Bond Basics for Fire Districts in New York State

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DISCLAIMER: Nothing contained in this booklet should be construed or relied upon as legal advice. Instead, this booklet is intended to serve as an introduction to the general subject of the use of tax-exempt bonds by fire districts in New York State, from which better informed requests for advice, both legal and financial, can be formulated.

Published by Orrick, Herrington & Sutcliffe LLP

First Edition

Dedicated to the memory
of
A.T. “Tom” Galloway II

Bond Counsel to Fire Districts
Across New York State

1942–2004

Coach, Mentor, Scholar, Friend
and One Funny Guy
We Miss You

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CHAPTER ONE

Introduction

The borrowing of money for various governmental purposes of a Fire District in New York State (the "State") is governed predominately by the State Constitution and the Local Finance Law, Chapter 33-a of the Consolidated Laws of the State (hereinafter sometimes referred to as the "LFL"). The power to spend the borrowed money to accomplish a valid purpose of the Fire District, however, generally derives from other laws, in particular, the Town Law, as well as the General Municipal Law. The focus of this booklet is on the restrictions, rules and procedures governing the issuance of debt by Fire Districts in the State. The role of Bond Counsel relates to determination of the validity of debt: valid authorization, valid sale, valid tax and disclosure status, and valid issuance.

The role of Bond Counsel in the issuance of debt by a Fire District in a nutshell is thus, as follows:

- Determine that the project is a valid Fire District object or purpose under New York State law.
- Determine that the object or purpose is a capital project eligible for financing.
- Determine the useful life of the object or purpose as provided by the State Legislature (regardless of what Bond Counsel and/or the Fire District may know to be different in actual use).
- Determine that any conditions necessary to be completed prior to adoption of a bond resolution have been properly completed (i.e., compliance with the State Environmental Quality Review Act).
- Draft the text of the bond resolution in accordance with Local Finance Law requirements and confirm valid adoption.
- Draft the proceedings calling the election and draft the notice in accordance with Town Law requirements.
- Draft the text of the Legal Notice of estoppel of the bond resolution to be published after valid adoption and successful referendum and confirm proper publication.

- Draft the documentation necessary to ensure that the sale of Fire District bond anticipation notes or bonds is in conformity with requirements of Local Finance Law and the regulations of the office of the State Comptroller.
- Participate in the production of a disclosure document about the Fire District and its finances (the official statement) and work with Fire District and financial advisor to be sure it is not less than 100% accurate.
- Determine that the sale and award of Fire District debt is in conformity with Local Finance Law and the regulations of the office of the State Comptroller thereunder, and is within the debt limit applicable.
- Draft the actual debt instruments of the Fire District and the requisite closing documentation, including federal tax law and disclosure law covenants and compliance certifications.
- Provide an opinion of Bond Counsel that, in effect, each of the steps described above was completed in conformity with the laws of the State.

To this end, bond counsel are involved early on in planning either a capital project or a cashflow borrowing for operational expenses. From the beginning, the activities of a Fire District prior to borrowing may have implications under Federal Tax Laws, Federal Securities Laws the Local Finance Law and/or the Town Law.

Without a "bond counsel opinion" from a reputable, knowledgeable firm, preferably one that will exist at least as long as the debt is outstanding, a Fire District is generally not able to sell its debt because it is that opinion that provides comfort to the purchasers of such debt that it is a valid and binding obligation of the Fire District to repay the purchaser both the principal loaned and interest thereon.

This booklet should serve as a primer for Fire District officials and other interested parties on the basic bond rules governing Fire Districts in New York State and the proper functions of bond counsel. It does not cover village or city borrowings for their own municipal fire departments. See our primer for those units of government for such financings.

While this primer also does not cover in detail financings by volunteer fire companies as a separate non-governmental entity, *outside* the Fire District context, there is one chapter on volunteer fire company financings, particularly those unaffiliated with any Fire District with general taxing power, for example, a not-for-profit company contracted to provide fire-fighting services in a fire protection district borrowing in its own name.

While a volunteer fire company serving *within* the context of a Fire District might also have legal authority to borrow in its own name as a not-for-profit corporation, such a financing would not usually make economic sense. Fire District debt is, as discussed herein, a "general obligation" financing involving the investor-preferred pledge of taxing power, which a volunteer fire company is unable to do.

CHAPTER TWO

Constitutional Requirements

Limitations on Fire District indebtedness are not set forth in Article VIII of the New York State Constitution as they are for other municipal units of government. They are implemented by the Local Finance Law. The provisions of Article VIII, while not generally applicable to Fire Districts in the State and the obligations authorized by their Fire District Board of Fire Commissioners in their capacity as the "finance board," are applicable *in effect* and so those provisions are discussed herein. Most local governments have a constitutionally established debt limit (and those which do not have a statutory limit). In addition, there are constitutionally based rules on the loan of Fire District credit, uses of borrowed moneys and the pledge of faith and credit, which apply to Fire Districts through the Local Finance Law.

Loan of Credit Prohibition

Article VIII, Section 1 of the Constitution provides that no county, city, town, village or school district shall give or loan any money or property to or in aid of any individual or private corporation, association or private undertaking nor shall any such local governmental unit give or loan its credit to or in aid of any of the foregoing or any public corporation. There are limited exceptions to the general rule that local governmental units cannot give or loan money, property or credit for other than governmental purposes, generally relating to health and welfare facilities. Incidental private benefit is permissible and there is an abundance of case law on its limitations. This constitutional provision, while not listing Fire Districts, is, in effect, applicable through statutory law.

Valid Purpose Requirement

Article VIII, Section 2 of the Constitution provides that no county, city, town, village or school district shall contract indebtedness except for a county, city, town, village or school district purpose, respectively. In effect, a Fire District can only borrow money to do things that a Fire District is permitted to do. (For example, a Fire District is without legal authority to run an elementary school or to construct a permanent outdoor competitive sports facility. *See e.g.* Opin. No. 93-24, Office of the State Comptroller.) No such indebtedness is to be contracted for longer than the period of probable usefulness of the particular purpose which is legislatively determined by the State in every case (or, in the alternative, the weighted average period of probable usefulness of several purposes if financed in the same obligation) for which it is contracted and in no event may this period exceed forty years. This constitutional provision, while not listing Fire Districts, is, in effect, applicable through statutory law.

Pledge of Faith and Credit

Article VIII, Section 2 of the Constitution also provides that each such local governmental unit must pledge its faith and credit and make annual provision for the payment of the principal of and the interest on any of its indebtedness. This is the heart of a "general obligation" bond or note—the ability and promise to tax as necessary to repay the debt. All of the taxable real property within the Fire District is subject to the levy of ad valorem taxes to pay principal, and, interest without limitation as to rate or amount. Fire Districts in the State are authorized only to issue general obligation type debt. They cannot issue revenue bonds solely backed by a specific stream of revenue or bonds secured by a mortgage on property or any other type of debt instrument, including a simple bank loan. (The sole exceptions to the rule are certain lease-purchase obligations subject to appropriation, including energy performance contracts, which cannot involve the pledge of the faith and credit and therefore are not technically debt yet are subject to the same authorization requirements as debt. *See* Chapter 16 herein.)

Except for certain short-term indebtedness contracted in anticipation of the collection of taxes and indebtedness to be paid within one of the two fiscal years immediately succeeding the fiscal year in which such indebtedness was contracted, all indebtedness must be paid in annual installments of principal. Indebtedness must be paid in annual installments commencing not more than two years after the debt was contracted and no installment may be more than fifty percent (50%) in excess of the smallest prior installment unless the Board of Fire Commissioners provides for and utilizes substantially level or declining annual debt service payments. It is never possible to skip a year in the paydown of borrowed amounts after the first anniversary of the first borrowings.

Annual Appropriation

Provision must be made annually by appropriation by the Fire District for the payment of interest on all indebtedness and for the amounts required for the amortization and redemption of serial bonds. If at any time the respective appropriating authorities fail to make such appropriations, and if a court were determined that this provision effectively applied to Fire Districts a sufficient sum must be set apart from the first revenues thereafter received to be applied for debt service and may be so required at the suit of any holder of a debt obligation; however, this latter Constitutional provision does not apply to revenue anticipation notes, tax anticipation notes, or bond anticipation notes, discussed later in the primer.

Debt Limits

Article VIII, Section 4 of the Constitution provides that no county, city, town, village or school district shall contract indebtedness which, including existing indebtedness, shall exceed seven percent (7%) of the five-year average full valuation of taxable real estate therein. (There are some exceptions to this, most notably, cities having 125,000 inhabitants or more (except New York City), nine percent (9%), and any small city school district, five percent (5%). Central and union free school districts are statutorily limited to ten percent (10%).) *The debt limit for Fire Districts is three percent (3%) unless the proposition includes voter authorization by a 2/3 affirmative vote to go up to five percent (5%), and the State Comptroller consents.* The average full valuation of taxable real estate of the respective governmental unit is determined pursuant to Article VIII, Section 10 of the State Constitution by taking the assessed valuations of taxable real estate on the last completed assessment roll and the four preceding rolls and applying to such rolls the ratio (as determined by the State Office of Real Property Services) which such assessed valuation bears to the full valuation. Article VIII, Section 5 and Article VIII, Section 2-a of the State Constitution enumerate exclusions and deductions from the Constitutional debt limit. Such exclusions include, for example, self-liquidating debt, indebtedness incurred for water and certain sewer facilities, as well as typical cashflow borrowings hereinafter described.

There are also numerous exclusions and deductions in the debt limit calculations particular to each type of governmental unit. Inasmuch as few, if any, Fire Districts, ever approach their debt limit, these exclusions and deductions will not be discussed in detail here.

Tax Limits

It is significant that there is no constitutional limitation on the amount that may be raised by a Fire District by tax upon real property in any fiscal year to pay principal of and interest on its indebtedness. Indeed, the State is specifically precluded from restricting the power of any local government to levy taxes on real property for this purpose in Article VIII, Section 12 of the Constitution. This is the firm basis upon which Fire District general obligation debt rests that, together with sound fiscal practices and the resultant bond rating, permits a Fire District to borrow at advantageous tax-exempt interest rates.

CHAPTER THREE

General Implementing Statutory Provisions

Sections 100.00 and 101.00 of the Local Finance Law contain the statutory counterparts of the Article VIII Sections 1 and 2 Constitutional provisions described above and apply by their terms to Fire Districts as "district corporations." They read simply and clearly:

> "**§100.00 Requirement of pledge of faith and credit**
>
> Every municipality, school district and district corporation shall pledge its faith and credit for the payment of all indebtedness contracted by it."
>
> "**§101.00 Giving or loaning of municipal credit and contracting indebtedness other than for municipal purposes prohibited**
>
> a. No municipality, school district or district corporation shall:
>
> 1. Give or loan its credit to or in aid of any individual, or public or private corporation or association, or private undertaking, or
>
> 2. Contract indebtedness except for the purposes of such municipality, school district or district corporation.

However, for a Fire District the following are permitted:

a. Increasing, pursuant to law, the amount of pension of any member of a retirement system of the state, or of a subdivision of the state.

b. Providing, pursuant to law, for the protection by insurance or otherwise against the hazards of unemployment, sickness and old age.

Protection of Holders of Local Government Debt in the State

Holders of the debt instruments of local governmental units in the State including Fire Districts are the beneficiaries of strong statutory protections. The pledge of the faith and credit of the issuer is taken very seriously in the State. There is no known occurrence of an absolute default in the payment of general obligation debt in the State in the past 100 years or more. Rating agencies, insurance companies, bond mutual funds, and banks all know this which helps to keep the interest rates Fire Districts pay on their debt in New York relatively low in comparison to non-general obligation debt.

Contract Remedies

The General Municipal Law of the State provides that it shall be the duty of the governing board, i.e., the Board of Fire Commissioners, to assess, levy and cause to be collected a sum of money sufficient to pay a final judgment for a sum of money or judgment directing the payment of money which has been recovered against the governmental unit and remains unpaid. The General Municipal Law further provides that the rate of interest to be paid by a municipal corporation upon any judgment against a municipal corporation shall not exceed the rate of nine percent (9%) per annum. This provision might be construed to have application to the holders of local governmental debt, such as Fire District debt, in the event of a default in the payment of principal of and interest. Execution or attachment of Fire District property cannot be obtained to satisfy a judgment by holders of general obligation indebtedness of any Fire District.

The Federal Bankruptcy Code allows public bodies recourse to the protection of a Federal Court for the purpose of adjusting outstanding indebtedness. Section 85.80 of the Local Finance Law contains specific authorization for any "municipality" in the State to file a petition under any provision of Federal bankruptcy law for the composition or adjustment of municipal indebtedness. Fire Districts are not included in the Local Finance Law definition of "municipality."

At the Extraordinary Session of the State Legislature held in November, 1975, legislation was enacted which purported to suspend the right to commence or continue an action in any court to collect or enforce certain short-term obligations of The City of New York. The effect of such act was to create a three-year moratorium on actions to enforce the payment of such obligations. On November 19, 1976, the Court of Appeals, the State's highest court, declared such act to be invalid on the ground that it violates the provisions of the State Constitution requiring a pledge by such City of its faith and credit for the payment of such obligations.

As a result of the Court of Appeals decision, the constitutionality of that portion of Title 6-A of Article 2 of the Local Finance Law enacted at the 1975 Extraordinary Session of the State Legislature authorizing any city, school district, town or village with respect to which the State has declared a financial emergency to petition the State Supreme Court to stay the enforcement against such municipality of any claim for payment relating to any contract, debt or obligation of the municipality during the emergency period, is subject to doubt.

Regardless, what State Comptroller Arthur Levitt said in 1957—"No bondholder has ever lost a penny through default of any bond issued by a New York State school district"—is as true today as it was fifty years ago and it is equally applicable to Fire Districts.

CHAPTER FOUR

Anatomy of a Bond Resolution and Its Adoption

In general, the State Legislature has, by the enactment of the Local Finance Law, authorized the power and procedure for each type of municipality including Fire Districts in the State to borrow and incur indebtedness, subject, of course, to the constraining Constitutional and statutory provisions set forth previously.

Bond Resolutions

Pursuant to the provisions of the Local Finance Law, Fire Districts authorize the issuance of bonds to finance a capital project, judgment or other valid purpose, known as an "object or purpose" therein, by the adoption of a bond resolution. Bond resolutions are usually drafted by specialized counsel known as bond counsel who will ultimately opine as to the validity of any debt issued thereunder as well as the tax-exempt status of its interest. There is essential specialized language that must be included for the bond resolution to be valid.

A bond resolution is approved by a majority vote of three-fifths of the voting strength of the members of the Board of Fire Commissioners, acting as the finance board of the Fire District. Voting strength means the total membership of the board, not simply those board members present at the meeting. The bond resolution is subject to mandatory referendum of the voters in the Fire District.

A Fire District first adopts the bond resolution, subject to the mandatory referendum. Thus, that resolution is not valid unless and until the voters approve it and that means it is not a valid source of funds for purposes of signing contracts to buy or build something until after the successful vote.

Customarily, in a bond resolution, a finance board delegates to the chief fiscal officer ("CFO"), the Treasurer, the power to authorize and sell bond anticipation notes in anticipation of authorized bonds, as well as the bonds themselves pursuant to Section 56.00 of the Local Finance Law.

The delegation of the power and duties to sell and issue debt to the chief fiscal officer does not remove the Board of Fire Commissioners from the transaction completely: Sections 20.00 and 163.00 of the Local Finance Law provide that the Treasurer as CFO must file a certificate with the Board of Fire Commissioners upon sale and issuance providing all of the terms and conditions thereof are met. In addition, a Board of Fire Commissioners holds the power either to limit the delegation of authority or to elect to reassume the same pursuant to Section 56.00 of the Local Finance Law. This is rarely, if ever, utilized, as the sale of debt is customarily subject to market conditions requiring very prompt action.

Once delegated to the CFO, Section 160.10 of the Local Finance Law permits the Treasurer to make a further delegation to a deputy district official of any delegated powers, with such authorization in writing and filed with the Board of Fire Commissioners.

Each bond resolution authorizes the construction, reconstruction, acquisition or installation of an "object or purpose" to be financed, sets forth the plan of financing and specifies the maximum maturity of the bonds subject to the legal (Constitution, Local Finance Law and case law) restrictions relating to the period of probable usefulness with respect thereto. Historically, Fire Districts have authorized bonds for a variety of objects or purposes within the Constitutional constraints noted above, typically including building construction and reconstruction, acquisition of land, equipment, machinery and fire-fighting vehicles.

A Fire District may adopt one or more bond resolutions authorizing the issuance of bonds for a specific object or purpose for which object or purpose serial bonds may be issued. In addition thereto, a Fire District may adopt one or more bond resolutions authorizing the issuance of bonds for any class of objects or purposes, for which objects or purposes serial bonds are to be issued. The distinction between "specific" and "class" is discussed in the next chapter.

The issuance of obligations for a capital improvement and for the acquisition of land or permanent rights in land for such improvement may be authorized by the same bond resolution, notwithstanding the fact that the subdivision of paragraph a of section 11.00 of the Local Finance Law which sets forth the period of probable usefulness for such capital improvement (hereinafter described) does not include therein the acquisition of land or permanent rights in land for such improvement.

The issuance of bonds for two or more specific objects or purposes or two or more classes of objects or purposes may be authorized by the same bond resolution, notwithstanding the fact that such specific objects or purposes or classes of objects or purposes are described in separate subdivisions of paragraph a of Section 11.00 of the Local Finance Law, provided:

1. The maximum period of probable usefulness is five years or less, or
2. The bond resolution is not subject either to mandatory or permissive referendum—as is the case for Fire Districts; the exception is not available to them.

Proceeds of a borrowing pursuant to a bond resolution may never be legally used for any other purpose than that described in the bond resolution. Once borrowed, no reallocation to some other purpose is permissible; the only permissible use of such borrowed proceeds, if not used for the project as described, is to pay down debt service on the debt obligation under which the money was borrowed.

The requisite elements to every bond resolution, discussed below, are based on the few basic Constitutional and statutory principles and limitations described previously.

Elements of a Bond Resolution

What does a bond resolution do? The function of any bond resolution is, in essence, to authorize the financing of a valid object or purpose, such as a capital project. A bond resolution has several essential components:

a. **accurate description of the item(s) or improvement(s) to be financed. Here is a typical example:**

   Section 1. The reconstruction of various Fire District facilities in and for the Duke Fire District in the Town of Earl, Dutchess County, New York, including original furnishings, equipment, machinery, apparatus, appurtenances and incidental improvements and expenses in connection therewith, is hereby authorized at a maximum estimated cost of $___________.

b. **statement as to whether the item or improvement is a specific object or purpose or a class of objects or purposes. Here is a typical example:**

   Section 2. It is hereby determined that the plan for the financing of said class of objects or purposes is as follows:

c. **statement of maximum estimated cost of the project; the "hard costs" of a capital project may have added to them such "soft costs" as those for planning, public hearings, environmental impact review, title fees, interest during construction, and, yes, attorneys fees. Here is a typical example:**

   Section 1. The reconstruction of various Fire District facilities in and for the Duke Fire District in the Town of Earl, Dutchess County, New York, including original furnishings, equipment, machinery, apparatus, appurtenances and incidental improvements and expenses in connection therewith, is hereby authorized at a **maximum estimated cost** of $___________.

d. **plan of financing of the cost, i.e., how much to be financed, how much cash is to be used, if any, sources of cash contribution to estimated cost. Here is a typical example:**

   Section 2. It is hereby determined that the plan for the financing of said class of objects or purposes is as follows:

   (a) by the issuance of the $_________ serial bonds hereby authorized to be issued pursuant to the provisions of the Local Finance Law; and

   (b) by the expenditure of $_________ building capital reserve fund moneys, which moneys are hereby appropriated therefor.

e. **statement of the period of probable usefulness ("ppu") of the capital project and maximum maturity of the bonds authorized. Here is a typical example:**

   Section 3. It is hereby determined that the period of probable usefulness of the aforesaid class of objects or purposes is 25 years, pursuant to subdivision 12(a)(1) of paragraph a of Section 11.00 of the Local Finance Law.

f. delegation of authority to the chief fiscal officer to arrange for the financing by bonds and/or bond anticipation notes as well as renewals of said notes (this is not mandatory but is customary to permit prompt activity when needed). Here is a typical example:

Section 4. Subject to the provisions of the Local Finance Law, the power to authorize the issuance of and to sell bond anticipation notes in anticipation of the issuance and sale of the serial bonds herein authorized, including renewals of such notes, is hereby delegated to the Treasurer, the chief fiscal officer. Such notes shall be of such terms, form and contents, and shall be sold in such manner, as may be prescribed by said Treasurer, consistent with the provisions of the Local Finance Law.

Section 5. All other matters, except as provided herein relating to such bonds including determining whether to issue such bonds having substantially level or declining annual debt service and all matters related thereto, prescribing whether manual or facsimile signatures shall appear on said bonds, prescribing the method for the recording of ownership of said bonds, appointing the fiscal agent or agents for said bonds, providing for the printing and delivery of said bonds (and if said bonds are to be executed in the name of the Fire District by the facsimile signature of the Treasurer, providing for the manual countersignature of a fiscal agent or of a designated official of the Fire District), the date, denominations, maturities and interest payment dates, place or places of payment, and also including the consolidation with other issues, shall be determined by the Treasurer. It is hereby determined that it is to the financial advantage of the Fire District not to impose and collect from registered owners of such serial bonds any charges for mailing, shipping and insuring bonds transferred or exchanged by the fiscal agent, and, accordingly, pursuant to paragraph c of Section 70.00 of the Local Finance Law, no such charges shall be so collected by the fiscal agent. Such bonds shall contain substantially the recital of validity clause provided for in section 52.00 of the Local Finance Law and shall otherwise be in such form and contain such recitals in addition to those required by section 52.00 of the Local Finance Law, as the Treasurer shall determine.

Section 6. Such bonds shall be in fully registered form and shall be signed in the name of the Duke Fire District in the Town of Earl, Dutchess County, New York, by the manual or facsimile signature of the Treasurer and a facsimile of its corporate seal shall be imprinted or impressed thereon and may be attested by the manual or facsimile signature of the Fire District Secretary.

g. pledge of the full faith and credit of the Fire District to pay any such obligations by using its unlimited taxing power (the "general obligation" pledge). Here is a typical example:

Section 7. The faith and credit of said Duke Fire District in the Town of Earl, Dutchess County, New York, are hereby irrevocably pledged for the payment of the principal of and interest on such bonds as the same respectively become due and payable. An annual appropriation shall be made in each year sufficient to pay the principal of and interest on such bonds becoming due and payable in such year. There shall annually be levied on all the taxable real property of said Fire District a tax sufficient to pay the principal of and interest on such bonds as the same become due and payable.

h. a reimbursement authorization. Here is a typical example:

Section 8. This resolution shall constitute a statement of official intent for purposes of Treasury Regulations Section 1.150-2. Other than as specified in this resolution, no moneys are, or are reasonably expected to be, reserved, allocated on a long-term basis, or otherwise set aside with respect to the permanent funding of the object or purpose described herein.

i. an estoppel clause. Here is a typical example:

Section 9. The validity of such bonds and bond anticipation notes may be contested only if:

1) Such obligations are authorized for an object or purpose for which said Fire District is not authorized to expend money, or

2) The provisions of law which should be complied with at the date of publication of this resolution are not substantially complied with, and

an action, suit or proceeding contesting such validity is commenced within twenty days after the date of such publication, or

3) Such obligations are authorized in violation of the provisions of the Constitution,

j. a statement that the bond resolution is adopted subject to mandatory referendum. Here is a typical example:

Section 10. This resolution is adopted subject to approval at a special election of said Fire District to be held on ______________, 2010, the details of which shall be provided in a separate resolution of this Board of Fire Commissioners.

k. a directive to the secretary to publish the estoppel notice described in Chapter Seven *after* the referendum. Here is a typical example:

Section 11. Upon this resolution taking effect, it shall be published in summary or in full in *The Early Earl Gazette* and the *Southern Duke News*, the official newspapers of said Fire District, together with a notice of the Fire District Secretary in substantially the form provided in Section 81.00 of the Local Finance Law.

Temporary Advances of Non-Borrowed Moneys/Bond Resolutions for Planning

Temporary advances of other available moneys for a project prior to authorization of financing can be a problem.

Bond resolutions to authorize the financing of the cost of planning for a future capital improvement deserve special comment. While preliminary costs, such as the fees of architects, surveys, planners, and environmental analysis, may be rolled into and included in the authorization for borrowing of the capital improvement, there are times when the latter cost cannot be determined until some of the initial costs are incurred. Section 165.10 of the Local Finance Law does not permit reimbursement of those, or any costs, paid temporarily with other available funds unless a valid bond resolution is in place at the time of expenditure. (There is a similar rule under federal tax law governing tax-exempt obligations—this is the reason for item "(h)" above).

This dilemma is usually resolved in one of two ways: (a) adoption of a bond resolution with a somewhat high estimate of the ultimate total cost, including initial planning, or (b) adoption of a bond resolution just for the initial planning costs. There is, however, a trap for the unwary in adoption of a bond resolution only for planning costs. Section 99-d of the General Municipal Law provides that where a board has authorized debt issuance for planning costs, authorization for the undertaking of the actual improvement itself cannot occur during the one-year period after such debt is issued. Section 99-d of the General Municipal Law provides that where a board has authorized debt issuance for planning costs, authorization for the undertaking of the actual improvement itself cannot occur during the one year period thereafter. (Section 99-d also places a limit on the aggregate amount of stand-alone advance planning financings a Fire District can authorize in any fiscal year. That ceiling is generally 5% of the "amount of the annual budget.")

The continued purpose for this rule is unclear in an era when construction projects typically move more quickly than that. Legislation could be introduced to eliminate this unnecessary restriction, which is observed more in the breach in any event.

However, the whole idea of a bond resolution for planning costs is unworkable for Fire Districts. Why? Since even a bond resolution for planning would be subject to voter approval in a Fire District, this option is never utilized. So what can a Fire District do?

In any case in which the Fire District intends to reimburse itself from borrowed proceeds for moneys temporarily advanced for any aspect of a capital project, the law says the adoption of a bond resolution is necessary prior to the advance. Current law is modifiable by state legislative action. In the meantime, at a minimum, and with no guarantee that is adequate, a Fire District expending moneys prior to the referendum for the initial stages of a capital project, (like preliminary planning or architectural designs) should adopt a "resolution of intent to reimburse" to signal the clear intention of the Board of Fire Commissioners to reimburse temporary advance of cash upon approval of the project by the voters and the coming into effectiveness of the bond resolution upon the successful vote. Alternatively or in addition, it may be possible to issue a budget note for these expenses. 12 Opin St. Compt. 391 (1956). *See* Chapter 8.

Additional Money Bond Resolutions / Phased Projects

There are times when the bid cost of a capital project comes in higher than that authorized in the bond resolution. What to do? A special form of bond resolution known as an "additional money" bond resolution may be adopted if it is desired by the Board of Fire Commissioners to finance the increased cost. This is subject to the same voting requirements in the same order as for the initial financing. Such a resolution does not amend the existing bond resolution (if moneys have already been borrowed under it); rather, it supplements the existing bond resolution, and the new plan of financing refers the prior bond resolution. It is subject to all the same rules as other bond resolutions, and the period of probable usefulness for permitted borrowing for the additional costs runs from the first borrowing under the existing bond resolution. Compare this with providing funding for phases of a single large capital project: some projects, generally large ones, have separate construction phases, and it is possible to authorize the financing one phase at a time especially the cost of later phases, as they may be dependent on how the earlier phase(s) work out. Note that this method of authorization can put larger projects at risk mid-construction if later bond authorizations fail to get the requisite approval.

Bond Resolutions and Contingencies to Utilization

Bond resolutions generally cannot include contingencies to their utilization. (However, adoption of a bond resolution does not require that it ever be utilized in whole or in part.) Why? Because the lenders to a Fire District and bond counsel need certainty that the bond resolution is valid. A built-in contingency would impinge on the certainty of valid adoption. In short, bond counsel could not opine in the required "unqualified opinion" that the debt was valid without following up on a contingency and obtaining certified satisfaction that the contingency was met. Reasonable people could differ as to whether the contingency had, in fact, been met. Hence, contingencies are not found in bond resolutions. The only exception to this rule is that pertaining to grants and the determination not to borrow long term to the extent such funds are received.

Repeal of a Bond Resolution

Section 41.00 of the Local Finance Law governs the repeal of all or a portion of a bond resolution.

In relevant part for a Fire District, this reads:

"**§41.00 Repeal of unexpended authorizations**

a. The finance board of:

2. Any municipality may at any time, by resolution, repeal or revoke in whole or in part (a) any resolution heretofore or hereafter adopted authorizing the issuance of obligations, and (b) any certificate of a chief fiscal officer authorizing the issuance of obligations, dated on or after the effective date of this chapter. . . except to the extent that any indebtedness shall already have been contracted or encumbrances made thereunder for the object or purpose for which such resolution or certificate authorizes the issuance of obligations . . . .

> b. Any resolution heretofore or hereafter adopted authorizing the issuance of obligations, or any certificate of a chief fiscal officer authorizing the issuance of obligations, dated on or after the effective date of this chapter, unless repealed or revoked at a prior date in the manner provided in paragraph a of this section, shall be deemed to be repealed ten years after the date it becomes effective, except to the extent that any indebtedness shall already have been contracted or encumbrances made thereunder for the object or purpose for which such resolution or certificate authorizes the issuance of obligations."

This latter provision is to ensure that such unexpended authorizations will not unnecessarily swell the "authorized but unissued indebtedness" disclosure in an official statement and other reports. *See* Chapter 14 re: official statements.

CHAPTER FIVE

Certain Legal Elements of a Financed Capital Project

Periods of Probable Usefulness

Every capital project to be financeable must have a legally set period of probable usefulness ("PPU") which establishes a maximum maturity date for any debt issued for that project. Paragraph a of Section 11.00 of the Local Finance Law assigns periods of probable usefulness to those improvements and other objects or purposes that the State Legislature has determined can have a PPU; without a PPU set forth in this section (or otherwise, in for example, special legislation), a project is not considered capital and therefore no capital debt can be issued for such projects. As Section 10.00 of the LFL states:

> "**§ 10.00 Power of municipalities, school districts and district corporations to contract indebtedness.**
>
> . . . a municipality, school district or district corporation shall have the power to contract indebtedness respectively for any municipal, school district or district corporation object or purpose set forth in paragraph a of section 11.00 of this title, or for a class of such objects or purposes when authorized under the provisions of section 31.00 of this article, if it is authorized by law to expend money for or to accomplish such object or purpose; provided, however, that it shall not be able to contract indebtedness to a greater extent than it is authorized by law to spend money for such object or purpose or class of such objects or purposes and provided also that this section shall not relieve any such unit of government of any duty imposed by law to include in its annual budget or tax levy or otherwise to pay from current funds all or part of any expenditure that it may make for such object or purpose or class of such objects or purposes."

Typical periods of probable usefulness are, for example, three (3) years for a passenger vehicle, five (5), ten (10) or twenty (20) years for various items of fire-fighting vehicles and apparatus (depending on cost), twenty (20) to thirty (30) years for building construction, expansion or reconstruction, depending on the materials utilized, and thirty (30) years for land acquisition. The Board of Fire Commissioners may prescribe a serial bond maturity period for any number of years equal to or less than the PPU (but never greater than the legally prescribed PPU).

The PPU establishes the maximum maturity for any borrowing or series of borrowings for a project; it does not mandate that the maximum be utilized (but it does provide the greatest flexibility over time). A Board of Fire Commissioners is always able to limit the maximum maturity in the bond resolution or a borrower is always able to set up voluntarily the payoff of its debt over a shorter period, if preferable. It is also true that there is not generally a public market for local governmental debt that has a final maturity beyond the 25–30 year range.

The maximum maturity date of any borrowing or series of borrowings for a single capital project is thus set with the initial borrowing for that project because it is from that date that the period of probable usefulness is calculated. If, for example, a Fire District borrows to construct a new fire substation building with a PPU of twenty-five (25) years by issuance of a one-year bond anticipation note ("BAN") to obtain funds during construction, and then, the following year, refinances that BAN with a serial bond issue, the final maturity of that bond issue cannot exceed twenty-four (24) years, taking into account that there has already been debt (the BAN) outstanding for one year. Likewise, on a larger, multi-year project, multiple new money borrowings during construction (commonly known as "series") all have the running of their maximum maturity tied to the date of the very first borrowing. Each series is not entitled to the full PPU as if it were the first borrowing—rather the first borrowing has already established the longest maturity date for any debt issued for that particular capital project. (Needless to say, however, a related but different capital project, which is not additional, increased costs of the same project, would have its own full PPU.)

