as of the first date on which the property secured bonds of the issue. Property used or to be used for private business use and payments in respect of that property are treated as private security if any interest in that property or payments secures the payment of debt service on the bonds. The property involved need not be financed with the proceeds of the bonds. Proceeds qualifying for an initial temporary period under § 1.148-2(e)(2) or (3) or a deposit to a reasonably required reserve or replacement fund described in § 1.148-2(f)(2)(i) are not taken into account before the date on which those amounts are either expended or loaned by the issuer to an unrelated party. Private security (other than financed property and private payments) is taken into account only to the extent it is provided, directly or indirectly, by a user of the proceeds.

C. <u>Types of Qualified Private Activity Bonds</u>. "Qualified" private activity bonds which the Agency can issue as Tax-Exempt Debt include (a) bonds issued to provide airports, docks and wharves, mass commuting facilities, water sewage or solid waste disposal facilities, low-income residential rental projects, facilities for local furnishing of electric energy or gas, local district heating or cooling facilities, or qualified hazardous waste facilities (Code Section 142), (b) bonds issued to provide manufacturing facilities (Code Section 144)(see item D below), (c) bonds issued to provide facilities for 501(c)(3) organizations (Code Section 145)(see item E below), (d) bonds issued to provide new empowerment zone facilities (including facilities located in either an empowerment zone or an enterprise community) (Code Section 1394)(see item F below), (e) bonds issued to refund any of the foregoing and (f) bonds issued to refund other tax-exempt bonds issued before December 31, 1986. Each of these sections contains certain requirements that must be met in order for such bonds to be federally tax-exempt. It is important to note that qualified bonds issued under Code Sections 142, 144 and 1394 generally may not be used to finance taxable debt, with certain exceptions, or to reimburse expenditures incurred prior to the adoption of an "inducement resolution" by the Agency. **Therefore, whenever tax-exempt debt is contemplated with respect to a project, it is critical that the project occupant consider filing an application with the Agency requesting that the Agency adopt an inducement resolution prior to significant costs being incurred on a proposed project.** An exception to this rule exists with respect to a 501(c)3 project, where the 501(c)3 entity is allowed arrange for an appropriate representative of the 501(c)3 organization to declare official intent in the manner described in Treasury Regulation Section 1.150-2(e).

D. **Small Issue Manufacturing Bonds.** In 1993, Congress re-authorized on a permanent basis the manufacturing exception in Code Section 144, which is the most common exception utilized by the Agency to exempt interest on its bonds from gross income for federal income tax purposes. The interest on an issue of manufacturing bonds will be excludable from gross income for federal income tax purposes if (a) the bonds receive an allocation of state bond volume cap under Code Section 146, (b) the face amount of the bonds (plus certain "prior issues" and certain "capital expenditures") does not exceed $10,000,000, (c) at least 95% of the net proceeds of the bonds are spent on the acquisition, construction or improvement of land or property of a character subject to depreciation which qualifies as a manufacturing facility, (d) no owner or user of the facility financed by the bonds is the beneficiary of more than $40,000,000 of tax-exempt bonds and (e) the bonds meet the so-called "three pile" test - i.e., at least 70% of the proceeds of the bonds are expended on "core manufacturing" facilities, (i.e., the widget machine, the floor beneath it and the ceiling above it), no more than 25% of the proceeds of the bonds are expended on "ancillary facilities (i.e., facilities directly related and ancillary to core manufacturing, such as raw material storage, finished goods storage, employee cafeteria, plant manager's office, etc.), no more than 2% of the proceeds of the bonds are expended on issuance costs, and no more than 3% of the proceeds of the bonds are expended on other items.

