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OVERVIEW OF PRIVATE ACTIVITY BOND FINANCING AND INCENTIVES

SCOPE OF THIS OVERVIEW

This memorandum provides a brief explanation and overview of tax-exempt Private Activity Bond (formerly known as Industrial Development Bond) financing under the Internal Revenue Code of 1986, as amended (the "I.R.C."), including financing for manufacturing facilities, for Section 501(c)(3) non-profit organizations, for certain "exempt facilities" and in Enterprise Zones. This memorandum also describes "Taxable Bond" financing and other incentives for the location of industry, which have developed as an alternative to the more restrictive Private Activity Bond program. Details concerning "manufacturing small issues," "Section 501(c)(3) organizations," "exempt facilities" and "Taxable Bonds" appear in this memorandum. Bond financing for 501(c)(3) organizations, schools, hospitals and governmental facilities is specialized and we have separate Overviews on those subjects, available on request. The information provided may be useful in determining whether Bond financing or other incentives will be available in particular cases, how the transaction might be structured and proceed, what advantages exist, and what limitations are imposed. However, Bond Counsel should be consulted early to assist in determining whether a project qualifies and in assuring that the applicable legal requirements will be met.

BOND FINANCING

What is Bond Financing? Bond financing takes the form of loans, or some times leases or installment sales, from a local government entity, often a development authority or development corporation (the "Issuer"). State laws vary concerning Bonds, but they are available in most jurisdictions. The interest rate is low because Bonds issued by the Issuer can be qualified to pay tax-exempt interest to the investors under the I.R.C., and the low interest rate is passed on to the User. The money raised from the Bonds is reloaned by the Issuer to the User or used to acquire facilities to be leased or sold by the Issuer to the User. Bonds offer considerable flexibility in structuring terms, such as variable and fixed interest rates, prepayment and long and short maturities.

Why Use Bond Financing? Interest on a qualified Private Activity Bond is exempt from Federal income taxation (but, except for Bonds for Section 501(c)(3) organizations, is subject to alternative minimum tax) and, usually, income taxation in the state in which the Bonds are issued. The primary advantage of Private Activity Bond financing is that, due to the tax-exemption, typical borrowing rates are substantially lower than interest rates on conventional borrowings. A Taxable Bond does not satisfy the requirements for a Federally tax-exempt Private Activity Bond, but usually pays interest that is exempt from state income taxation in the

state of issue and may confer other benefits. In some localities, ad valorem and sales tax exemptions may be utilized through Private Activity Bond or Taxable Bond financing. *See* “Taxable Bonds and Other Incentives” herein. Private Activity Bond issues usually are exempt from SEC and blue sky registration. A final important consideration is that the public involvement in the financing can generate substantial community interest in and support for the project financed (the “Project”).

How are Bonds Repaid? Bond financing is normally backed solely by the User’s credit and any credit enhancement that it furnishes, and sometimes by assets or other security that the User may pledge for this purpose. Users commonly utilize bank letters of credit or other forms of “credit enhancement” such as bond insurance to back Bonds issued for their facilities. Credit enhancement assures that the Bonds can be readily sold and obtain the lowest interest rates, as investors examine and rely upon the credit enhancer’s financial strength and not the User’s. The User’s credit, financial position and operating history must be satisfactory to the credit enhancer, however, in order to obtain this type of financing.

Who Buys the Bonds? Bonds may be publicly sold or privately placed. Banks may choose to buy Bonds, although the I.R.S. rules result in increased rates on bank-held Private Activity Bonds (except some Section 501(c)(3) Bonds) (see “Bond Placement” herein). Bonds may also be sold to institutional investors and mutual funds, and sometimes individuals. Numerous banks and investment bankers offer Bond placement and underwriting services (*see* “Procedural Steps – Bond Placement” herein).

Contents of this Memorandum. The remainder of this memorandum will outline who may issue Private Activity Bonds and for what purposes, the limitations and requirements imposed by state and Federal law on Private Activity Bond financing, the typical structures for such transactions, the steps necessary to complete the same, Taxable Bond financing, tax and other incentives, and the role of Bond Counsel.