Specific Object or Purpose or Classes of Objects or Purposes

A bond resolution can authorize a specific object(s) or purpose(s) or a class (or classes) of objects or purposes. If the Board of Fire Commissioners, for example, specifies an exact number of vehicles it plans to acquire, that is "specific," and the cost of each particular vehicle is specific and must be specified; if it authorizes the acquisition of "vehicles," that is a "class" with a single aggregate cost. What is the difference? If a specific number of vehicles is authorized, that is what the Fire District must acquire each at no more than the specified cost; if it turns out the amount of dollars authorized is insufficient for any particular vehicle, this is a problem. Even if the aggregate authorization would cover the insufficiency for that vehicle, there is no authority to move authorization from a vehicle that turned out to be less costly to one that turned out to be more costly. If, however, a class is authorized, i.e., "acquisition of vehicles," then greater flexibility ensues. Some flexibility is generally preferable for just this reason. While such problems are rare, they can be quite embarrassing. Issues can arise, particularly in bond resolutions for multi-facility building projects when the cost of work at one building comes in high while another comes in lower than expected. There is, thus, an art to the drafting of bond resolutions.

The LFL provides this guidance of definitions of "specific" and "class":

> "The term "specific" as applied to the terms "object or purpose," "capital improvement" or "equipment" shall mean a single item, or a specified number of items, the description of which is contained in a single subdivision of paragraph a of section 11.00 of this chapter."
>
> "The term "class," as applied to the terms "objects or purposes," "capital improvements' or "equipment," shall mean an unspecified number of items, the description of which is contained in a single subdivision, other than subdivision thirty-five of paragraph a of section 11.00 of this chapter, notwithstanding the fact that such subdivision may be drafted in the singular number."

and then permits either to be used in drafting a bond resolution:

> "Any municipality, school district or district corporation may adopt one or more bond resolutions . . . authorizing the issuance of bonds . . . for a special object or purpose, for which object or purpose serial bonds may be issued. In addition thereto any municipality or school district may adopt one or more bond resolutions . . . authorizing the issuance of bonds . . . for any class of objects or purposes, for which objects or purposes serial bonds may be issued."

Policing a Class of Objects or Purposes

One may well ask, if a capital project is described generally, as a class of objects or purposes i.e. reconstruction of Fire District buildings, how can one know which particular facilities under consideration before the Board of Fire Commissioners at the time of adoption are those intended to receive the funding (and therefore required to receive the funding)? The answer is actually quite simple: the record of adoption by the Board of Fire Commissioners includes the written materials used by the Board in making its decision on the financing as well as the record of debate at adoption. These form the "legislative history" of the bond resolution adoption and provide the roadmap to legislative intent as to the use of the borrowed proceeds.

In the case of grant aided projects within a class, by the terms of the grant they are usually the only legal recipients of the aid portion of the cost of that project.

A chief fiscal officer, in any event, has no power to increase or decrease appropriation or enter into contract beyond the scope of authority. That power is vested only in the Board of Fire Commissioners. No delegation of this power is permissible.

Further Aggregation of Items

In addition to the determination of whether a capital project is a specific object or purpose or a class of objects or purposes, it may also be possible for a Board of Fire Commissioners to aggregate multiple *related* capital projects under one of the "super-PPUs" established by the State Legislature for projects with a common PPU of 5, 10, 15, 20, 25, 30, 35, or 40 years. This is most useful in circumstances in which the exact costs of certain related components of a capital program are not known at the time of adoption of the bond resolution. If the dollar cost of each component is not yet known, these components of a Fire District program can possibly share a common PPU as long as it does not exceed the maximum permitted PPU of any one of the components, i.e. if one element of a capital project has a 15-year PPU and a second element has a 10-year PPU, a combined 10-year PPU (the lowest common denominator) could be used for the aggregated costs of both.

A typical context for use of a super-PPU is the acquisition of a parcel of land and the building thereon. Land has a 30-year PPU and a building acquisition can have a 30-year PPU if it is a fireproof building. Neither the seller nor the Fire District may know a reasonable allocation of the cost of the purchase price to the land and to the building—since they both have a 30-year PPU, it may be possible to combine them in one aggregate cost.

While there is some uncertainty about the proper use of super-PPUs, they are in use in the State based on Section 32.00(4) of the Local Finance Law.

Section 32.00 (4) provides that a bond resolution includes:

> "4. A determination of the period or periods of probable usefulness of the specific object or purpose or class of objects or purposes for which such bonds . . . are to be issued, if such determination is made by the finance board. However, if bonds are to be used for a class of objects or purposes for which more than one period of probable usefulness is prescribed pursuant to section 11.00 of this chapter and if the determination of the period of probable usefulness therefore is to be made by the finance board, the bond resolution authorizing the issuance of such bonds shall
>
> "(a) Specify the kind of specific object or purpose within such class to which the proceeds of such bonds are to be applied and the appropriate period of probable usefulness therefore, or
>
> "(b) Specify as the period of probable usefulness of such class the lowest period of probable usefulness assigned thereto."

This is the basis for the super-PPUs.

Maximum Estimated Cost

The maximum estimated cost of a capital project stated in a bond resolution is intended to be just that and nothing more or less. It is self-evident that how the scope of a project is described will expand or limit its maximum estimated cost. For example, a capital project with multiple sources of funds, only one of which is the local share, could be described in one of two ways:

a. To pay the Fire District's share of the cost of construction of a fire substation (the "Local Share Model" or "net funding")
b. To pay the cost of construction of a new Fire District fire substation (the "Full Cost Model" or "gross funding").

The Local Share Model focuses on the local share only. Thus it would not allow for a Fire District to "gross fund" a capital project with federal and/or state grants-in-aid, *i.e.* temporarily borrow on short-term bond anticipation notes (but not bonds) until the grant moneys arrive. Since many grants require a temporary local advance of the grant portion, as well as a truly local share, this Local Share Model of the bond resolution would not work in those cases. A Full Cost Model of bond resolution will state the total maximum estimated cost and then provide in the plan of financing (described below) for the various sources of funding. As such it can include (or not) borrowing authority for the grant portion and that borrowing authority can be limited to bond anticipation notes. It should always be used in Fire Districts so that the voters approve the full capital project cost, which they need to do. This proviso looks like this in a bond resolution:

> *Section 2.* It is hereby determined that the plan for the financing of the aforesaid specific object or purpose is by the issuance of $4,459,150 serial bonds of said Fire District hereby authorized to be issued therefor pursuant to the provisions of the Local Finance Law; **PROVIDED, HOWEVER,** that to the extent that any Federal or State grants-in-aid are received for such specific object or purpose, the amount of bonds to be issued pursuant to this resolution shall be reduced dollar for dollar.

Keep in mind that a maximum estimated cost for a plan of financing is a maximum ESTIMATED cost. As provided in Section 32.00 (2) of the LFL:

> ". . . Such financial plan, by virtue of its inclusion in such resolution, shall not be deemed binding upon such municipality, school district or district corporation."

In other words, the maximum estimated cost may change at some point after adoption of the bond resolution. That will require amendment of some capital plan and project authorization proceedings, and it will require amendments or supplementation of the bond resolution *and an additional vote of the public*. Furthermore, reduced costs which will result in reduced borrowings do not require amendment of a bond resolution, but repeal of unused authorizations is recommended periodically.

Plan of Financing

As discussed above, the scope of a capital project can be described in a bond resolution as the local share or the entire cost. In either event, a bond resolution must contain a plan of financing paragraph that sets forth the source(s) of funding for the capital project as described. Again, Section 32.00 (2) of the LFL clarifies that changes to the plan do not require amendment or supplementation of a bond resolution unless there are additional costs to be financed. In such circumstances, a bond resolution to cover specifically the additional costs is the recommended course. Such an additional money bond resolution references the prior bond resolution in the plan of finance and with regard to the beginning date for calculating the maximum maturity under the shared PPU.

Some Peculiar PPU Rules

Some peculiar rules in the Local Finance Law about certain financeable and non-financeable items:

1. There is a PPU for replacement vehicles but not for fleet expansion of automobiles (but new "equipment" that is not a replacement is okay). The law excludes passenger vehicles from the definition of "fire-fighting vehicle." Is a fire chief's car a simple passenger vehicle or a fire-fighting vehicle? The State Comptroller has opined that fire chief vehicles are fire-fighting "apparatus and equipment." Opin 98-7 Office of the State Comptroller, and opinions cited therein.

2. The useful life of new buildings depends on what they are made of.

3. The useful life for building reconstruction/additions depends on what it is made of.

4. An SUV-type vehicle could have the useful life of a passenger vehicle or of equipment for maintenance or of a fire-fighting vehicle depending on its projected use.

5. Repairs are not financeable, but reconstruction is.

6. The cost of a piece of fire-fighting apparatus or vehicle will determine its useful life.

7. Replacing a general telephone system, including Web-based telephone service, has no specific PPU, but a "911" system or a police or fire telephone system does.

8. HVAC and electrical, plumbing and lighting work has one useful life if done as a stand-alone project and a longer useful life if it is part of or involves "reconstruction."

9. Land has useful life of 30 years. (What happens to it after that?)

10. If you can get an "expert" to certify as to the useful life of something not listed in Section 11.00 of the LFL, it is financeable for that period of time (or less).

11. A capital project with a PPU can include incidental expenses. What is "incidental" may be in the eye of the beholder, but it should be reasonable. (Really!)

12. Computer equipment for financial management and accounting has its own PPUs for hardware and software but no other computer equipment has a specified useful life (must use generic equipment category for it).

Some of this seem illogical? It is. Bottom Line: PPUs are an art, not a science, but it is not worth it to push the limits.

CHAPTER SIX

The Mandatory Referendum Process

Procedural Rules Regarding Bond Resolutions

The first step is compliance with the State Environmental Quality Review Act ("SEQRA") and the regulations promulgated thereunder. One of the easiest ways for an opponent of a project to challenge it is for failure to properly comply with SEQRA. The bond resolution itself should specify the previously determined status under SEQRA of the capital project whose financing is authorized by it. Each pre or post bond resolution step, such as the notice of vote should likewise state SEQRA status. Thus, prior to adopting a bond resolution, compliance with SEQRA is required.

Thereafter, an information meeting/public hearing may be recommended by bond counsel in cases in which the Fire District has a volunteer fire company organized by the not-for-profit corporation law of the State.

The second step is adoption of a bond resolution, *subject to* a mandatory referendum at an annual or special election. The public vote is *upon the bond resolution itself* rather than a voter authorization/instruction to the Board of Fire Commissioners to adopt and implement a bond resolution. (The distinction can be significant when it comes to amendatory bond resolutions). Thus, a bond resolution must be duly adopted *prior* to the vote!

The bond resolution of a Fire District must be adopted by three-fifths of the voting strength of the Board of Fire Commissioners. (Two-thirds and three-fifths are the same for a seven (7) or nine (9) member board but not for a five (5) member board). Voting strength means total membership, not just those present.

All bond resolutions of all Fire Districts are subject to mandatory referendum (i.e., even for judgments or compromised or settled claims which are effective immediately upon adoption by two-thirds of the voting strength of the board of a town, village, county, school district or city).

Referendums are generally successful if approved by a simple majority of those voting.

A timeline is presented in Appendix C.

The third step is publication of an estoppel notice as described in Chapter Seven.

Coordination of Proposition Language and Bond Resolution Language

Problem Language

In a Fire District, the description of the project in the bond resolution determines the project description in the proposition.

The language must be very carefully drafted and consistent. For example, as noted earlier, if you authorize two (2) pumper tandems with xyz capacity then that is what the district must purchase. A later change to buy one pumper tandem and one different fire-fighting vehicle for the same aggregate price is not okay. A pumper tandem with xyz-1 capacity is not okay. Therefore, districts are better advised to authorize "the purchase of fire-fighting vehicles" and provide one aggregate cost as a "class of objects or purposes."

If a number of vehicle is specified, a dollar value must be given to each specific item enumerated and should one vehicle come in cheaper and the other more expensive, there is no authority to move the money around. If it is "fire-fighting vehicles" which are authorized at an aggregate cost, flexibility ensues. Similarly with building reconstruction projects involving multiple facilities, it is best to authorize the aggregate cost of a class rather than specific projects at specific costs at each facility. Sometimes, however, local circumstances do dictate that a particular improvement on items be named in order to garner sufficient public approval. If this cannot be handled in the public relations materials alone, then it may be necessary in the proposition(s) and it will limit flexibility in the allocation of the authorized amount.

Propositions should not present alternatives or contain contingencies or options, and certain terminology is mandatory or a proposition will be invalid for purposes of issuing indebtedness. Thus, bond counsel is always best is involved at an early stage of drafting election documents.

Proposition Language

Typical capital project propositions for a Fire District would be as follows:

> **FACILITIES BOND PROPOSITION**
>
> Shall the bond resolution adopted by the Board of Fire Commissioners of the White Rabbit Fire District in the Town of Slick, Jefferson Airplane County, New York, on December 6, 2009, authorizing the construction of improvements to and reconstruction of the firehouse on East Main Street in White Rabbit, New York, including site work, and original furnishings, equipment, machinery, apparatus, appurtenances and incidental improvements and expenses in connection therewith, at a maximum estimated cost of \$3,200,000, authorizing the issuance of \$3,200,000 serial bonds of said Fire District to pay the cost thereof; pledging the faith and credit of said Fire District for the payment of the principal of and interest on said bonds; determining that the period of probable usefulness thereof and maximum maturity of the serial bonds therefor is twenty-five years; delegating the power to authorize and sell bond anticipation notes and to fix the details of and to sell serial bonds; containing an estoppel clause and providing for the publication of an estoppel notice, be approved?

FIRE TRUCK BOND PROPOSITION

Shall the bond resolution adopted by the Board of Fire Commissioners of the White Rabbit Fire District in the Town of Slick, Jefferson Airplane County, New York, on December 6, 2009, authorizing the acquisition of a pumper fire-fighting vehicle, including incidental equipment and expenses in connection therewith, at a maximum estimated cost of $750,000, authorizing the issuance of $750,000 serial bonds of said Fire District to pay the cost thereof; pledging the faith and credit of said Fire District for the payment of the principal of and interest on said bonds; determining that the period of probable usefulness thereof and maximum maturity of the serial bonds therefor is twenty (20) years; delegating the power to authorize and sell bond anticipation notes and to fix the details of and to sell serial bonds; containing an estoppel clause and providing for the publication of an estoppel notice, be approved?

In any case in which capital reserve fund moneys are expected to form part of the plan of finance, authorization to spend a specific amount of the capital reserve fund needs to also be part of the proposition language. *See* Chapter 18 herein for any limitations on expenditures from capital reserve funds.

While contingent language *within* a proposition would be ill-advised, it is permissible to have dependent, linked propositions if the linkage is presented simply and clearly. For example, a second bond proposition can include language that its implementation is predicated on successful approval of the first bond proposition at the same election. If proposition number one is unsuccessful, then proposition number two is null and void even if successful. This is a particularly useful technique if one element of a capital program is controversial, particularly expensive, or not really as necessary as the other elements. It does also provide something for the voters to reject, which can be a positive or a negative from the point of view of the Board of Fire Commissioners.

CHAPTER SEVEN

Estoppel

The LFL provides that where a bond resolution is published with a statutory form of estoppel notice, and the bond resolution itself contains an estoppel provision, the validity of the bonds authorized thereby, including bond anticipation notes issued in anticipation of the sale thereof, may be contested only if:

a. such obligations are authorized for a purpose for which the local governmental unit is not authorized to expend money; or

b. there has not been substantial compliance with the provisions of law which should have been complied with in the authorization of such obligations; and
an action, suit, or proceeding contesting such validity, is commenced within twenty days after the date of such publication; or

c. such obligations are authorized in violation of the provisions of the State Constitution.

Except on rare occasions most local governmental units comply with this estoppel procedure. It is a procedure that is recommended by bond counsel, but it is not an absolute legal requirement.

In any case, after adoption of a bond resolution, a legal notice of estoppel should be published.

What is estoppel and why publish the notice?

If a bond resolution of a Board of Fire Commissioners authorizing the issuance of bonds and BANs contains the estoppel statement referred to in Section 80.00 of the LFL, such resolution after adoption, or a summary of such resolution, should be published in full by the Fire District secretary, together with a notice in substantially the following form:

> "The resolution (or the resolution a summary of which is) published herewith has been adopted on the ______ day of ________________, 20___, and the validity of the obligations authorized by such resolution may be hereafter contested only if such obligations were authorized for an object or purpose for which the (Here insert name of Fire District) is not authorized to expend money or if the provisions of law that should have been complied with as of the date of publication of this notice were not substantially complied with, and an action, suit or proceeding contesting such validity is

commenced within twenty (20) days after the date of publication of this notice, or such obligations were authorized in violation of the provisions of the Constitution."

[name]
(Fire District Secretary)

In the past a legal notice of estoppel always contained both the estoppel statement noted above plus the full text of the bond resolution. Due to rising publication costs, it is now customary to publish a summary legal notice of estoppel which includes the estoppel statement, the bond resolution title, a very brief description of the specific object or purpose or class of objects or purposes (i.e., the capital project), the maximum estimated cost of same, the plan of financing of same, including how much cash, and how many bonds, and the period of probable usefulness, as well as an indication as to where the full text may be examined. The use of a summary form of this notice is authorized in Section 81.00 of the LFL.

If a summary of such resolution is published, such summary must list the specific or class or classes of objects or purposes for which the obligations to be authorized by such resolution are to be issued together with the period or periods of probable usefulness, SEQRA status, and the amount of obligations to be issued for each such specific or class of objects or purposes, and in addition, such summary must state an office of the Fire District where the resolution summarized thereby is to be available for public inspection. Such resolution must be kept available for public inspection at such office during normal business hours for twenty (20) days following the publication of such summary.

Such publication is to be in the official newspaper or newspapers of the Fire District or if there be no such newspaper or newspapers, then in such newspaper or newspapers having a general circulation in the Fire District as the Board of Fire Commissioners shall designate (usually within the text of the bond resolution).

Timing. There is no timing requirement as to how quickly an estoppel notice must be published after passage of the proposition in the case of Fire District bond resolutions subject to a successful mandatory referendum. In the case of such Fire District, the notice can be published any time after a successful vote, but never before. While it is legal to contract for a project during the estoppel period, it is generally not recommended until the twenty-day estoppel period has elapsed. Why? Because estoppel protects the Fire District and its debt obligations from any validity challenge, other than on constitutional grounds once the twenty-day period after publication has elapsed. Thus, any procedural error inadvertently occurring in the process of authorization may not be used to challenge the borrowing after estoppel has passed. The twenty (20) day estoppel period begins to run on the date of publication. Thus, the sooner it is able to be published, the better. The estoppel notice is usually drafted by bond counsel.

If the obligations issued pursuant to a resolution published in the manner described above contain a recital in substantially the form prescribed in Section 52.00 of the LFL, such recital binds the Fire District issuing such obligations, and twenty (20) days after such resolution has been published and such obligations have been purchased in good faith and for fair value by any person, the validity of such obligations cannot be questioned by such Fire District or any taxpayer thereof in any court (unless the Fire District has violated a provision of the State Constitution). Thus, both the issuer and the purchaser are protected by estoppel.

CHAPTER EIGHT

Types of Debt

The LFL authorizes a variety of types of debt instruments for a Fire District, all of which must be general obligations. Debt instruments which are not specifically authorized include for example, a revolving line of credit at a local bank, a revenue bond backed not by the pledge of the faith and credit, but rather solely backed by some particular stream of revenue, or a bond with a security interest in a Fire District building, land or other asset. The basic types of debt instruments most frequently utilized in the State by Fire Districts are as follows:

a. bond anticipation notes ("BANs") and bond anticipation renewal notes ("BARNs");
b. serial bonds;
c. statutory installment bonds;
d. tax anticipation notes ("TANs");
e. revenue anticipation notes ("RANs");
f. budget notes.

Less common are:

g. specialized bond types, including capital appreciation bonds, original issue discount bonds, variable rate debt, term bonds and joint indebtedness;
h. capital notes; and
i. refunding bonds.

Each of these are described later in this chapter.

Even less common are:

j. urban renewal notes
k. deferred payment notes
l. land installment purchase obligations (until July 31, 2011)

These latter three categories are not discussed herein.

The basic elements of any type of bond or note are to be found in Sections 51.00 and 52.00 of the LFL, which read as follows:

§51.00 Terms, form and contents of obligations

Every bond and note shall contain a statement of at least the following:

1. The type of obligation
2. The amount of the obligation and the total amount of the issue of which the obligation is a part.
3. The date and maturity of the obligation.
4. If the obligation is a tax anticipation note or a revenue anticipation note, the fiscal year for which the taxes were levied or are to be levied or in which the revenues are to become due and payable, as the case may be; if the obligation is a tax anticipation note to be issued in anticipation of the levy or collection of assessments for a fiscal year or in anticipation of the collection of an installment of an assessment for a capital improvement, the fiscal year for which such assessments were levied or are to be levied or in which such installment becomes due, as the case may be.
5. The rate of interest or, in the case of obligations bearing a variable rate of interest, the procedure for calculating such variable rate of interest and the maximum rate of interest which such variable rate notes may bear, together with the date or dates of payment thereof. [Eff. Until July 15, 2012]
5. The rate of interest and the date or dates of payment thereof. [Eff. July 15, 2012]
6. The place or places of payment of principal and interest.
7. The medium of payment.
8. An irrevocable pledge of the faith and credit of the municipality, school district or district corporation issuing the obligation for payment thereof.
9. If the obligation is payable to bearer, whether it may be converted into a registered obligation; if the obligation is in registered form, whether it may be converted into a bearer obligation.
10. If the obligation may be called for redemption prior to its date of maturity, the terms and conditions under which such obligation may be redeemed; and:

§52.00 Recital of validity in obligations

Any obligation issued by a municipality, school district or district corporation may contain on its face a recital in substantially the following form:

"It is hereby certified and recited that all conditions, acts and things required by the Constitution and statutes of the State of New York to exist, to have happened and to have been performed precedent to and in the issuance of this (*Here insert type of obligation*), exist, have happened and have been performed, and that the issue of (*Here insert type of obligations*) of which this is one, together with all other indebtedness of such (*Here insert name of municipality, school district or district corporation*) is within every debt and other limit prescribed by the Constitution and laws of such State.

The method of execution of any note is found in Section 61.00 of the LFL which reads:

§61.00 Execution of obligations

a. All obligations, including interim bonds, shall be executed in the name of the municipality, school district or district corporation by the chief fiscal officer unless the finance board shall by resolution, designate a different officer or officers to execute such obligations. Such execution may be by facsimile signature, in which event the finance board shall provide for authentication of such obligation by the manual countersignature of a fiscal agent or of a designated official of the municipality, school district or district corporation. Such obligations shall have the seal or a facsimile seal of the municipality, school district or district corporation impressed or imprinted thereon.

Such obligations may be attested by the school district or district corporation or such other official thereof as may be designated by the finance board. Coupons attached to a bond shall be authenticated by the facsimile or manual signature of the chief fiscal officer unless the finance board shall, by resolution, provide that such coupons shall be authenticated by the facsimile or manual signature of a different officer.

b. Obligations executed in the manner set forth above by the officials designated and referred to above shall be valid and binding obligations when duly delivered, notwithstanding the fact that before the delivery thereof the persons executing the same shall have ceased to be officials or other officials may have been designated to perform such functions.

BANs and BARNs

BANs and BARNs are typically one (1) year or less, single fixed-rate debt obligations, renewable annually at maturity at then current interest rates. Principal and interest are due at maturity. A new money borrowing is known as a BAN; its annual renewal is known as a BARN. BANs and BARNs are issued only for capital projects, never for cashflow purposes and never for a greater amount than the amount of bonds authorized for the capital project. However, a BAN may be issued for capital costs which include a portion of a project for which a grant is later anticipated. Once the grant is received, it usually must be used to pay down an equal portion of BAN principal at the next renewal date. It is often wise to authorize borrowing for both the local share and the non-local share of a project by BANs in case grant-in-aid moneys are delayed in receipt. **Financing for all Fire District projects must convert from BARNs to bonds no later than the fifth anniversary date after the first borrowing of the particular new money borrowed.** (Therefore, if new money for a project was borrowed in series, each series must comply with the 5 year rule independently and is not tied, for this purpose, to the very first new money borrowing.) (Also, there is an exception to this general rule for assessable improvements in Town improvement districts that is not available to Fire Districts.)

While BANs and their renewals may be authorized by one, or annual, BAN/BARN resolutions, it is far more common that the original bond resolution authorizing the issuance of serial bonds for the capital project, includes a delegation of authority to the Treasurer as chief fiscal officer to issue BANs and BARNs as well as the eventual bonds. Which method is used is a political, rather than legal, decision. Flexibility and quick action ensue from full delegation so it is common nowadays when markets can change quite rapidly.

One final feature of BANs and BARNs is worthy of note: either may be issued for less than one year or with an early redemption feature which would permit the optional right (of the issuer) to call in and pay off such a note prior to its maturity date. This option may be useful when a Fire District plans to convert its notes to bonds sometime during the forthcoming fiscal year but is for any number of factors unsure precisely when. Similarly, either BANs or BARNs can be issued for over one year, up to five (5) years, as long as provision is made for specific annual principal paydowns in the documents.

Serial Bonds

Serial bonds are the most common long-term debt obligations issued by Fire Districts in the State. They are often referred to as "plain vanilla general obligation bonds;" "plain vanilla" meaning they are a simple form of debt instrument with multiple succeeding annual maturities of principal, each maturity of which has a single fixed rate of interest. The "general obligation" aspect refers to the constitutionally required pledge of the faith and credit of the Fire District to use its taxing power to pay the debt, no matter what.

Serial bonds may be issued either (a) to redeem outstanding BANs and/or BARNs or (b) to acquire new money to pay the cost of all or a portion of one or more capital projects. A combination of these purposes is also permitted. Bonds issued to finance all or a portion of the cost of multiple capital projects, and/or to refinance the same, are known as consolidated bond issues. There is no restriction on how many projects may be consolidated for purposes of sale into a single bond issue. (The same is true of BANs and BARNs.) However, each project in such a consolidation must maintain a separate accounting for purposes of its annual requisite principal paydown schedule, its PPU and its maximum maturity. Only in the case of debt sold with a substantially level or declining annual debt service structure may these elements be merged, aggregated and averaged across all the individual capital projects financed in a consolidated serial bond issue.

Serial bonds mature serially; that is, one after the other in their stated principal amounts, annually on the same day each year until final maturity. That annual maturity day can be any date but the first or the fifteenth of any calendar month are most common. Principal must be paid annually and by custom interest is paid semiannually in most serial bond issues. Serial bonds may carry an early redemption feature—the industry custom is 10-year call protection; that is, the first ten (10) years of a serial bond issue are not "callable," i.e., redeemable prior to maturity. Early redemption usually involves payment of a small premium to the bondholder at the time of the call (almost always in the 2% of principal redeemed early or less range, depending on how soon prior to stated maturity the call occurs). In the current low interest rate environment, a par call (without premium) is common. This feature is set at the time of sale of serial bonds in consultation with a financial advisor and bond counsel.

One exception to the requirement that annual principal be paid is the basic 2-year rule applicable at the beginning of a borrowing cycle for a project, which comes into play here: The first payment of principal on a new money borrowing (by series) need not be paid until the second anniversary of the first borrowing. This initial one-year optional moratorium period on payment of principal may occur during the period of time that the financing for a project is still in its BAN/BARN cycle or, it may occur within the structuring of the serial bond issue. The two years runs from the first borrowing (by series) for a capital project regardless of the form that borrowing has taken. Each new money borrowing starts operation of its own 2-year rule; therefore, in multiple new money borrowings over time for a single project, each such series has its own timetable in this regard.

In plain English, this means that a Fire District must make a principal payment within two years of the date of issuance of a borrowing of new money.

By omission, then, the statute permits a municipality to make no payment at the end of the first year and, for example, roll over a bond anticipation note in full (or skip that first principal payment in a new money bond issue).

As an example, take a $100,000 financing with a 10-year maturity. The municipality issues $100,000 bond anticipation note in year one. At the end of year one, the municipality makes a $10,000 principal payment and issues a $90,000 renewal note. At the end of year two (the year in which a principal payment is mandated by the statute) the municipality makes a $5,000 principal payment. This is an automatic violation of the 50% rule, because the 50% rule says that no principal payment may exceed by more than 50% the smallest previous principal payment mandated by law. By making the principal payment in the amount of $5,000, no subsequent payment may legally exceed $7,500, and one can see that over the next eight years, it is impossible to amortize the remaining $85,000 without violating the 50% rule.

Consider a different scenario, however: at the end of the first year, the municipality makes a $5,000 principal payment. The uninitiated would conclude, using the reasoning above, that there is an automatic violation of the 50% rule. This is not correct. After all, the LFL provides that no principal payment need be made at the end of year one. If that is the case, then why should a municipality be punished for making a "voluntary" payment at the end of year one. Thus, for the purpose of the 50% rule, one can disregard the first payment in this case, since it was voluntary, not mandated by law.

Serial bonds for multiple capital projects each contain pro rata allocations of principal relating to the different projects financed by the bond issue. In each maturity, there will be multiple projects represented to the extent that each such project has not exceeded its maximum maturity. Thus in the first five years after issuance, all consolidated projects may be amortizing but in the sixth year, any project with a five-year PPU will have already been paid off in full in the prior annual maturity (except in the case of substantially level or declining annual debt service which merges all project PPUs to a shared average, as described earlier). It is part of the function of a financial advisor and bond counsel to ensure compliance of the whole and its parts to these rules.

In a consolidated serial bond issue, each component must be in compliance with the 50% rule described earlier, or be part of a substantially level or declining annual debt service amortization structure which has aggregated all components.

At each maturity of a serial bond issue, a portion of the principal due on each consolidated project is and must be annually paid down (no skipping of principal paydowns is permitted after the initial year), together with semiannual interest due on all outstanding maturities. On the other semiannual interest payment date, just interest due on all outstanding serial bonds is due. Therefore, note, the interest due on any interest payment date always relates to multiple outstanding maturities, not just the particular maturity amount of principal due in that particular year. There is only one rate of interest per maturity—these aggregate for the overall debt service payment due at such semiannual date.

How is principal and interest paid when due on outstanding bonds or notes? A Fire District can pay a bank or trust company located and authorized to do business in the State to act as fiscal agent for the debt. Those duties and responsibilities are set forth in Section 70.00 of the LFL. In brief, they are payment of debt service when due, conversion, re-conversion and transfer of bonds and notes, preparation of substitute bonds and notes for lost or destroyed ones, and related services.

Alternatively, an officer of the Fire District may serve as the fiscal agent. This is common in this era of book-entry-only issued debt (described below). Unless otherwise named, the particular officer for a Fire District, the Fire District's Secretary is specified in Section 70.00 of the LFL. It is the job of the fiscal agent to wire the principal and interest when due to the holders of the debt obligations. Nowadays, with the prevalence of book-entry-only debt, it is usually only necessary to wire payment to one party, a national repository holding the debt on behalf of all owners. It is then their responsibility to forward the funds to the beneficial owners. See "DTC" in the "Transaction Players and Their Roles" appendix herein.

Finally, serial bonds may only be issued for valid capital projects, each specified in Section 11.00 of the LFL and identified as a specific object or purpose or a class of objects or purposes. They may not be issued for cashflow purposes, including the redemption of outstanding RANs, TANs or budget notes (further described below). Through special legislation, however, bonds to finance the payoff of a cumulative budgetary deficit can be given a period of probable usefulness, declared as a valid object or purpose and be issued.

To summarize, consistent with rules discussed earlier, the first payment of principal in a serial bond issue must also conform to the following rules:

a. it must occur within two years of the date of issuance of all new money or for any such portion;
b. it must occur annually thereafter;

c. it must occur no later than the fifth anniversary date of any first borrowing for a non-assessable project included in the bond issue that was previously financed with BANs and BARNs; and
d. it must be paid, like each succeeding principal payment, by an annual appropriation.

To further summarize, consistent with the above rules, the last payment of principal in a serial bond issue must conform to the following rules:

a. it must occur on a date no later than the maximum maturity date calculated based upon the PPU of each of the projects or average PPUs of the projects, and the first borrowing date(s) for each project or each series of new money borrowings for a project;
b. it must occur no later than the expiration of the period of probable usefulness of the object or purpose (or average objects or purposes in the case of level annual debt service) for which the serial bonds were issued as computed from the date of such bonds, or if BANs and BARNs were issued in anticipation of the bonds, as computed from the date of the earlier note so issued;
c. it must not exceed by more than 50% any prior principal payment on a project-by-project basis internal to the maturity or, if the bonds were issued with substantially level or declining annual debt service, it must not exceed by more than 5% or $10,000, whichever is greater, any prior annual debt service for the bond issue as a whole.