E. **Qualified 501(c)(3) Bonds.** If qualified 501(c)(3) bonds are to be issued under Code Section 145, (a) no owner or user of the facility financed by the bonds may be the beneficiary of more than $150,000,000 of non-hospital tax-exempt bonds (this restriction is dropped for bonds issued after 8/15/97 if at least 95% of the proceeds of such bonds will be expended to finance or refinance capital expenditures incurred after 8/7/97), (b) the volume cap requirements of Code Section 146 do not apply, (c) the inducement resolution requirement is modified, in that expenditures paid for with borrowed money (even if the borrowing was a conventional borrowing) may be refunded with tax-exempt bonds, and, if such expenditures were paid for prior to such borrowing, either the Agency or the 501(c)(3) entity must have adopted an inducement resolution or otherwise declared official intent to fund such expenditures with borrowed money, and (d) if the project includes residential rental housing for family units, such housing must either (1) be new (i.e. first use is pursuant to the tax-exempt bonds), (2) meet the requirements of Code Section 142 (d) (i.e., income to area median gross income test: 20-50 test, or 40-60 test), or (3) be substantially rehabilitated (i.e., rehabilitation costs must equal 100% of the adjusted basis of such facility).

F. **Enterprise Zone Facility Bonds:** In 1993, Congress authorized the issuance of tax-exempt bonds to provide certain enterprise zone facilities (including facilities located in either an empowerment zone or an enterprise community). The interest on an issue of enterprise zone bonds will be excludable from gross income for federal income tax purposes if (a) the bonds receive an allocation of state bond volume cap under Code Section 146 (as with exempt facility bonds, empowerment zone bonds are eligible for carryforward allocation), (b) the face amount of the bonds (plus certain prior issues in the same zone) does not exceed $3,000,000 (if the zone is one of the original 106 zones authorized in 1993) or up to $230,000,000 (if the zone is one of the 20 empowerment zones designated in a second round of zones authorized in 1997), (c) if the zone is one of the original 106 zones authorized in 1993, no owner or user of the facility financed by the bonds can be the beneficiary of more than $20,000,000 of tax-exempt empowerment zone bonds, (d) at least 95% of the net proceeds of the bonds are spent on the acquisition, construction or substantial rehabilitation of depreciable property (and related land) located in the zone, so long as 85% of such property is used in the active conduct of a qualified enterprise zone ("EZ") business by the owner of the facility or 100% of such property is used in the active conduct of a qualified EZ business by the lessee of the facility, (e) no portion of the bonds are used to finance a health club, airplane or private luxury box, and (f) the principal user of the facility (i.e., the owner or lessee thereof) is a qualified EZ business. A qualified EZ business must meet the following criteria: (1) 35% of the employees must certify under oath that they reside in the zone; (2) the business must derive at least 50% of its gross income from the active conduct of an in-zone business (note that a division or branch of a larger non-zone business **can** be treated as an EZ business, even if it is not separately incorporated); and (3) the in-zone business cannot be the rental of property (rental of commercial property or equipment can qualify if 50% of the rentals are from in-zone businesses or residents, and the business is not a golf course, massage parlor, hot tub facility, suntan facility, race track or other facility used for gambling, or store the principal purpose of which is selling alcoholic beverages for consumption off-premises).

G. <u>Alternative Minimum Tax</u>: Private activity bonds other than qualified 501(c)(3) bonds are subject to the federal alternative minimum tax on individuals. In addition, interest on all tax-exempt bonds (including governmental bonds) is subject to a federal alternative minimum tax on corporations - but interest income from private activity bonds other than qualified 501(c)(3) bonds is taxed at a higher rate.

V. <u>Bank Eligible Bonds</u>.

A. <u>General Rule</u>: Code Section 265(a)(2) provides, in part, that for federal income tax purposes, no deduction will be allowed for interest on indebtedness incurred or continued to purchase or carry tax-exempt obligations. Code Section 265(b)(1) provides that, in the case of a financial institution, no deduction shall be allowed for that portion of the taxpayer's interest expense which is allocable to tax-exempt interest, and Code Section 265(b)(1) provides that, for purposes of Code Section 265(b)(1), the portion of the taxpayer's interest expense which is allocable to tax-exempt interest is an amount which bears the same ratio to such interest expense as (1) the taxpayer's average adjusted basis of tax-exempt obligations acquired after August 7, 1986 bears to (2) such average adjusted basis for all assets of the taxpayer.