TYPES OF PROJECTS FINANCEABLE

Manufacturing and Processing Facilities. “Small Issue” Private Activity Bonds may be issued for property and facilities used in the manufacturing, production or processing of personal property, and on-site related and ancillary office and other space (no more than 25% of Bond proceeds may be applied to ancillary uses). At least 70% of the proceeds of “Small Issue Bonds” must be used to finance property directly utilized in the manufacture, production or processing of personal property (the directly-utilized property being referred to as “core manufacturing assets”). Items of property used in the storage or movement of raw materials and inventory, for example, are not core manufacturing assets, but often are functionally related to the manufacturing process. I.R.S. rules sometimes require companies desiring to use bonds for manufacturing facilities to exclude some such portions of their total capital projects from the financing to avoid exceeding the 25% limit on financed assets that are not core manufacturing assets and are only “ancillary.” Investments in property used in functions such as storage, manufacturing offices, packaging, and shipping that are related functionally to the manufacture of goods on site and are subordinate (in the sense that the portion of the investment that these functions represent is smaller than the investment in the core manufacturing assets financed) are treated as “ancillary” costs subject to the 25% limit.

Raising of Capital Expenditure Limit to \$20,000,000. The \$10,000,000 capital expenditure limitation for tax-exempt “small issue” manufacturing facilities Bonds was raised to \$20,000,000 effective for Bonds issued on and after January 1, 2007. Although the Bonds themselves may not exceed \$10,000,000, the amount of permitted capital expenditure over the limitation period in the same jurisdiction is increased, allowing larger projects to qualify. Use of this form of very attractive tax-exempt financing for manufacturing had declined, since fewer manufacturers could stay within the capital expenditures limitation at a single location. The doubling of the limitation of \$20,000,000 has sparked a renaissance of interest in these Bonds.

Section 501(c)(3) Non-Profit Organizations. Private Activity Bonds may be issued to finance Section 501(c)(3) non-profit organizations, such as schools, charities and certain healthcare facilities. Certain tax-exempt Private Activity Bonds for Section 501(c)(3) organizations can be designated as “qualified” for purchase by banks with full tax benefits.

“Exempt” Facilities. Private Activity Bonds also may be issued to provide certain qualifying projects, such as some multifamily rental housing projects, solid waste disposal facilities, hazardous waste facilities, water furnishing facilities, sewage facilities, certain local electric energy facilities, certain local heating or cooling facilities, airport and mass transportation facilities, public educational facilities, green building and sustainable design projects, and certain freight transfer facilities, all free from the Small Issue limitations. Included in this category are airport, dock, wharf and mass-commuting facilities, but although these facilities may be leased to private businesses, they must be owned by a governmental unit.

Redevelopment Projects. Pursuant to a redevelopment plan, an Issuer may issue tax-exempt qualified redevelopment bonds for the acquisition, clearing and refurbishing of real property in certain areas designated as blighted for resale at market value to private parties. The bonds must be secured primarily by taxes of general applicability, including increments of property taxes attributable to increases in valuation by reason of carrying out the redevelopment plan. Such bonds may take the form of “tax allocation bonds” or other tax-increment financing.

Restriction on Used Equipment and Buildings. Private Activity Bonds, except Bonds for Section 501(c)(3) organizations and Qualified Enterprise Zone Business, may not be utilized to acquire previously-used property, except that used buildings (and equipment for the building purchased with the building) and other structures may be financed if sufficient qualifying rehabilitation is to be done--15% for buildings (and such integrated equipment) and 100% for other structures.

Disqualified Uses. Although Federal law permits up to 5% of Private Activity Bond proceeds to be used for non-capital purposes or other nonqualifying costs, the applicable state law may be more restrictive. If Bond proceeds are used for costs of issuance, they are counted against this 5%. In no event may proceeds of a Private Activity Bond be used to provide an airplane, a private luxury box, certain healthclub facilities, a gambling facility or a liquor store.

Broader Use of Taxable Bonds. Taxable Bonds may be issued for any Project authorized by state law. State laws, although they vary considerably, authorize Taxable Bonds for a wide

variety of manufacturing and non-manufacturing projects, which may include warehousing, distribution, office, research and development, utility, service, retail, commercial and healthcare facilities.

BOND ISSUERS

Public Purpose Principle. An Issuer may issue Bonds for a Project only if a public purpose is served, for example, an increase in employment opportunities, the promotion of commerce or industry, or the improvement of the public welfare. Specific requirements vary under state law.