When serial bonds are issued, traditionally there were multiple printed bonds issued for each maturity adding up to the total per maturity in paper form, each with the owner's name (or, in prehistory, "Bearer"), the amount, the maturity date, (or, actual interest "coupons") the interest rate, and the interest payment date schedule on it. Nowadays, most bonds are issued in book-entry-only form such that only one printed bond is issued for each annual maturity and held at a national repository on behalf of all owners, whose ownership record is maintained electronically. See "DTC" in the "Transactional Players and Their Roles" appendix hereto. The basic elements of a serial bond are provided in Sections 51.00 and 52.00 of the LFL as noted earlier and the rules of their execution are found in Section 61.00 thereof, as provided above. It is a function of bond counsel to prepare the actual physical, printed bonds (and notes) for issuance by a Fire District.

Statutory Installment Bonds

Statutory Installment Bonds ("SIBs") are a somewhat simplified type of serial bond. All of the rules of amortization described above apply; however, instead of printed bonds for each maturity, an SIB is a single "typewritten" style bond representing all maturities which, in addition to regular serial bond information described above, also includes a full principal amortization schedule and separate interest payment schedule (SIBs are the form of serial bonds in which one occasionally sees annual rather than semiannual interest payments). If the principal amount for an object or purpose, or objects or purposes, or class or classes thereof, to be financed by the issuance of bonds does not exceed one million dollars ($1,000,000) in the aggregate, a single SIB may be issued for the full principal amount. Any such bond shall provide for the payment of both the principal and interest upon physical presentation of the bond for notation of such payments thereon (except SIBs issued and sold to the United States of America or any agency thereof in any amount may have principal and interest payable without such presentation). The notations of principal and interest payments are to be made on the face of the bond, on the reverse side, or on a sheet attached thereto.

SIBs can be issued for new money purposes or to refinance a BAN or BARN or both. Since SIBs may not exceed one million dollars ($1,000,000) in principal and require physical notation, they are typically placed with local banks in the community where the issuer is located (and deposits its fund balances). While capital projects of any period of probable usefulness and maximum maturity may be financed with an SIB, local banks typically do not like to invest in SIBs with maturities greater than ten (10) years. This forms a market-based maximum maturity limitation on projects with longer than ten year PPUs. It is not uncommon for Fire Districts to issue SIBs to finance an equipment replacement program or small capital reconstruction projects.

SIBs are usually sold at private sale rather than public sale. This distinction is discussed below in Chapter 10.

There is a standard form to an SIB which is provided in detail in Section 62.10 of the LFL.

§62.10 Statutory installment bonds

a. Notwithstanding any other provisions of this chapter, if the principal amount for an object or purpose, or objects or purposes, or class or classes thereof, to be financed by the issuance of bonds does not exceed one million dollars in the aggregate, a single bond, to be known as a statutory installment bond, may be issued for the full principal amount, if the issue is to be sold at private sale. Any such bond shall provide for the payment of both the principal and interest upon presentation of the bond for notation of such payments thereon, except that such a statutory installment bond may be issued and sold to the United States of America or any agency thereof in any amount and that such principal and interest shall be payable without such presentation.

b. A statutory installment bond, in bearer, if authorized by federal law, or registered form, shall be in terms, form and contents, substantially as follows:

Statutory	United State of America	$ (*Here insert full*
Installment	State of New York	*amount of bond issue*)
Bond	Fire District in the Town of	
	(*Here insert name of the issuer*)	

(Here insert type of bond and year, such as "Fire Truck Serial Bond—2009")

The (*Here insert name of the issuer*), in the Fire District in the Town of ________________, a (*Here insert whether a municipality, school district, Fire District or other district corporation*) of the State of New York, hereby acknowledges itself indebted and for value received promises to pay to (*Here insert "bearer" or the name of registered owner if the bond is issued in registered form*) the principal sum of ________ Dollars ($_______ (in (______) equal annual installments of _______ Dollars ($_____) on the _______ day of ________ in the years, 20__, to 20__, inclusive)

Or

(in _________ (_________) annual installments (*Here state the amounts, the annual principal payment date, and the year in which the principal payments will be made. No annual installment shall be more than fifty per centum in excess of the smallest prior installment unless the finance board has determined to provide for substantially level or declining annual debt service, in which case the aggregate amount of debt service payable in any year shall not exceed the lowest aggregate amount of debt service payable in any prior year by more than five percent*))

and to pay interest on the unpaid balance of such principal sum at the rate of _____________ per centum (_____%) per annum, semi-annually on the _________ days of __________ and ___________ in each year from the date of this bond until it matures. Interest will not be paid on any installment or principal, or of interest, after the due date thereof. Both the installments of principal of and the interest on this bond will be paid to the (*Here insert "bearer" or "registered owner" if the bond is issued in registered form*) of this bond in lawful money of the United States* only upon presentation of this bond for notation of any such payment thereon* (*omit language enclosed within asterisks when the bond is sold to the United States of America or any agency thereof*) at the office of ______________

(*Here insert place or places of payment*)

This bond is a statutory installment bond, the principal sum of which cannot exceed One Million Dollars ($1,000,000) unless it is issued and sold to the United States of America or any agency thereof, and is issued pursuant to section 62.10 of the Local Finance Law and pursuant to a bond resolution entitled "(*Here insert title*)," duly adopted by (*Here insert name of the finance board*) of such (*Here insert name of issuer*) on the _______ day of ___________, 20__. This bond may not be converted into a coupon bond.

The faith and credit of such (*Here insert name of the issuer*) are hereby irrevocably pledged for the punctual payment of the installments of principal of and the interest on this bond according to its terms.

It is hereby certified and recited that all conditions, acts and things required by the Constitution and statutes of the State of New York to exist, to have happened and to have been performed precedent to and in the issuance of this bond, exist, have happened and have been performed, and that this bond, together with all other indebtedness of such (*Here insert name of the issuer*) is within every debt and other limit prescribed by the Constitution and laws of such State.

In Witness Whereof, the (*Here insert name of the issuer*) has caused this bond to be signed by its (*Here insert title of officer*) and its (*Here insert title of officer*), and its corporate seal to be hereunto affixed and attested by its (*Here insert title of attesting officer*) and to be dated as of the _______ day of _______________, 20__.

(*Name of municipality, school district,*
(Corporate Seal) *Fire District or other district corporation*)
By: (*Signature and title of officer*)
and (*Signature and title of officer*)

Attest:

(*Signature and title of attesting officer*)

PRINCIPAL PAYMENT

Amount	Date Received	Received by
$____________	___________, 20__	__________________ (*Signature of person receiving payment*)
$____________	___________, 20__	__________________

(*Continue as necessary*)

INTEREST PAYMENT

Amount	Date Received	Received by
$____________	___________, 20__	__________________ (*Signature of person receiving payment*)
$____________	___________, 20__	__________________

(*Continue as necessary*)

The notations of principal and interest payments may be made on the face of the bond, on the reverse side, or on a sheet attached thereto (omit language enclosed within asterisks when the bond is sold to the United States of America or an agency thereof).

Note that until September 30, 2011, statutory installment bonds, in substantially the form noted above, may be issued and sold to the New York state environmental facilities corporation in a principal amount not to exceed twenty million dollars ($20,000,000) and such bonds can provide for either a fixed rate or, if such bonds provide for serial maturities, at a set rate for each maturity, which rate is fixed on the date of issuance of such bonds. This provision is unlikely to be utilized by Fire Districts.

BANs or Bonds for a Capital Project

A Fire District has the option to issue bonds or bond anticipation notes initially for a capital project. BANs generally mature within one year, at which time they may be renewed, after the paydown of a portion of the principal due (principal paydowns to begin no later than the second anniversary of the first borrowing and then annually thereafter). Similar to a variable rate home mortgage in respect to interest rate risk, each year at renewal, the issuer is subject to the then current interest rate environment and the issuer's then-current rating by companies like Moody's Investors Service who rate issuers. Nevertheless, as typically one year obligations, the interest rate is always, or almost always historically lower than longer term debt. Thus, a Fire District might choose to issue one year BANs at the then current one year rate each year for five years. This option would also permit a Fire District to use unexpected excess cash to pay down extra principal on any annual maturity date, prior to renewal. (By the fifth anniversary date, the debt, if not paid off, would need to convert to bonds).

The issuance of serial bonds to obtain funds for a capital project involves establishing at sale a single-interest rate or rates per maturity on a single date of sale, which then locks that rate or rates in for the life of the bonds. Likewise, the annual principal paydowns must be predetermined prior to sale in order to establish what the purchasers are going to be buying. There is usually no ability to pre-pay all or any portion of a serial bond issue within the first ten years after issuance. On the other hand, in a period of rising interest rates, it is a very reasonable decision to set and lock rates before they increase.

A typical borrowing pattern for construction or reconstruction projects involves issuing BANs and BARNs during construction and converting to serial bond financing after the project is complete. While this pattern is often followed to be sure all of the proceeds are in fact needed for the project, no Fire District project has ever used less than the maximum amount authorized!

In addition to debt issued for a capital project, Fire Districts often issue short-term debt to keep their general fund solvent.

Tax Anticipation Notes

Tax Anticipation Notes ("TANs") are a debt instrument issued for cashflow purposes. They are typically issued because the receipt of property taxes by a Fire District is not congruent with its cashflow expenditure requirements within its fiscal year cycle. TANs are not subject to the same amortization rules as debt issued for capital purposes.

TANs may be issued by any Fire District, as follows:

a. Any Fire District *in a town in the County of Westchester* in which real estate taxes and assessments become payable on April first in each year may issue tax anticipation notes during any fiscal year prior to June first in such year in anticipation of the collection of taxes or assessments levied for such Fire District for such year. Notes issued pursuant to these provisions shall mature on or before June first next following the date of their issuance and shall be redeemed from the taxes or assessments in anticipation of the collection of which such notes were issued. Such notes shall not be issued in an amount in excess of the difference between the amount of the Fire District taxes or assessments remaining uncollected at the time of such borrowing and the amount of tax anticipation notes issued in anticipation of the collection of such taxes or assessments. Whenever the amount of tax anticipation notes issued shall equal the amount of such taxes or assessments remaining uncollected, all of such taxes or assessments, as thereafter collected, shall be set aside in a special bank account to be used only for the payment of such notes as they become due. The proceeds of such notes shall be used only for the purposes for which such taxes or assessments were levied.

b. Any Fire District *in any town other than a town in the county of Westchester* may issue tax anticipation notes at any time during the first three months of its fiscal year in anticipation of the collection of real estate taxes levied for such Fire District for such fiscal year. Notes shall mature on or before the fifteenth day of April next following the date of their issuance and shall be redeemed from the taxes in anticipation of the collection of which such notes were issued. Such notes shall not be issued in an amount in excess of the difference between the amount of the Fire District taxes remaining uncollected at the time of such borrowing and the amount of tax anticipation notes issued in anticipation of the collection of such taxes. Whenever the amount of tax anticipation notes issued shall equal the amount of such taxes remaining uncollected, all of such taxes, as thereafter collected, shall be set aside in a special bank account to be used only for the payment of such notes as they become due. The proceeds of such notes shall be used only for the purposes for which such taxes were levied. For the purpose of this paragraph such real estate taxes shall be deemed to be uncollected until the Fire District receives cash therefore from the public officer required to pay such taxes to the Fire District.

In the case of such notes issued in anticipation of the collection of taxes already levied, such notes may not be issued in an amount in excess of the amount of taxes levied for a fiscal year that is uncollected at the time of such borrowing (i.e., at closing, not at the date of sale of the TAN) less:

a. The amount of the outstanding tax anticipation notes issued in anticipation of the collection of such taxes, and
b. The amount, if any, included in the annual budget for such fiscal year or in the levy of taxes for such fiscal year to offset, in whole or in part, an anticipated deficiency in the collection before the end of such fiscal year of the taxes levied for such fiscal year.

In addition, there are federal tax regulations establishing limitations on the size of cashflow borrowings based upon a reasonably expected cashflow deficit during the term of the TAN and allowing for a small margin of comfort. *See* Chapter Eleven for a further discussion of these tax considerations.

TANs must mature within one year from the date of their issuance and may be renewed from time to time, but each renewal may be for a period not to exceed one year. Such notes or the renewals thereof must be retired within five years after their date of original issue and in any event not later than five years after the close of the fiscal year for which were levied the taxes in anticipation of the collection of which such notes were issued; (however, such notes issued in anticipation of taxes to be levied (i.e., not yet levied at the time of borrowing), or the renewals thereof, may not extend beyond the close of the fourth fiscal year succeeding that in which the original notes were issued). TAN principal and interest is payable in a single payment (not semiannually) at maturity.

There are five other significant aspects to the issuance of TANs:

a. The authority to issue TANs is by resolution by the affirmative vote of the majority of the voting strength of the Board of Fire Commissioners; the TAN resolution typically delegates to the Treasurer as chief fiscal officer the authority to sell and issue TANs, often up to a capped amount and often only for a single fiscal year (but multi-year authorizations and delegations are permitted). There is no public referendum requirement. There is no estoppel or other public notice publication requirement after adoption. The essential elements of a TAN note are provided in Section 51.00 of the LFL as discussed earlier. The essential elements of a TAN resolution are described in Section 39.00 of the LFL hereinafter set forth.
b. The proceeds of such notes are only to be used for the purposes for which the taxes or assessments in anticipation of which they are issued were or are to be levied or for the redemption of notes in renewal of which they were issued.
c. Whenever the amount of TANs issued in anticipation of the collection of the taxes or assessments levied or to be levied for a fiscal year equals the amount of such taxes or assessments remaining uncollected (less the amount, if any, included in the annual budget for such fiscal year or in the levy of taxes or assessments for such fiscal year to offset, in whole or in part, an anticipated deficiency in said collection before the end of such fiscal year), such moneys as thereafter collected, must be set aside in a special bank account to be used only for the payment of such notes as they become due, unless other provisions are made pursuant to law for the redemption of such notes. This is the LFL Section 24.00(e) debt service fund, also discussed later in this primer under tax considerations. Any Fire District may make budgetary appropriations for the redemption of such notes whether or not required or otherwise authorized by law to do so. In the event such an appropriation is made, such Fire District shall not be required to pay into the special account the proceeds of the taxes or assessments against which such notes were issued but such proceeds may be used in the manner provided by law or if there is no provision of law pertaining to the use of such

proceeds, such proceeds shall be treated as surplus moneys for the fiscal year in which they are collected.

d. Where a tax anticipation note is to be renewed by the issuance of a renewal note, and the taxes or assessments in anticipation of which it was issued have been levied for a fiscal year, but remain uncollected, such renewal note shall not be issued for an amount in excess of the amount of such taxes or assessments remaining uncollected at the time of such renewal, less:
(a) The amount of any other outstanding tax anticipation notes issued in anticipation of the collection of such taxes or assessments, and
(b) The amount, if any, included in the annual budget for such fiscal year or in the levy of taxes or assessments for such fiscal year to offset, in whole or in part, an anticipated deficiency in the collection before the end of such fiscal year of the taxes or assessments levied for such fiscal year.

   Renewal notes cannot be issued for an amount in excess of the amount of the note in renewal of which it is to be issued, including TANs issued in anticipation of taxes or assessments which remain unlevied as of the renewal date.

e. There are other specialized rules in Section 24.00 of the LFL for issuing TANs in special circumstances such as prior to the adoption of an annual budget.

Revenue Anticipation Notes

Revenue anticipation notes ("RANs") are a second common debt instrument issued for cashflow purposes by Fire Districts. Again, RANs are typically issued because the receipt of some particular form of revenue, *e.g.*, state aid or other grant to a Fire District, is not congruent with cashflow expenditure requirements within the fiscal year cycle. Like TANs, RANs are not subject to the same amortization rules as debt for capital projects.

RANs may only be issued in anticipation of receipt of certain types of revenues and then, only such revenues due and payable within the fiscal year of issuance. The common types of revenue against which RANs may be issued are taxes other than real estate taxes, rents, rates or charges (such as special fee revenues and grant-in-aid moneys from the State or Federal government). Because of the pay back limitations described below, it is usually preferable to borrow in anticipation of grants-in-aid for capital projects through BANs which can be renewed up to five (5) years while awaiting such grant receipt.

RANs may be issued by any Fire District in anticipation of the collection or receipt of revenue, provided that each such note shall be issued only against a specific type of revenue, or for the purpose of renewing a previously issued RAN. A RAN may be issued in anticipation of multiple types of revenues, but in such case each such type must be separately accounted for in authorizing documentation and for purposes of all applicable rules.

RANs may be issued during any fiscal year in which such taxes, rents, rates or charges or other income in anticipation of which such notes are issued become due and payable or such moneys become due; however, such notes may be issued by a Fire District in anticipation of moneys to be received in a fiscal year during the two weeks prior to the commencement of such fiscal year.

The total amount of RANs that a Fire District may issue in anticipation of the collection or receipt of a specific type of revenue is to be determined in the following manner:

1. In a typical Fire District in which an annual budget is prepared and adopted for a fiscal year prior to the commencement thereof, such amounts must be:
   a. The amount of such specific type of revenue as estimated in the annual budget of such municipality, school district or district corporation for such fiscal year, or the amount of such specific type of revenue recognized for the fiscal year preceding that for which such budget is to be or has been adopted, whichever amount is the smaller, less
   b. The amount of such specific type of revenue so estimated in each budget which has actually be received or collected at the time of the issuance (not sale) of such RANs, and the amount of any outstanding RANs issued against such specific type or revenue for the fiscal year for which such notes are to be issued.

   These provisions are not applicable (1) where a specific type of revenue has not been estimated in such budget and in that case such amount may be the amount of such revenue as is estimated by the chief fiscal officer to be recognized for the fiscal year for which such budget has been adopted, or (2) where a specific type of revenue has not been recognized for the entire fiscal year preceding that for which such budget has been adopted and in that case such amount may be the amount, if any, of the specific type of revenue as estimated in the annual budget, less, in either case, the amount of such specific type of revenue which has actually been received or collected at the time of the issuance of such notes, and the amount of any outstanding RANs issued against such specific type of revenue for the fiscal year for which such notes are to be issued.

In addition to this limitation under the LFL, there are applicable federal tax regulations limiting sizing as noted in the discussion of TANs. *See* Chapter 11.

There are three other significant aspects to the issuance of RANs:

a. The authority to issue RANs is typically by resolution by the affirmative vote of the majority of the voting strength of the Board of Fire Commissioners. The RAN resolution typically delegates to the chief fiscal officer the authority to sell and issue RANs, often up to a capped amount and often only for a single fiscal year (but multiyear authorizations and delegations are permitted). There is no public referendum requirement. There is no estoppel or other public notice publication requirement after adoption. The essential elements of a RAN resolution, like a TAN resolution, are described in Section 39.00 of the LFL hereinafter discussed. The essential elements of a RAN note, like a TAN note, are provided in Section 51.00 of the LFL.

b. Whenever the amount of RANs issued for a fiscal year against a specific type of revenue shall be the estimated amount of such specific type of revenue in anticipation of the collection or receipt of which such notes shall have been issued, less the amount of such revenue actually received or collected, all of such revenue, as thereafter received or collected, is to be set aside in a special bank account to be used only for the payment of such revenue anticipation notes as they become due. This is the LFL Section 25.00(g) debt service fund also discussed later in this primer under tax considerations. Any Fire District may make budgetary appropriations for the redemption of revenue anticipation notes whether or not required or otherwise authorized by law to do so. In the event such an appropriation is made, such Fire District is not required to pay into the special account of proceeds of the specific type of revenue against which such notes were issued but such proceeds may be used in the manner provided by law or if there is no provision of law pertaining to the use of such proceeds, such proceeds shall be treated as surplus moneys for the fiscal year in which they are collected.

c. RANs must mature within one year and may be renewed from time to time, but each renewal must be for a period not exceeding one year and in no event may such notes, or the renewals thereof, extend beyond the close of the second fiscal year succeeding the fiscal year in which such notes were issued. Such notes may not be renewed in an amount in excess of the difference between the amount of the uncollected or unreceived revenue in anticipation of which they were issued and the amount of any other outstanding revenue anticipation notes issued in anticipation of the collection or receipt of such revenue. RAN principal and interest is payable solely at maturity.

TAN and RAN Resolutions Format

The following provision of law governs the text of both TAN and RAN resolutions.

§39.00 Tax anticipation note resolution, revenue anticipation note resolution and urban renewal note resolution , form and contents.

a. Whenever the finance board shall authorize the issuance of tax anticipation notes, revenue anticipation notes or urban renewal notes, or the renewal of such notes, it shall do so by a "tax anticipation note resolution," a "revenue anticipation note resolution" or an "urban renewal note resolution," as the case may be. Each such resolution shall be properly dated and shall bear a title which will indicate the type of note to which it relates. Whenever any such note has been duly authorized by a chief fiscal officer the certificate required to be filed by such officer pursuant to section 30.00 of this chapter shall bear a title which will indicate the type of note to which it relates.

b. A tax anticipation note resolution, revenue anticipation note resolution or an urban renewal note resolution shall contain, in substance, the following provisions:

1. A statement that such notes are issued in anticipation of:

(a) The tax collection of real estate taxes or assessments, in the case of tax anticipation notes;

(b) The collection of revenues other than real estate taxes or assessments, in the case of revenue anticipation notes; or

(c) The receipt of moneys from (1) the sale of real property, or any interest therein, acquired for or incidental to an urban renewal project; or (2) from the United States government pursuant to title one of the federal housing act of nineteen hundred forty-nine, as amended; or (3) from the state of New York pursuant to the general municipal law; or from any or all such sources, in the case of urban renewal notes.

2. (a) In the case of tax anticipation notes:

(1) If such taxes or assessments were levied or are to be levied for a fiscal year, a statement of the fiscal year for which such taxes or assessments were levied or are to be levied, or

(2) If such notes are to be issued in anticipation of the collection of assessments levied for a capital improvement and to be collected in a single installment, and, if such assessments have been levied, a statement of the date of the levy of such assessments, or

(3) If such notes are to be issued in anticipation of the collection of an installment of assessment which are levied for a capital improvement and which are to be collected in several installments, and, if such installment of assessments has been levied, a statement of the date on which such installment is due and payable.

3. (a)In the case of revenue anticipation notes, a statement of the assessments have been levied, a statement of the amount of such taxes or assessments remaining uncollected against which such notes are authorized to be issued.

(b) In the case of revenue anticipation notes, a statement of the amount of uncollected revenues against which such notes are authorized to be issued.

(c) In the case of urban renewal notes, a statement of (1) the total estimated cost of the urban renewal project as stated in the certificate of the chief fiscal officer of the municipality filed and approved in the manner prescribed in paragraph d of section 25.10 of this chapter; (2) the total amount of any and all advances, loans and grants made by the United States government or by the state of New York in aid of such project to the municipality prior to and including the date of the issuance of any such note or notes; (3) the amount of any and all local grants-in-aid made or to be made for such project; and (4) the total amount of such notes outstanding for such project.

4. In the case of urban renewal notes, a statement identifying the particular urban renewal project with respect to which such notes are to be issued.

5. A statement of the amount of such notes to be issued.

6. A statement of the period of maturity on such notes.

7. (a) In the case of tax anticipation notes issued in anticipation of the collection of taxes or assessments which have been levied, or the renewals thereof, a statement that the date of maturity of such notes shall not extend beyond the close of the applicable period provided in section 24.00 of this chapter for the maturity of such notes.

(b) In the case of revenue anticipation notes, if such notes are to be issued in renewal of similar notes, a statement that the date of maturity of such notes shall not extend beyond the expiration of the second fiscal year succeeding the fiscal year in which such original notes were issued.

Budget Notes

A Fire District may issue budget notes only during the last nine months of any fiscal year for expenditures for which an insufficient or no provision is made in the annual budget for such fiscal year. The amount may not exceed five per cent of such annual budget (but can nevertheless be in an amount of at least $1,000 for very small budgets).

There are also special provisions as follows:

- Any Fire District may issue budget notes for expenditures for necessary repairs to any fire-fighting apparatus, fire-fighting vehicles or other motorized equipment of such Fire District which has been damaged as the result of an accident; but only to the extent that budgetary appropriations for such purpose and the proceeds of insurance received on account of such damage and on hand at the time the repairs are completed are insufficient to pay for such damage. Unless the budgetary appropriation for the payment of such notes is in existence at the time the proceeds of any such insurance are received, such proceeds shall be used only for the payment of such notes.
- Any municipality or Fire District may issue budget notes during any fiscal year to provide for the payment in such fiscal year of the cost of insurance secured to indemnify against liability for benefits payable under the volunteer fireman's benefit law and for which cost is insufficient or no provision was made in the annual budget of the municipality or Fire District for such fiscal year. The aggregate amount of any such notes which may be issued for such purpose in a fiscal year commencing after December 31, 1965, shall not exceed the sum by which the actual cost of such insurance to be paid in the fiscal year in which such notes are issued exceeds the actual cost of such insurance in the fiscal year prior to the fiscal year in which such notes are issued; provided, however, that this limitation shall not apply in a case where the municipality or Fire District has not incurred any such cost in the fiscal year prior to that in which such notes are issued.
- Any Fire District may issue budget notes for expenditures for water supply and in relation to fire hydrant maintenance and rental costs; but only to the extent that budgetary appropriations for such purpose under subdivision twelve of Section 176 of the town law are insufficient to pay increase charges which the public service commission has authorized and the Fire District is required to pay in the fiscal year in which the budget note is issued for such maintenance or rental.
- Any Fire District which elects to become liable for payments in lieu of contributions pursuant to Section 575 of the labor law and is required by the commissioner of labor to pay into the unemployment insurance fund an amount equal to the amount of benefits paid to claimants and charged to such Fire District's account may issue budget notes for such expenditures for the amount required to be so paid in the fiscal year in which the budget note is issued, but only to the extent that budgetary appropriations for such purpose are insufficient to pay such claim.
- Any municipality, school district or district corporation which is required by law to include in its annual budget the amount of judgments or compromised or settled

claims that are outstanding at the time such budget is prepared, may issue budget notes for payment of any such judgment or claim. Such notes may be issued at any time prior to the earliest time at which tax anticipation notes may be issued by such municipality, school district or district corporation pursuant to Section 24.00 of the LFL in anticipation of the levy or collection of taxes for such budget. If such notes are issued in a fiscal year prior to the preparation of an annual budget during such fiscal year, an appropriation for their redemption shall be included in such next budget when it is prepared. If such notes are issued after an appropriation has been included in an annual budget for the payment of the judgments or claims for which the notes are issued, such notes shall be redeemed from such appropriation. Such budget notes may be renewed from time to time, but such notes including renewals thereof shall mature not later than the close of the fiscal year for which such annual budget is adopted.

- Budget notes must be redeemed out of the taxes or assessments levied or to be levied for the fiscal year in which they mature or out of other revenues of that fiscal year legally available for that purpose. Principal and interest is payable solely at maturity.
- Any Fire District that has the power to issue budget notes is also granted the power to appropriate and expend money received from the proceeds of the sale of budget notes for the purposes for which such notes are issued.

There are also special rules for budget notes for certain insurance purposes, snow and ice removal, judgments and settled claims, and other specific problematic budgetary situations.

It is important to note that, while budget notes may be issued due to increased expenses, there is no authority to issue budget notes for revenue shortfalls of any kind. That is considered a problem to be solved by cost-cutting, cashflow borrowings, midyear tax or fee increases, and/or deficit financing.

Budget notes are authorized by a budget note resolution of the Board of Fire Commissioners by the affirmative vote of a majority of the voting strength. A public referendum is not required. Delegation to the Treasurer as chief fiscal officer of sale and issuance duties is common. There is no publication requirement. The essential elements of a budget note resolution may be found in Section 40.00 of the LFL, as follows:

§40.00 Budget note resolution; form and contents; authorization thereof

a. The issuance of budget notes or renewals thereof shall be authorized by a "budget note resolution." Each such resolution shall be properly dated and shall bear a title which will indicate that it relates to a budget note.

b. Any municipality, school district or district corporation may adopt one or more budget note resolutions authorizing the issuance of budget notes for a specific object or purpose, for which object or purpose budget notes may be issued. In addition, any municipality may adopt one or more budget note resolutions authorizing the issuance of budget notes for a class of objects or purposes set forth in paragraph b, c, d or e of section 29.00 of this chapter.

c. A budget note resolution shall contain, in substance, at least the following provisions:

1. A statement setting forth the facts and circumstances necessitating the issuance of such budget notes and the specific object or purpose or the class of objects or purposes for which the budget notes to be authorized by such resolution are to be issued and stating that there are no other funds available with which to pay or provide for such object or purpose or class of objects or purposes. Such circumstances necessitating the issuance of budget notes and such specific object or purpose shall be described in brief and general terms sufficient for a reasonable identification.

2. A statement of the amount of budget notes to be issued for such specific object or purpose or class of objects or purposes.

3. A statement of the period of maturity of such notes.

4. If such notes are to be issued in renewal of other notes a statement that the date of maturity of such notes shall not extend beyond the applicable period provided in section 29.00 of this chapter for the maturity of such notes.

d. Every budget note resolution shall be adopted by at least a majority vote of the voting strength of the finance board. A majority vote shall be sufficient for the adoption of a resolution authorizing the renewal of any budget note.

The essential elements of a budget note are also provided in Section 51.00 of the LFL, as described earlier.

The issuance of a budget note is a red flag to the rating agencies that there are fiscal problems at the Fire District and should be avoided if at all possible.

Specialized Bond Types

In addition to the plain vanilla fixed rate general obligation serial bonds, Fire Districts in the State have authority to issue certain specialized type long-term debt obligations, including capital appreciation bonds ("CABs"), and original issue discount ("OID") bonds, including zero coupon bonds. While each of these bond types must be issued as general obligation bonds, they each include features as to the nature or timing of interest or as to partial mandatory redemption of principal by lot that appeal to certain types of investors in certain markets. These instruments are very rarely issued in the State. It is only important to note their available authority and the need to put separate provisions in a bond resolution, or, if necessary, amending resolutions to permit the use of them. Investment banking firms will make Fire Districts, their local counsel, their bond counsel and their financial advisors aware when such instruments might be an advantageous form of issuance, because such debt can be sold on a negotiated basis to them.

Capital Notes

In the hoary days of antiquity when dinosaurs still roamed the State, the authorization for the financing of most capital projects by most types of municipalities, required a five percent so called "down payment" to be appropriated in cash as part of the financing plan. This was considered to be "earnest money"—the local governmental unit really had to want the capital project enough to use some currently raised taxpayer dollars. For many years, prior to 1991, when this requirement was eliminated, a municipality could also satisfy this requirement, however, through the issuance of capital notes. (This effectively negated the "earnest money" aspect of the down payment.)

While it is still permissible to authorize the financing of a capital project in whole or in part with capital notes instead of BANs and bonds, the particular requirements for principal payoff are not appealing: such capital notes may be renewed from time to time but such notes, including the renewals thereof, must mature not later than the first day of the second fiscal year succeeding the fiscal year in which such notes are issued. In addition, an installment of not less than fifty per cent of the principal amount of such notes must mature in the first fiscal year succeeding the fiscal year in which such notes are issued, unless such notes are authorized and issued during a fiscal year at a time subsequent to the date of the adoption of the annual budget for the next succeeding fiscal year. (In such case, one more year is permissible.) As a result, BANs and BARNs are much more common due to their flexibility and longer term renewability.

Capital notes must be redeemed out of taxes or assessments levied or to be levied for the fiscal year in which they mature or other legally available revenues of that fiscal year. They cannot be automatically converted to BARNs, but can be refinanced with bonds. Principal and interest are payable at maturity.

Capital notes and capital renewal notes are each authorized by adoption of a capital note resolution adopted by the Board of Fire Commissioners by an affirmative vote of two-thirds of the voting strength. Unlike bond anticipation notes and bond anticipation renewal notes, the renewal of a capital note cannot be authorized and delegated in the original capital note resolution. The essential elements of a capital note or capital renewal note resolution may be found in Section 32.00 of the LFL, and are the same as for a bond resolution, discussed elsewhere herein. The essential elements of a capital note are provided in Section 51.00 of the LFL, as described earlier.

Capital notes are rarely, if ever, utilized by Fire Districts nowadays.

Refunding Bonds

What is an advance refunding? An advance refunding is a refinancing of outstanding bonds by the issuance of new bonds. It is thus not unlike refinancing a home mortgage note. It is a transaction in which a Fire District issues new bonds ("refunding bonds"), the proceeds of which are placed in an escrow account (in a bank or trust company located and licensed to do business in New York State). The proceeds, after payment of costs of issuance, are used to purchase special United States Treasury securities (generally directly from the Bureau of the Public Debt Division of the U.S. Treasury Department), the principal and interest payments of which are then used to pay the outstanding, now "refunded bonds." Debt service on the refunded bonds is paid from those investment proceeds in the escrow account. The refunded bonds are subsequently (on their "call date") "called" for early redemption prior to their stated maturity date, if such bonds have such a call feature. Many plain vanilla general obligation bonds have such a call feature available as of and after the date ten years from the original dated date of the bonds.