B. <u>Exception for "qualified tax-exempt obligations"</u>: Code Section 265(b)(3)(A) provides that a "qualified tax-exempt obligation" shall be treated as exempt from the disallowance of carrying costs (because such obligation is treated as if it were acquired on August 7, 1986). Under Code Section 265(b)(3)(B), an obligation is a "qualified tax-exempt obligation" if it meets all of the following tests: (1) the obligation was issued after August 7, 1986 by a "qualified small issuer"; (2) the obligation is either (a) a governmental bond, (b) a qualified 501(c)(3) obligation, or (c) an obligation issued to refund an obligation issued prior to August 8, 1986 which was not an industrial development bond, as defined in the Code; and (3) the obligation is designated by the issuer for purposes of Code Section 265(b)(3).

C. Qualified Small Issuer: Under Code Section 265(b)(3)(C), an issuer is a qualified small issuer with respect to obligations issued during a calendar year if the reasonably anticipated amount of tax-exempt obligations (other than refunding obligations and private activity bonds that are not qualified 501(c)(3) obligations) expected to be issued by such issuer in such calendar year does not exceed $10,000,000. Code Section 265(b)(3)(E) provides that, for purposes of this rule, (1) the issuer and all entities that issue on behalf of such entity must be treated as one issuer, (2) all obligations of a subordinate entity shall be treated as issued by the parent entity, and (3) an entity formed for the purpose of avoiding this rule and all entities benefiting thereby are treated as one entity.

VI. Typical Structure of an Agency Financing.

A. Lease Transaction:

1. **Form:** Title to (or a leasehold interest in) the Project is conveyed to the Agency and the Borrower agrees to acquire or construct the Project as agent of the Agency. The Agency leases the Project to the Borrower pursuant to a lease agreement. Under the lease agreement, the Borrower promises to pay rent sufficient to pay all costs of the Project (including payments in lieu of taxes and, if any Agency bonds were issued with respect thereto, the principal and interest on the bonds as the same become due and payable). At the end of the lease term, the Borrower has an obligation to purchase the Project for nominal consideration.

2. **Discussion:** This was the original method used by the Agency to undertake projects. However, in Agency bond transactions, this method results in the Agency retaining title (and thereby liability as an owner of real estate) for the entire term of the Agency bonds. If the Agency intended to exempt the project from real estate purposes for 10 years, but the term of the bond issue is 30 years, this format results in the property remaining on the exempt portion of the assessment rolls for 30 years. Even if the payment in lieu of tax agreement requires payments in lieu of taxes in an amount equivalent to normal taxes, there is still a detriment to the affected tax jurisdictions, since payments in lieu of taxes are not secured by a first priority tax lien on the real property. In addition, the Agency retains liability as an owner of said property for a longer period than is necessary to accomplish the purposes of the Agency.

B. Installment Sale transaction:

1. **Form:** Title to (or a leasehold or license interest in) the Project is conveyed to the Agency and the Borrower agrees to construct the Project as agent of the Agency. The Agency and the Borrower enter into an installment sale contract, pursuant to which the Agency agrees to convey title to the Project back to the Borrower, either at completion of construction or at some later time (usually corresponding to the expiration of any intended real property tax exemption for the Project). Under the installment sale contract, the Borrower promises to pay installment purchase payments sufficient to pay all costs of the Project (including payments in lieu of taxes and, if any Agency

bonds were issued with respect thereto, the principal and interest on the bonds as the same become due and payable).

2. **<u>Discussion</u>:** This is the newer form of transaction used by the Agency to undertake a bond transaction. This format has the advantage of allowing the Agency to convey title to the Project back to the Borrower at the end of the period of intended real property tax exemption <u>without</u> causing the bond transaction to collapse. For example, if the term of the bonds is 30 years, but the intended real property tax exemption is 10 years, this format allows the Agency to place the property back on the tax rolls after 10 years, and also allows the Agency to avoid the last 20 years of owner liability.