State Law. Private Activity Bonds must be issued by governmental authorities. Virtually all states authorize Bond financing, and the types of Issuers and the Projects that they may finance vary. Frequently included in financeable costs are preliminary studies, direct costs of the Project, attorneys' fees, financing and issuance costs, interest paid during construction and certain reserve funds. For illustrative purposes, several of the Issuers and Projects financeable in the State of Georgia are described below.

Development Authorities. Created by statute in every Georgia city and county, and active in many, Development Authorities may issue Private Activity Bonds to finance the acquisition, construction, renovation, expansion, improvement or modification of plants, factories, mills and sewage and solid waste facilities, and machinery, equipment or any other property which an industrial concern might desire to acquire or lease in connection with the operation of such a facility within its jurisdiction. Development Authorities may issue Taxable Bonds for a wider variety of facilities, such as warehouses, office buildings, industrial parks, nursing homes and research and development facilities. No facility may be financed by a Development Authority unless it will increase or maintain permanent employment in the jurisdiction to some degree. A number of regional Development Authorities also have been created in Georgia.

Downtown Development Authorities. Downtown Development Authorities also can be activated in any incorporated municipality in Georgia. A Downtown Development Authority may finance any Project that the Authority determines will further the public purposes for which it was created. However, Downtown Development Authorities may finance Projects only in designated downtown development areas.

Other Authorities. Housing Authorities, Resource Recovery Development Authorities, Solid Waste Management Authorities and Hospital Authorities also exist or can be activated in each county, with the capacity to issue Bonds. Moreover, in approximately two-thirds of Georgia's counties, special authorities have been created by amendment to the Georgia Constitution with powers to issue Bonds. The particular legislation must be consulted in each instance.

SIZE LIMITATIONS

General. Taxable Bonds may be issued without size limitations. Federal law imposes maximum size limitations on Small Issue manufacturing Projects, Enterprise Zone Projects and

some financings for Section 501(c)(3) organizations. Financing for tax-exempt qualified residential rental properties, sewage or solid waste disposal facilities, water furnishing facilities, local electric energy and gas furnishing facilities, hazardous waste facilities, local heating and cooling facilities, transportation facilities and qualified redevelopment projects are not limited in size.

\$1,000,000 Small Issue Bonds. Small Issue Private Activity Bond Projects are subject to a \$1,000,000 or a Capital Expenditure Limitation. Up to \$1,000,000 in Private Activity Bonds can be issued to finance a portion of any Project, regardless of its size, in any particular city or county. However, any outstanding Small Issue Private Activity Bonds previously used for that Project or for certain other facilities in the same political jurisdiction of a “Principal User” of that Project (or a “Related Person” to such a “Principal User”) will be added to the proposed Private Activity Bond to determine compliance with the \$1,000,000 limitation. The use of the terms “Principal User” and “Related Person” is described below.

Up to \$10,000,000 Small Issue Bonds. The \$1,000,000 Bond amount limitation may be expanded to \$10,000,000 at the election of the Issuer. However, in such a case there is a “Capital Expenditure Limitation” of \$20,000,000 (increased from \$10,000,000, effective January 1, 2007). To determine compliance with the Capital Expenditure Limitation, one must add to the sum of the Private Activity Bond issues described in the preceding paragraph, certain “Capital Expenditures” that have been or will be paid or incurred within the three years before and three years after the issuance of a Private Activity Bond (and paid otherwise than out of the proceeds of such Bond issues). If at any time the Capital Expenditure Limitation is exceeded, the Private Activity Bond will thereafter be taxable.

Capital Expenditures. “Capital Expenditures” is a broad concept encompassing any expenditure that may be capitalized under any treatment under the Internal Revenue Code. The Capital Expenditures that must be taken into account for the Capital Expenditure Limitation are those made by any person with respect to the Project, or with respect to any facility in the same county or incorporated municipality of which any Principal User of the Project (or a Related Person) is a Principal User. (In certain instances where contiguous or integrated facilities are located in adjoining jurisdictions, capital expenditures and Private Activity Bond issues in both jurisdictions must be included.)

Principal Users. A Principal User includes both the User and each and every lessee, sublessee or other person who has the right (contingent or otherwise) to occupy ten percent or more of the Project, as measured by the lesser of noncommon use space or the gross rent for any year. Application of the ten percent annual rent test entails complexities relating, among other matters, to tax reimbursements and other escalation charges and common area maintenance payments - all of which should be counted as rent - as well as to contingent rents. In addition, a person may qualify as a Principal User of the Project even though not having a right to occupy, if he takes a substantial portion of the goods or services produced at the Project pursuant to a contractual obligation. There can be more than one Principal User of a Project.