Certain outstanding bonds without a call feature rarely may be refunded in advance, but in such a case, the escrow account is established to pay debt service on the refunded bonds to each bond maturity date rather than an earlier "call date."

It is generally necessary to issue a greater amount of refunding bonds than the amount of bonds to be refunded due to two factors:

a. The costs of issuance of the refunding bonds (which may be included in the refunding bond size rather than paid in cash). These costs include: bond counsel, financial advisor, escrow agent bank, independent verification agent (to confirm that the escrow is sufficient to pay off the outstanding bonds), local counsel, and underwriter's fees.
b. The amount of money necessary to invest in U.S. Treasury securities to pay off the outstanding bonds (which are generally at a higher interest rate(s)) is necessarily more than the outstanding, refunded bond amounts because the escrow will pay principal *and* interest on the refunded debt and will be invested usually at a lower interest rate than the rate(s) on the refunded bonds (due, in part, to federal arbitrage rules governing advance refundings).

Present Value Savings. "Present value savings" is the historical benchmark requirement for advance refunding transactions in New York State: it is a time-value analysis of the stream of debt service payments due on the outstanding bonds in comparison to the proposed advance refunding bonds. The main governing provision of law, LFL Section 90.10, requires that there be present value savings for an advance refunding transaction to receive the legally-requisite approval of the Office of the State Comptroller. Such transactions are generally not done unless the present value savings in dollars equal or exceed 3% of the outstanding principal amount of bonds to be refunded (although this 3% threshold is not a legal requirement). Thus, although a refunding bond may be larger in size than the remaining outstanding, refunded debt, the transaction *must*, nevertheless, make financial sense to proceed.

In addition, in order to receive the requisite approval of the State Comptroller, there are certain additional requirements.

Costs of Issuance of Refunding Bonds. The State Comptroller also must approve the full terms and conditions of the refunding transaction. What does this mean? It means that all of the fees and expenses of the transaction are subject to State Comptroller review prior to closing an advance refunding transaction. Section 90.10 of the LFL provides for the inclusion of such costs of issuance in the sizing of the refunding bond issue (thus automatically taking such bond-paid costs into account in any calculation of the present value savings of the transaction). Advance refunding transactions are the most complicated general obligation bond issues which a local governmental unit could undertake. There are more parties to the transaction, more documentation and more governmental oversight and approval than a "plain vanilla" capital project borrowing. As a result, advance refundings are more costly to complete. These costs should be taken into account in determining whether to proceed with such transactions. Consultation with a financial advisor is recommended on this point.

Refinancing Debt Structure Rules. In the course of structuring a refunding transaction, the first payment of principal on the new, refunding bonds must occur no later than the next occurring principal payment date on the outstanding bonds to be refunded. Why? If this rule was not in place, it would be possible to effectively skip the current fiscal year cycle in the payment of principal. The Constitution and Local Finance Law of New York State require regular annual principal paydowns of debt on each project which is bond-financed. Nevertheless, note: a refunding *can* generate savings in the current or next fiscal year to the benefit of the municipality.

Similarly, there is a separate provision of law which states that the *maximum* period of probable usefulness cannot be extended simply by completing a refunding transaction. In short, if your capital project financed by bonds has a forty year *maximum* period of probable usefulness (typical of water and sewer projects, but not much else) and the first borrowing was, for example, in 2000, then the anniversary date of that first borrowing in 2040 is *still* the final date by which the refunding bonds must be paid off, even though two years have elapsed since the initial borrowing. The clock continues, rather than beginning to run anew. *That is not to say that outstanding debt cannot be extended.* If the outstanding debt was issued for twenty years when the project for which it was issued is entitled to a maximum 40-year useful life, then an extension of the debt to a longer period would be permissible in the course of the refunding (as long as it would not exceed a maximum of forty years total). This would lower the annual costs of debt service by spreading it out over time despite the overall cumulative increase in interest expense over time.

Finally, the internal structure of your new refunding bond issue must conform to the so-called "fifty per-cent rule" or substantially level or declining level annual debt service. The determination of compliance with these rules is made solely with reference to the new refunding bonds. How the prior, now to be refunded, bonds were amortized in this regard becomes irrelevant.

Board Action. Advance refunding transactions require adoption of a refunding bond resolution which includes a "preliminary refunding financial plan" (obtained from a willing underwriter/investment banking firm who will usually bring the refunding opportunity to the Fire District's attention in the first place). This is a specialized form of bond resolution with "magic" language known only to bond counsel. Some of it truly is essential to validity.

Voter Referendum. A voter referendum is generally not required with regard to doing an advance refunding transaction, despite the increased size of the refunding bond issue.

Steps in an Advance Refunding Transaction.

a. Adoption of a Refunding Bond Resolution by affirmative vote of two-thirds of the voting strength of the Board of Fire Commissioners, including an appendix with "Preliminary Refunding Financial Plan."

b. Publication of Legal Notice of Estoppel of Refunding Bond Resolution or summary thereof.
c. After passage of minimum of twenty days, sale of Refunding Bonds can commence including, in the interim, preparation of Preliminary Official Statement and solicitation of bids for escrow bank and verification agent by financial advisor.
d. Sale of Refunding Bonds including initial advance purchase of special U.S. Treasury Securities of the State and Local Government Series ("SLGs") to fund escrow on closing date.
e. Application of Office of the State Comptroller for approval of transaction in accordance with requirements of Section 90.10 of the LFL. (Minimum 10-day approval period)
f. Closing of Refunding Bond Issue and purchase of SLGs to fund escrow.
g. The Escrow Account pays all refunded bond debt service when due until called and then the cost of redemption on the date all the bonds are called. The Fire District is responsible for debt service on the Refunding Bonds.

Joint Projects and Municipal Cooperation Debt

There are various ways to accomplish this depending on the particular facts and circumstances. A Fire District should explore these kind of obligations with bond counsel if financing a joint project is contemplated. Article VIII Section 1 and Section 2-a of the constitution, Title 1-A of the Local Finance Law and Article 5-G of the General Municipal Law are the main governing provisions.

CHAPTER NINE

Amortization Structures

In New York State, there are rules regarding when principal must first be paid, when principal may last be paid, and how often and how much may and must be paid between the two dates.

The New York State Constitution has long provided that no installment for the payment of principal of outstanding indebtedness of any municipal issuer may exceed any prior installment by more than fifty percent. This provision has generally meant that the debt service requirements for any particular general obligation municipal debt in New York declined with time, as the decline in annual interest due overtook any limited permitted annual increase in principal repayment. The point was to ensure that debt was not back-loaded to future generations of property taxpayers.

In 1993, that provision of the Constitution was amended, effective January 1, 1994. All municipalities, school districts and district corporations such as Fire Districts in New York State may now, consistent with the Constitution, alternatively contract to repay indebtedness in substantially level or declining annual debt service payments.

Paydown of Principal Options

There are a few basic legal rules in this regard that must be considered:

a. **The 2-Year Rule:** The Fire District must begin to pay down principal within two (2) years of the original date of issuance, but may voluntarily pay down its first principal earlier. (If a local government delays in the case of five year items like vehicles, it does substantially increase what the last four payments will look like.)

b. **Annual Principal:** Thereafter, principal must be paid down annually. (That means not so little as one day beyond the anniversary date.)

c. **Method of Amortization of Annual Principal:** As noted above, there are two methods for determining the overall structure of debt service over the payoff period: (1) what is known as "50% rule debt" in which principal is structured according to the Constitutionally-based rule that no principal payment over time may exceed any prior smaller principal payment by more than 50%. This rule was designed to prevent excessive back loading of principal payoffs onto later generations of taxpayers, or

(2) substantially level annual debt service in which principal and interest payments are substantially equal in each year (not usually perfectly equal) similar to home mortgage payments except that BANs usually pay interest and principal annually and bonds usually pay interest semi-annually and principal annually.

d. **Length of Amortization:** The period of probable usefulness of a capital project establishes the outside date by which all debt for the project must be paid off, set by the date of the first borrowing therefor.

The "Two-Year Rule" for Bond Anticipation Notes

A principal payment must be made with respect to bond anticipation notes within two years of the date of issuance of the first bond anticipation note. That principal payment should be sized with the "fifty percent" rule in mind, or after determining to implement level annual debt service.

The "Two-Year Rule" for Bond Issues

If a Fire District does not issue bond anticipation notes, but instead goes directly to a bond issue, the first principal payment of a bond issue must fall within two years of the date of the bonds.

Put another way, the rule is that the first principal payment with respect to any financing must be made within two years of the date of the first bond anticipation note or within two years of the date of the bonds.

The 50% Rule

The general rule is that no principal payment during the course of bond anticipation note financing or serial bond financing may exceed by more than fifty (50%) percent, the smallest previous principal payment.

Thus, when a Fire District plans on making a principal payment during the course of bond anticipation note financing, the Fire District wants to make sure that that principal payment is sufficient enough to allow the Fire District to amortize the future bond issue over the remaining years allowed without any of the future principal payments exceeding by more than fifty percent the next principal payment that the Fire District is planning to make.

In the case where the period of probable usefulness is in excess of five years, and the bond resolution does not restrict the maximum maturity thereof to five years, and it is planned to finance that purpose over a period in excess of five years (i.e., common Fire District building projects), the general rule is that serial bonds must be sold, issued and delivered within five years of the date of issuance of the first bond anticipation note, with the first maturity of such serial bonds falling on or before the date that marks the five-year period computed from the date of issuance of the first bond anticipation note.

A principal payment from a source other than the proceeds of bonds or bond anticipation notes must be made within two years of the date of issuance of the first bond anticipation note and the amount of that principal payment and the amount of each subsequent principal payment should be sufficient so as to allow the Fire District to pay off the balance of the financing over the remaining period of years allowed to it without violating the so-called "50% rule."

The 50% rule, simply stated, says that no principal payment of indebtedness, whether made in the course of bond anticipation note financing or in a serial bond maturity schedule, may exceed by more than 50% the smallest of any of the previous principal payments.

A simple illustration: a Fire District has a $100,000 purpose that can be financed, according to the term specified in the bond resolution, over ten (10) years. It makes a first principal payment of $8,000. Because the 50% rule permits the Fire District now to go as high as $12,000 on any subsequent payment, it is obvious that, whether or not a principal payment is made at the end of the first year of bond anticipation note financing, the Fire District will be able to pay off the indebtedness over the period remaining to it eight (8) years in the first case, nine (9) years in the second) without violating the 50% rule.

Compare another Fire District, with the same $100,000 purpose, which makes a first principal payment of $6,000 instead of $8,000. Under the 50% rule, the $6,000 payment limits the Fire District to a maximum payment of $9,000 in any subsequent year. Assuming that the $6,000 payment was made at the end of the second year (no payment having been made at the end of the first year), the Fire District now has eight years of payment left. Taking these 8 years and multiplying 8 x $9,000, you arrive at $72,000; and one can see, this $72,000 plus the original $6,000 payment ($78,000) makes it impossible for the Fire District to pay off the financing by the end of the ten-year period without violating the 50% rule.

The 50% Rule and Seeming Violations

Under certain circumstances bond counsel can approve the legality of bond anticipation notes which, on their face, seem to violate the so-called fifty percent rule described above.

Assume that a Fire District issued a bond anticipation note in the principal amount of $330,000 for a building reconstruction project in "Fiscal Year 1." This was the first note issued for the project. The bond resolution limited the maximum maturity of the serial bonds to five years. (It would never happen, but imagine it for purposes of a simplified illustration; it would be the case for a bus financing.)

In the following fiscal year ("Fiscal Year 2"), against the outstanding $330,000 bond anticipation note then maturing, the Fire District made a principal payment in the amount of $66,000, such amount constituting the first installment of such indebtedness, and issued a renewal note in the principal amount of $264,000.

Similarly, in the next succeeding fiscal year ("Fiscal Year 3"), the Fire District made a principal payment in the amount of $66,000 and issued a renewal note in the principal amount of $198,000.

The Fire District then advises bond counsel that they would now like to pay off entirely the outstanding $198,000 bond anticipation note at the time of its maturity and asks whether this would be legal in view of the so-called "fifty percent rule."

The answer to that question is unequivocally in the affirmative: the Fire District legally may make such a payment. The rationale lies in the distinction between "voluntary" payments and "involuntary" or "mandated" payments.

Pursuant to Section 53.00 of the LFL, a Fire District may issue obligations which are redeemable prior to maturity. Thus, for example, a Fire District could issue a $2,000,000 bond issue payable of $100,000 per year over a period of twenty (20) years with the bonds callable at the end of the tenth year. Assume that that serial bond issue was issued by a current administration in office at a Fire District in Fiscal Year 1 with a 10-year call feature. The provisions for early redemption do not mandate upon the administration which is in office in year ten (10) the decision to call in the bonds at that time; the decision to call in the bonds in Fiscal Year ten (10) by the administration in office in that year is an entirely voluntary decision not mandated by law or any other circumstances.

If one accepts the constitutionality of the provisions of the LFL which permit the issuance of callable bonds and which allows an administration ten years after issuance to voluntarily pay off the balance of the bonds, thus seeming to violate the so-called "fifty percent rule," then one must accept the constitutionality and legality of an issuer voluntarily deciding to pay off a bond anticipation note in the circumstances which are described above.

It is important to note: voluntary payments can only be said to be constitutional and legal where the previous payments have been of such sufficient magnitude so as not to have mandated the issuer into having to make a payment which violates the fifty percent rule in order to amortize the issue over the remaining allowable maturity.

Thus, for example, in the instant situation, if the Fire District had paid $66,000 in Fiscal Year 2 and then in Fiscal Year 3 lowered that payment down to $30,000, one can see that under the fifty percent rule no subsequent payment could exceed $45,000 and to enable the Fire District to pay off the financing within the allowable 5-year maturity period (computed from the date of issuance of the first bond anticipation note), the Fire District would be forced (mandated) to make a principal payment within such 5-year period of such a magnitude so as to result in a violation of the fifty percent rule.

Accordingly, it follows that whether a payment may be regarded as being "voluntarily" made or "involuntarily" made depends upon the size of the principal payments that have been made during the course of the financing up to the date that the Fire District is considering the payment which, on the face of it, would seem to violate the fifty percent rule.

Now consider a different set of circumstances when a principal payment has been made after the first year of bond anticipation note financing which seemingly violates the so-called 50% rule set forth in paragraph d of Section 21.00 of the Local Finance Law.

Paragraph b of Section 23.00 of the Local Finance Law provides that bond anticipation notes shall mature within one year from the date of their issue and may be renewed from time to time, but each renewal shall be for a period not exceeding one year and in no event shall such notes or the renewals thereof extend more than two years beyond such original date of issue unless a portion of such notes or the renewals thereof shall be redeemed from a source other than the proceeds of bonds within two years from such original date of issue.

In plain English, as discussed earlier, this means that you must make a principal payment within two years of the date of issuance of the first bond anticipation note.

By omission, then, the statute permits a municipality to make no payment at the end of the first year and roll over the bond anticipation note in full.

Let us take a $100,000 financing with a 10-year maturity as an example. The municipality issues $100,000 bond anticipation note in year one. At the end of year one, the municipality makes a $10,000 principal payment and issues a $90,000 renewal note. At the end of year two (the year in which a principal payment is mandated by the statute) the municipality makes a $5,000 principal payment.

Bingo!—you have an automatic violation of the 50% rule, because the 50% rule says that no principal payment may exceed by more than 50% the smallest previous principal payment mandated by law. By making the principal payment in the amount of $5,000, no subsequent payment may legally exceed $7,500, and you can see that over the next eight years, it is impossible to amortize the remaining $85,000 without violating the 50% rule.

Take a different scenario, however: At the end of the first year, the municipality makes a $5,000 principal payment. The uninitiated would conclude, using the reasoning above, that there is an automatic violation of the 50% rule. This is not the case. After all, the Local Finance Law provides that no principal payment need be made at the end of year one. If that is the case, then why should a municipality be punished for making a "voluntary" payment at the end of year one. Thus, for the purpose of the 50% rule, one can disregard the first payment in this case, since it was a voluntary payment not mandated by law.

Level Debt Service

Since January 1, 1994, the LFL provides for the issuance of bonds with substantially level or declining annual debt service, as an alternative to compliance with the "fifty percent" rule described above. This provision also allows use of the weighted average period of probable usefulness of various capital projects in the case of a consolidated bond issue in which a single bond issue is sold for multiple projects. If bond anticipation notes are issued for a project or projects for which it is anticipated that serial bonds will be issued with substantially level or declining annual debt service, such notes must be redeemed in part in each year in an amount at least equal that which an annual installment of hypothetical substantially level or declining serial bonds would be if issued at a five percent rate of interest. Compliance with the "fifty percent" rule during bond anticipation note financing prior to the issuance of serial bonds should generally comply with this requirement but should always be verified.

Bond Counsel should always be consulted as to exactly how "substantially level or declining annual debt service" should be implemented. If it is not done properly, the debt is not validly issued.

Note the relationship of PPU calculation discussed earlier to a level debt service amortization: in the level debt service context, each object or purpose with its own PPU, in effect, "pulls its own weight" to be part of a resultant average aggregate maximum PPU. In this context, while a project with a 5-year useful life may be paid for, in effect, over ten (10) years, so too is a building with a 25-year useful life.

Relationship of Bond Anticipation Notes to Bonds: The "Five-Year" Rule

Generally, serial bonds must be sold, issued and delivered within five years of the date of issuance of the first bond anticipation note. A Fire District must arrange to sell the bonds sufficiently in advance of the five-year anniversary date so that the first maturity of the serial bonds will fall within five years of the date of the first bond anticipation note. This is a trap for the unwary.

Series Financings

It is possible to divide a financing into series of notes and series of bonds.

Assume that the Fire District has authorized an issue of $10,000,000 and in the first year they only wish to issue $5,000,000 and follow that up in the second year by another $5,000,000 note issue. In the third year, they plan to consolidate the two borrowings into one serial bond issue.

In each case, each of the series (let us call them Series A and Series B) would stand on their own as separate issues; each series would have its own two-year rule; each series would have its own five-year rule; each series would have its own 50% rule; however, it is important to remember that the maximum maturity of the Series B financing would have to be pegged from the date of issuance of the first bond anticipation note (or serial bonds, if no such notes were ever issued) issued for the Series A financing. Within the single consolidating bond issue in year three, these rules must be observed.

CHAPTER TEN

Public or Private Sale of Debt Instruments

The sale of BANs and serial bonds can involve private local placement or public competitive sale, but if over $1,000,000, competitive sale of bonds (not notes) is legally required at this time with few exceptions. Unlike bonds, BANs may be sold at public competitive sale or privately placed with local banks or regional investment banking houses, regardless of the size of the issue. One of the roles of a financial advisor is to assist in the determination of how to sell the debt, between the legally available options. (This chapter is pretty dry and boring but it is useful to read it just once.) In case you don't , here is an executive summary:

- A Fire District can sell bond anticipation notes in any amount, either by competitive public sale with the help of a financial advisor or locally placed bank with which you have a depository relationship. Get three bids if possible.
- A Fire District can sell up to one million dollars of serial bonds annually locally with a bank, often a bank with which you have a depository relationship. Get three bids if possible.
- Any bond issued of over $1,000,000 must be sold publicly (competitively) following detailed statutory law and State Comptroller's regulations. Most will need a financial advisor to help you access this market.

Note Sales

Notes (BANs, BARNs, TANs, RANs, capital notes and budget notes) may be sold at public competitive sale or privately placed regardless of the size of the issue. If sold publicly, the notice of sale must conform to the requirements of Section 60.00 of the LFL and the State Comptroller's rules found in Part 26 of Chapter II of the Title 2 of the N.Y. Comp. Codes Rules and Regulations (hereinafter, "N.Y.C.R.R."). If privately placed, it is recommended that bids be solicited from at least three institutions, e.g. local banks, assuming three banks still do business in the area. This is not a legal requirement.

The basic note sale rules are as follows:

a. Notes may be sold at either public or private sale, but they generally cannot be sold on option or on a deferred payment plan.

b. Notes may be sold without limitation as to rate of interest, and generally for a sum not less than the par value of, and the accrued interest on, such obligations, and bond anticipation notes may be sold to the State of New York Municipal Bond Bank Agency, at such rate or rates of interest as may be agreed upon by and between the issuer and such agency.
c. Capital notes for one or more specific objects or purposes or classes of objects or purposes, or a combination thereof, may be sold as a single capital note issue. Bond anticipation notes for one or more specific objects or purposes or classes of objects or purposes, or a combination thereof, may be sold as a single bond anticipation note issue. This is known as a consolidated issue.
d. If notes are sold at public sale the Board of Fire Commissioners may specify the procedure therefore or they may adopt as much of the procedure prescribed for the sale of bonds in sections 57.00 to 59.00 inclusive, of the LFL, as they may desire. In all such sales, however, the provisions of paragraph e below must be complied with. Nothing in the rules prevents the sale of notes at public auction.
e. The State Comptroller has adopted regulations, prescribing a procedure for the circularization of notices for the public sale of notes and which also prescribes such data and information that his office deems advisable to be contained in such notices. It is a part of the job of bond counsel to ensure compliance with those regulations.

Smaller note issues are often privately placed after an informal solicitation process with local banks, particularly depository banks of the issuer. What constitutes small is basically a matter of the appetite of your local banks for local governmental debt. When notes are publicly sold by competitive sale, or are to be sold privately, on the longer financial markets, the services of a financial advisory firm are usually engaged.

Public Bond Sales

Bonds of over $1,000,000 in principal amount may be sold only at public sale and in accordance with the procedures set forth in Sections 57.00, 58.00 and 59.00 of the LFL with few exceptions as noted below. A debt statement must be filed with the Office of the State Comptroller before the public sale of most bonds (but not notes) in accordance with the requirements and procedures specified in Title 10 of the LFL.

The basic bond sale rules are as follows:

a. Bonds issues of over $1,000,000 shall be sold only at public sale and in accordance with the procedure set forth in the LFL, except as described below.
b. Bonds may be sold at private sale in any authorized amount to the United States government or any agency or instrumentality thereof (such as the Department of Agriculture, Rural Development Division), the State of New York Municipal Bond Bank Agency, to any sinking fund or pension fund of the municipality, school

district or district corporation selling such bonds, or, in the case of bonds or other obligations of a municipality issued for the construction of any sewage treatment works, sewage collecting system, storm water collecting system, water management facility, air pollution control facility or solid waste disposal facility, also to the New York State Environmental Facilities Corporation ("EFC") and some local governmental issuers may sell such debt to the Dormitory Authority of the State of New York.

c. Bonds may also be sold at private sale as provided in Section 63.00 of the LFL $1,000,000 and under, hereinafter described.

d. No bonds shall be sold on option or on a deferred payment plan, except that options to purchase, effective for a period not exceeding one year, may be given in certain very limited cases, including to EFC with respect to bonds or other obligations issued for the construction of any sewage treatment work, sewage collecting system, storm water collecting system, water management facility, air pollution control facility or solid waste disposal facility. A loan commitment may also be entered into by and between a county and the State of New York Municipal Bond Bank Agency and by and between such a municipality and EFC, such commitment to be fulfilled by the purchase of the bonds or other obligations by such state agency or such state corporation.

e. Bonds shall be sold without limitation as to rate of interest and for a sum not less than the par value of, and the accrued interest on, such obligations except as authorized by the LFL, and may also be sold at private sale to the State of New York Municipal Bond Bank Agency and to EFC and to the Dormitory Authority of the State of New York in certain cases. When sold at public sale, the rate of interest shall be determined in the manner provided in Section 59.00 of the LFL. A maximum rate of interest at which such bonds shall be sold may be fixed.

f. Bonds for one or more specific objects or purposes or classes of objects or purposes, or a combination thereof, may be sold as a single bond issue. This is known as a "consolidated bond issue."

g. The state comptroller has adopted rules with which bond counsel ensures compliance:
1. Designating a financial newspaper or newspaper published and circulated in the city of New York in which notices for the sale of bonds may be published;
2. Prescribing the procedure for the circularization of notices for the sale of bonds;
3. Prescribing certain other requirements as necessary relating to the publication or circularization of notices for the sale of bonds;
4. Prescribing certain data and information with which both bond counsel and the financial advisor are familiar; and
5. Prescribing the requirements for the alternative and permissive publication or circularization of notices particular to the sale of bonds of an issue not exceeding $1,000,000.

It is part of the duties of bond counsel and the financial advisor to the Fire District to ensure compliance, and to assist with the filing of a debt statement with the office of the State Comptroller prior to the bond sale.

h. Notwithstanding the limitations set forth above, a municipality or school district may provide for the public sale of its bonds at a price of less than the face value of such bonds at maturity i.e. at an original issue discount such that the issuer does not receive full face amount of principal; provided that no issue of bonds shall be sold at a price such that the difference between the sale price of such bonds, not including accrued interest, and the face value of such bonds at maturity, shall exceed five percent of the face value of such issue of bonds at maturity unless the municipality, school district or district corporation issuing such bonds has determined to issue them pursuant to a substantially level or declining annual debt service schedule (or unless interest is contributed at least annually to a sinking fund in accordance with Section two of article VIII of the constitution and the procedures of Section 22.10 of the LFL). The cost of such original issue discount, together with other costs of the issuance of obligations, is deemed a part of the cost of the object or purpose for which such obligations are issued.

Public Bond Sale Notice

The rules for the notice of sale of bonds are as follows:

a. There must be published, at least once, not less than five nor more than thirty days before the date fixed for public sale of bonds, a notice of such public sale or a summary thereof in accordance with one of the following methods:
    1. the notice of sale must be published in any financial newspaper published and circulated in the city of New York which the State Comptroller has designated for such publication as *The Daily Bond Buyer*;
    2. the notice of sale must be circularized in such manner as the State Comptroller has prescribed and shall be published in any newspaper or newspapers which the Board of Fire Commissioners may designate for such purpose; or
    3. (i) a summary of the notice of sale shall be published in both the financial newspaper published and circulated in the city of New York which the state comptroller has designated as *The Daily Bond Buyer*, and (ii) any newspaper or newspapers which the Board of Fire Commissioners may designate for such purpose. A summary of the notice of sale at a minimum must contain the name of the issuer, the amount, date, and maturities of the bonds, the frequency of interest payments, the place where bids will be received, including the designation of the receiving device if the Board of Fire Commissioners has authorized the receipt of bids in an electronic format, the time and date for the opening of the bids, including circumstances under which such time and date may be changed

in accordance with law, the method of award and a procedure for promptly obtaining the complete notice of sale and any preliminary official statement prepared in connection with the sale, and certain other information that the State Comptroller requires.

b. Such notice shall call for sealed bids for the purchase of such bonds, and shall state:
    1. The place where bids will be received and considered, and the designation of the receiving device for electronic bids if the Board of Fire Commissioners has authorized same.
    2. (a) The time and date for the opening of bids, which shall be only on weekdays, Saturdays and holidays excluded, between the hours of 10:00 a.m. and 4:00 p.m.
    (b) In lieu of the statement of the time and date for the opening of bids, a statement (i) that the time and date for the opening of bids will be provided on not less than twenty-four hours prior notice by means of a supplemental notice of sale and indicating the manner in which such supplemental notice will be provided, or (ii) setting a time and date for the opening of bids, stating that notice of a change in time or date for the opening of bids may be provided not less than twenty-four hours prior to the time originally scheduled for the opening of bids by means of a supplemental notice of sale and indicating the manner in which such supplemental notice will be provided. Where notice is given that the time or date of a sale will be changed without specifying the new time or date, notice of the new time or date of sale must be provided by means of a second supplemental notice of sale at least twenty-four hours prior to the new time for the opening of bids.
    (c) A supplemental notice of sale must refer to and be deemed a part of the notice of sale and must not establish or change the terms of the sale other than the time or date for the opening of bids, the amount of principal scheduled to be repaid in each year, the right or redemption prior to maturity, and the face value at maturity of the issue or any installment thereof. The time set for the opening of bids in the supplemental notice of sale must not be less than five nor more than thirty days after publication of the notice of sale.
    (d) The supplemental notice of sale must be provided by transmittal over a definitive trade wire service of the municipal bond industry which, in general, makes available information regarding activity and sales of municipal bonds and is generally available to participants in the municipal bond industry, or by publication in the financial newspaper published and circulated in the city of New York which the state comptroller, designates for such publication in regulations. In addition, public notice of the time and date set for the opening of bids in the supplemental notice of sale shall be given to the news media and must be posted in one or more designated public locations within the issuing Fire District at least twenty-four hours prior to the time and date set for the opening of bids; provided,

however, that such public notice is not to be construed to require publication as a legal notice.

3. The maximum rate of interest, if any, that may be bid.

c. Such notice must also include:

1. A statement that the rate or rates of interest to be bid shall be a multiple of one-hundredth of one per centum per annum or a multiple of one-eighth of one per centum per annum, as the offices in charge of the sale may determine and may require or permit in such notice.

2. A statement of the conditions of sale and the methods of bidding which must include the following:

a. A statement that one or more than one rate of interest may be bid; provided, however, that only one rate of interest may be bid for bonds of the same maturity. Where more than one rate of interest may be bid, such notice shall specify the maximum number of rates which may be bid. Where the net interest cost method of calculating interest cost is used, or where the notice so provides, the interest rate for each maturity shall not be less than the interest rate for any prior maturity. Such notice shall also state that such rate or any of such rates may not be higher than the maximum rate prescribed in such notice, if a maximum rate has been prescribed. Notwithstanding the above, in inviting proposals for the sale of bonds in an amount of $20 million or more (a most unlikely event), a Fire District may advertise in such notice to sell, in series, at a single bid price per bond.

b. Where two or more issues are offered in the same notice of sale, a statement specifying whether each of the issues so offered shall be sold separately as a single bond issue, whether some of the issues shall be combined and sold separately as one or more single bond issues, or whether the aggregate amount of bonds of all of the issues shall be combined and sold as a single bond issue.

c. Where the Board of Fire Commissioners has determined to provide for substantially level or declining annual debt service, a statement specifying the dates of maturity for such bonds and the dates for payment of interest on such bonds, and setting forth the annual principal installments expected to provide for, together with the interest thereon, substantially level or declining annual debt service on such bonds. Such notice shall state that the Fire District may, after selecting the low bidder, adjust such installments to the extent necessary to meet the requirement of substantially level or declining debt service.

3. A requirement that as a condition precedent to the consideration of his bid, each bidder shall deposit with the official of the Fire District in charge of the sale, a certified or cashier's check drawn upon an incorporated bank or trust company to the order of the county or such official, for not less than one per centum of

the amount of bonds to be bid for. Such notice may also provide that, in lieu of a certified or cashier's check, bidders may furnish as security an eligible surety bond or an eligible letter of credit, approved by such official as to form, sufficiency, and manner of execution. "Eligible surety bond" means a bond executed by an insurance company authorized to do business in this state, the claims-paying ability of which is rated in the highest rating category by at least two nationally recognized statistical rating organizations; and "eligible letter of credit" means an irrevocable letter of credit issued in favor of the municipality or Fire District, for a term not to exceed ninety days by a bank, as that term is defined in section two of the banking law, whose commercial paper and other unsecured short-term debt obligations (or, in the case of a bank which is the principal subsidiary of a holding company, whose holding company's commercial paper and other unsecured short-term debt obligations) are rated in one of the three highest rating categories (based on the credit of such bank or holding company) by at least one nationally recognized statistical rating organization or by a bank that is in compliance with applicable federal minimum risk-based capital requirements.

4. A statement that there is reserved to the Fire District the right to reject all bids, and that any bid not complying with the terms of the notice will be rejected.
5. A statement that the Fire District has reserved to itself the power to call in and redeem a portion of such bonds prior to their date of maturity, if it has reserved to itself such power (a so-called "early redemption" provision). Such statement shall identify the portion of the bonds which may be so redeemed and shall describe the terms and conditions under which such bonds may be redeemed.
6. A statement indicating which of the methods set forth in paragraph a of Section 59.00 of the LFL (described below) will be used in awarding such bonds.
7. Certain further data and information required by the State Comptroller.

d. It may be a condition of the sale of bonds that every bidder may be required to accept a portion of the whole amount of the bonds for which he has bid, at the same rate for such portion as may be specified in his bid for the full amount. If such condition is imposed, the notice of sale shall so state and such notice also shall state that, in addition, any bidder may offer to purchase all or none of such bonds on different terms.
e. The notice of sale may provide that the bidder to whom the bonds are to be awarded, at his option, may refuse to accept the bonds if prior to the delivery of the bonds any income tax law of the United States of America shall provide that the interest on such bonds is taxable, or shall be taxable at a future date, for federal income tax purposes, assuming the bonds were sold as federally tax exempt.
f. Until June 1, 2013 sealed bids can include bids submitted in electronic format but not as a sole method and this method must be in compliance with certain statutory rules.

