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PUBLIC FINANCE ALERT

Squire, Sanders & Dempsey L.L.P.

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STIMULUS LEGISLATION

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TABLE 1 – Legislative Provisions

Legislative Provision	Stimulus Act Provisions
Temporary expansion of qualified tax-exempt obligation (QTEO) provisions.[1] Effective for bonds issued after 12/31/08, through 12/31/10.	Increases the QTEO limit from $10 million to $30 million for tax-exempt bonds issued in 2009 and 2010 (new money or refunding).
	In applying the $30 million limit to qualified 501(c)(3) bonds issued during 2009 and 2010, the bonds are treated as though issued by the 501(c)(3) borrower, not by the actual issuer. Thus, each 501(c)(3) borrower is subject to its own $30 million limitation and qualified 501(c)(3) bonds do not count against the issuer's limit.
	For pooled financings,[2] the limit is applied to the "qualified borrower"[3] (from the pool) rather than to the pool issuer.[4]
Temporary extension of *de minimis* (2 percent) safe harbor to investment interest of financial institutions.[5] Effective for bonds issued after 12/31/08, through 12/31/10.	Banks are generally not allowed to deduct that portion of their interest expense that is allocable to tax-exempt interest received on bonds that are not QTEOs. The allocation is generally made by multiplying the bank's interest expense by the ratio of tax-exempt bonds (other than QTEOs) to total assets of the bank. Under the Act, a bank can exclude from the numerator of that fraction non-QTEO tax-exempt obligations owned by the bank and issued during 2009 and 2010, up to a limit of 2 percent of the bank's assets.
	However, tax-exempt obligations excluded from the numerator of the disallowance fraction above are treated as "financial institution preference items" and any interest deduction attributable to them is reduced by 20 percent if a financial institution is a bank.[6]
	Current or advance refunding bonds are treated as having been issued on the date of the original refunded bond.
Temporary relief from the Alternative Minimum Tax (AMT).[7] Effective for bonds issued after 12/31/08, through 12/31/10.	Eliminates treatment as an AMT preference item for interest on tax exempt private activity bonds that are: (i) new money bonds issued in 2009 and 2010; or (ii) refunding bonds issued in 2009 and 2010 to refund new money or refunding bonds issued in 2004 through 2008. Interest on such bonds will no longer be an individual AMT preference item, and will not be included in the corporate AMT adjustment based on adjusted current earnings.

[1] American Recovery and Reinvestment Tax Act of 2009 (the Act), § 1502, 111th Cong. (Feb. 17, 2009).
[2] A "pooled financing" for these purposes is any issue the proceeds of which are used directly or indirectly to make or finance loans to two or more ultimate borrowers, all of whom are qualified borrowers.
[3] "Qualified borrower" means: (1) a state or political subdivision of a state; or (2) an organization described in Internal Revenue Code of 1986, as amended (the Code), Section 501(c)(3) and exempt from tax under Code Section 501(a).
[4] The Joint Committee on Taxation's Explanation of the House bill provision (which can still provide meaningful guidance, since the Conference Committee adopted the same language used in the House bill) provides the following example: "Thus, for example, a $100 million pooled financing issue that was issued in 2009 could qualify for the [Code Section] 265(b)(3) exception if the proceeds of such issue were used to make four equal loans of $25 million to four qualified borrowers. However, if (1) more than $30 million were loaned to any qualified borrower, (2) any borrower were not a qualified borrower, or (3) any borrower would, if it were the issuer of a separate issue in an amount equal to the amount loaned to such borrower, fail to meet any of the other requirements of [Code Section] 265(b)(3), the entire $100 million pooled financing issue would fail to qualify for the exception."
[5] Act, § 1501.
[6] Code Section 291(e); this is done by treating bonds excluded under the Act as issued on Aug. 7, 1986, for purposes of Code Section 291(e) only.
[7] Act, § 1503.