Related Persons. A Related Person includes for these purposes any corporation, entity or individual to which the User or another Principal User is related by greater than 50% ownership or by a “controlled group” relationship. In the case of an individual, a Related Person includes certain family members and trusts.

Capital Expenditures Included. In addition to the foregoing, other Private Activity Bonds (and related Capital Expenditures), regardless of where the Project is located, that are issued at substantially the same time pursuant to a common plan of financing for the same Principal User or a Related Person, might be included in the \$1,000,000 or Capital Expenditure computation. Furthermore, other Private Activity Bonds (and related Capital Expenditures) which are used, in whole or in part, for other portions of the same building or strip of offices, warehouses, *et cetera* using substantial common facilities, regardless of whether the Principal Users are related, generally must be included in the \$1,000,000 or \$20,000,000 computation.

Lease Expenditures Excluded. A method for limiting expenditures for a Small Issue Project is the leasing of equipment. Expenditures for a “true” lease of equipment from an unrelated third party in the business of leasing do not count as Capital Expenditures. Purchase options for leased equipment can be exercised after the three year limitation period has ended. Ask for our memorandum “Requirements of a True Lease for Capital Expenditure Purposes.”

\$40,000,000 Limitation. A Small Issue Private Activity Bond, when aggregated with the other Private Activity Bonds (whether or not Small Issues) allocable to facilities, wherever located, of Principal Users of the Project (and Related Persons) may not exceed \$40,000,000 for a three-year test period. For this purpose, when a Private Activity Bond finances a Project with more than one owner, the Private Activity Bond is allocated among them pro rata on the basis of ownership. When a Private Activity Bond finances a Project with more than one user, the Private Activity Bond is allocated among them on the basis of use.

ARBITRAGE

Arbitrage Restrictions. Bonds are not entitled to tax exemption if they are deemed “arbitrage bonds.” Arbitrage rules are complex, and only a brief sketch is provided below. Bonds are arbitrage bonds if more than the lesser of 5% or \$100,000 of amounts treated as bond proceeds are reasonably expected to be used, or to replace funds used, directly or indirectly to acquire higher yielding investments. Amounts treated as bond proceeds can include amounts pledged to payment of Bonds, or sinking funds or other funds from which repayment of Bonds may reasonably be expected to be made. The concept of “investments” is broad, including virtually any contract or property to which a rate of return can be ascribed. Exceptions are made for investment of proceeds during certain temporary periods, including the temporary investment of monies in a bona fide debt service fund and in a fund for proceeds awaiting use. The temporary period for investment of proceeds pending use for the acquisition or construction of property is three years. Amounts in a reasonably required reserve or replacement fund are not

subject to investment yield restrictions, provided that the reserve or replacement fund cannot generally exceed 10% of the proceeds of the issue.

Arbitrage Rebate. Even though Bonds may comply with the arbitrage rules referred to above, arbitrage earnings in excess of the yield on the Bonds must be rebated periodically to the federal government. The rebate rules require that periodic computations and filings be made. However, there are limited “18-month” and “6-month” exemptions from the rebate requirement. The ability to comply with the appropriate exemption may influence the timing of when the User will want to close the Bond issue.

18-Month Exemption. An exemption from the rebate requirement applies if all gross proceeds (except for proceeds placed in a reasonably required reserve fund) are expended in accordance with the following schedule: At least 15% within 6 months; at least 60% within 12 months; and 100% within 18 months (with an exception for reasonable retainage spent within 30 months).

Six Month Exemption. An exemption from the rebate requirement applies if all gross proceeds (except for proceeds placed in a reasonably required reserve fund) are expended within six months.

Limitation of Exemptions. Compliance with the construction, 18-month or 6-month exemptions does not relieve the obligation to rebate arbitrage from investment of a reasonably required reserve fund or arbitrage on a bona fide debt service fund in excess of \$100,000 per year.