The bid opening and award process is also governed by statute, being Section 59.00 of the LFL, with the following rules:

Bid Opening and Award Rules

a. All bids must be opened publicly at the time and place stated in the notice of sale, and not before, and shall be publicly announced. Prior to the time fixed for such public opening of bids, a sealed bid may be amended by a bidder by delivery to the official to whom the sealed bid was delivered of a sealed amendment to such bid. No bid can be amended by a telegraphic or telephonic communication (except electronic bids may be amended by same method). The bonds are to be awarded to the bidder offering the lowest interest cost to the municipality, village or district corporation, as computed in accordance with the net interest cost method or the actuarial or true interest cost method as duly noticed in the notice of sale.
b. If it is a condition of the sale of bonds that every bidder may be required to accept a portion of the whole amount of such bonds for which he has bid, at the same rate for such portion as may be specified in his bid for the full amount then any bidder may, in addition, offer to purchase all or none of such bonds on different terms.
c. When the bidder to whom the bonds are to be awarded has been ascertained, the municipality, Fire District or district corporation must promptly return all security to the persons furnishing the same, except the security furnished by such bidder. Such bidder must be promptly notified of the award to him, and if he refuses or neglects to pay either the agreed price for the bonds less the amount of any certified or cashier's check furnished as security, or the agreed price in full for the bonds if an eligible surety bond or eligible letter of credit was furnished as security, the security furnished by him, in whatever form, shall be forfeited to and retained by or claimed against or drawn upon by, the school direct as liquidated damages for such neglect or refusal. However, if the notice of sale shall contain the notice and if prior to the delivery of the bonds any income tax law of the United States of America shall be revised to provide that the interest on such bonds is federally taxable, or shall be so taxable at a future date, for federal income tax purposes, and the debt had been sold as federally tax exempt then, at the request of such bidder the security accompanying his bid must be returned to him and he is to be relieved of his contractual obligations arising from the acceptance of his bid.

Bond Interest Rates

While the LFL provides that bonds must be sold without limitation as to rate of interest and for a sum not less than the par value of, and the accrued interest on, such obligations except as authorized by the LFL, this does not preclude establishing certain bidding parameters in a public competitive bond sale. Here is an example:

> Each bid must be for all of said bonds and may state a single rate of interest or different rates of interest for different maturities, provided, however, that (i) only one rate of interest may be bid for bonds of the same maturity, (ii) the maximum difference between the highest and lowest interest rate bid may not exceed one and one-half per centum per annum, (iii) variations in rates of interest so bid shall be in ascending progression in order of maturity so that the rate of interest on any single maturity of said bonds shall not be less than the rate of interest applicable prior to maturity, and (iv) all rates of interest bid must be stated in a multiple of one-eighth or one-hundredth of one per centum per annum. Unless all bids are rejected the award will be made to the bidder complying with the terms of sale and offering to purchase said bonds at such rate or rates of interest as will produce the lowest net interest cost computed in accordance with the net interest cost method of calculation, that being the rate or rates of interest which will produce the least interest cost over the life of the bonds, after accounting for the premium offered, if any.

The purpose of such limitations is to prevent surprises like a 25% interest rate in one maturity counter-balanced by low rates later.

Bonds may also be sold by Fire Districts at private sale to the State of New York Municipal Bond Bank Agency or to the EFC, or to the Dormitory Authority of the State of New York, each in accordance with particular programs if the project fits their requirements, at such rate or rates of interest as may be agreed upon by and between the issuer and any such agency or corporation, as the case may be.

When sold at public sale, the aggregate rate of interest is to be determined in the manner provided in Section 59.00 of the LFL computed as net interest cost or true interest cost as provided in the notice of sale. A maximum rate of interest at which such bonds shall be sold may be fixed by the issuer.

Sale of Bond issues of $1,000,000 or less

When sold at public sale, bonds of an issue not exceeding $1,000,000, whether of a single issue or sold as a single issue pursuant to paragraph c of section 57.00 of the LFL, having a maximum maturity of not more than five years measured from the date of the bonds, need not be sold in accordance with the requirements of section 58.00 of the LFL , described above, for publication of the notice of sale but may be sold upon such publication or circularization of the notice as prescribed by the State Comptroller in regulations of that office.

Bonds of an issue not exceeding $1,000,000, whether of a single issue or sold as a single issue pursuant to paragraph c of section 57.00 of the LFL, may also be sold at private sale without limitation as to rate of interest, provided, however, that the total amount of bonds which may be sold at private sale in any fiscal year of the issuer cannot exceed $1,000,000. The 5-year limit does not apply to private sales.

Private Sales of Bonds

As described above, bonds of an issue not exceeding $1,000,000 may be sold at private (negotiated) sale as provided in Section 63.00 of the LFL, without limitation as to rate of interest, provided, however, that the total amount of bonds which may be sold at private sale in any fiscal year of a Fire District may not exceed $1,000,000. This permits any Fire District to privately place such bonds, or informally solicit bids locally without any of the formal notice requirements described above for competitive sales of bonds.

Bonds may also be sold at private negotiated sale with original issuer discount as described earlier or as variable rate debt. As both are exceedingly rare in New York State, they shall not be further discussed here.

The State Comptroller has also promulgated rules in conformance with the state administrative procedure act governing the sale of bonds and notes on a negotiated basis. No bond or note sale on a negotiated basis can be conducted by a municipality, school district or district cooperation without prior approval of the State Comptroller except as provided in such rules, which set forth the circumstances under which such approval shall not be required, which includes bonds sold pursuant to the authority specified in Section 63.00 of the LFL.

Bonds may also be sold at private sale to the United States government or any agency or instrumentality thereof such as the U.S. Department of Agriculture (formerly known as the Farmers Home Administration bond program, now referred to as "Rural Development"), the State of New York Municipal Bond Bank Agency, to any sinking fund or pension fund of the County selling such bonds, or, in the case of bonds or other obligations of a municipality issued for the construction of any sewage treatment or collecting system, storm water collecting system, water management facility, air pollution control facility or solid waste disposal facility, to the New York State Environmental Facilities Corporation (which has an interest subsidy program for qualifying issuers and projects) and in certain cases to the Dormitory Authority of the State of New York.

Private Competitive Sale of Bonds

Serial bond issues of under $1,000,000 may also be sold at private competitive sale. This is a hybrid category. What distinguishes it from sales pursuant to Section 57.00 of the LFL as described above is (1) no filing of a debt statement with the State Comptroller is required, (2) no notice of sale need be published, and (3) an official statement will not generally be necessary. It is thus an inexpensive way to sell certain debt by mailed or other transmitted-only notice.

Sales and Closings

Except in the cases of the local placement of notes, small serial bond issues or SIBs, most significant local government debt is sold nowadays in the State and national capital markets with the assistance of a financial advisory firm and bond counsel. Competitive bidding procedures typically are conducted by the financial advisors with legal guidance by bond counsel who drafts the notice of sale and the award documentation. After the award, bond counsel drafts the closing documents, the obligations themselves, and a detailed letter of instruction which is typically forwarded to local counsel, or on advice of counsel, directly to the mutual client. In negotiated note or bond offering, an opinion of local counsel as to any material litigation is often required in addition to the validity opinion of bond counsel. Nowadays, these competitive sales of notes and bonds typically "close" without a formal physical closing (or lunch at a nearby bistro) at a law office. Instead, the issuer forwards the debt obligations themselves to bond counsel or to a national repository on their instruction, and the closing papers to bond counsel. At closing, the purchaser wires the purchase price to the issuer's bank and upon telephonic or facsimile confirmation of receipt, bond counsel, the financial advisor and the purchaser call the repository and "release" the debt obligations to the purchaser. The closing is now complete and all parties may eat lunch at their desks.

CHAPTER ELEVEN

Federal Tax Law Issues—Arbitrage and Arbitrage Rebate

The Federal Tax Exemption

Bonds and notes of state and local governmental units generally bear interest that is excludable from gross income for federal income tax purposes for their holders. This federal provision has provided several generations of low-interest borrowings for several generations of local governmental capital improvements. Prior to 1986, the federal government did not ask for much in return. Municipalities and school districts and Fire Districts issued this debt, and invested the proceeds until they needed the money for the project. The Internal Revenue Code of the time had some basic rules but they were such that municipalities, schools and Fire Districts hardly needed to concern themselves with any federal tax implications of their borrowings, so they didn't.

The Tax Reform Act of 1986

On October 22, 1986, the Tax Reform Act of 1986 (the "1986 Act") was signed into law ushering in a new era for tax-exempt finance, and instituting the new Internal Revenue Code of 1986 (the "1986 Code"). The 1986 Code imposed many new restrictions on the ability of state and local governmental units to finance their facilities and operating expenses on a federally tax-exempt basis. For the first time, municipalities and school districts, including Fire Districts might need to employ taxable financing for some operations that had traditionally been thought of as governmental in nature. In addition to raising the interest cost of borrowing, the 1986 Code increased the administrative burdens placed on state and local political subdivisions in maintaining compliance with the rules relating to tax-exempt financing, thereby further increasing the overall costs of transactions. The 1986 Act could be said to have been a congressional attempt to micromanage tax-exempt debt issuance.

The 1986 Code changed the rules relating to tax-exempt financing in two major ways. First, it sought to eliminate the "arbitrage" profits that at least in the past were frequently generated in tax-exempt financings as a result of a Fire District's ability to borrow at low tax-exempt interest rates and invest the proceeds of the borrowing at higher taxable rates until use. Second, it was designed to drastically reduce the ability of state and local governments to undertake tax-exempt financings which benefit nongovernmental entities, regardless of whether the conferring of such benefits is a primary goal or is merely incidental to a true municipal purpose (as would be necessary of a Fire District capital project under state law).

Under the 1986 Code a distinction is made between "governmental bonds" and "private activity bonds." A brief discussion of the treatment of private activity bonds under the 1986 Code is included in the next chapter, and should be reviewed with some care, as the terms "governmental bonds" and "private activity bonds" are something of misnomers. For example, obligations issued for a number of legitimate governmental purposes in accordance with state statutory and constitutional requirements may, in some instances, be private activity bonds under the 1986 Code. Unless specifically noted, the restrictions imposed by the 1986 Code apply equally to bond and notes (and to other evidences of municipal indebtedness, as well). Accordingly, as used herein, the term "bond" includes notes (and other evidences of municipal indebtedness)

This chapter will outline those substantive provisions of the 1986 Code that have the greatest impact on Fire District issuers of general obligation bonds and notes. Since the vast majority of general obligations issued by Fire Districts within New York State would be considered "governmental bonds" under the new law, the discussion of "private activity bonds" has been relegated to the later chapter. Except as discussed in such chapter, and as may be specifically noted elsewhere, all general obligation bonds and notes issued by a Fire District pursuant to the LFL and effectively under Article VIII of the State Constitution will be considered to be "governmental bonds" under the 1986 Code.

Arbitrage Restrictions With Respect To "New Money" Issues

Perhaps the most important impact of the 1986 Code on issuers of general obligations like Fire Districts is the limitation that it imposes upon the amount of "arbitrage" that a municipality can realize as a result of issuing its obligations at a low tax-exempt interest rate and investing the proceeds of such borrowings in taxable obligations bearing higher interest rates. By taking advantage of this spread between tax-exempt and taxable interest rates, municipalities in the past could realize arbitrage profits within the fairly liberal constraints imposed by Section 103 of the Internal Revenue Code of 1954 (the "1954 Code") and the Treasury Regulations promulgated thereunder. In addition to being used to pay the costs of issuance of obligations, arbitrage profits often played a key part in the financing of municipal or Fire District projects.

The 1986 Code accomplishes the goal of limiting the amount of arbitrage profits that a Fire District can earn in one major way. While it generally does not shorten the currently available "temporary periods" during which proceeds of an issue of Fire District obligations can be invested in taxable securities with a yield higher than the yield on the bonds, it does require the issuer to rebate to the Federal Government *all* of the arbitrage profits earned with respect to the financing unless all (or in some cases, almost all) of the, original and investment proceeds of the bonds (and, in certain cases, other amounts) are spent within certain set time periods after the date of issuance. It should be emphasized that failure to satisfy this requirement may result in the bonds being retroactively taxable as of their date of issuance.

In addition, the 1986 Code generally prohibits tax-exempt bonds from being issued too far in advance of the time proceeds are expected to be used to construct or acquire the assets to be financed (the so-called "hedge bonds" rule). The temporary period rules and the arbitrage rebate exceptions described in this chapter often provide good reason to issue bonds close to the time when the bond proceeds will be spent; similarly, economics dictates this result whenever the short-term interest rates at which bond proceeds may be invested prior to use are lower than the long-term rates at which the bonds accrue interest. However, under certain circumstances, Fire Districts may be interested in issuing bonds at the earliest opportunity. In general, interest on the bonds will not be tax-exempt unless the Fire District reasonably expects either (i) to spend at least 85% of the net sale proceeds within three years of the date the bonds are issued, as well as invest no more than 50% of the bond proceeds in investments of guaranteed yield of four or more years or (ii) to spend at least 10% of the net sale proceeds within one year, 30% within two years, 60% within three years, and 85% within five years of the date the bonds are issued. These expenditure requirements do not apply to refundings, or to new money bonds in which virtually all of the proceeds of the bonds are invested in other tax-exempt bonds until such proceeds are expended. These hedge bond rules are separate from the arbitrage rebate rule and its exceptions.

Temporary Periods and the "Minor Portion"

The 1954 Code, as amended up to 1986, provided "temporary periods" during which the proceeds of an issue of municipal obligations could be invested in taxable obligations having a yield which exceeded the yield on the bonds. In the case of obligations issued for construction or acquisition, a three-year temporary period was generally available. In the case of cashflow borrowings, such as revenue anticipation notes, tax anticipation notes, and grant anticipation notes (*e.g.*, bond anticipation notes issued to refund the portion of the costs of a project anticipated to be paid with Federal or State grants-in-aid) a temporary period of at least thirteen (13) months has been generally available if the proceeds of the issue did not exceed the "maximum anticipated cumulative cashflow deficit" that was expected to occur during the term of the borrowing.

The 1986 Code does not reduce these temporary periods. However, for all bonds and notes, the former "minor portion" rule, under which up to 15% of the bond proceeds could be invested at an unrestricted yield even after the expiration of the applicable temporary period, was replaced with a new minor portion rule. The "minor portion" is now limited to the lesser of 5% of bond or note proceeds or $100,000.

The new "minor portion" is in addition to any proceeds deposited in a reasonably required reserve fund. However, while a reasonably required reserve fund can also generally be invested without restriction as to yield, the amount of original bond proceeds which can be deposited in such a fund is limited to 10% of bond proceeds. Moreover, even if cash on hand is used to fund a larger reserve, the amount held in the reserve that may be invested at an unrestricted yield is still limited to 10% of the original bond proceeds. Thus, any amounts held in a reserve fund that are in excess of 10% of the original bond proceeds must be yield restricted. There are, however, exceptions to these 10% limitations for issues which the Treasury Department determines require a larger reserve fund. (In New York, it is generally not permissible to fund the type of reserve fund addressed here with the proceeds of general obligations, so this is not discussed further.)

Definition of "Yield"

The 1986 Code substantially revises the definition of "yield" by legislatively overruling then current case law. Under the new law, yield must now be calculated based on the price at which the obligations were sold to the public, rather than the funds received by the issuer after the payment of underwriter's compensation and other issuance costs. This has the effect of reducing the yield on the bonds, thus decreasing the permissible arbitrage profit which may be earned (although subject -to rebate) after expiration of the applicable temporary period. In many cases, "negative arbitrage" will result. In effect, unlike prior law, issuance costs can no longer be partially "recovered" from arbitrage earnings.

The 1986 Code does, however, provide that certain credit enhancement fees, such as municipal bond insurance premiums and letter of credit fees, may be treated as interest payments on the bonds if such fees result in a net present value interest savings to the issuer. By treating these payments as interest on the bonds, the "yield" on an issue is increased, thereby allowing bond proceeds to be invested at a correspondingly higher yield with the result that the issuer can recoup a portion of such credit enhancement fees from permissible arbitrage.

In all circumstances where yield restrictions are imposed, the issuer is obligated to abide by the "market price rules." Thus, an issuer cannot artificially limit its apparent yield by investing in obligations which bear a below-the-market interest rate or by acquiring an investment at a price in excess of its fair market value or selling it at a price below its fair market value. When yield must be restricted and there is no suitable investment available in an arms'-length transaction, an issuer can subscribe for United States Treasury Securities—State and Local Government Series (commonly referred to as "SLGS"), which are United States Treasury Bonds, Notes or Certificates of Indebtedness with yields and terms tailored to the municipality's needs which are sold by the United States Government to municipalities and states. In the alternative, the municipality can invest in tax-exempt obligations (subject, of course, to the limitations set forth in Section 165.00 of the LFL). The Treasury Department was mandated by the 1986 Act to develop a "money market"-type, flexible SLGS program to accommodate issuers.

Rebate Requirement and Exceptions

The General Rule. Even if arbitrage profits are permissibly earned, in the first instance, pursuant to the exceptions for temporary periods, the minor portion and reasonably required reserve funds, the issuer must nevertheless rebate to the Federal Government *all* the arbitrage profits that are earned from the date of issuance of the bonds. (See below for *de minimus* exceptions to the rebate requirement that apply when all original and investment proceeds of the obligations are spent within six months of their date of issuance.) The amount which must be rebated to the Federal Government is equal to only the arbitrage "profit" that results from the investments. For example, if a municipality issued tax-exempt 30-year bonds having a yield of 8% and earned 10% on its investments, only those earnings attributable to the difference between 10% and 8% would have to be rebated. The rebated amounts must be paid to the Internal Revenue Service at least every five (5) years and within sixty (60) days of the date that the last of the bonds is retired. In effect, this renders useless temporary periods and minor portions since issuers will have to rebate most of the profits they have earned in any event.

Rebate cannot be avoided by investments that violate the previously discussed "market price rules." However, where feasible, investment in tax-exempt obligations is an alternative to avoid rebate. (However, an issue may permissibly utilize demand deposit accounts (such as N.O.W. Accounts) rather than investing proceeds in certificates of deposit, treasury Bonds, Bills or Notes, or other high yielding types of investments, so long as the investment is made in accordance with the "market price rules," and complies with other limitations applicable to investments of proceeds by the issuer (*e.g.*, those found in the Local Finance Law, or General Municipal Law). Note that the restrictions of LFL Section 165.00 apply to proceeds of all types of obligations except tax anticipation notes and revenue anticipation notes.

The provisions of Section 11 of the General Municipal Law apply to investments of proceeds of TANs and RANs. Simply placing proceeds in a noninterest bearing account (such as a typical checking account) will not obviate the necessity to make a rebate. Since the bank is gaining the use of those funds at no cost, an interest rate would be imputed by the IRS for the deposit.

Arbitrage Rebate and Exceptions

Since the effective date of the 1986 Code, all Fire Districts (and other municipalities such as counties, towns, villages, school districts and cities) have been potentially subject to the arbitrage rebate rules whenever they issue federally tax-exempt bond anticipation notes, capital notes, statutory installment bonds or other serial bonds for capital projects. These rules, in the form of detailed U.S. Treasury regulations, can require Fire Districts to pay to the federal government much of the interest earnings on proceeds received by the Fire District from the issuance of such tax-exempt obligations and invested prior to use for their intended purposes.

However, the Code and regulations do provide several exceptions to these generally applicable rules:

1. an exception for governmental issuers, such as counties, cities, towns, villages, school districts and Fire Districts, who do not reasonably expect to issue more than $5,000,000 in tax-exempt obligations in the current calendar year (this is the so-called "small issuer" exception);

2. an exception *solely applicable to School Districts* who, in addition to the issuance of not to exceed \$5,000,000 in tax-exempt obligations for any School District purpose (i.e., cashflow or capital) in the current calendar year (as noted in (1) above), do not reasonably expect to issue more than an *additional* \$10,000,000 in tax-exempt obligations in the current calendar year, *provided*, such additional \$10,000,000 (or such lesser amount as is applicable if the School District is not issuing that much) is attributable *solely* to financing the "construction" of "public school facilities" (the "school small issuer" exception not generally applicable to Fire Districts but is included here briefly in the interests of completeness).
3. an exception for governmental issuers of RANs or TANs, regardless of whether they reasonably expect to issue more than \$5,000,000 in the current calendar year, if the issuer can meet certain rapid spend-down requirements once the obligation is issued; and
4. several exceptions for governmental issuers of notes or bonds for capital projects regardless of whether they reasonably expect to issue more than \$5,000,000 in the current calendar year, if the issuer can meet certain rapid spend-down requirements once the obligation is issued.

Small Issuer Exception to Rebate Rule

This exemption from the rebate requirement is for governmental bonds or notes issued by small governmental units, such as Fire Districts with general taxing powers which will not issue in excess of \$5,000,000 of governmental obligations in any given calendar year. This exemption does not apply to the first \$5,000,000 of issues of governmental units which will issue more than \$5,000,000 per year. (The issues of any "subordinate" governmental issuers must be aggregated with the issues of an issuer for purposes of the \$5,000,000 limit. However, Fire Districts in New York State do not tend to have "subordinate" entities.)

For purposes of this requirement, an entity will be deemed "subordinate" to the issuing governmental unit if the entity derives its power to issue obligations from the governmental unit or is subject to substantial control by the governmental unit. However, the mere fact that the entity is located within the boundaries of the issuing governmental unit will not, in and of itself, be viewed as making the entity "subordinate" to the governmental unit. (This aggregation requirement is generally unimportant for New York issuers, since it requires aggregation only of issues by subordinate entities which derive their power to issue indebtedness from the entity in question. Geographic location within the territory of an issuer does not mean that one municipality is subordinate. However, issuance by an urban renewal agency, for example, would probably have to be aggregated with the issuances of the municipality to which it relates.)

If your Fire District may be a "small issuer" in any current calendar year in which general obligation notes or bonds are proposed to be issued, there is a three-step analysis which must be completed to confirm that status:

Step No. 1: Determine whether the Fire District reasonably expects to issue an aggregate of $5,000,000 or less in tax-exempt notes or bonds in the calendar year.

WHAT COUNTS:

1. All new money governmental issues (BANs, Serial Bonds, RANs, TANs, Capital Notes).

2. Advance refundings (renewal of a note or bond more than ninety (90) days in advance of its maturity or redemption date).

3. All governmental new money or advance refunding bonds or notes issued by a governmental entity subordinate to the municipality or an entity issuing "on behalf of" same (i.e., certain I.D.A. debt may count).

4. All tax-exempt lease purchase or installment sales agreements.

WHAT DOES NOT COUNT:

1. Current renewals (to the extent that the amount of the renewal does not exceed outstanding principal amount of maturing debt, i.e., typical bond anticipation renewal notes).

2. Private activity bonds or notes (i.e., obligations, the proceeds of which are used for a capital project with a private business user receiving some substantive benefit from the project).

3. Most federally taxable debt obligations.

Note that for Step No. 1, this is a "reasonable expectations" standard which the Fire District must apply to itself at the time of each borrowing. The expectation of being and remaining a "small issuer" is not made one time for each calendar year. It is made each time the Fire District proposes to borrow. Likewise, an unanticipated borrowing later in a calendar year which unexpectedly brings an issuer over the $5,000,000 mark does not "taint" debt previously issued in that calendar year, and thus does not make such prior debt retroactively subject to the arbitrage rebate rules.

Step No. 2: Determine whether the particular note or bond issue itself is eligible for the "small issuer" exceptions to the general arbitrage rebate requirement. The fact that the Fire District has determined in Step No. 1 that it is, indeed, a "small issuer" does *not* automatically exempt its note or bond issue from the rebate requirement. The note or bond issue itself must also meet certain requirements:

A. NEW MONEY ISSUES

1. 95% or more of net proceeds of the issue are to be used for local governmental activities of the issuer.
2. Not a "private activity" bond or note (i.e., proceeds not used for a capital project with a significant private business user of the project).

B. **RENEWAL/REFUNDING ISSUES (current or advance)**

1. Aggregate face amount does not exceed $5,000,000.
2. Each refunded bond or renewed note was part of an issue which itself qualified at the time for the "small issuer" exception in its year of issuance.
3. The average maturity date of the refunding/renewal obligation is *not* later than the average maturity date of the obligations being refunded/renewed.

   Note: This rule in itself would eliminate renewal notes or bonds from qualifying when refunding/renewing typical one year notes so there is an exception:

   If the average maturity of the refunded debt is three years or less, the requirement is waived. (Fire District debt most frequently renewed is in the form of one year or less bond anticipation notes; these qualify for this waiver.)
4. No refunding bond can have a maturity date which is later than the date which is thirty (30) years after the date that the original note or bond was issued.

NOTE: it is possible to be a $5,000,000 or under "small issuer," and still be required to rebate if the issue itself does not meet the requirements of Step No. 2.

C. **COMBINATION NEW MONEY/RENEWAL-REFUNDING ISSUES**

1. All of the above-stated rules apply.
2. The aggregate face amount rule may require that a consolidated issue be split into two issues.

6-Month/12-Month Exception to Rebate Requirement: Under a special exception to the rebate rule, no rebate will be required if all of the original and investment proceeds of the issue, except for a "minor portion" equal to the lesser of 5% of the bond proceeds or $100,000, are expended within six (6) months of the date of issuance of the obligations, and all of the proceeds, including that "minor portion," are spent within twelve (12) months of the date of issuance. However, this rule does not apply to revenue anticipation note and tax anticipation note issues ("RANs" and "TANs," respectively), which have a separate exception noted below.

This 6-month/12-month exception to rebate requirement must be considered in conjunction with Section 165.00 of the LFL which limits the use by New York issuers of investment proceeds to the payment of debt service on the municipal obligations with respect to which such amounts constitute proceeds. In the case of notes, unless all proceeds are expended *immediately*, there will be at least some investment earnings which cannot be expended to pay debt service until the maturity of notes. Thus, unless the maturity of notes is limited to six (6) months or less, an issuer will not be able to avoid the rebate requirement under the 6 month/12 month exception unless all original and investment proceeds in excess of the "minor portion" (i.e. all such proceeds in excess of the lesser of 5% of the proceeds or $100,000) are expended within the first six (6) months and the minor portion is spent within the second 6 months, thus, if the "major portion" proceeds (i.e. all proceeds except that amount which is the lesser of 5% or $100,000) cannot be expended within the first six (6) months, or if only a minor portion remains unexpended as of such date but such minor portion cannot be expended within the second six (6) months, then all the arbitrage must be rebated. Where an issuer expends a "major portion" of the proceeds of its issue within six months and uses the entire remaining "minor portion" to pay debt service within the next six months, the necessity to make any rebate will be avoided.

Six-Month Exception for RANs and TANs: A separate exception to the rebate requirement is available for RANs and TANs. First, in order to be exempt from the rebate requirement, *all* of the original and investment proceeds of the RANs or TANs must be spent within the first six months. Second, there is a special rule for determining whether all of the proceeds of RANs and TANS will be deemed to have been expended within the first six months. The rule states that the original and investment proceeds of such issues will be treated as expended on the first day after the date of issuance that the *actual* cumulative cashflow deficit exceeds 90% of the issue's face amount. In this calculation, all other proceeds available for the governmental purpose of the borrowing must be treated as spent first, with the result that the original and investment proceeds of the RANs or TANS are viewed as having been expended last. For this purpose (unlike the method for determining the maximum permissible size of the issue which remains the same as under prior law), no allowance is permitted for a working cash balance equal to the issuer's estimate of an additional month's gross expenditures and the deficit is calculated on the basis of actual experience. Thus, the allowance for a working cash balance remains available for sizing issues, but its inclusion in the face amount of a financing could make it difficult to meet the safe harbor test. This means that some issuers should probably reduce the size of their RAN and TAN issues so as to assure that all of the proceeds will be viewed as expended within six months in order to avoid rebate. This may necessitate a schedule of semiannual RAN and TAN borrowings with maximum cashflow deficits projected to occur within six months. RANs and TANs should benefit from the rebate exception for bona fide debt service funds (discussed below) as regards their LFL Section 25.00(g) and 24.00(e) funds. See Chapter Eight.

The Six Month Capital Spend-down Exception: An exception for all local governmental issues, including Fire Districts, which actually spend all of the borrowed process (and investment earnings thereon) for a capital project on or before the date six months after the closing date for the new money notes or bonds (exception for an amount not to exceed 5% of the proceeds of such issue, as long as such amount is spent no later from an additional six months thereafter). This exception is *not* limited to construction and reconstruction projects, and is likely to be most useful in acquisition financings, reimbursement financings and current refundings.

The 18-month Capital Spend-down Exception: An exception for all local governmental issuers, including Fire Districts, which actually spend all of the borrowed proceeds (and investment earnings thereon) for a capital project in accordance with the following schedule: at least 15% within six (6) months, at least 60% within twelve (12) months, and 100% within eighteen (18) months (in each case, measured from the date of issuance), except that an amount held for reasonable retainage after eighteen (18) months is permitted as long as it is expended for the capital project within thirty (30) months of the issue date. This exception is *not* limited to construction and reconstruction projects.

The 2-Year Construction Spend-down Election/Exception: An exception for all local governmental issuers of notes or bonds, including Fire Districts, for capital construction and reconstruction projects only regardless of whether they reasonably expect to issue more than $5,000,000 in the current calendar year, if the issuer can meet certain rapid spend-down requirements once the obligation is issued. The rules for this much-utilized exception are as follows:

How to Calculate the Construction Spend-down Election/Exception

Step No. 1: The first step is that the Fire District designate the issue as a *"construction issue"* (this can be done where 75% of the proceeds are allocable to construction vs. acquisition; bond or note issues may be bifurcated for this purpose). "Construction issue" is defined in the Internal Revenue Code of 1986, as amended to include reconstruction and rehabilitation expenses. A "construction issue" is entitled to avoid arbitrage rebate if the Fire District can meet certain spending rules which are much more favorable than the "95% in the first six months—5% in the next six months" schedule that is available for acquisitions. The spending rules for a designated construction issue give the Fire District the following schedule: The Fire District would have to expend 10% of the proceeds, including earnings on investments, within six months of the date of issuance of the obligations; 45% of the proceeds, including earnings on investments, within twelve months of the date of issuance of the obligations; 75% of the proceeds, including earnings on investments, within eighteen months of the date of issuance of the obligations; and 100% of the proceeds*, including all remaining earnings on investments, within two years of the date of issuance of the obligations unless a retainage is required by law, in which event, the 100% becomes 95% and the final 5%, including all remaining earnings on investments, must be expended within three years of the date of issuance of the obligation. (Money is expended only when the check is not only written but also delivered.)

Step No. 2: The second step of the *"construction issue"* designation process is that the Fire District must elect whether the bond or note issue should operate under the so-called "Penalty Option" or decline to operate under such "Penalty Option." If the Fire District elects to operate under the "Penalty Option," then failure to meet any of the spending tests at the six-month expiration, the twelve-month expiration, the 18-month expiration, the 2-year expiration or the 3-year expiration, will subject the Fire District to a penalty instead of arbitrage rebate for that particular period. The penalty is calculated by multiplying the difference between what the Fire District did spend and what the Fire District should have spent by 1.5% and this will give the Fire District the amount that the Fire District has to pay as a penalty to the federal government for that period.

For instance, if a Fire District had to expend $100,000 within the first six months and the Fire District only expended $90,000 as of that date, the difference, $10,000, would be multiplied by 1.5% which produces $150.00 and this $150.00 the Fire District would have to pay to the federal government.

The advantage of the "Penalty Option" is that the penalties are a lot easier to calculate than the arbitrage rebate. However, for the reason described below, it is rarely chosen.

On many occasions (for instance, during a period of "negative arbitrage") a Fire District may not wish to elect the Penalty Option. In this case, the Fire District would designate the issue as a *"construction issue,"* but the Fire District would specifically decline to elect the penalty option. In such case, the Fire District would still be subject to the same 10%-six months; 45%-twelve (12) months; 75%-18 months; 100%-2 years (or 95%-2 years with remaining 5%-3 years) spending tests, but if the Fire District should fail to meet such spending test, then the Fire District would not owe the aforesaid 1.5% penalty; rather, the Fire District would be subject to rebate on the investment (arbitrage) earnings, *BUT ONLY* to the extent the Fire District had such earnings; and such earnings exceeded the overall arbitrage yield on the bond or note issue. This makes the most sense at those common times when the Fire District expects to spend the proceeds quickly and reinvestment rates are relatively low compared to the rate the Fire District is paying on an issue. In such event, the Fire District may not even be able to earn any arbitrage earnings to rebate in the first place, or may well earn less than the amount which the penalty would be. In such "negative arbitrage" or similar situations, it may not make sense to elect to pay a penalty when investment earnings would not be rebatable because they do not exist (or they would be less than the penalty amount(s)).