Clean Renewable Energy Bonds (CREBs).[8] Effective for bonds issued after the date of enactment.	The Act authorizes issuance of up to an additional $1.6 billion of CREBs. The credits may be stripped from the bonds.
Qualified Energy Conservation Bonds (QECBs).[9] Effective for bonds issued after the date of enactment.	1. The Act expands the present-law QECB program by authorizing issuance of an additional $2.4 billion of QECBs, expanding the limitation from $800 million to $3.2 billion. 2. QECBs can be issued to fund loans and grants for green community programs without causing such bonds to be treated as private activity bonds for purposes of the private activity bond restrictions in the QECB rules. The credits may be stripped from the bonds.
Qualified Zone Academy Bonds.[10] Effective for bonds issued after 12/31/08 and before 1/1/11.	Authorizes the issuance of up to $1.4 billion of qualified zone academy bonds in each of 2009 and 2010. Current law permits $400 million in 2009 and none thereafter (except possible carryover). The credits may be stripped from the bonds.
Expanded Small-Issue Industrial Development Bonds (IDBs).[11] Effective for bonds issued after the date of enactment and before 1/1/11.	The Act expands the definition of "manufacturing facilities" in the small-issue IDB provisions[12] to include any facility that is used in the manufacturing, creation or production of tangible property or intangible property (any patent, copyright, formula, process, design, know-how, format or similar item).[13] Facilities that are directly related and ancillary to a manufacturing facility are treated as a manufacturing facility and any amount of the net proceeds (rather than the current law maximum of 25 percent) of the bonds can be used to finance such directly related facilities that are located on the site of the manufacturing facility.
Exempt Facility Bonds for High-Speed Intercity Rail Facilities.[14] Effective for bonds issued after the date of enactment.	The Act modifies the definition of high-speed train to include trains that are reasonably expected to attain a top speed of 150 mph, rather than "operating" at speeds above 150 mph between stops.

[8] Act, § 1111.
[9] Act, § 1112.
[10] Act, § 1522.
[11] Act, § 1301.
[12] Code Section 144(a)(12)(C).
[13] Code Section 197(d)(1)(C)(iii).
[14] Act, § 1504.

Qualified School Construction Bonds.[15] Effective for bonds issued after 12/31/08 through 12/31/10.	Qualified School Construction Bonds (QSCBs) are treated as "qualified tax credit bonds" under Code Section 54A.
	The credit rate on QSCBs is set by the Treasury Secretary at a rate that is **100 percent** of the rate that would permit issuance of such bonds without discount or interest cost to the issuer.
	Like all qualified tax credit bonds, the maturity of QSCBs is the term that the Treasury Secretary estimates will result in the present value of the obligation to repay the principal on such bonds being equal to 50 percent of the face amount of such bonds, using as a discount rate the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month the QSCBs are issued.
	General Requirements: 1. 100 percent of the Available Project Proceeds[16] must be used for the "construction, rehabilitation or repair of a public school facility or for the acquisition of land on which such a bond-financed facility is to be constructed." 2. State or local government must issue QSCBs where the school is or will be located. 3. The issuer must designate the bonds as QSCBs.
	National limitation. $11 billion of QSCBs may be issued in each of 2009 and 2010.[17] 1. States and certain US possessions (including Washington DC) receive 60 percent of the $11 billion issuance authority ($6.6 billion). The $6.6 billion is first allocated to US possessions (other than Puerto Rico) according to the amount each state and each possession (other than Puerto Rico) would receive if all of the $6.6 billion were allocated based on the respective populations of individuals below the poverty line.[18] The remaining amount is then allocated among the states based on the amount each state was eligible to receive under section 1124 of the Elementary and Secondary Education Act [19] for the most recent fiscal year ending before the calendar year of allocation. If a state does not use all of its allocation in a given year, the allocation can be carried forward to subsequent calendar years. Thus, QSCB issuance authority could be in 2009, 2010 and beyond. 2. Each state is free to suballocate this issuance authority to political subdivisions. The remaining 40 percent of the national issuance authority limit ($4.4 billion) is allocated among "large local educational agencies" (either: [1] among the 100 local educational agencies with the largest number of children from families living below the poverty level, or [2] one of 25 local educational agencies, other than those in [1], that the Secretary of Education determines are in particular need of assistance). The allocation is made in proportion to the respective amounts each agency received for Basic Grants under subpart 2 of Part A of Title I of the Elementary and Secondary Education Act of 1965 for the most recent fiscal year ending before the year of allocation.[20] If a large local educational agency has issuance authority remaining at the end of a calendar year, such agency may "sub-allocate" the remaining issuance authority to the state in which it is located. Under this allocation, specifically in the footnotes, between 100 and 125 large local educational agencies will receive this 40-percent allocation.

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[15] Act, § 1521. Note that QSCBs are available to finance primary and secondary education facilities, not higher education facilities.
[16] As used in the Act and in this chart, "Available Project Proceeds" means sale proceeds of an issue and investment earnings on sale proceeds less issuance costs of up to 2 percent. Note that, unlike other provisions of the Act, issuers of QSCBs are not allowed to subtract amounts held in a reasonably-required reserve fund, as defined in Code Section 150(a)(3).
[17] The Act also authorizes $200 million of issuance authority for QSCBs in 2009 and 2010 to construct, rehabilitate or repair schools funded by the Bureau of Indian Affairs. This allocation does not reduce the amount of QSCB issuance authority.
[18] As defined by the Office of Management and Budget.
[19] 20 U.S.C. § 6333.
[20] 20 U.S.C. § 6333.