OTHER LIMITATIONS

Length of Private Activity Bond Financing. The average maturity of a Private Activity Bond issue is limited by Federal law to 120% of the average reasonably expected economic life of the Project financed. Average economic life must be weighed by taking into account the respective costs of the components of the Project. Economic life is to be determined as of the later of the date a Private Activity Bond is issued or the date facilities are placed into service. Midpoint lives under the old ADR system for personal property and guideline lives under Revenue Procedure 62-21 for buildings may be treated as safe harbors for determining economic lives. Land generally is not to be taken into account in determining the average.

Specified Cost Recovery Method. The deduction for cost recovery (depreciation) for property financed with a Private Activity Bond (other than qualified residential rental property) must be determined using the straight-line method under the Alternate Depreciation System.

Federal Guaranty Prohibition. Private Activity Bonds are not entitled to tax exemption if the payment of principal or interest is directly or indirectly guaranteed in whole or in part by the United States or any of its agencies or instrumentalities. Bonds will be treated as guaranteed by the federal government if 5% or more of the proceeds are used to make loans guaranteed by the federal government or to invest in federally insured deposits or accounts. Exceptions are made to permit proceeds to be invested in United States Treasury obligations and to permit investments

of bona fide debt service funds, reasonably required reserve funds, and funds to hold proceeds prior to their initial use.

Speculative Projects. Compliance with several provisions of Federal and state law requires that the particular assets to be financed with a Private Activity Bond be ascertained with reasonable certainty prior to issuance. A Private Activity Bond generally cannot be issued to finance undetermined Projects or contingencies, or in an amount substantially in excess of that required for the Project.

Issuance Costs. No more than 2% of the proceeds of a Private Activity Bond may be used to pay costs associated with the issuance of the Bond. Any excess costs may be paid from other sources.

Change in Use. A change in use of a facility financed with a Private Activity Bond to a use for which such a Bond could not have been issued may result in a loss of the User's deduction for interest on the debt service and in the Bond becoming taxable or other consequences.

INDUCEMENT

Inducement Resolutions. The first step in a Bond transaction normally is obtaining an inducement resolution and agreement from the Issuer, sometimes known as a declaration of official intent (the "Inducement"). This constitutes an agreement in principle by an Issuer to issue Bonds for a proposed Project. An Inducement should be obtained as early in the planning process as is practical. The public purpose principle suggests that an Inducement should serve as a factor in the decision to locate the Project in a particular jurisdiction. Thus, an Inducement generally should be obtained before the User enters into binding contracts looking toward the location or construction of a Project. *However, Bonds may finance costs if an Inducement or other qualifying declaration of official intent to finance is made no more than 60 days after the costs are spent and the Bonds are issued not more than eighteen month after the Project is ready to be placed in service.*

Financeable Costs. Costs incurred prior to an Inducement (except certain preliminary costs such as surveys and planning) are not "qualifying costs" under Federal law. Federal law requires that 95% of the proceeds of a Private Activity Bond, including any income from the investment of Private Activity Bond proceeds, be expended for costs of land and depreciable property that qualify by virtue of a prior Inducement. When components of a Project are to be acquired from a Related Person, a particular inquiry must be made to determine that the costs qualify. Furthermore, any person who used 5% or more of a facility (a "Substantial User") in the 5 years prior to the Private Activity Bond issue and is paid 5% or more of the proceeds from the Private Activity Bond generally may not be a Substantial User in the 5 years succeeding the issue. For these purposes, "Related Person" has the meaning described above, and also includes every partner and his partnership, and every shareholder and his "Subchapter S" corporation.

Expiration. An Inducement may or may not have an expiration date. In any event, a Private Activity Bond must be issued within three years after the declaration of official intent and eighteen months after the later of the date a Project is acquired or placed in service.

FORM OF TRANSACTION

General. Because a Bond transaction utilizes an Issuer as an intermediary, the transaction takes a form different from a conventional financing transaction. The exact form to be used depends on the desires of the parties and local requirements. In any transaction the Issuer sells the Bond and makes the proceeds available for the Project. Three forms of transaction commonly are used: loans, leases and installment sales.

Loans. An Issuer may be authorized by statute to loan Bond proceeds to a User for use on a Project. When this form is used, the User enters into a loan agreement with the Issuer and usually gives its note to evidence the loan. The Issuer will assign the loan agreement and note as security for the Bond. The User holds title to the Project in such a transaction. This is the simplest and most common arrangement.