Bona Fide Debt Service Fund Exception to Rebate Rule. There is one other special rule regarding exemptions from the rebate requirement for any issue with a maturity of less than five years, such as BANs, BARNs, RANs and TANs. Any amount earned on a "bona fide debt service fund" will not be taken into account in determining the aggregate amount to be rebated for a given year if the gross earnings on such fund for any bond year are less than $100,000. In the current interest environment, this means that fairly substantial debt service funds can still earn arbitrage without rebate. This includes such funds established for RANs or TANs under LFL Sections 25.00(g) and 24.00(e). In addition, arbitrage earnings in such a fund are exempt from any rebate payment for most issues of bonds that have a fixed rate of interest or for issues with an average annual debt service of $2,500,000 or less.

Administrative Burdens. In addition to eliminating most, if not all of the arbitrage profits that may presently be realized by municipal issuers of tax-exempt obligations, the rebate requirement necessitates burdensome accounting procedures and may require complex mathematical computations that are beyond the capability of all except the most sophisticated financial managers. Since failure to satisfy the rebate requirement may result in the bonds becoming taxable as of their date of issuance if the failure is due to "willful neglect" (or in the imposition of an additional penalty of up to 50% of the amount of the issuer failed to rebate, even if the failure is due to "reasonable cause"), it seems obvious that many Fire Districts will be forced to retain accountants or others to perform this task, thus further increasing the total costs for the bond issue.

Reasonable Expectations. Under the 1954 Code, if an issuer did not reasonably expect to invest the proceeds of the tax-exempt obligations in taxable obligations with a yield materially higher than the yield on the bonds (except for permitted temporary periods, minor portions and reserve funds), then a certification to that effect served to protect the tax-exempt status of the bonds. The 1986 Code clarifies this "reasonable expectations" test by providing that any subsequent "intentional" act which produces arbitrage after the bonds are issued will render the bonds taxable retroactively to their date of issuance.

Summary. The net result of the rules relating to the reduced minor portion and the redefinition of "yield" is that issuers will be able to *earn* lesser amounts of arbitrage in the first instance than has previously been the case. Moreover, if the obligations do not qualify under the "small issuer" exception, and all proceeds of the issue are not-spent within six months (except, in the case of obligations other than RANs or TANs, for the lesser of 5% or $100,000 which is allowed to remain invested for a year if the rest of the proceeds are spent within-six-months), any arbitrage profits that issuers do earn will have to be rebated to the Federal Government. More frequent issuance at greater cost seems the most likely practical solution. Issuers will also have to be more vigilant to ensure that they do not violate the arbitrage rules so that the tax-exempt status of their obligations is not put at risk.

Restrictions on Refundings. The 1986 Code also applies severe new restrictions on the current ability of municipalities to advance refund their existing tax-exempt indebtedness. The new law defines an "advance refunding" to be a refunding transaction where the refunding obligations are issued more than ninety (90) days prior to the repayment of the refunded obligations.

It is extremely rare for bond anticipation renewal notes to be issued other than simultaneously with the maturity of the outstanding notes of which they are renewals. When renewal notes are issued before the maturity of the refunded notes, it is typically only done one or two days prior to the maturity of the outstanding notes, and then only for the convenience of the issuer. Thus, most renewal note issues are "current" refundings, not subject to the advance refundings rules. On the other hand, serial bonds are often issued for the purpose of refunding several series of notes, with the result that some of the refunded notes are redeemed more than 90 days after the issuance of the serial bonds.

If the refunded notes were issued after August 15, 1986, any portion of the temporary period remaining for the unexpended proceeds of the refunded notes terminates upon. the date of issuance of advance refunding obligations, and such remaining proceeds must then be invested at-a yield no higher than the yield on the refunded obligations plus 1/8 of one (1) percent until the refunded notes are paid. After such date, such proceeds can be invested at a yield no higher than the yield on the refunding obligations. For other refundings (i.e., so-called "current" refundings), the balance of any remaining temporary period for proceeds of the refunded obligations remains available. In all cases, the proceeds of the refunding issue may be invested only in accordance with the rules described in the text.

In connection with refundings, note that, to the extent that unexpended proceeds of an original borrowing (and the interest earnings thereon) remain when an issue of obligations is refunded, such proceeds are considered to be "transferred proceeds" of the refunding issue as of the date on which the proceeds of the refunding issue are used to pay off the refunded issue. Where the outstanding obligations being refunded were issued prior to August 16, 1986, any remaining proceeds of such obligations will be unaffected by the 1986 Code until, and unless, refunding obligations are issued. At the time such proceeds become transferred proceeds of the refunding issue, they are subject to the arbitrage rebate rules outlined above in the text, and (assuming the refunding issue (or an issue which it refunded) was originally issued more than six months prior to the date on which such proceeds become transferred proceeds) the issuer will be obligated under the 1986 Code to rebate to the Federal Government all arbitrage profits realized after they become transferred proceeds, which will require valuation of all assets in which such proceeds are invested as of such date.

Governmental bonds may be advance refunded only if *all* of the following conditions are satisfied:

a. Bonds or notes originally issued before January 1, 1986 may not be advance refunded more than twice (or, if already advance refunded twice before March 15, 1986, not more than once after such date). Thus, for example, if a Fire District issued "new money" BANs in 1983, issued refunding BANs in 1984 more than 180 days prior to the maturity of the 1983 BANS, and issued refunding bonds in February of 1985 to refund the 1984 BANs more than 180 days prior to their maturity date, the bonds could only be advance refunded one more time.
b. Bonds or notes originally issued after December 31, 1985, can only be advance refunded once.

In the case of refunded bonds or notes issued after 1985, the refunded obligations must be called on the first call date if there are (or may be) present value debt service savings (determined without regard to administrative expenses) as a result of the refunding.

In the case of refunded bonds or notes issued before 1986 (most of these will have already matured in full), the refunded obligations must be redeemed at the earliest date on which they can be redeemed at par or at a premium of 3% or less if present value debt service savings will (or may) result from the refunding.

The original and investment proceeds of the advance refunding bonds are granted a temporary period of only 30 days. At the end of such temporary period, the proceeds of the refunding bonds can be invested at a yield no higher than the yield on the bonds (plus a truly de minimus amount known in the business as "the peanut"). It is important to note that the temporary period rules and the arbitrage rebate rules are independent. Thus, even if a temporary period is available, if all proceeds of an issue, including a refunding issue, are not expended within six months (subject to the "minor portion" exception discussed above), arbitrage profits, including profits earned during a temporary period, must be rebated. In the case of refundings, issuers must exercise particular care to insure that not only the refunding bond proceeds are promptly expended, but also that the refunded bond proceeds were spent within six months. Moreover, any remaining temporary period with respect to unexpended proceeds of the refunded obligations terminates as of the date of issuance of the refunding obligations if the refunded obligations were issued after August 15, 1986. Thus, as of the date of issuance of the refunding bonds, all unexpended proceeds of such refunded obligations must be invested at a yield no higher than the yield on the refunded obligations (plus 1/8 of 1%). This, of course, would be very detrimental to the issuer where bond anticipation notes, or other short-term municipal obligations bearing a very low interest rate, are refunded more than 90 days prior to their maturity. Moreover, as of the date the refunded obligations are actually paid off, any remaining proceeds of the refunded obligations must be invested at a yield no higher than the yield on the refunding obligations (plus 1/8 of 1%).

The minor portion for the refunded obligations must be reduced on the date of issuance of the refunding bonds to an amount no greater than the lesser of 5% of the refunded bonds' original amount or $100,000.

Information Reporting Requirement. In order for its obligations to qualify for tax exemption, the issuer must file with the Internal Revenue Service an information return with respect to *all* obligations. The return, similar to Form 8038 required, only for certain nongovernmental bonds under earlier law, requires information relative to, among other things, the issuer, the bonds (including the date of issuance, amount of net proceeds, interest rate, costs of issuance and the amount of any reserves), and, where applicable, any private users of the bond or note proceeds. Failure to file this return will cause interest on the bonds or notes to be taxable as of the date of issuance unless relief is sought from, and granted by the Internal Revenue Service.

CHAPTER TWELVE

Federal Tax Law Issues—Private Business Use of Fire District-Financed Facilities

Introduction

Federal tax law governing local governmental issuance of tax-exempt debt includes a concern with private business beneficiaries of such tax-exempt financing. At the outset, it is necessary to remind ourselves: so does the Constitution and applicable statutes of the State. Indeed, assuming a Fire District is in compliance with State laws governing private use of government facilities and resources, such as the loan of credit and valid Fire District purposes provisions of the Constitution described in an earlier chapter, and the implementing statutes, case law and opinions of the office of the State Comptroller, compliance with the federal tax law rules in this area is very likely. Nevertheless, a review of the tax rules is appropriate.

Federal Restrictions on Tax-Exempt Financing for the Benefit of Nongovernmental Entities Before 1986

Before the 1986 Code, up to 25% of the proceeds of tax-exempt municipal obligations could be "used" for the benefit of taxable business entities. However, the indirect, as well as the direct, use of bond proceeds had to be taken into account for purposes of determining whether the 25% limitation was exceeded. Thus, for example, the lease of all or a portion of a bond-financed facility to a taxable business entity was treated as an indirect use of the bond proceeds by such entity. Therefore, prior to the 1986 Code and if permissible under State Law, a municipality could issue tax-exempt obligations to finance an office building and lease up to 25% of the office space to one or more taxable business entities without impairing the tax-exempt status of the bonds. (This would not be permissible in New York State.) However, if more than 25% of the building were leased to such entities, more than 25% of the bond proceeds would be viewed as being indirectly "used" by such entities and, thus, the bonds would generally be taxable. A similar rule applied in certain instances where a taxable business entity agreed to operate a bond-financed facility on behalf of a municipality, as well as to other arrangements, whereby one or more taxable business entities agreed to purchase the output of a bond-financed facility, such as, for example, a municipally-owned electric generating plant. (This type of arrangement can be permissible in New York State, subject to many restrictions.)

In addition, tax law prior to 1986 provided that, with certain enumerated exceptions, no more than 5% of the proceeds of an issue of municipal obligations could be "loaned" to persons other than state or local governmental units or certain charitable organizations. However, the 5% threshold for "loans" has not usually presented a problem to issuers of traditional general obligation bonds because the proceeds of such issues cannot typically be loaned to nongovernmental entities under the provisions of our State Constitution noted earlier. Moreover, the 25% limit also had not been a serious problem because the indirect "use" of general obligation bond proceeds by taxable entities is usually *de minimus*, as Fire Districts are without authority to do so.

Finally, earlier tax law did not require that any nongovernmental use of bond proceeds be related to governmental uses of such proceeds of any particular issue.

Private Activity Bonds Under the 1986 Code

Under the 1986 Code, an issue of municipal obligations is deemed to constitute "private activity bonds" and is therefore generally subject to Federal income taxation if 10% or more of the proceeds of the bonds is "used," directly or indirectly, in the trade or business of persons other than state or local governmental units or members of the general public on an equal basis, and if 10% or more of the debt service on the bonds is secured by funds from private users (e.g., rental payments for the use of bond-financed facilities). "Use" includes leasing a bond-financed facility, purchasing output from a bond-financed facility or certain management contracts (including such contracts as are permissible in New York State). Debt service will be considered to be "secured" by funds of private-users, even if no direct link exists between debt service and moneys paid or available from a private user. Thus, the fact that debt service is paid from moneys in an issuer's general fund is not significant if moneys are paid by the private user to the issuer and applied by the issuer for a purpose other than direct payment of the obligations. Continuing the rule of prior tax law, bonds will also be private activity bonds if 5% or more of the bond proceeds or $5,000,000, whichever is less, is "loaned" to persons other than state or local governmental units. (For purposes of these tests, the portion of the bond or note proceeds used by all nongovernmental beneficiaries of the obligations is aggregated. The term "loan" is to be broadly construed. The only exception to this 5% or $5,000,000 rule is provided for loans that enable the borrower to finance any governmental tax or assessment of general application for an essential governmental function. Thus, the present ability of state and local governmental units to issue tax-exempt obligations to finance tax assessments or certain types of public improvements, such as water and sewer lines, is not impaired as long as the financing is made available to all members of the general public on an equal basis. *Note that Section 501(c)(3) or other charitable organizations are not exempt users of bond proceeds for purposes of the "use" and "loan" provisions.*)

If you are a Fire District manned by volunteer firemen, and if the volunteers are formally organized into a not-for-profit corporation, then this fact may be significant for any district borrowing. It is *not* an impediment, but it may require one slight adjustment in your financing timetable. Why? Because use of a Fire District facility and equipment by any non-governmental entity, including any not-for-profit, is technically "private use" under the federal definitions described above. Absurd in your context? Perhaps, but it may need to be taken into account in your financing, depending in part on the corporate status of your volunteer firemen.

The slight adjustment is simply the holding of an information meeting/public hearing on your capital project (which you doubtless do in any current). Contact bond counsel on this point. Views may differ on how to treat the volunteers as an "integral part" or "instrumentality" of your Fire District.

Although the legislative history of the 1986 Code stated that its provisions were not intended to interfere with traditional municipal financings, lowering the threshold from 25% nongovernmental use to 10% can call many more projects into question than was previously the case. The following examples illustrate these restrictions.

Example 1

A Fire District wishes to issue general obligation bonds to finance a new central fire station. The building will be larger than the Fire District needs at this time, but it expects to use the whole facility eventually. Because the building will be located on the edge of a small business district, the Fire District desires to lower its overall occupancy costs by leasing out separable space for use as shops and stores temporarily until needed for Fire District use. Because of these leases, more than 10% of the bond proceeds will be viewed as being "used" by the store owners and, since the rental payments for the shops and stores will be viewed as "securing" the bonds, even if they are not formally pledged to the payment of debt service, the bonds will be private activity bonds. The same result would apply if the space consisted of a parking garage for use by the Fire District and others if the Fire District, rather than operating such facilities itself, hired a private management company to perform such function pursuant to certain types of long-term contractual arrangements.

Example 2

A Fire District desires to issue general obligation bonds to finance improvements to its main fire station, including a new kitchen complex. The Fire District intends to offer certain parts of these facilities to caterers and others for events when not needed by the district. An analysis would be necessary to determine the percent of available use for private users and whether such use would cause problems for the tax-exempt status of such bonds.

Example 3

A Fire District proposes to finance a new kitchen complex addition in the main firehouse of the Fire District. Having been informed by bond counsel that private management or use of the food preparation facility could cause the bonds to be private activity bonds, the Fire District decides to operate some portions of the facility itself. However, because the Fire District will hire Leaseme Corporation to manage the leasing of the food preparation facilities to others for a fee plus percent of the profits arrangement, the bond proceeds are deemed "used" by the management company and the bonds are private activity bonds even though the Fire District owns all of and operates some of the facility.

In short, private use scenarios of Fire District facilities are rather unlikely in New York State. Talk with your lawyer if any such use is anticipated, or in the context of a volunteer fire company with its own corporate status.

Related Use Rule Under the 1986 Code

The 1986 Code imposed additional requirements, even if the new 10% rule is not violated. Under the 1986 Code, if over 5% of the proceeds of a bond issue are used by private entities in a way that is not related to the governmental purpose of the rest of the issue, the bonds become taxable. This provision ended the era of consolidated issues in which private uses were "flooded" as part of large issues in which 75% or more of the proceeds would be used for assorted traditional governmental purposes with the "private" financing being limited to 25%. Now, only 5% of the bond proceeds can be used for the benefit of private entities without any further restrictions. The remainder of the permissible 10% that is used for the benefit of private entities must satisfy two additional restrictions—first, any such additional private financing must be "related" to a governmental facility that is also being financed with the bond issue; second, the amount of bond financing provided to the private entity with respect to such facility cannot exceed the amount of financing being provided to the governmental entity with respect to the same facility.

For example, if a $1,000,000 bond issue were to be used to finance a courthouse costing $900,000 that was to be used solely by a governmental entity and a $100,000 improvement at the issuer's airport, which is used mainly by commercial airlines, the bonds would be taxable, even though the 10% limit was not violated, because over 5% of the proceeds would be used for an "unrelated" facility. However, if the $100,000 were instead used to finance a privately operated cafeteria, located in the courthouse, that would be used predominantly by municipal employees, the bonds would be tax-exempt because the additional financing being provided with respect to the cafeteria (i.e., the amount in excess of the 5% unrestricted amount) would be "related" to the governmental use of the facility and the bond-financed cost of the cafeteria does not exceed the amount of financing being provided to the governmental entity with respect to the same facility.

In the case of an issue in which more than 5% of the proceeds, but less than 10%, are to be used for an unrelated purpose, the entire issue would be treated as a private activity bond, requiring a public hearing and becoming subject to the alternative minimum tax. Furthermore, if the private use is not one treated as an exempt purpose under the 1986 Code, there is a risk that the whole issue would be retroactively characterized as taxable (even if 90% of the bonds were used for a traditional governmental purpose).

Because of these stringent requirements and the severe penalty, Fire Districts must regularly examine their financing plans very carefully in order to determine whether or not tax-exempt financing is being made available to entities other than state or local governmental units or members of the general public on an equal basis, and should consult with bond counsel early in the planning process if any questions are raised in this regard. Obligations which are private activity bonds may still be entitled to tax exemption, but only if they meet all of the applicable requirements of the 1986 Code, including the holding of a public hearing and, in some cases, obtaining an allocation of "volume cap" from the State.

Private Activity Bonds That Qualify for Tax Exemption as "Exempt Facility Bonds," "Qualified Redevelopment Bonds" or Small Issue "Industrial Development Bonds"

Although private activity bonds are generally taxable under the 1986 Code, there are several exceptions to this rule that provide at least some relief. Thus, some private activity bonds nevertheless qualify for tax-exempt status if they constitute "qualified redevelopment bonds" or are issued to finance the various types of "exempt facilities," or some types of "industrial development," each under its own qualifying set of conditions. These permutations are beyond the scope of this primer, as the primer is directed at general obligation governmental bond issues, which would not finance such facilities or projects.

State Law Aspects of Private Activity

A full review of the basic rules governing non-governmental use of Fire District facilities is beyond the scope of this bond primer. In brief, and subject to the specific facts and circumstances in any case, and certain statutory case law and State Comptroller opinion exceptions, these are the rules in "nutshell" form:

- No gifts or loans of public funds or properties to any private individual, private undertaking, private corporation or association;
- No gifts or loan of credit to same or to any other municipality or Fire District;
- No contracting indebtedness except for a valid Fire District purpose;
- Truly incidental private benefit is permissible;
- Private management contracts negotiated at arms length to operate certain Fire District facilities on behalf of a Fire District are permissible under certain limited conditions;
- Property leased by a Fire District may be improved for Fire District use, provided that such improvement is completely amortized during the life of the lease;
- A Fire District cannot be in the landlord business as an investment, but it can acquire a property needed for a valid Fire District purpose that is larger than current need, as long as the entirety is reasonably expected to be needed by the Fire District in the "foreseeable future." Such temporary use by others, if at fair market value, is permissible, but if the property was bond-financed, "private activity" considerations are paramount and should be considered prior to leasing to the private user.

Please note that this is a very “broad stroke” description of State law limitations on what federal tax laws refers to as “private activity.” There are numerous permitted exceptions. Always talk first with your Fire District Attorney when such matters come up!

CHAPTER THIRTEEN

Federal Tax Law Issues—Special Tax Provisions for Certain Buyers of Fire District Debt

Bank Qualified Debt—Why Your Local Bank Likes Your Debt

The law before the 1986 tax reform disallowed a deduction for interest on indebtedness incurred or continued by a taxpayer to purchase or carry obligations, the interest on which is exempt from Federal income tax. This rule applied to both individuals and corporate taxpayers. Banks, however, had been largely exempted from this general rule. The 1986 Code changed this by denying banks a deduction for that portion of the bank's interest expense, which is allocable to tax-exempt obligations (regardless of date of issuance) acquired by them after August 7, 1986, for taxable years that began after December 31, 1986. (The prior law rule, allowing an 80% deduction for banks was continued for bonds acquired on or before August 7, 1986.)

The 1986 Code did, however, provide an exception to this rule which continues presently. Under the exception, a bank can purchase up to $10,000,000 ($30,000,000 in 2009 and 2010) of the obligations of any governmental issuer who does not expect to issue in excess of $10,000,000 ($30,000,000 in 2009 and 2010) of obligations in the calendar year in which the "bank qualified" debt is to be issued. This exception does *not* apply to the first $10,000,000 ($30,000,000 in 2009 and 2010) in obligations of municipalities that plan to issue more than $10,000,000 ($30,000,000 in 2009 and 2010) in the calendar year. This exception is limited to "qualified obligations" acquired by a bank. A bank can acquire as many of such obligations as it wishes of different issuers without limitation. For this purpose, "qualified obligations" include any obligation that (1) is not a private activity bond (i.e. Fire District general obligations), and (2) is designated by the issuer. Banks like debt that qualifies for this exception.

Obviously, not more than $10,000,000 of such obligations ($30,000,000 in 2009 and 2010) may be designated for these purposes by any issuer during any calendar year. Moreover, it must be reasonably anticipated that the issuer will not issue more than $10,000,000 (30,000,000 in 2009 and 2010) of tax-exempt obligations (other than private activity bonds) in any calendar year, including any issues of "subordinate" governmental entities that are controlled by or derive their authority from the issuer in question. For issuers that meet these criteria, this is a cost-free way to make their obligations more attractive to bank purchasers.

Most Fire Districts in New York State should be able to take advantage of this provision.

In order for issuers to maximize their benefits from this exception, appropriate language must be inserted in notices of sale for applicable notes or bonds so that bidders will be aware that the obligations qualify for this treatment. When informal bids for notes are solicited orally, prospective purchasers should be similarly informed. Additionally, for qualifying issues that are sold without a printed notice of sale, Bond Counsel must be so informed so that the necessary insertions can be made in the certificate authorizing the issuance of such obligations, and a copy of such certificate must be provided to the purchaser.

How can a Fire District determine if it will be an issuer that can issue bank qualified debt in a particular calendar year? Here are the steps:

Step No. 1: Does the Fire District reasonably expect to issue $10,000,000 ($30,000,00 for calendar years 2009 and 2010) or less in tax-exempt bonds and notes in the calendar year? (small issuer question)

WHAT COUNTS:

1. All new money governmental general obligation issues.
2. Advance Refundings (renewal more than 90 days in advance).
3. All governmental general obligation new money or advance refunding bonds or notes issued by a governmental entity subordinate to the municipality or issuing "on behalf of" same (i.e. certain I.D.A. debt may count).
4. All tax-exempt installment sales/ lease purchase agreements.

WHAT DOESN'T:

1. Private activity bonds or notes.
2. Current renewals (to the extent that the amount of the renewal does not exceed outstanding principal amount of maturing debt).
3. Most federally taxable debt obligations.

Step No. 2: Is the issue itself eligible for designated and qualified status? (issue qualification question)

A. New Money Issues—

1. Not a private activity bond or note (other than a 501(c)(3) obligation).
2. Not a taxable bond or note.

B. Renewal/Refunding Issues (Current or Advance)

1. Aggregate face amount does not exceed $10,000,000/$30,000,000 (09-10).
2. Each refunded bond or renewed note was part of an issue which itself did *not* qualify at the time for the $10,000,000/$30,000,000 (09–10) exception in its year of issuance and was *not* designated. (An issue renewing or refunding a designated bond or note will be deemed designated—see below.)
3. Not a private activity bond or note (other than a 501(c)(3) obligations).
4. Not a taxable bond or note.

C. Certain Refundings/Renewals Or Designated Obligations May Be "Deemed Designated"

1. If a qualified and designated obligation is refunded/renewed, the refunding bonds or renewal notes are "deemed designated" if:

   a. The refunded/renewed obligation was both eligible to be designated and was actually designated.

   b. The par amount of refunding obligations does not exceed the outstanding amount of the refunded or renewal obligation. (Any excess can be designated.)

   c. The average maturity date of the refunding/renewal obligation is *not* later than the average maturity date of the obligations being refunded/renewed. Note: This rule by itself would eliminate renewal notes or bonds from qualifying when refunding/renewing typical 1-year notes so there is an exception:

      If the average maturity of the refunded debt is three years or less, the requirement is waived.

   d. No refunding bond has a maturity date that is later than the date, which is 30 years after the date that the original note or bond was issued.
2. Deemed designated obligations provide financial institutions with same benefit as designated obligations.
3. Deemed designated obligations do not count toward the $10,000,000/$30,000,000 limit of obligations which may be designated in a calendar year.

   Therefore, more than $10,000,000 ($30,000,000 in 2009 and 2010) may ultimately be issued, of which $10,000,000/$30,000,000 is designated and the rest is renewals/refundings, which are deemed designated.

D. Certain Obligations May Not Be Designated Or Deemed Designated:

1. Any refunding/renewal obligation when the aggregate face amount of the issue exceeds $10,000,000/$30,000,000.
2. Private activity notes or bonds (other than 501(c)(3) obligations).
3. Taxable obligations.

Alternative Minimum Tax

The 1986 Code imposed an alternative minimum tax on individuals and a similar tax on corporations. Although the alternative minimum tax on individuals existed before the new tax law, it was included from 1986 until 2009 in the computation of income interest on newly issued private activity bonds (other than qualified 501(c)(3) bonds). In addition, corporations have had to treat 50% of the interest on *all* types of municipal obligations, including Fire District general obligations, as a preference item, regardless of when such bonds were issued. (That is, 50% of interest received on any tax-exempt obligations, including governmental activity general obligations, became subject to the corporate minimum tax.) In addition, interest income received by corporations was for some time includable in a corporation's tax base for purposes of computation of such corporation's liability for an additional 0.12% environmental corporate tax imposed by the "Superfund Amendments and Reauthorization Act of 1986" and later phased out.

Under a provision of the American Recovery and Reinvestment Act of 2009 (the "Recovery Act"), interest earned on any new money bonds or notes issued in 2009 and 2010 and any bonds or notes issued in 2009 and 2010 to refund/refinance bonds or notes issued in calendar years 2004 through and including 2008 are not subject to the alternative minimum tax in any form.

New "Cost to Carry" Deduction for Banks in 2009 and 2010

The Recovery Act has also provided an additional incentive for bankers to buy the type of debt issued by a Fire District in 2009 and 2010 as it permits banks to avoid limits on interest expense deductions for new money, non-bank qualified bonds issued in 2009 and 2010 provided such bonds do not exceed 2% of its total assets

Under prior law, individuals and corporations are generally prohibited from deducting interest expense that they incur in order to acquire or carry tax-exempt bonds. However, as a matter of administrative policy, the IRS does not apply this rule to individuals and corporations (other than banks) whose holdings include only an insubstantial amount of tax-exempt bonds. Corporations generally meet this "insubstantiality" test if tax-exempt bonds comprise no more than 2% of their investment in active business assets; for individuals, tax-exempt bonds must comprise no more than 2% of their total investment portfolio and business assets.

Banks that hold tax-exempt bonds have not benefited from the IRS policy described above, and are generally prohibited from deducting a portion of their total interest expense. The non deductible portion is calculated based on the ratio of the bank's investment in tax-exempt bonds to its total investment in all assets. Bank Qualified Bonds are generally not counted as tax-exempt bonds for purposes of the investment ratio calculation.

To stimulate the purchase of tax-exempt bonds by banks, the Recovery Act allows banks to avoid any limitations on interest expense deductions for a limited amount of new-money, non-bank qualified bonds issued in 2009 and 2010. Thus, any new-money bonds issued in those years (whether or not they are private activity bonds) can qualify for exclusion from the investment ratio calculation. Each bank may only exclude 2009 and 2010 bonds up to 2% of its total investment in all assets; amounts beyond that limitation will be counted as invested in tax-exempt bonds in the investment ratio calculation and reduce the bank's deductible portion. Refunding bonds issued in 2009 and 2010 to refund bonds issued prior to 2009 will continue to be subject to the full interest expense deduction disallowance unless they are bank qualified bonds. However, refunding bonds issued to directly or indirectly refund 2009 and 2010 bonds that qualified for the exclusion will themselves qualify for the exclusion, regardless of when the refunding bonds are themselves issued.

CHAPTER FOURTEEN

Disclosure Issues

The Official Statement ("OS")

Except in the case of direct lease financings with a vendor, leasing company or bank and financings where the securities are sold to a bank or very limited number of sophisticated investors for investment rather than resale, the documentation in a debt financing includes a disclosure document, which is usually called an "official statement." The official statement is used to provide information to investors and prospective investors about the Fire District and the bonds and notes. Bonds and notes constitute securities for purposes of state and federal securities laws and, therefore, the offering and sale of them through the official statement is subject to certain provisions of such laws, including, importantly, the antifraud laws. The official statement sets forth information about the terms of the securities, the security features, the sources and uses of the proceeds, the issuer, any material risk factors in an investment in the securities, the documents under which the bonds or notes are issued and the tax-exempt interest on the securities.

Prior to 1989, debt issuance by Fire Districts was not directly or indirectly subject to oversight by the U. S. Securities and Exchange Commission ("SEC"), except for general securities law rules governing the perpetration of "fraud on the market" by an issuer of debt found in the Securities Act of 1933 and the Securities Exchange Act of 1934, which have always applied to municipal securities, including Fire District debt.

Background of the Rule

In 1989, Rule 15c2-12 under the Securities Exchange Act of 1934 (the "Rule") was adopted to further protect investors in the municipal securities market from fraud and manipulation. Historically, the municipal securities market has been largely unregulated, but over the past twenty years the SEC has progressively introduced regulation designed to protect and inform investors.

The Rule requires an "underwriter," that is, one buying municipal bonds, notes, or other securities for purposes of resale in a primary offering, to obtain disclosure material or an "official statement," describing the issue and the issuer that is "deemed final" by the issuer. "Deemed final" means that the official statement is as complete and as accurate as possible, without (among other items, specifically referred to in the Rule) the principal amount(s), interest rate(s), offering price(s) and name of underwriter(s). Financial advisors work with issuers on their official statement for borrowing and bond counsel reviews it prior to distribution.

Before a competitive sale, "deemed final" official statements are provided to underwriters interested in bidding. After a competitive sale, the "deemed final" official statements which have been circulated to potential underwriters may then become final official statements by reprinting them, or attaching to them new covers or wrap-arounds with the final principal amount(s), interest rate(s), offering price(s), name(s) of underwriter(s), and other information which is reflective of the winning bid(s) (for example, if the issue is insured, the name of insurer, and information concerning the insurance). Final official statements must be printed in an adequate supply and provided to underwriters within seven days following the bond or note sale (or less, to permit underwriters to comply with applicable Municipal Securities Rulemaking Board ("MSRB") requirements, if delivery is scheduled for less than seven days of the sale).

In a negotiated sale, the underwriter must secure a contractual commitment, usually in the bond purchase agreement (the "BPA"), to be furnished with an appropriate quantity of final official statements within seven business days of the date of the BPA. MSRB Rule G-32 requires that one official statement and at least one official statement for each $100,000 of principal amount of the issue be furnished by the underwriter to each purchaser not later than the settlement date of their purchases. The official statement must be available to bond or note purchasers promptly after the date of sale, but no later than two business days before the date the securities are delivered to the underwriters.

Under the Rule, Nationally Recognized Municipal Securities Information Repositories ("NRMSIRs") were proposed as a means to improve availability of official statements. Final official statements have been sent by underwriters to current NRMSIRs and kept on file. As of July 1, 2009 only one NRMSIR is now recognized by the SEC and it is be operated by the MSRB and known as the Electronic Municipal Market Access System ("EMMA"). The role of the NRMSIRs (and hence, now, EMMA) was increased under certain amendments to the rules further discussed below.

1994 Amendments

On November 10, 1994, the SEC adopted amendments (the "Amendments") to Rule 15c2-12 under the Securities Exchange Act of 1934, establishing disclosure requirements for municipal securities offerings in the secondary market. The Amendments, which are a modified version of those proposed by the SEC in a release dated March 9, 1994 (the "March Release"), were part of an ongoing process to improve the quality of information about municipal securities available to potential purchasers.

The SEC, among other things, regulates the underwriters that purchase municipal securities for resale. While, under current law, the SEC has limited power to regulate municipal issuers directly, the Rule, including the Amendments, has an impact on such issuers, because underwriters can purchase most municipal securities only after reviewing disclosure materials provided by the issuer. Furthermore, underwriters cannot recommend most municipal securities to their customers unless they have enough information to judge that the securities are an appropriate investment for their customers.

The Amendments require underwriters to determine that municipal issuers have agreed to provide ongoing disclosure to state and national repositories, including annual financial statements, operating data, and notices of "material" events that could affect such issuers' obligations, and that underwriters have systems in place to monitor such information concerning municipal bonds, notes, and other securities being sold in the secondary market. Some municipal securities are exempt or partially exempt from the Amendments.

The Amendments have been effective since July 3, 1995.