Continued– **Qualified School Construction Bonds.**	The three-year spending rule applicable to other qualified tax credit bonds applies – all Available Project Proceeds must be spent within three years of issuance. After three years, unspent proceeds must be used to redeem bonds within 90 days.[21]
	The special arbitrage rules applicable to other tax credit bonds apply.[22]
	The credits may be stripped (i.e., assigned by the bondholder to another party) from the bonds.[23]
Build America Bonds.[24] Effective for bonds issued after date of enactment and before 1/1/11.	**General –** Allows governmental issuers to irrevocably elect, at or before issuance, to treat bonds that would be tax exempt and would not be private activity bonds as taxable bonds that provide a tax credit to holders equal to 35 percent of the interest payable on an interest payment date.[25] Credits accrue as of the date of the interest payments. Credits can be used to offset regular tax or AMT liability. Unused credits can be carried forward to future taxable years. To be eligible for election, bonds must not have more than a *de minimis* amount of OIP.[26]
	Bonds[27] can be issued as Build America Bonds if issued after the date of enactment and prior to 1/1/11.
	Interest on a Build America bond and the related credit are includible in gross income to the holder for federal tax purposes. Until a state requires otherwise, the interest and credit on any Build America Bond is treated as exempt from federal income tax for purposes of *state* income tax laws.
	For arbitrage purposes, yield on Build America Bonds is determined without regard to the credit.
	The credits may be stripped from the bonds.

[21] 100 percent of the Available Project Proceeds of qualified school construction bonds must be used within the three-year period that begins on the date of issuance. After three years, bonds will continue to qualify as QSCBs only if unspent proceeds are used within 90 days from the end of this period to redeem bonds. The spending period may be extended by the Treasury Secretary if the issuer demonstrates that the failure to satisfy the three-year requirement is due to reasonable causes and the projects will continue with due diligence. This requires the issuer to obtain a private letter ruling from the IRS, which is a costly and time-consuming process.
[22] Available Project Proceeds invested during the three-year spending period are not subject to the arbitrage restrictions (i.e., yield restriction and rebate requirements). In addition, amounts invested in a reserve fund are not subject to the arbitrage restrictions to the extent: (1) such fund is funded no faster than a rate of equal annual installments; (2) such fund is funded in a manner reasonably expected to result in an amount not greater than an amount necessary to repay the issue; and (3) the yield on such fund is not greater than the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month the QSCBs are issued.
[23] Several of the public finance provisions in the Act authorize the issuance of tax credit bonds. For many of these types of bonds, the tax credit can be "stripped" from its corresponding bond. However, it is unclear whether the Treasury Secretary must first issue enabling regulations before the credits can be stripped. The provisions of the Act that authorize credit stripping all rely on Code Section 54A(i). Code Section 54A(i) (which predates the passage of the Act) states that the credit stripping provisions apply "[u]nder regulations prescribed by the Secretary [of the Treasury]."
[24] Act, § 1531.
[25] An "interest payment date" is "any date on which the holder of record of the taxable governmental bond is entitled to a payment of interest under such bond."
[26] The legislative language notes that whether a bond has more than a *de minimis* amount of OIP is to be determined under "rules similar to the rules" of Code Section 1273(a)(3).
[27] There is some question regarding whether refunding bonds can be issued as Build America Bonds. The Build America Bonds rules require that 100 percent of Available Project Proceeds of an issue (less amounts in a reasonably required reserve) be spent on "capital expenditures." The question is whether the refunding of the refunded bonds would constitute a "capital expenditure" for these purposes. The answer is not clear.