Leases. Most Issuers can, and some Issuers must, own the Project financed and lease it to the User. When such form is used, the Project site normally is conveyed to the Issuer and the Project is constructed or acquired in the name of the Issuer with the proceeds from the Bond. The Project is then leased to the User, which agrees to pay rents to be applied to service principal and interest on the Bond. The Issuer assigns its rights under the lease as security for the Bond. When the Bond is paid, the User normally purchases the Project at a nominal purchase price. In some jurisdictions ad valorem and/or sales taxes can be avoided through the use of the lease form of the transaction. See “Ad Valorem Tax Breaks” below.

Installment Sales. An installment sale transaction sometimes is used. This type of transaction is similar to the lease transaction in that the Issuer takes title to the Project. Instead of leasing the Project to the User, the User enters into an installment sale agreement whereby it agrees to pay purchase price installments equal to debt service on the Bond. Title to the Project may be conveyed to the User immediately or upon payment of the Bond.

User’s Control Over Project. Under any arrangement, loan, lease or sale, the User normally is entitled to depreciation, is responsible for insurance, taxes and maintenance, has freedom with respect to design and construction, and may be regarded as the Project “owner” for all practical purposes. During the term of the financing, the User has essentially the same control over the Project as under conventional financing. Furthermore, covenants and security devices usual in conventional construction, commercial or corporate lending normally can be incorporated in the Bond transaction.

Credit for Bonds. Regardless of the form of the transaction, *usually* neither the Issuer, the local government nor the state provides any credit for the Bonds. The bondholders look to the underlying obligation of the User and any guaranties, mortgages, security instruments, insurance, letters of credit or other funds or credit enhancements that may be provided as arranged by the User to pay the Bond. *However, some jurisdictions have legal power permitting them to support Bond financing through a limited tax pledge. Bond Counsel should be consulted with respect to such arrangements.*

“Variable Rate Demand Bonds” Specialized methods of financing have developed in the Bond area that provide highly favorable terms. The “variable rate demand bond (VRDB)” or “lower floater” method of financing accesses short-term markets for a longer-term stated maturity, but with a “put” option whereby the bondholder at regular intervals (usually weekly) may cause the Bond to be repurchased on behalf of the User. Because of the “put” feature, a variable rate demand Bond can be sold in the short-term market, which involves the lowest interest costs. Such a Bond bears interest at rates that may be reset by a remarketing agent. A variable rate demand Bond may be held by a particular holder for any period and normally would be “put” if the holder has other needs for its funds or market interest rates have shifted upward such that the rate borne by the Bond is not currently attractive. If a lower floater Bond is “put” because of an upward shift in rates, the remarketing agent will set a new, higher rate at which a remarketing agent can re-place the Bond; if market rates fall below the Bond rate, the agent will reset the rate at the lowest rate that will avoid the Bond being “put.” A credit facility of a rated institution must be available to advance the repurchase price of any variable rate demand Bond that is “put” back.

PROCEDURAL STEPS

Bond Placement. After an Inducement is obtained and Bond Counsel has determined that the transaction can be appropriately structured as a Bond Project, generally the User will place the Bonds, generally through an investment banker or underwriter. Bonds may be privately placed, for example, with an investor group or a financial institution, placed with a mutual fund or sold publicly. The I.R.C. denies to banks and other financial institutions the ability to deduct their interest cost of money borrowed to purchase or carry tax-exempt Private Activity Bonds acquired after August 7, 1986, which costs previously were 80% deductible. As a result, such institutions now charge higher rates of interest on Private Activity Bonds. An exception to this treatment is available for certain \$10,000,000-or-less governmental issues and Section 501(c)(3) organization Bonds only. Disclosure documents normally are prepared when a bond fund or public sale is utilized. Depending on the nature and number of the bondholders, a trustee may be appointed for the issue. Interest on a Private Activity Bond will not be tax-exempt if held by a Substantial User of a Project.

Legal Documentation. When the type of Bond sale has been determined, the terms and provisions of the Bond and the related documents must be negotiated and settled upon. Bond Counsel will prepare most of the necessary documentation for the transaction. Provided that an Inducement has been obtained, the acquisition and construction of the Project could be commenced during this period if funds are available.

“TEFRA” Hearing. Federal law requires that a public “TEFRA” hearing be held at least 14 days after the giving of published notice apprising the community of a proposed Private Activity Bond and the nature and the location of the Project. Following such public hearing, both the Issuer and an appropriate elected official or legislative body with jurisdiction over the Project must approve the Private Activity Bond.