VII. <u>Types of Agency Bond Transactions</u>.

A. <u>Taxable vs. Tax-Exempt</u>: As indicated above, interest on Agency bonds may or may not be excluded from gross income for federal income taxes. In any event, interest on Agency bonds is exempt from personal income taxes imposed by the State.

B. <u>Fixed vs. Floating Interest Rate</u>: As with a home mortgage, interest on Agency bonds may be fixed (i.e., 20 years at 7%) or may be floating (i.e., current tax-exempt floating rate, reset weekly, monthly or yearly).

C. <u>Credit Enhancement</u>: The interest rate on Agency bonds is wholly a function of the credit rating of the Borrower. If the Agency bonds are intended for sale to the public, there is a large spread between "investment grade" debt (i.e., debt publicly rated by a national debt rating agency in the four (4) highest categories of such rating agency) and "junk" debt (i.e., debt which is not so rated). A Borrower which does not meet the criteria for an investment grade rating from a national rating agency can "borrow" the rating of an entity which is so rated by inducing such other entity to enhance the credit of the Agency bonds through a guaranty, a letter of credit, a bond insurance policy, a mortgage insurance policy, or other form of credit enhancement. Typical credit enhancers include banks (which can issue a letter of credit), insurance companies (which can issue either bond insurance or mortgage insurance) and a parent corporation (which can issue a guaranty).

D. <u>Private vs. Public Sale</u>: Prior to 1986, most Agency bonds were directly purchased by banks because a private purchase by a bank typically has the lowest issuance cost. **As indicated above, in 1986 Code Section 265 was amended to discourage banks from purchasing all but "bank-eligible" governmental and qualified 501(c)(3) bonds.** Accordingly, most tax-exempt Agency bonds are now sold either directly to the public (a "public sale") or indirectly to the public (via a private placement to a mutual fund).

VIII. <u>Advantages and Disadvantages of Agency Transactions</u>.

A. <u>Advantages</u>:

1. **<u>Tax-Exempt Interest Rates</u>:** Ability to borrow at significantly lower interest rates. If the project is eligible for tax-exempt financing, the reduction in debt service resulting from the lower tax-exempt rates is significant. If the project is not eligible for tax-exempt financing, a taxable Agency bond may be issued which, if sold in the public market, may result in lower debt service.

2. **Access to the Public Market:** Borrowing money through the issuance of tax-exempt or taxable Agency bonds enables the Borrower to access the public market. Usually credit enhancement is required for access to the public market. The public market, unlike most conventional sources of financing, does offer long-term fixed rates.

3. **Exemption from Mortgage Recording Tax:** Any mortgage securing debt of the Agency, or otherwise executed for the purposes of the Agency, is exempt from the New York state mortgage recording tax (usually either ¾ of 1% or 1%, depending on whether the Sponsor is in a regional transportation authority district).

4. **Real property tax abatement:** Under state law, property owned by the Agency is exempt from real estate property tax. Although the Agency requires payments in lieu of taxes to be paid with respect to most projects, this exemption enables the Agency to set the method of determining the payments in lieu of taxes by contract.

5. **Exemption from sales tax:** Materials and other personal property purchased by the Agency, or in the name of the Agency by an agent of the Agency, or incorporated into real property owned by the Agency are not subject to New York State and local sales and use taxes. Under certain circumstances, this exemption can be extended to other terms (equipment rentals, construction consumables, major maintenance items, etc.).

6. **SEQR Coordination:** The possibility exists of utilizing the Agency to coordinate the State Environmental Quality Review Act (SEQR) process.