Continued– **Build America Bonds.**	**Special Rule Allowing Credit to the *Issuer* rather than the Holder.** The issuer of Build America Bonds may elect to receive the credits (rather than allowing the bondholder to receive the credits) if 100 percent of Available Project Proceeds are spent for capital expenditures. Amounts in a reasonably required reserve fund[28] are ignored for purposes of this test. The "credit" to the issuer is actually a payment that is made by Treasury to the issuer contemporaneously with the issuer's payment of interest to the bondholder, and is designed to subsidize the issuer's interest payment. As further evidence that the "credit" is designed to fully subsidize the issuer's interest payment, the Act provides that the "credit" can be paid to a third party responsible for arranging the issuer's interest payment to the bondholder. If the issuer elects to receive the "credit," the credit cannot be stripped from the bonds. For purposes of the arbitrage rules, the yield on a qualified bond is reduced by the amount of the credit/payment if the credit is paid to the issuer rather than the holder. As with Build America Bonds generally, the special issuer-credit taxable bond option is available for bonds issued after the date of enactment and before 1/1/11.
Recovery Zone Economic Development Bonds (RZEDBs) and Recovery Zone Facility Bonds.[29] Effective for bonds issued after the date of enactment and before 1/1/11.	The Act authorizes both "recovery zone economic development bonds" and "recovery zone facility bonds." RZEDBs are subject to a national limitation of $10 billion, and Recovery Zone Facility Bonds are subject to a national limitation of $15 billion.
	The Recovery Zone Bond issuance authority is allocated among the states in the proportion that each state's 2008 employment decline[30] bears to the aggregate 2008 employment declines for all states. Each state is then required to suballocate issuance authority among counties and large municipalities based on proportional employment decline. When calculating county employment decline, the employment decline in any large municipality located in that county is ignored. Each state is guaranteed at least 0.9 percent of the total national issuance authority.
	After receiving a suballocation from the state, the local government issuer designates one or more areas as recovery zones. To qualify as a recovery zone, an area must: (i) have significant poverty, unemployment, rate of home foreclosures, or general distress;[31] (ii) be economically distressed by reason of the closure or realignment of a military installation pursuant to the Defense Base Closure and Realignment Act of 1990; or (iii) be designated as an empowerment zone or renewal community. A local government can "waive" any portion of a recovery zone allocation made by a state.

[28] *See* Code Section 150(a)(3).
[29] Act, § 1401.
[30] Measured by comparing December 2007 employment to December 2008 employment.
[31] *Cf.* Code Section 1392(a)(2), which defines general distress.

Recovery Zone Economic Development Bonds (RZEDBs).	RZEDBs are "issuer credit" Build America Bonds issued as part of an issue, if: 1. 100 percent of Available Project Proceeds, ignoring amounts in a reasonably required reserve fund,[32] are to be used for one or more **qualified economic development purposes;** and 2. Such bonds are designated by the issuer as RZEDBs. **Qualified economic development purpose** means: Promoting development or other economic activity in a recovery zone including: (i) capital expenditures paid or incurred with respect to property located in such zone; (ii) expenditures for public infrastructure and construction of public facilities located in such zone; and (iii) expenditures for job training and educational programs.
	Issuance of RZEDBs entitles the issuer to receive a credit, i.e., payment, equal to **45 percent** of the interest payable on an interest payment date.
	The "credit" to the issuer cannot be stripped from the bonds.
Recovery Zone Facility Bonds.	Recovery Zone Facility Bonds are a new category of exempt facility bonds (i.e., tax-exempt private activity bonds).
	Although the Act is not specific, presumably recovery zone facility bonds can be issued only by a county or large municipality after receiving a mandatory suballocation from the state.
	At least 95 percent of the net proceeds of an issue of Recovery Zone Facility Bonds must be used for **recovery zone property**, and the issuer must designate the bonds as qualified Recovery Zone Facility Bonds.
	"**Recovery zone property**" is defined as depreciable property[33] if: 1. Such property was purchased after the date the recovery zone was designated; 2. The original use of the property commences with the user; 3. Substantially all of the use of the property is within the recovery zone; and 4. The bond-financed property is used in the active conduct of a **qualified business.**[34]
	Recovery Zone Facility Bonds are private activity bonds; thus, all of the private activity bond rules apply, except: 1. Recovery Zone Facility Bonds do not count against the aggregate annual state private activity bond volume limits and[35] 2. The restriction on acquisition of existing property does not apply.[36]

[32] An issuer may exclude from this calculation amounts in a reasonably required reserve fund, as defined by Code Section 150(a)(3).
[33] The Act specifically defines such depreciable property as property "to which Code Section 168 applies," or to which Code Section 168 would apply, but for the operation of Code Section 179.
[34] The Act defines a "qualified business" as "any trade or business except that the rental to others of real property located in a recovery zone shall be treated as a qualified business only if the property is not residential rental property (as defined in Code Section 168(e)(2) and does not include any trade or business consisting of the operation of any facility described in Code Section 144(c)(6)(B) (i.e., any private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal purpose of which is the sale of alcoholic beverages for consumption off premises."
[35] Code Section 146.
[36] Code Section 147(d). However, as stated above, the definition of "recovery zone property" requires the initial use of the bond-financed property to commence with the user under the Recovery Zone Facility Bond financing.