Validation and Other Procedures. States frequently require additional procedural steps prior to the issuance of a Bond. For example, most Bonds in Georgia must be judicially

validated in a proceeding to which the State, the Issuer and the User are parties. Another public notice must be published in advance of this proceeding. Both the TEFRA and the state procedures affect the closing date.

Allocation of Volume Cap. Every Private Activity Bond (issued other than for a Section 501(c)(3) organization) must be issued within the total Private Activity Bond volume limitation for the applicable state, and further procedural steps are necessary to obtain an allocation of the state's quota. Depending on the state, one may have to compete for an allocation from either a state or a local pool.

Georgia Allocation Procedure. In Georgia, a statewide pool has been established, and applications are considered on a periodic basis. The "Economic Development Share", which is parceled out over four periods, is available on a first come-first served basis for any Private Activity Bond that meets the standard of creating or retaining at least one job per \$125,000 of Bond funds. In order to apply for an allocation, one must submit a copy of the Inducement, proof of publication of the TEFRA hearing and the TEFRA approval, an opinion of legal counsel, and a commitment letter from a Bond purchaser, placement agent or underwriter, together with an application and application fee. Specialized Projects require additional materials. A Private Activity Bond must be sold within a certain period after receiving an allocation.

Information Report. In connection with the closing of the transaction, an information report providing details of the Private Activity Bond, the Issuer, the User and the Project must be filed with the Internal Revenue Service.

TAXABLE BONDS AND OTHER INCENTIVES

Uses of Taxable Bonds. Due to various restrictions on the issuance of federally tax-exempt Private Activity Bonds described herein, a User may choose to finance a portion or all of a Project with Bonds that do not qualify for the Federal tax-exemption of interest. Such Bonds may be exempt from income taxation in the state of issuance, and if title to the Project is taken by the Issuer relief from ad valorem taxes may be available in certain jurisdictions. Such a Taxable Bond is free from most of the procedural requirements and substantive restrictions described in this memorandum as applicable to Private Activity Bonds. When portions of a Project would not comply with the requirements applicable to a Private Activity Bond, a combination of Private Activity Bonds and Taxable Bonds might be used to finance the entire project. Alternatively, if a Private Activity Bond is not available for a particular Project (*e.g.*, a non-manufacturing Project, or an over \$10,000,000 Project) or is not available on favorable terms, then a Taxable Bond may provide an attractive alternative.

Ad Valorem Tax Abatement. Any Georgia community can provide partial relief, and some can provide full exemptions, from ad valorem taxes for Projects through the use of a Bond-lease transaction. Ask for a copy of our memorandum "Ad Valorem Tax Breaks for IDB-Lease Transactions." To obtain such an exemption, an Issuer would sell a tax-exempt or taxable Bond to finance a facility which it leases to a User, the lease payments would amortize the Bond, and the User would purchase the facility at the end of the lease. Constitutional amendments and statutes creating authorities in Georgia ordinarily include a provision to the effect that the

property of the authority is exempt from taxation to the same extent as governmental property. These amendments and statutes sometimes contain a further provision that the exemption from taxation does not apply to a lessee of the authority's property. For example, the general Development Authorities Law applicable to the most common type of Issuer includes such a provision. In such a case, the value of the leasehold estate must be determined and an appropriate tax assessed. Given the terms and other characteristics of the lease, taxation of the leasehold will be less than taxation of the ownership interest. Often, the tax will start at a low level and increase annually as the value of the purchase option increases. Some special legislation creating local development authorities contains the general exemption from taxation and not the language subjecting the leasehold interest to tax. In such cases, the leasehold can be fully exempt from tax. When relying on the powers of an authority created by a Constitutional amendment, care must be taken to determine that the amendment did not lapse by virtue of the Constitution of 1983, but was affirmatively continued. *See* J. Monacell, "Lapse or Continuation of Local Amendments under the Constitution of 1983." 21 *Georgia Bar Journal* 78 (1984). A few communities have legal authority to exempt new or expanded industries from ad valorem taxes without the use of a Bond transaction.