B. Disadvantages:

1. **Complexity:** Due to the number of parties involved and the documentation required in arranging an Agency transaction, an Agency transaction is usually somewhat more complex and costly than a corresponding non-Agency transaction would be, resulting in increased transaction costs and the potential for slight delays in the transaction.

2. **Legal Restrictions:** Due to the legal requirements imposed on the Agency under the Act and other state laws, there may be requirements that (1) the project be modified to fit the restrictions on the types of Projects that may be financed by the Agency or (2) the Project comply with procedural requirements (SEQR, public hearings, public approvals, etc.) that otherwise might not be applicable to the project.

3. **State Bond Issuance Fees:** Part X of Chapter 85 of the 2002 Laws of the State of New York upon the Agency the following new state bond issuance fees:

Principal Amount of Bonds	Percentage Fee
$1,000,000 or less	.14%
$1,000,000 to $5,000,000	.28%
$5,000,001 to $10,000,000	.42%
$10,000,001 to $20,000,000	.56%
more than $20,000,000	.70%

To date, New York State has been exempting Agency bond issues from the state bond issuance charge if the total amount of "construction proceeds" is less than $10,000,000.

4. **Health Department Fees:** Part X of Chapter 85 of the 2002 Laws of the State of New York imposes upon the borrower the following new state fees respecting debt issued to finance the cost of a project approved by the Commissioner of Health for which reimbursement is provided pursuant to Article 28 of the Public Health Law:

Fee	Amount
Issuance Fee (New Project)	.90%
Issuance Fee (Refinancing)	.50% of bonds originally issued
Annual Inspection Fee	.20%

IX. Role of Bond Counsel.

A. General. As mentioned above, in the 1800s, many local governments issued bonds to benefit railroad companies that subsequently failed to make promised repayments to said governments. Facing insolvency, many of these local governments were able to avoid liability by convincing the courts that said bonds were illegally issued, and accordingly that said governments were not liable thereon. Courts have generally held that a municipality has no liability on debt which was not properly authorized. As a reaction to these cases, bondholders have refused to purchase local governmental debt unless said debt is accompanied by an opinion from an attorney or firm of attorneys whose experience in matters relating to the issuance of obligations by states and their political subdivisions is nationally recognized (hereinafter, "Bond Counsel"), indicating that said debt was properly issued. Without a formal legal requirement, it evolved that "good delivery" of a bond generally could not be made without inclusion of a copy of the approving legal opinion. Over time, bondholders also required that the opinion of Bond Counsel speak to whether the dent qualifies as Tax-Exempt Debt. This practice later was codified by the Municipal Securities Rulemaking Board when it adopted Rules G-12 and G-15. Accordingly, today each primary offering of municipal securities is accompanied by an opinion usually referred to as the "bond opinion" or "bond counsel opinion," to the effect (1) that the securities are valid and binding obligations of the issuer and (2) unless taxable, that interest on the securities is excluded from gross income for federal income tax purposes.

B. Typical Functions of Bond Counsel. The typical services rendered by Bond Counsel include those which are necessary for Bond Counsel to render the legal opinion regarding the validity and binding effect of the bonds, the source of payment and security for the bonds and the federal [and state] income tax treatment of interest on the bonds. The services Bond Counsel may render include:

1. preparing and reviewing documents necessary or appropriate to the authorization, issuance, sale and delivery of the bonds, coordinating the authorization and execution of such documents, and, where appropriate, drafting enabling legislation;

2. assisting the issuer in seeking from other governmental authorities such approvals, permissions, and exemptions as are necessary or appropriate in connection with the authorization, issuance and delivery of the bonds;

3. reviewing legal issues relating to the structure of the bond issue;

4. preparing public hearing materials and pursuing any required public approvals;

5. assisting the issuer in reviewing specified sections of the official statement, private placement memorandum or other disclosure document to be disseminated in connection with the sale of the bonds;.

6. assisting in presenting information relating to the structure and legality of the bonds to bond rating organizations and providers of credit enhancement; and

7. drafting the continuing disclosure undertaking of the issuer.