The Amendments in Detail

The Rule was originally adopted to protect investors in the "primary" market (the market in which underwriters directly offer municipal bonds, notes, or other securities purchased by them from issuers in either competitive or negotiated sales). The Amendments are intended to offer protection to investors in the "secondary" market (the market in which the securities are traded or resold). Although much of the general obligation notes offered by issuers in New York State are purchased directly by banks or other institutions and held in their portfolios and not reoffered (and those that are reoffered are often purchased for mutual funds by dealers), it is important to become familiar with the Amendments.

Secondary market disclosure is viewed by the SEC and others as necessary because purchasers of municipal securities in the secondary market should have access to current financial information and operating data in order to evaluate the securities they are interested in selling or purchasing in the secondary market. The current financial information and operating data presented in the final official statement that is prepared for the initial offering certainly will change over time, possibly affecting the value of the securities. The purpose of the Amendments is to make available, to purchasers in the secondary market, the most current financial and operating information regarding issuers. The SEC believes that accessible, periodic updates from issuers are a way to assure orderly markets and fairness to all participants.

Under the Amendments, underwriters will require as a condition of purchase that, among other things, issuers provide in the future reviewable information, in a timely fashion. The Amendments required underwriters have systems in place, by January 1, 1996, for reviewing such information. Generally, underwriters are now prohibited from purchasing or selling municipal bonds, notes and other securities (unless such securities fit within an exemption to the Rule as amended) unless they determine that the issuer (or obligor on the securities for conduit-type issues) has undertaken a written agreement or contract for the benefit of the holders of bonds, notes or other securities, to provide annual financial information and notices of material events (notices of material events are explained further below).

Under the Amendments, underwriters cannot agree to purchase bonds or notes in competitive or negotiated sales unless they have reasonably determined that the issuer has agreed in writing to provide ongoing disclosure of annual financial information and notices of material events (unless the issue is exempt under the Amendments, or partially exempt; see "Exemptions" herein).

The effective dates of the Amendments were designed to allow issuers, underwriters, and other market participants enough time to develop and implement the procedures necessary to comply therewith. The first step is a covenant by the issuer, for the benefit of holders of bonds, notes or other securities, to provide ongoing secondary market disclosure of annual financial information and notices of material events to the NRMSIRs and state information depositories ("SIDs") or as of July 1, 2009 solely to the MSRB.

The official statement for the primary offering sets the standard for ongoing disclosure. Future financial information and operating data must be provided for those persons, entities, enterprises, funds and accounts that are necessary for an evaluation of the offering. The SEC suggested in an interpretive release dated November 10, 1994 (the "November Release") that in the case of a general obligation offering, demographic statistics should be considered as operating data.

The official statement must contain a description of the agreement to provide ongoing financial information and operating data and notice of material events, as well as the scope of that ongoing disclosure.

At the time of the primary offering, the participants in an offering (for example, the issuer, the purchaser, and the insurer, if any) will decide what type of information is material to the offering and who is responsible for providing ongoing information to repositories. As stated above, the final official statement will set the standard for what type of information this will be. The final official statement would either contain financial information and operating data or refer to documents prepared and previously made publicly available, containing such information.

The participants in the primary offering will also commit to provide annual financial information for subsequent years by a particular date. The SEC originally proposed that issuers be required to produce annual audited financial statements, which was considered quite burdensome by many of those who commented on the proposed Amendments. As adopted, the Amendments do not require that all issuers produce audited financial statements. However, if an issuer or obligor does produce audited financial statements, they must be delivered to the NRMSIRs. The accounting principles used in preparing such statements must be stated, and financial information should be reasonably consistent to enable year to year comparisons. Annual financial information may reference other information already on file with the NRMSIRs and SIDs or the MSRB.

In addition to annual financial disclosure, the Amendments list eleven "material" events requiring notice to the secondary market, in a timely manner ("timely" has not been defined by the SEC, and could be interpreted to mean as soon as reasonably possible), by delivery to NRMSIRs or the MSRB and the appropriate SIDs until July 1, 2009 and as of this writing only to the MSRB:

- principal and interest payment delinquencies;
- nonpayment related defaults;
- unscheduled draws on debt service reserves reflecting financial difficulties;
- unscheduled draws on credit enhancements reflecting financial difficulties;
- substitution of credit or liquidity providers, or their failure to perform;
- adverse tax opinions or events affecting tax-exempt status of the security;
- modifications to rights of security holders;
- bond calls;
- refundings;
- release, substitution, or sale of property securing repayment of securities; and
- rating changes.

In addition, notice of any failure of the issuer (or other obligor) to provide annual financial information by the date specified in the written agreement generally must also be disclosed to repositories, which is discussed below. Any failure to comply with the written agreement to provide secondary market disclosure within the previous five years must be disclosed for bond issues. The SEC recommends, but does not require, that issuers file notice of favorable events, including cure of an adverse event listed above.

Underwriters must now have in place, systems designed to monitor material event disclosure, and must have "reasonable assurance" that they will receive prompt notice of material events before they can recommend purchase of a municipal security to their customers. Although this appears to be a limitation placed only on underwriters, this is also a concern for issuers as well, because if a dealer is unable to recommend or sell a security, they are unlikely to purchase it in either the primary or secondary market.

Annual financial information and notice of material events (the ones listed above) must be sent by issuers (or the obligors in conduit issues) to all NRMSIRs or the MSRB and the appropriate SID (in the state of issuance, if such depository exists) until July 1, 2009 and as of this writing only to the MSRB.

The SEC required that NRMSIRs be national in scope, maintain current accurate information, and have effective retrieval and dissemination systems. They cannot place limits on the persons from which they will accept information from, and must provide access to documents to anyone willing to pay the fees. They must charge "reasonable" fees, and may not charge issuers for filing information.

In the November Release, the SEC encouraged and offered guidance to states developing SIDs. As mentioned above, if an appropriate SID exists, notices of material events and annual financial information were to be submitted to such SID as well as the NRMSIRs or the MSRB. With the takeover of the NRMSIR function solely by the MSRB on July 1, 2009, SIDs, if any, will likely cease to operate.

The New York State Comptroller's Office already collects most debt statements, official statement filings, and reports of financial condition, as required under Section 30 of the New York State General Municipal Law. New York State never did establish an official SID.

Exemptions

The Rule fully exempts some issues. The Rule does not apply to issues with principal amounts under $1,000,000. The Rule also only applies to issues purchased from the issuer by an underwriter with a view to offer or sell. If the issue is being purchased privately for the portfolio of an institution, for example, a bank buying a bond anticipation note that such bank will hold in its own portfolio, the Rule does not apply (regardless of the principal amount).

An issue of bonds, notes or other municipal securities, which is otherwise subject to the Rule, that is sold in denominations of $100,000 or more is not subject to the Rule, if such issue: i) is sold to no more than thirty-five (35) "sophisticated" investors (investors who are believed to have the knowledge and experience in financial matters to evaluate the merits and risks of such issue) who are not purchasing for distribution; or ii) has a maturity of nine months or less, or has a put option exercisable at least every nine months (a put option is the opportunity for the owner to request that the issuer, directly or through an agent, redeem or purchase such security at par value or more).

The Amendments provide limited exemption for securities with maturities of eighteen months or less. Annual financial and operating information are not required for these securities, but issuers are still required to agree to provide notices of material events to the NRMSIRs or the MSRB and appropriate SIDs, until July, 2009, and thereafter, to the MSRB.

Issuers with less than an aggregate of $10,000,000 in outstanding debt (including the obligations offered and excluding securities that were offered in transactions exempt under the Amendments), were exempt from the annual financial information requirement of the Amendments if such issuers made a "limited undertaking" (the term used in the Amendments) to provide financial information and operating data on request, or provide such information annually to an SID. (An agreement to provide the financial and operating data that is generally prepared and available to the public satisfied such limited undertaking. Issuers using this exemption had to describe in the final official statement where the financial information and operating data would be obtained and from whom.) Recent revisions to this provision have effectively eliminated this special limited undertaking.

Compliance

Frequent issuers, and those with full-time finance staffs have been able to meet the new requirements with the least difficulty. However, disclosure in official statements needs constant updating and revision. Issuers must covenant to provide ongoing information (unless, of course, the issue is exempt). Nowadays, appropriate modifications to customary bond and note proceedings accommodates the inclusion of such covenants.

It is important for issuers to understand the implications of Rule 15c2-12 because failure to comply may have several potential repercussions. At the very least, failure to provide ongoing information will cause the market to react unfavorably the next time such an issuer tries to sell its bonds or notes. A refusal to make a covenant would severely limit the market of an issue.

While your bond counsel will certainly want to review your compliance with the Rule and its Amendments, including any Official Statement prepared by a financial advisor with the help of a Fire District in connection with a public offering of debt, it is ultimately the responsibility (and liability) of the Fire District to ensure that the Official Statement or other disclosure compliance document is 100% accurate. The standard to which the Fire District will be held is as follows:

> "The statements contained in the Final Official Statement dated _______________, 20__ do not contain any untrue statement of material fact or omit to state a material fact necessary to make the statements therein, in the light of the circumstances under which they were made, not misleading."

There is a limited exception for data from other sources.

That is the general antifraud requirement of the securities law applicable to any municipal securities offering in the public markets of any Fire District in the State.

Fire District Responsibilities and Liabilities

As noted above, the antifraud provisions of the 1933 Securities Act and the 1934 Securities Exchange Act require that the information provided in connection with the offer or sale of securities must not contain any untrue statement of a material fact and must not omit to state a material fact necessary to make such information not misleading. This is of critical importance to the Fire District. The Fire District is primarily liable for any material misstatements or omissions regarding the Fire District made in the documents used to offer and sell the Fire District securities. The Fire District may not transfer this primary liability to its underwriter, its financial advisor, district counsel, bond counsel or any of the other parties involved in the financing. Such parties might be liable in their own right, but their liability will not absolve the Fire District of its primary liability. Consequently, the Fire District and its staff must make every effort to ensure that the Fire District's offering documents are accurate and complete. The SEC has stated that:

> "Because they are ultimately responsible for the content of their disclosure, issuers [of municipal securities] should insist that any professionals retained to assist in the

> preparation of their disclosure documents have a professional understanding of the disclosure requirements under the federal securities laws."

In connection with its Orange County, California bankruptcy investigations, the SEC reiterated that issuers "bear the most significant responsibility to ensure" disclosure is adequate, and commented that:

> "[A] public official may not authorize disclosure that the official knows to be false; nor may a public official authorize disclosure while recklessly disregarding facts that indicate that there is a risk that the disclosure may be misleading."

In short, always read your draft official statement.

CHAPTER FIFTEEN

Post-Issuance Responsibilities, Issues and Problems

After issuance of any cashflow or capital debt obligation, there are several areas of continuing responsibility for the issuer (besides paying back the bond or note holders for the loan of their money—highly recommended) as well as certain typical problem scenarios.

The areas of responsibility include proper investment of borrowed proceeds within LFL, General Municipal Law and Federal tax law guidelines, compliance with the federal reporting, arbitrage and arbitrage rebate rules, compliance with ongoing federal disclosure requirements, and proper reporting to State oversight authorities.

There are also some fairly typical problem scenarios which may arise, such as: (a) not enough money to finish a project; (b) too much money authorized, or authorized and borrowed for a project; and (c) issues surrounding reimbursement of moneys temporarily borrowed on an inter-fund basis to be repaid with debt proceeds upon issuance.

Responsibility: Investment of Borrowed Proceeds

The proceeds received upon the sale and issuance of debt obligations must, in most cases, be treated differently from other moneys raised by the tax levy or from other sources. While TAN, RAN or budget note proceeds may be treated like general fund moneys, moneys received from the sale of BANs or bonds to finance the cost of capital projects must be kept and accounted for separately.

The proceeds, inclusive of premiums, from the sale of bonds, bond anticipation notes, capital notes, urban renewal notes (a form of note similar to a specialized RAN) or budget notes must be deposited and secured in a special account in the manner provided by Section 10 of the General Municipal Law. Such capital proceeds cannot be commingled with other funds of the issuer, and must be expended only for the object or purpose for which such obligations were issued. Capital fund moneys cannot be utilized for inter-fund loans. In the event that any portion of the proceeds, inclusive of premiums, from the sale of bonds, bond anticipation notes, capital notes, urban renewal notes or budget notes is not expended for the object or purpose for which such obligations were issued, such portion must be applied only to the payment of the principal of and interest on such obligations, respectively. Notwithstanding the foregoing provisions of the

LFL, the Board of Fire Commissioners of any Fire District may adopt any or all of the following resolutions to provide that:

a. The proceeds, inclusive of premiums, of capital notes issued in amounts of $100,000 or less, and of budget notes, need not be deposited in a special account but may be deposited and commingled with other funds of the issuer in any account of the issuer in a bank or trust company located and authorized to do business in the State, but such power should not be construed as authorizing the use of such proceeds for an object or purpose other than that for which the obligations were issued.
b. The proceeds, inclusive of premiums, from the sale of any two or more issues of bonds, bond anticipation notes, capital notes, urban renewal notes or budget notes need not be deposited in separate special accounts but may be deposited in a single special account of the issuer in a bank or trust company located and authorized to do business in the State, but should not be commingled with other funds of the issuer. The chief fiscal officer should then maintain a separate accounting record of each issue to ensure that the proceeds shall be used only for the object or purpose for which the obligation was issued.
c. Moneys appropriated for a purpose for which bonds, bond anticipation notes, capital notes or urban renewal notes have been authorized may be deposited in the same bank account with the proceeds from the sale of such obligations. Such power should not be construed as authorizing the use of the proceeds of such obligations for an object or purpose other than that for which they were issued. Any moneys remaining in such bank account after the object or purpose has been completed or abandoned must be applied to the payment of the principal of and interest on such obligations. Any excess remaining thereafter may be used for any lawful purpose.

The proceeds, inclusive of premiums, from the sale of bonds, bond anticipation notes, capital notes and urban renewal notes are to be invested in the manner provided by Section 11 of the General Municipal Law which provides a list of permitted investments for Fire Districts. Such investment is to be made by the Board of Fire Commissioners or more typically the chief fiscal officer, if the Board of Fire Commissioners, as is customary, shall delegate such duty to that person. The separate identity of the proceeds from the sale of bonds, bond anticipation notes, capital notes, urban renewal notes and budget notes is to be maintained at all times, whether such proceeds consist of cash or investments or both. Any interest earned or capital gain realized on any investment is to be applied to either the payment of the principal of and interest on the bonds, bond anticipation notes, capital notes, urban renewal notes or budget notes, as the case may be, the proceeds from the sale of which were used in making such investment or for any other purpose or purposes for which such issue of bonds, capital notes or urban renewal notes has been authorized. However, any interest earned or capital gain realized on any investment, to the extent necessary to maintain the exemption from federal income taxation of interest on the obligations the proceeds from the sale of which were used in making such investment, is to be paid to the United States Treasury Department.

Where the proceeds from the sale of bond anticipation notes have been invested and such notes have been retired from the proceeds from the sale of the bonds in anticipation of which they were issued, any interest earned or capital gain realized on any investment is to be applied only to the payment of the principal of and interest on the bonds.

Investment of such moneys are regulated by the provisions of Sections 10 and 11 of the General Municipal Law, and the possible application of the yield restriction rules of the U.S. Treasury regulations promulgated under Section 148 of the Internal Revenue Code of 1986, as amended (the "Code"), previously discussed.

Responsibility: Compliance With Federal Reporting, Arbitrage and Arbitrage Rebate Regulations

Because the interest on general obligation bonds and notes issued by Fire Districts in the State is generally tax-exempt to the holders thereof for federal income tax purposes under Section 103 of the Code, each issuance of such debt is subject to the federal requirement that a Form 8038-G or Form 8038-GC be filed within regulatory deadlines. Bond counsel assists in completion of these forms. These are "information returns" by which the Internal Revenue Service is able to track all tax-exempt municipal debt issuances in the United States. Random audits of governmental debt has become more commonplace in the new millennium.

It is also part of the job of bond counsel to inform any Fire District issuer and their local counsel of the applicability of the federal arbitrage rules governing the period of time, if any, during which borrowed proceeds may be invested without restriction as to yield and the arbitrage rebate rules (and exceptions) governing the provision to the U. S. Treasury of certain investment earnings on borrowed proceeds, accrued prior to expenditure on the purpose for which the debt was borrowed. See Chapter 11 herein. The Fire District may need a rebate compliance provider to help with annual calculations.

Responsibility: Compliance with Federal Disclosure Rules

Any governmental debt issuance in the public markets, national, state or local, is potentially subject to the effect of Rule 15c2-12 of the SEC promulgated under the Securities Exchange Act of 1934, as amended. While the SEC does not directly regulate municipal issuers, it does regulate the bond markets and it does have authority to take legal action against municipal issuers in connection with fraud or misrepresentations in the sale of their debt. It is again part of the role of bond counsel to advise Fire District issuers and their local counsel as to any Rule 15c2-12 disclosure requirements upon the sale of debt, and ongoing thereafter to maturity. The Rule does fully exempt some issues and certain small issuers are subject to less onerous reporting requirements.

However, any debt issuance of over $1,000,000 nowadays will usually involve production of an "official statement." The production of an official statement is a joint work product of a Fire

District issuer and its financial advisor, local counsel and bond counsel. This is the municipal equivalent of a corporate prospectus plus annual report. The official statement is a general overview of the current financial and related circumstances of the issuer and its tax base. The standard for the inclusion of information in an official statement is straight forward: it must be the case that the statements contained in the Official Statement do not contain any untrue statements of a material fact or omit to state a material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading.

In order to sell such debt, an issuer will need to contract to update certain of the information in the official statement for the life of an issue. Which information needs updating and when are a function of the type of debt and the size of the issuer. Bond counsel must be familiar with these rules and advise local counsel and the Fire District issuer and its financial advisor accordingly. See Chapter 14 herein.

Responsibility: State Oversight Reporting

The issuance of serial bonds must be reported to the Office of the State Comptroller both in the annual report thereto as well as the filing of a debt statement, prior to the public sale of any issue of serial bonds.

Not more than fifteen nor less than three days before any Fire District having an aggregate assessed valuation of taxable real property of $100,000 or more, sells any bonds which are required to be sold at public sale, it must file with the State Comptroller a verified statement of its debt-contracting power prepared as of the date not more than thirty days previous of the date of the sale of such bonds. The statement is to show the amount of obligations proposed to be sold at such sale. A duplicate copy of every such debt statement is to be filed in the same respective period of time with the secretary of such Fire District.

Such statements are to be prepared in the manner prescribed in title ten of article 2 of the LFL. Any error, defect, omission or inaccuracy in any such statement, or in the manner of its execution or filing, will not affect the validity of any obligations of any Fire District.

Therefore, the annual report must include the latest debt information.

Post-Issuance Issues: Insufficient Funds

Turning now to some typical post-issuance problem areas, insufficient borrowed proceeds to finish a project is not an uncommon scenario.

Investment earnings which have been made on the borrowed proceeds prior to their expenditure, must be used to pay arbitrage rebate to the federal government, if applicable, or debt service on the debt obligations and is generally (but not exclusively) not available for project costs in the Fire District general obligation context. In any event, even if available for the capital purpose, it would be necessary for your voters to authorize the capital project first at the increased cost.

Assuming insufficient available funds from any other source, the only option is for the Board of Fire Commissioners to adopt a supplemental bond resolution authorizing the issuance of additional debt for the capital project. Such a supplemental bond resolution would be subject to precisely the same pre-adoption proceedings or post-adoption referendum requirements as the initial bond resolution.

Post-Issuance Issues: Too Much Money Authorized

Everyone should have this problem: the Board of Fire Commissioners has authorized a higher maximum estimated cost and debt issuance than the project as originally envisioned requires. What to do? It is first useful to note what cannot be done:

a. the excess authorized amount cannot be used on some other capital project.
b. The excess authorized amount cannot be used for any general fund or other fund operating purposes.

If the excess has already been borrowed at the time it is determined to be excess, it must be used to pay debt service on the obligation from whence it proceeds at the next available debt service payment date(s). It is only when no such debt service remains that such excess proceeds may be used for any lawful purpose, subject to federal yield restriction, arbitrage and arbitrage rebate rules.

Excess authorization which is not utilized or otherwise encumbered may be repealed, or, pursuant to Section 41.00 of the LFL, will automatically self-repeal ten years after the date of adoption.

Post-Issuance Issues: Reimbursement Issues

Often, prior to authorizing the financing of a capital project, a Fire District may expend available funds in connection with some initial or preliminary costs relating to the project. It is generally understood by all concerned that, if and when the project moves ahead, those available funds will be reimbursed from the proceeds of a borrowing, hopefully within the same fiscal year.

Both the LFL and the U.S. Treasury Regulations promulgated under Section 148 of the Code have specific rules regarding the reimbursement of previously expended available funds.

Section 165.10 of the LFL provides that if there are funds of a Fire District other than the proceeds of bonds, bond anticipation notes, capital notes and budget notes, and funds which, by law, may be used only for stated purposes, which are not immediately required for the purpose or purposes for which the same were borrowed, raised or otherwise created, the Board of Fire Commissioners may authorize the temporary use of such funds for the purpose or purposes for which an issue of bonds or capital notes has been authorized. Suitable records must be kept of the temporary diversion of such funds. Such funds are to be made again available to the Fire District from the proceeds of such bonds or capital notes or from the proceeds of the sale of bond anticipation notes issued in anticipation of the sale of such bonds.

Therefore, if a valid bond resolution is not in place (including any applicable referendum having successfully occurred), at the time available moneys are advanced, they may not be reimbursed from later borrowing proceeds. Nevertheless, this practice continues to occur with some regularity. It can be the subject of criticism on audit by the Office of the State Comptroller. It is preferable simply to adopt a bond resolution prior to the temporary advance without borrowing the funds in the public markets, and, thus, without starting the PPU clock running.

The adoption and public approval of a bond resolution will also cover the Fire District with regard to the federal bond reimbursement regulations. These regulations generally require a "statement of official intent" prior to temporary advances of available moneys. A properly drafted bond resolution may serve as an official notice of intent to borrow under these Treasury Regulations as well as LFL Section 165.10.

Post-Issuance Issues: Change in Capital Project Elements

The Fire District has an approved bond resolution and it has a voter approved proposition; it is proceeding with its building plans and financing plans and then something happens: some element costs a lot more than anticipated due to price increases or scarcity; a corporation that had planned a major expansion at a local facility with a significant influx of new families goes bankrupt, and the new substation is really not needed; some element needs revision due to a previously unconsidered aspect. What to do? What are the rules?

Boy, you ask difficult questions. This is a tough one, and a lot depends on the specific facts and circumstances. Therefore, it is only possible here to set out some of the key considerations:

1. People who voted for your capital program may have done so in anticipation of a particular element that now is under reconsideration or revision from that presented to the public before the vote. But for inclusion of that major element, they might have voted "no."
2. The Board of Fire Commissioners does have discretion within the voter mandate, and it has a fiduciary obligation not to waste assets of the Fire District. This is a representative form of government, not direct micromanagement by the public.
3. If the proposition used the broad language of a class of objects or purposes, the voters could have rejected it and called for the proposition language to be more specific.
4. What language did the Fire District information materials use? Was some element presented as definite?
5. A health, safety or welfare concern which leads to a change in a strong reason for revision.
6. A Board can order a special election to reallocate portions of a previously authorized project if the moneys have not yet been borrowed.
7. Proposition language which includes words like "incidental improvements," "ancillary work" or "related improvements" is intended to cover unexpected change orders and "while we are in there" type work. The word "including" does not mean the list following it is everything else.

8. An approved proposition can be rescinded only by a public vote of the qualified voters. Some cases hold that the affirmative vote is a mandate, unless and until so rescinded, especially if others have since relied on the vote in some way.
9. The maximum estimated cost of the project(s) presented to the voters cannot, in any event, be exceeded for work on said project(s) as described in the proposition, *regardless of the source of additional moneys*, without a further vote of the people.
10. Bonds or BANs authorized for an object or purpose may never be utilized for a different object or purpose. Never. Not Ever. Just No.

CHAPTER SIXTEEN

Lease Purchase Agreements, Energy Performance Contracts and Certificates of Participation

General Municipal Law Section 109-b. General Municipal Law Section 109-b authorizes political subdivisions including Fire Districts to enter into installment purchase contracts (also known as lease purchase agreements) to finance certain capital equipment and to cause or permit certificates of participation to be issued in connection therewith. Bond counsel participation in these transactions is customary to ensure validity and the tax-exempt status.

An "installment purchase contract" means any lease purchase agreement, installment sales agreement or other similar agreement providing for periodic payments between a corporation, person or other entity and a political subdivision which has as its purpose the financing of *equipment, machinery or apparatus (only)* under General Municipal Law Section 109-b which governs Fire District participation in such instruments. A Fire District cannot enter into an installment purchase contract to finance construction of a firehouse. Opin No. 97-10, Office of the State Comptroller.

A political subdivision may enter into an installment purchase contract subject to the following restrictions:

a. The governing board of a political subdivision must adopt a resolution authorizing the installment purchase contract, much like a bond resolution.
   (1) If an authorization for the issuance of the obligations to finance the equipment, machinery or apparatus would have been required by law to be subject to a permissive or mandatory referendum, then the authorization to enter into an installment purchase contract is subject to a permissive or mandatory referendum, as the case may be, in the same manner as provided for such referendum on the issuance of obligations.
   (2) If the authorization for the issuance of obligations to finance the equipment, machinery or apparatus would have been required by law to be subject to: (i) a certain supermajority vote of the governing board, (ii) a mandatory or permissive referendum, or (iii) both, then the authorization to enter into an installment purchase contract for equipment, machinery or apparatus is subject to such vote, referendum or such referendum and vote, as the case may be, in the same manner as provided for such

vote and/or referendum on the issuance of obligations. Thus, Fire Districts need public approval just like a bond vote. A referendum is required.

(3) If the authorization for the issuance of obligations would have been subject to a referendum only if the obligations had a maturity of more than five years or not less than some other minimum period, then the authorization to enter into the installment purchase contract is subject to referendum only if the term of the contract is equal to or more than such minimum period of maturity.

b. The term of such installment purchase contract, including all renewals thereof, cannot exceed the period of probable usefulness prescribed by section 11.00 of the Local Finance Law for equipment, machinery or apparatus being financed under the installment purchase contract.

c. The installment purchase contract must separately state the principal and interest component of the periodic payments to be made thereunder. The total of all periodic payments which include both principal and interest components made by the Fire District during each year throughout the term of the installment purchase contract must be substantially level or declining.

d. An installment purchase contract must contain the following clause: "This contract shall be deemed executory only to the extent of moneys appropriated and available for the purpose of the contract, and no liability on account thereof shall be incurred by the political subdivision beyond the amount of such moneys. The installment purchase contract is not a general obligation of (insert name of political subdivision(s)). Neither the full faith and credit nor the taxing power of (insert name of political subdivision(s)) are pledged to the payment of any amount due or to become due under such installment purchase contract. It is understood that neither this contract nor any representation by any public employee or officer creates any legal or moral obligation to appropriate or make moneys available for the purpose of the contract."

e. No payment under the installment purchase contract except payment for the total amount outstanding can be financed from the proceeds of obligations issued pursuant to the Local Finance Law other than the proceeds of revenue anticipation notes, tax anticipation notes or budget notes due to cashflow needs. An installment purchase contract may thus be paid off in full with the issuance of duly authorized BANs or serial bonds.

f. There are additional provisions if an installment purchase agreement is to be made a part of a certificate of participation instrument for wider sale of the financing contract to the general public.

g. Installment purchase contracts for equipment, machinery or apparatus do constitute purchase contracts for public bidding purposes and are subject to public bidding requirements to the extent applicable by law. For purposes of determining whether the cost of the equipment, machinery or apparatus exceeds the monetary threshold fixed in section one hundred three of the General Municipal Law relating to competitive bidding, the cost of the equipment, machinery or apparatus, exclusive of the cost of financing is considered. If the equipment, machinery or apparatus is to be financed by a party other than the party submitting the bid, the bid specifications may provide that the political subdivision may assign its right to purchase to a third party without the necessity of approval by the other party to the contract. Nothing precludes a Fire District from advertising for bids in the alternative with and without financing.

h. Each political subdivision shall have the power to enter into agreements providing credit enhancement with respect to the installment purchase contract, but any reimbursement obligation of the political subdivision is subject to appropriation by the legislative board.

It is important to note installment purchase contracts made pursuant to this section of law do *not* constitute or create indebtedness of the state or the Fire District for purposes of article seven or eight of the State Constitution or Section 20.00 of the Local Finance Law, nor do they constitute a contractual obligation in excess of the amounts appropriated therefore. Neither the state nor a Fire District has any continuing legal or moral obligation to appropriate money for said payments or other obligations due under the installment purchase contract. No installment purchase contract is permitted to contain any provision which, in the event of non-appropriation, precludes a Fire District from acquiring equipment, machinery or apparatus for the same or similar purpose as the equipment, machinery or apparatus included in the installment purchase contract for a period of more than sixty days from the date of expiration, termination or cancellation of such contract, provided, however, that in no case can an installment purchase contract contain any provision which would preclude a Fire District from performing any statutorily or constitutionally required duties or functions or require the political subdivision to pay liquidated damages.

In the case of the failure to appropriate, the sole security, apart from any security provided by a credit enhancement for any remaining periodic payments is the equipment, machinery or apparatus subject to the installment purchase contract. Any installment purchase contract may provide that the installment purchase contract is secured by the underlying equipment, machinery or apparatus and that, in the event the Fire District fails to appropriate funds sufficient for payments required under the contract, the financed equipment, machinery or apparatus may be sold on behalf of the persons entitled to receive payments under the installment purchase contract, provided that any excess proceeds from such a sale, after deduction for and payment of fees, expenses and any taxes levied on sale, plus accrued interest must be paid to the Fire District.

What a rating agency may think of a failure to appropriate is another matter entirely.

The aggregate amount of unpaid periodic payments, excluding interest, to be made under any outstanding installment purchase contract is to be deemed to be existing indebtedness solely for the purpose of determining the power of any Fire District to contract indebtedness under the debt limitations of section 104.00 of the Local Finance Law. No Fire District can enter into any installment purchase contract if the amount of unpaid periodic payments, excluding interest, proposed to be made under such installment purchase contract and those outstanding, together with the amount of outstanding indebtedness, would exceed one hundred fifty percent of the limit prescribed by such section 104.00 or if the total amount of such payments, excluding interest, under such proposed contract and those outstanding would exceed forty (40) percent of such limit.

A Fire District does not have the power to enter into an installment purchase contract except as authorized in Section 109-b of the General Municipal Law, and General Municipal Law Section 109-b does not authorize the conveyance or lease of property owned by a Fire District except as otherwise authorized by law.

All installment purchase contracts of a Fire District and the interest thereon are exempt from taxation for municipal and state purposes.

The State Comptroller's Rules

Subparagraph (d) of subdivision (3) of General Municipal Law Section 109-b requires the State Comptroller to adopt rules "governing the procedure which shall be adhered to when entering into installment purchase contracts or authorizing the execution and delivery of certificates of participation. . . ." The primary purposes of these rules are to:

a. cause a political subdivision to evaluate critically the financing alternatives available to it under Section 109-b of the General Municipal Law and the LFL;
b. ensure that a political subdivision, when procuring the capital improvements to be finances, complies with the competitive bidding requirements of article 5-a of the General Municipal Law or any other general, special or local law or, if such competitive bidding requirements are not applicable, the policies required to be adopted pursuant to General Municipal Law, Section 104-b; and
c. require a political subdivision to seek competition for financing unless the political subdivision determines that it is in its best interest to conduct a private sale of certificates of participation.

Definitions. For purposes of the State Comptroller's regulations governing installment purchase contracts, the following definitions apply:

a. *Cost of financing* shall mean the total payments of principal and interest estimated to become payable pursuant to an installment purchase contract or due on indebtedness, as the case may be, together with any estimated actual and necessary expenses incurred in connection with the execution of such installment purchase contract or the issuance of such indebtedness to the extent such expenses are not included in the periodic payments to be made under the installment purchase contract or aid from the proceeds of the indebtedness.

b. *Evaluation of financing alternatives* shall mean the evaluation prepared pursuant to the criteria indicated below.
c. *Indebtedness* shall mean bonds or notes issued in accordance with the LFL.
d. *Political subdivision, capital improvement, installment purchase contract* and *certificate of participation* shall have the meaning ascribed to them by paragraphs (a) through (d) inclusive of subdivision (1) of Section 109-b of the General Municipal Law.
e. *Pooled or aggregate program* shall mean any program under which certificates of participation are issued and represent a proportionate interest or the right to receive a proportionate share in lease, rental, installment or other periodic payments made or to be made by a political subdivision and one or more parties, other than the political subdivision, pursuant to installment purchase contracts.
f. *Private sale* shall mean any sale of certificates of participation, other than a public sale, conducted by a political subdivision.
g. *Public sale* shall mean any sale of certificates of participation conducted by a political subdivision pursuant to the regulations.