Georgia Business Expansion Support Act ("BEST"). The Georgia Business Expansion Support Act (the "Act") significantly expanded existing tax incentives and created new tax incentives for new and expanding businesses. Georgia counties now are placed in four tiers according to the current level of development, and Georgia income tax credits are available to employers and businesses, varying in amounts according to the tiers. Five-year Georgia income tax jobs credits are available for significant jobs creation and retention in many sectors. For existing Georgia manufacturers, a separate income tax credit for investment in machinery is available. Generally, a taxpayer may not take the investment tax credit and the jobs tax credit for the same project. Tax credits also have been created for certain job retraining and child care programs, for research and development expenses for research in specific industries, and for certain small businesses whose total tax liability does not exceed \$1.5 million. Georgia provides additional job and investment tax credit incentives to companies (1) that expand ports activity or (2) that establish their headquarters in or relocate their headquarters to Georgia. The Act also provides sales and use tax exemption for new manufacturing equipment and for major acquisitions, computer equipment, and electricity used in new product manufacturing when such electricity exceeds 50% of the total cost of all materials used to make the product. Primary material handling equipment, when part of a major investment in warehouse and distribution facilities, also is exempted from sales and use taxes.

Grant Programs. Georgia sponsors several grant programs to encourage economic development. Most grants, although they may support private projects, are applied for and made to development authorities or other units of local government. The property or facilities financed with the grant funds may be leased by the development authority to private business and acquired by the private business when the lease is completed. Grant programs include Community Development Block Grants (CDBG), the Employment Incentive Program (EIP), the Regional Economic Business Assistance Program (REBA), each administered by the Georgia Department of Community Affairs (DCA), and the Economic Development, Growth and Enterprise Program (EDGE) and Equity Fund Program administered by the OneGeorgia Authority. Such grants typically are committed to as part of the process of negotiating bond,

property tax and other incentives with the local development authority or other local economic development agencies.

Other Incentives. Approximately two-thirds of Georgia localities have adopted “Freeport” exemptions from inventory taxes at levels ranging from 20% to 100%. State “Enterprise Zones,” “Foreign Trade Zones” and “Opportunity Zones” are located in selected areas, each with significant tax or other incentives. Many localities have developed business parks and speculative buildings, and can assist with grants, loans and other services. Employee market profiles, recruiting, screening and training is available. Many Development Authorities and communities have put into place creative funding mechanisms that permit them to offer additional, specialized incentives, such as attractive or discounted building sites, buildings for lease and other services for a Project. Georgia’s QuickStart program offers free, customized worker training services for qualifying businesses.

BOND COUNSEL

Counsel experienced in municipal bond law should be retained to serve as Bond Counsel. The function of Bond Counsel is to structure and document the transaction and to issue an opinion on the validity and tax status of the Bond. Fees of Bond Counsel are payable by the User from Bond proceeds. Bond Counsel may represent other parties, or the User, the Issuer and the Bond purchaser or underwriter may be separately represented. Smith, Gambrell & Russell, LLP is a “Red Book” listed Bond Counsel firm.

SUMMARY

This memorandum has been designed to provide a brief overview of Private Activity Bond financing and other incentives. These devices may provide significant advantages, but are subject to extensive regulation on the federal and/or state levels. This Overview can do no more than touch upon some of the more salient issues and must not be regarded as an in-depth treatment on all legal issues. Instead, this Overview provides some basic information that may serve as the basis for further discussions with Bond Counsel.

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2. How Cities Borrow
3. How School Systems Borrow
4. Living With a Governmental Bond Issue – A Compliance Guide
5. How To Live With a 501(c)(3) Bond Issue
6. Overview of Private Activity Bond Financing and Incentives
7. Overview of Governmental Financing
8. Overview of Bond Financing for 501(c)(3) Nonprofit Organizations
9. Overview of Bond Financing for Nonprofit Schools
10. Overview of Tax-Exempt Financing for Nonprofit Hospitals
11. Overview of Revised Special Purpose Local Option Sales Tax (SPLOST) and Related Financing
12. Overview of Special Purpose Local Option Sales Tax for Educational Purposes
(Education SPLOST) and Related Financing
13. Overview of Lease-Purchase Financing and COPs
14. Overview of Georgia Debt Referendum Requirements
15. Overview of Continuing Disclosure Requirements for Tax-Exempt Bonds
16. Regional Solid Waste Management Authorities
17. Taxable Versus Tax-Exempt Bond Financing for Project Financing
18. Georgia Ad Valorem Tax Incentives through Bond – Lease Transactions in Georgia
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20. Reimbursement of Prior Expenditures with Bond Proceeds – Final Reimbursement
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