Tribal Economic Development Bonds (TEDBs).[37] Effective for bonds issued after the date of enactment.	National limitation of $2 billion, allocated by the Treasury Secretary after consultation with the Secretary of the Interior.
	TEDBs are treated as issued by a state, but volume cap under Code Section 146 does not apply.
	TEDBs are tax-exempt bonds, not tax credit bonds.
	TEDBs are any bonds issued by an Indian tribal government; that would be tax-exempt if issued by a state or local government and are designated by the Indian tribal government as TEDBs.
	Cannot be used for casinos, and can be used only for property on the issuer's reservation.
	Requires the Treasury Secretary to study the effects of these amendments and report to Congress within one year.
Expansion of New Markets Tax Credit Program.[38] Effective for calendar years 2008 and 2009.	The Act extends the NMTC program by increasing the maximum amount of "qualified equity investments" from $3.5 billion to $5 billion for each of 2008 and 2009. The additional amount for 2008 must be allocated to qualified community development entities that submitted an allocation application with respect to calendar year 2008 and either did not receive an allocation for such calendar year, or received an allocation for such calendar year in an amount less than the amount requested in the allocation application.
Extension of "Prevailing Wage" Requirement to Projects Financed by Qualified Tax Credit Bonds.[39] Effective for bonds issued after the date of enactment.	Subchapter IV of Chapter 31 of Title 40 of the United States Code (prevailing wage requirements) applies to projects financed with the proceeds of (i) CREBs, (ii) QECBs, (iii) QZABs, (iv) QSCBs and (v) RZEDBs.
Regulated Investment Companies Allowed to Pass Through Credits on Tax Credit Bonds.[40] Effective for taxable years ending after the date of enactment.	A regulated investment company (RIC) (i.e., a mutual fund) can pass through tax credits to its shareholders. An RIC is allowed to elect,[41] upon notice to its shareholders,[42] to pass through tax credits on any tax credit bond that the RIC holds, and the right to any credit separated from its corresponding bond and acquired by the RIC. The RIC must include the amount of the credit passed through in the RIC's gross income as interest income, but the RIC can offset this inclusion by increasing the RIC's dividends-paid deduction. The shareholder to whom the credit is passed through must include its proportionate share of the amount of credit in its gross income as interest income, but such shareholder can offset this inclusion by taking such shareholder's proportionate share of the credit passed through.

[37] Act, § 1402.
[38] Act, § 1403.
[39] Act, § 1601.
[40] Act, § 1541.
[41] The Act does not state whether this election is irrevocable.
[42] Such notice must be mailed to shareholders within 60 days of the close of the RIC's taxable year.

Repeal/Delay of Withholding Requirement on Payments to Government Contractors.[43] Effective on the date of enactment.	The Act delays for an additional year (from 12/31/10 to 12/31/11) the onset of the requirement that federal, state and local government payors under certain programs withhold 3 percent of the payment.

TABLE 2 – Credit Rates for Tax-Credit Bonds in Stimulus Act

Provision	Credit Rate
Clean Renewable Energy Bonds	70 percent of rate announced by IRS
Qualified Energy Conservation Bonds	70 percent of rate announced by IRS
Qualified Zone Academy Bonds	100 percent of rate announced by IRS
Qualified School Construction Bonds	100 percent of rate announced by IRS
Build America Bonds (Taxable Governmental Bonds)	35 percent of interest payments[44]
Recovery Zone Economic Development Bonds	45 percent of rate announced by IRS

TABLE 3 – Effective Dates of Relevant Provisions

Provisions Effective for Bonds Issued Before 1/1/11	Provisions Effective Indefinitely
Build America Bonds.	Clean Renewable Energy Bonds.
Extension of *de minimis* (2-percent) safe harbor to investment interest of financial institutions.	Qualified Energy Conservation Bonds.
Modifications to “qualified small issuer” exception from disallowance of investment interest deduction for financial institutions.	Exempt Facility Bonds for High-Speed Intercity Rail Facilities.
Temporary modification of alternative minimum tax limitations on tax-exempt bonds.	Tribal Economic Development Bonds.
Qualified Zone Academy Bonds.	Extension of “Prevailing Wage” Requirement to Projects Financed by Qualified Tax Credit Bonds.
Expanded Small-Issue IDBs.	RIC Election to Pass Through Credits to its Shareholders.
Qualified School Construction Bonds.	
Recovery Zone Bonds.	

[43] Act, § 1511.
[44] The credit under these bonds flows either to the holder of the bonds or, if certain conditions are met and the issuer elects, to the issuer.

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