The following rules of the State Comptroller are currently in effect:

Evaluation of financing alternatives. No Fire District Board of Fire Commissioners is permitted to adopt a resolution authorizing an installment purchase contract unless an evaluation of financing alternatives has been prepared in connection therewith. Such evaluation shall set forth the financing alternatives considered and the criteria used to evaluate these alternatives. The evaluation must also contain written documentation substantiating the estimates required to be included in the evaluation pursuant to this section. At a minimum, the evaluation of financing alternatives must contain the following:

a. a statement indicating the estimated cost of each capital improvement to be financed, exclusive of the cost of financing;
b. a statement indicating whether the proposed capital improvements may be financed with indebtedness issued under the LFL and if not, the specific reasons why such financing is not authorized;
c. if the capital improvements may be financed with indebtedness, a statement indicating the estimated total cost of the capital improvements, inclusive of the cost of financing, if financed pursuant to the LFL;
d. a statement indicating the estimated total cost of the proposed capital improvements, inclusive of the cost of financing, if financed pursuant to an installment purchase contract;
e. a comparison of the estimated total costs required by subdivisions (c) and (d) of this section; and
f. a recommendation as to whether it is in the best interests of the Fire District to finance the capital improvements pursuant to the LFL or pursuant to an installment purchase contract and the specific reasons for such recommendation.

Adoption of resolution authorizing an installment purchase contract. Any resolution authorizing a Fire District to utilize an installment purchase contract to finance capital improvements must refer to the evaluation of financing alternatives, and after taking into account such evaluation, set forth the specific reasons why the governing board has determined that it is in the best interests of the political subdivision to finance the capital improvements pursuant to an installment purchase contract. The evaluation of financing alternatives must be maintained by the Fire District as a public record and be filed with the resolution to which it pertains.

The resolution to be adopted is subject to the same rules of adoption as those governing bond resolutions.

Compliance with competitive bidding statutes or other applicable provisions. No political subdivision can enter into an installment purchase contract unless and until it has complied with the competitive bidding requirements of article 5-A of the General Municipal Law or of any other general, special or local law. If no such competitive bidding requirements are applicable, the political subdivision must comply with its own procurement policies and procedures adopted pursuant to General Municipal Law, Section 104-b. For purposes of complying with such requirements or procedures, a political subdivision may determine to solicit bids, quotations or proposals, as the case may be, in the alternative, exclusive and inclusive, of the cost of financing.

Procurement of vendor and non-vendor financing. If the Board of Fire Commissioners determines that it is in the best interest of the Fire District to select a bid, offer or proposal, as the case may be, inclusive of the cost of financing, the governing board must adopt a resolution authorizing the Fire District to enter into an installment purchase contract with the successful bidder or offerer, making a bid or offer inclusive of the cost of financing.

If the Board of Fire Commissioners determines that it is in the best interest of the Fire District to select a bid, offer or proposal, as the case may be, exclusive of the cost of financing, it must adopt a resolution requiring the capital improvement to be procured from the successful party making a bid, offer or proposal, exclusive of the cost of financing, and directing that non-vendor financing be obtained pursuant to the State Comptroller's applicable regulations. Such resolution must also authorize the political subdivision to enter into an installment purchase contract with any party selected to provide the financing or, if certificates of participation are to be issued with a party acting on behalf of the holders of the certificates of participation, the resolution may also delegate to the chief fiscal officer the power to cause certificates of participation to be sold pursuant to the State Comptroller's applicable regulations.

Any such resolution adopted must include a statement that execution of the installment purchase contract will not cause the political subdivision to exceed the limits prescribed by paragraph c of subdivision 6 of Section 109-b of the General Municipal Law.

Public sale of certificates of participation. A political subdivision is permitted to cause certificates of participation issued in connection with one or more of its installment purchase contracts to be sold at public sale, although, this has rarely been done in this State. Such certificates of participation must be sold to the bidder offering the lowest interest cost as computed in accordance with the net interest cost method, taking into consideration any premium or discount or the actuarial or true interest cost method, whichever is specified in the notice of sale. The notice of such sale must be circularized in accordance with any rule or order prescribed by the State Comptroller pursuant to paragraph d of Section 57.00 of the LFL for the circularization of notices for the sale of bonds. Where the notice of sale provides that bids shall be awarded based on net interest cost, the notice shall also require that the interest rate for each maturity shall not be less than the interest rate for any prior maturity. The notice of sale must be circularized not fewer than four (4) nor more than fifteen (15) days, Sundays excepted, before the date fixed for the public sale unless the notice provides for a supplemental notice of sale in accordance with the procedure for the sale of bonds in paragraph(d) of section 58.00 of the LFL.

Private sale of certificates of participation. The Board of Fire Commissioners or the chief fiscal officer, if the Board of Fire Commissioners has delegated such power to him, may determine that a public sale of certificates of participation is not in the best interests of the political subdivision. The determination of the governing board or chief fiscal officer, as the case may be, shall state that a private sale of such certificates of participation is expected to reduce the cost of financing and set forth the specific factors upon which the governing board or chief fiscal officer has relied on making such determination. The factors recited in such determination may include:

a. unstable or volatile market conditions;
b. conditions of fiscal stress or negative credit factors being experienced by the issuer;
c. the large dollar amount of the proposed issue;
d. the complexity of the issue; or
e. any other factor which the governing board or chief fiscal officer, as the case may be, reasonably and in good faith believes will cause the cost of financing to be lower if the certificates of participation are sold at private rather than public sale.

Such determination, if made by the Board of Fire Commissioners, must be made by resolution and if made by the chief fiscal officer, shall be made in a certificate filed with the governing board prior to such sale. Upon making the determination required, such certificates of participation may be sold at private sale, provided that any underwriters, providers of letters of credit or liquidity facilities, bond counsel and financial advisors to be used in connection with such sale have been selected in accordance with the policies and procedures contained in the applicable State Comptroller's regulations. The prior approval of the State Comptroller is not required for private sale of certificates of participation conducted in accordance with these requirements.

Solicitation of alternative financing quotations. The Board of Fire Commissioners, or if authorized by the governing board, the chief fiscal officer may solicit alternative quotations for financing from qualified interested parties. The political subdivision or chief fiscal officer, as the case may be, must prepare and maintain written documentation of compliance with this rule, including the names and addresses of all qualified interested parties from which financing quotations were sought, the responses received from such parties and written justification of the ultimate selection made. Any political subdivision which enters into an installment purchase contract by private sale cannot permit certificates of participation to be issued in connection therewith except as part of a pooled or aggregate program.

Application of periodic payments and proceeds of certificates of participation. Periodic payments to be made under an installment purchase contract and the proceeds of certificates of participation shall be applied only towards the following:

a. the cost of the capital improvements being financed;
b. the payment of interest pursuant to paragraph (e) of subdivision 2 of the General Municipal Law, section 109-b;
c. preliminary costs of surveys, maps, plans, estimates, taking of title and interest during construction;
d. the establishment of reserve funds;
e. the cost or premiums of letters of credit, insurance or other credit enhancements;
f. the costs of bond counsel, financial advisors, underwriters, trustees and paying agents; and
g. other actual and necessary expenses directly related to the issuance of certificates of participation or execution of the installment purchase contract.

The political subdivision must include in its annual report, filed with the State Comptroller in accordance with Section 31 of the General Municipal Law, such information as the Comptroller may require for all installment purchase contracts and certificates of participation that are issued in connection with such installment purchase contracts, including the amount and date of all certificates of participation sold at private sale.

Energy Performance Contracts

Installment purchase contracts tied to energy performance contracts are also subject to the rules provided in Section 109-b of the General Municipal Law but as modified by the requirements of Article 9 of the Energy Law. They are a specialized form of installment purchase contract for capital projects designed to reduce energy costs and involving guaranteed savings.

The term "energy performance contract" is defined in Section 9-102(4) of the Energy Law as:

> [A]n agreement for the provision of energy services, including but not limited to electricity, heating, ventilation, cooling, steam or hot water, in which a person agrees to install, maintain or manage energy systems or equipment to improve the energy efficiency of, or produce energy in connection with, a building or facility in exchange for a portion of the energy savings or revenues.

The purpose of this law is to obtain long-term energy and cost savings for agencies and municipalities (and Fire Districts are specifically included) by facilitating prompt incorporation of energy conservation improvements or energy production equipment, or both, in connection with buildings or facilities owned, operated or under the supervision and control of agencies or municipalities, in cooperation with providers of such services and associated materials from the private sector. Such arrangements are believed by the State to improve and protect the health, safety, security, and welfare of the people of the state by promoting energy conservation and independence, developing alternate sources of energy, and fostering business activity.

The primary operative provision of law is Section 9-103 of the Energy Law:

Section 9-103 Energy Performance Contracts

1. Notwithstanding any other provision of law, any agency, municipality, or public authority, in addition to existing powers, is authorized to enter into energy performance contracts of up to thirty-five years' duration, provided, that the duration of any such contract shall not exceed the reasonably expected useful life of the energy facilities or equipment subject to such contract.

2. Any energy performance contract entered into by any agency or municipality shall contain the following clause: "This contract shall be deemed excutory only to the extent of the moneys appropriated and available for the purpose of the contract, and no liability on account therefore shall be incurred beyond the amount of such moneys. It is understood that neither this contract nor any representation by any public employee or officer creates any legal or moral obligation to request, appropriate or make available moneys for the purpose of the contract."

3. In the case of a school district or a board of cooperative educational services, an energy performance contract shall be an ordinary contingent expense and shall in no event be construed as or deemed a lease or lease purchase of a building or facility, for purposes of the education law.

4. Agencies, municipalities, and public authorities are encouraged to consult with and seek advice and assistance from the New York State energy research and development authority concerning energy performance contracts.

5. Notwithstanding any other provision of law, in order to convey an interest in real property necessary for the construction of facilities or the operation of equipment provided for in an energy performance contract, any agency, municipality or public authority may enter into a lease of such real property to which it holds title or which is under its administrative jurisdiction as is necessary for such construction or operation, with any energy performance contractor, for the same length of time as the term of such energy performance contract, and on such terms and conditions as may be agreeable to the parties thereto and are not otherwise inconsistent with law, and notwithstanding that such real property may remain useful to such agency, municipality or public authority for the purpose for which such real property was originally acquired or devoted or for which such real property is being use.

6. In lieu of any other competitive procurement or acquisition process that may apply pursuant to any other provision of law, an agency, municipality, or public authority may procure an energy performance contractor by issuing and advertising a written request for proposals in accordance with procurement or internal control policies, procedures, or guidelines that the agency, municipality, or public authority has adopted pursuant to applicable provisions of the state finance law, the executive law, the general municipal law, or the public authorities law, as the case may be.

7. Sections one hundred three and one hundred nine-b of the general municipal law shall not apply to an energy performance contract for which a written request for proposals is issued pursuant to subdivision six of this section.

This provision establishes the basic features of an installment purchase contract for energy savings equipment: the useful life ("PPU"), the contingent nature of the Fire District obligation to pay, the method of procurement, the need for there to be savings guaranteed in the contract for the provisions to apply.

It was further clarified in 1996 by counsel to the New York State Energy Research and Development Authority that the financing portion of an energy performance contracting transaction may benefit from the same rules applicable to the acquisition of equipment through the lease purchase acquisition agreement portion. (This remains ambiguous in the law as written).

As was pointed out at that time, for those who are considering energy performance contracting, the agreement to install, maintain, or manage energy systems or equipment must be "in exchange for a portion of the energy savings or revenues." Energy Law, Section 9-102(4). An energy performance contract should not be misused in an attempt simply to purchase equipment without regard to energy savings and without regard to other supporting services, such as maintenance, monitoring and other activities that are necessary to ensure energy savings."

In Summary,

a. Energy performance contracts with vendor financing may be entered validly into by Fire Districts, other municipalities and school districts (and it would seem Fire Districts may do so without the usually mandatory voter approval but this is not free from doubt.)

b. Third-party financing for an energy performance contract may be validly entered into by Fire Districts, other municipalities and school districts (and it would seem Fire Districts may do so without voter approval but this is not free from doubt) and certain other relevant elements of General Municipal Law Section 109-b should also be complied with.

c. Energy performance contracts may be entered into only for equipment and incidental reconstruction costs in connection therewith, *not* for integral structural elements, such as roofs and windows and internal elements such as wall insulation and asbestos removal.

d. The installment purchase agreements entered into in connection with an energy performance contract should comply with the level annual debt service rules of the LFL, in accordance with the requirements of General Municipal Law Section 109-b applied to the financing portion of the transaction (but not to the energy performance contract portion).

e. A Fire District could adopt a bond resolution (subject to mandatory referendum) for the purchase and installation of energy-saving equipment (complying in such case with voter referendum requirements), and, in conjunction therewith, enter into an energy performance contract as a service contract with a guaranteed savings provision. However, as the serial bonds or bond anticipation notes would be payable regardless of savings and would not be subject to a non-appropriation clause, the energy performance contract would require drafting to account for such structure (unlike the cases of vendor financing or third-party institutional financing, both of which are subject to a non-appropriation clause). For example, such an energy performance contract would require not only savings and penalties for the lack thereof, but also a termination/liquidated damages provision for payment to the Fire District in the event of non-appropriation and/or cancellation, in order for the Fire District to pay off its general obligation debt. Also, any "savings" projected (and achieved) in an energy performance contract must be net of any State aid for the project. Such debt would need an early redemption provision.

CHAPTER SEVENTEEN

Bond Insurance and Section 168.00 of the Local Finance Law

A Board of Fire Commissioners is authorized and empowered by Section 168.00 of the LFL to enter into agreements (and delegate to the chief fiscal officer authority to do so) as it deems reasonable and appropriate with any department or agency of the United States of America, the State, or any other financially responsible party to facilitate the issuance, sale, resale and payment of bonds, notes, or other evidences of indebtedness of such Fire District, including, but not limited to letters of credit, lines of credit, revolving credit, bond insurance or other credit enhancements. Such agreements may provide for (i) the advance or advances of funds on behalf of such public body to pay the interest on and principal and premium of bonds, notes or other evidence of indebtedness of such Fire District on their date or dates of maturity or redemption or when interest is otherwise due and for (ii) the reimbursement of such advance or advances by such Fire District.

Before the great credit meltdown of 2008, bond insurance was often utilized in Fire District bond issues and the major insurance companies providing bond insurance to general obligation bonds issued in New York State were Ambac Indemnity Corporation ("AMBAC"), Financial Guaranty Insurance Company ("FGIC"), MBIA Corporation ("MBIA"), Financial Security Assurance, Inc., ("FSA") and CIFG Assurance. Losses due to insuring collateral mortgage obligations and subsequent ratings downgrades made most bond issuers unable to sell bond insurance that would save the issuer money on the interest cost. Now, in 2010 the market is just beginning to redevelop and the players have changed to some extent: Assured Guaranty Municipal Corporation, Municipal and Infrastructure Assurance Corporation, Everspan Financial Guaranty Corporation (formerly AMBAC), and National Public Finance Guarantee Corporation (owned by MBIA) are the emerging bond insurers. Whether a serial bond issue should be insured is a financial question: Will it save the Fire District money on the interest rates the Fire District will have pay to the holders of the debt? In competitive bond sales, it is generally the purchasing broker-dealer who decides whether to buy bond insurance (and pays for it out of any expected profits from resale of the debt). In a negotiated bond transaction, it is the Fire District which decides (and pays the premiums which Section 168.00 of the LFL permits to be treated as part of the cost of the object(s) or purpose(s) being financed by the bonds), usually with the help of a financial advisor.

It is common for a financial advisor to a Fire District to run anticipated debt service schedules at anticipated insured and uninsured rates to assist in making this determination.

Bond anticipation notes are not subject to the bond insurance option although they can be sold with a letter-of-credit purchased from a bank, which serves as a credit enhancement. As this is very rare in New York State for Fire District note issuers, it will not be further discussed in this primer.

If it is the Fire District that is determining to acquire (and pay for) bond insurance, the Fire District must take the following considerations into account pursuant to Section 168.00 of the LFL:

"1. consider the ability of the credit or liquidity enhancement provider to make required payments as and when due under the terms of the appropriate governing instruments;
2. consider the business reputation of the credit or liquidity enhancement provider;
3. consider the maximum term of the credit or liquidity enhancement relative to the maturity of the bonds, notes or other obligations being credit or liquidity enhanced;
4. provide for the right of substitution for the credit or liquidity enhancement provider in all agreements, including a provision permitting such substitution when the rating of the credit or liquidity enhancement provider falls below the probable credit rating of the issue without considering the credit or liquidity enhancer; and
5. consider the cost of the credit or liquidity enhancement relative to the savings or other benefit likely to be achieved through the utilization of the credit or liquidity enhancement."

CHAPTER EIGHTEEN

Reserve Funds

This chapter will discuss capital reserve funds and repair reserve funds in some detail and then simply note other reserve funds available to Fire Districts.

The Establishment of Capital Reserve Funds in Fire Districts

Section 6-g of the General Municipal Law is the statutory authority for most types of Fire Districts in New York State to accumulate money for future capital purposes. In Fire Districts, capital reserve funds may be established by action of the Board of Fire Commissioners, subject to authorization by a majority of the voters at any annual or special Fire District meeting. The vote of the public is mandatory, not permissive.

Capital reserve funds may be established for the purpose of financing in whole or in part the cost of the following objects or purposes for which bonds may be issued:

a. The construction, reconstruction or acquisition of a specific capital improvement or acquisition of a specific item or specific item of equipment.
b. The construction, reconstruction or acquisition of a type of capital improvement or the acquisition of a type of equipment.

The term "capital improvement" means:

1. Any physical betterment or improvement or any preliminary studies and surveys relative thereto.
2. Land or rights in land.
3. Any furnishings, equipment, machinery or apparatus for any physical public betterment or improvement acquired at the time when such betterment or improvement is constructed, reconstructed or acquired.

The term "equipment" includes any equipment, machinery or apparatus not included in the definition of the term "capital improvement" and for the acquisition of which a period of probable usefulness has been provided by law.

The resolution of establishment, as well as the proposition itself, authorizing establishment of a capital reserve fund should specify:

1. The purpose for which the fund is established, and if it is for a specific capital improvement or specific item or items of equipment, the maximum estimated cost of same;
2. The ultimate amount of the fund;
3. The probable term or number of years over which the fund is to be built up; and
4. The source(s) from which the funds are to be obtained.

In Fire Districts the published notice of the district meeting must state that the proposition to establish a capital reserve fund is being submitted to a vote of the people. The notice should also include the four (4) items of information listed above in the form of an abstract of the establishment resolution.

Below is a typical form of proposition which might be used for a particular capital reserve fund. The details of any proposition would be different in order to cover the particular items to be included in the establishment of each fund.

CAPITAL RESERVE FUND PROPOSITION

Shall the following resolution be adopted, to-wit:

RESOLVED, that the Board of Fire Commissioners of the Duke Central Fire District, is hereby authorized to establish a capital reserve fund pursuant to Section 6-g of the General Municipal Law to be designated "Facilities Improvement Capital Reserve Fund" in order to defray the cost of the construction, reconstruction and equipping of Fire District buildings and other facilities, including original equipment, machinery, apparatus, appurtenances, furnishings and other incidental improvements and expenses in connection therewith, and, in order to accomplish the same, said Board is hereby authorized to establish the ultimate amount of such Reserve Fund to be $1,000,000 plus accrued interest and other investment earnings with a probable term of ten years and, to appropriate from available fund balance and/or other legally available funds of the Fire District to such Reserve Fund.

If more than one reserve fund is established by a district, there should be a separate bank account for each such fund. The title of each reserve fund will be determined in accordance with the purpose specified in the original resolution.

Any capital gains or interest earned would become a part of the respective capital reserve fund.

Expenditures to be made from a capital reserve fund are subject to the following:

- An expenditure from a reserve fund is to be made only upon authorization by the Board of Fire Commissioners by resolution and if for a specific capital improvement or a *specific* item or *specific* items of equipment, the cost of which may be financed therefrom it is not subject to permissive referendum. However, if a proposed expenditure is from a fund established for a *type* of capital improvement or equipment the authorization of such an expenditure shall be subject to a permissive referendum. When ten (10) working days after the adoption by a Board of Fire Commissioners of the resolution being subject to a permissive referendum, the Fire District secretary, in the same manner as provided for notice of annual elections, must publish a notice which sets forth the date of adoption of the resolution and contains an abstract of such resolution concisely stating the purposes and effect thereof. The notice is to specify that such resolution was adopted subject to a permissive referendum.

- Any such resolution of the Board of Fire Commissioners subject to permissive referendum will not take effect until thirty (30) days after its adoption; nor until approved by the affirmative vote of a majority of the electors of the Fire District affected, qualified to vote at an annual election of Fire District officers, voting on such proposition, if within thirty (30) days after its adoption there be filed with the Fire District secretary a petition signed and acknowledged or proved in the same manner as a deed to be recorded, by resident taxpayers of such Fire District, owning taxable real property aggregating at least one-quarter of the assessed valuation of all the taxable real property of the Fire District as such valuation appear upon the latest completed assessment roll of the town or towns in which said Fire District is located, protesting against such resolution and requesting that it be submitted to the qualified electors of the Fire District affected for their approval or disapproval.
- If such petition be so filed not more than forty-five (45) days nor fewer than thirty (30) days prior to an annual election of Fire District officers, a proposition for the approval of such resolution is to be submitted at the annual election of Fire District officers. If a petition be so filed at any other time, a proposition for the approval of such resolution is to be submitted at a special fore district election to be held not more than forty days after the filing of such petition.
- If, within five days after the filing of such petition, a written objection thereto be filed with the Fire District secretary, and a verified petition setting forth the objections be presented by the person so filing such objections to the supreme court or any justice thereof of the judicial district in which such Fire District or any part thereof is located, such court or justice within twenty (20) days shall determine any questions arising thereunder and make such order as justice may require. Such proceeding shall be heard and determined in the manner prescribed by Section 16-116 of the Election Law.
- A proposition for the submission of any such resolution of the Board of Fire Commissioners to the approval of the said qualified electors pursuant to this section shall contain an abstract of such resolution concisely stating the purpose and effect thereof. The Fire District secretary shall prepare such abstract with the advice of the attorney for

the Fire District, if there be one, and forthwith transmit the proposition to the Board of Fire Commissioners in the form in which it is to be submitted as such annual or special election of such Fire District. If there be more than one such proposition to be voted upon at such election, each proposition shall be separately and consecutively numbered.

Transfers of all or a part of any such reserve fund to any other capital reserve fund are possible. The Board of Fire Commissioners may authorize the transfer to the credit of another capital reserve fund of such Fire District all or part of:

a. The unexpended balance remaining in a capital reserve fund established for a specific capital improvement or a specific item or specific items of equipment, on which improvement has been completed or acquired, or which equipment has been acquired, after deducting from such balance a sum sufficient to satisfy all outstanding claims arising from the construction, reconstruction or acquisition of such capital improvement or the acquisition of such equipment.
b. The unexpended balance remaining in a capital reserve fund established for a specific item or specific items of equipment which have not been acquired or a specific capital improvement which has not been completed or acquired or remaining in a fund established for a type of capital improvement or a type of equipment. If the proposed transfer is from a fund established for a specific capital improvement or a specific item or specific items of equipment, the authorization of such transfer shall be subject to a permissive referendum if the authorization of the creation of a fund for such capital improvement or item or items of equipment was subject to permissive referendum.

The Fire District treasurer must keep a separate account of each fund established. Such account is to show the various amounts put into the fund by dates, interest earned and capital gains or losses resulting from the sale of investments, each withdrawal from the fund and the amount of any investments in federal or state obligations and the cash balance.

The members of the Board of Fire Commissioners are declared "trustees" of such funds and are subject to all the duties and responsibilities imposed by law on trustees, and such duties and responsibilities may be enforced by the Fire District or by any board, commission, agency, officer or taxpayer thereof.

It is a rare provision and important to note that the members of the Board of Fire Commissioners are guilty of a misdemeanor (a criminal charge) if they:

a. Authorize a withdrawal from a fund for any purpose other than for a capital improvement or an item or items of equipment, the cost of which has been authorized to be financed in whole or in part from such fund.
b. Expend any money withdrawn from a fund for a purpose other than that for which it was authorized to be withdrawn.

These provisions are in addition to any other penalties provided by law.

Note: It is improper to use capital reserve fund moneys to pay debt service on notes or bonds issued to finance a capital item. This is a common misconception, but in applicable law, paying for the item is *not* the same as paying debt service for this item. However, Fire Districts may establish a reserve fund for bonded indebtedness.

Where any Fire District is located wholly or partly in a town which is wholly or partly in the Adirondack Park and has within the town boundaries state lands assessed at more than thirty (30) percent of the total assessed valuation of the district, such Fire District may not establish a capital reserve fund except on the consent of the State Comptroller, likewise, for any expenditure or transfer from such a reserve fund of such a Fire District.

Section 6-g of the General Municipal Law authorizes the investment of capital reserve fund moneys under specified conditions. Special time deposit accounts or certificates of deposit constitute acceptable forms of investment providing: (a) the bank or trust company is located in and authorized to do business in New York State, (b) the money shall become available when needed, and (c) the investment is secured by a pledge of obligations of the United States or New York State.

Capital reserve fund moneys may also be invested in obligations of the United States, New York State, or the Fire District and in accordance with rules specified in Sections 10 and 11 of the General Municipal Law. Unless registered in the name of the Fire District, such obligations shall be purchased through and held in the custody of a bank or trust company in New York State. They must be redeemed through such bank and must be redeemable at the option of the Fire District.

The Establishment of Repair Reserve Funds in Fire Districts

The authority to establish a repair reserve fund is Section 6-d of the General Municipal Law. What is the difference between a repair and a capital reconstruction project? Good question. In a nutshell, it is the difference between an operating expense and a capital expense. A repair is a type of improvement of a facility or of equipment, not recurring annually or in a shorter time frame, but it is also not major or structural work. Think of patching a roof versus replacing a roof.

The Board of Fire Commissioners, without voter approval, may establish a repair reserve fund by majority vote of its members. Moneys paid into the funds, be it from a budgetary appropriation or from revenues not required by law to be paid into any other fund or account or by transfer from another reserve fund, also do not require specific voter approval.

In cases of emergency, expenditures may be made simply by a two-thirds (2/3) affirmative vote of the strength of the Board of Fire Commissioners without voter approval or public hearing. However:

a. not less than one-half (1/2) of the moneys so expended must be repaid in the next fiscal year.
b. the remainder of the moneys used must be repaid in the second fiscal year.

In order to use these funds for any purpose other than an emergency, the board must hold a public hearing and publish a notice of such hearing in a designated newspaper at least five (5) days prior to the hearing (The law is quite specific as to the content of the newspaper notice, so check with Fire District Counsel before publication).

In addition to emergency use, such moneys after public hearing can be used only for:

a. repairs of capital improvements or equipment which repairs are of a type not recurring annually or at shorter intervals.
b. transfer to a Capital Reserve Fund established under the provisions of Section 6-g of the General Municipal Law.

The moneys in a Repair Reserve Fund must be deposited in a bank designated by the board, must be deposited in a separate bank account, and be invested with interest added to the fund.

Very unusual for a municipal law provision, the members of the Board of Fire Commissioners shall be guilty of a misdemeanor if they:

a. authorize a withdrawal from a Repair Reserve Fund for any purpose except as provided in this section.
b. expend any money withdrawn from a Repair Reserve Fund for a purpose other than that provided in this section.

A Repair Reserve Fund can be abolished by Board Resolution. Then what happens to any remaining moneys?

Once established, there is no way for the board to use repair reserve moneys except for (1) proper repairs or (2) transfer to a capital reserve fund. The board may not, even with voter approval, authorize the transfer of unneeded or unused repair reserve moneys back to the General Fund, except in the circumstances discussed above.

The following Reserve Funds are also available to Fire Districts.

1. **Reserve for Employment Benefit and Accrued Liabilities**
   (Statutory Authority: General Municipal Law, Section 6-p).
   The purpose of this reserve fund is to make payment of the monetary value of accumulated or accrued and unused sick leave, holiday leave, vacation leave, time allowance granted in lieu of overtime compensation and other forms of payment for accrued leave time and benefits due to a municipal employee upon termination of municipal employment. The reserve may be established without voter approval by board action and is funded by budgetary appropriations and such other funds as may be legally appropriated. Funds may be spent, without voter approval, for cash payment of the monetary value of accumulated or accrued and unused sick leave, holiday leave, vacation leave, time allowance granted in lieu of overtime compensation; the reasonable costs of the administration of the reserve fund, expert or professional services rendered in connection with claims. The moneys remaining in the fund may be transferred to any other reserve fund. This reserve is accounted for in the General Fund.

2. **Workmen's Compensation Reserve**
(General Municipal Law, Section 6-j)
The purpose of this reserve fund is to pay for compensation benefits and other expenses authorized by Article 2 of the Workers' Compensation Law and for payment of expenses of administering this self-insurance program. The reserve may be established without voter approval by board action and is funded by budgetary appropriations and such other funds as may be legally appropriated. Funds may be spent, without voter approval, only for the payment of compensation and benefits, medical, hospital or other expense authorized by the Workmen's Compensation Law and for expenses administering the self-insurance program. Sixty (60) days after the end of any fiscal year, excess amounts may be transferred either to another reserve or may have the excess applied to the appropriations of the next succeeding fiscal year's budget. This reserve is accounted for in the Risk Retention Fund.

3. **Unemployment Insurance Payment Reserve**
(General Municipal Law, Section 6-m)
This reserve fund is used to pay the cost of reimbursement of the State Unemployment Insurance Fund for payments made to claimants where the employer has elected to use the benefit reimbursement method. The reserve may be established without voter approval by board action and is funded by budgetary appropriations and such other funds as may be legally appropriated. Funds may be spent, without voter approval, only as required by law to pay into the unemployment insurance fund an amount equivalent to the amount of claimant benefits paid. Sixty days after the end of any fiscal year, excess amounts may either be transferred to another reserve or the excess applied to the appropriations of the next succeeding fiscal year's budget.
If the employer elects to convert to tax (contribution) basis, excess of fund over sum sufficient to pay pending claims may be transferred to any other reserve fund. This reserve is accounted for in the Risk Retention Fund.

4. **Reserve Fund for Bonded Indebtedness**
(General Municipal Law Section 6-h).
The purpose of this reserve is to provide for gradual use of the moneys of the Fire District for debt service on bonds of the Fire District with a maximum of at least five years. Transfers to a capital reserve fund permitted with voter approval. Interest earned may be credited to the reserve and used to pay future debt service. This reserve is accounted for in the Debt Service Fund and also has a misdemeanor provision.

5. **Mandatory Reserve for Debt Service**
(General Municipal Law, Section 6-1)
Upon the sale of district property that was financed by obligations which remain outstanding at the time of sale, a reserve must be established for the purpose of retiring the outstanding obligations separate from the section 6-h fund described above. The funding of the reserve is from the proceeds of the sale of board-financed district facilities or other capital improvement. This reserve is accounted for in the Debt Service Fund.

6. **Insurance Reserve**
(General Municipal Law, Section 6-n)
This reserve is used to pay liability, casualty and other types of losses, except losses incurred for which the following types of insurance may be purchased: life, accident, health, annuities, fidelity and surety, credit, title residual value and mortgage guarantee. In addition, this reserve may not be used for any purpose for which a special reserve may be established pursuant to law, e.g., Unemployment Compensation Insurance. This reserve may be established by board action and funded by budgetary appropriations or such other funds as may be legally appropriated. There is no limit on the amount that may be accumulated in the Insurance Reserve; however, the annual contribution to this reserve may not exceed the greater of $33,000 or 5% of the budget. Settled or compromised claims up to $525,000 may be paid from the reserve without judicial approval. This reserve is accounted for in the Risk Retention Fund.

7. **Retirement Contribution Reserve**
(General Municipal Law Section 6-r)
This provides for payment to the New York State Employee Retirement System or the Police and Fire Retirement System. Voter approval is not needed to authorize establishment or expenditures. Transfer to other reserve funds requires public hearing. It has a misdemeanor provision.

8. **Contingency and Tax Stabilization Reserve**
(General Municipal Law Section 6-e)
This type of reserve fund provides a source of funding to cover an unanticipated revenue loss chargeable to the general fund of a Fire District. It is established by resolution of the Board of Fire Commissioners subject to permissive referendum. Expenditure is by resolution of the Board of Fire Commissioners adopted by affirmative vote of two-thirds (2/3) of the voting strength thereof after recommendation by the Chairman of the Board of Fire Commissioners. The statute provides limitations on the amount of funding permissible and the amount of expenditure therefrom permissible in a fiscal year. There is a misdemeanor provision.

Available Reserves for Fire Districts in New York State—*Summary Table*

Type Reserve Fund	Procedure To Establish	Usage and Restrictions
Capital Reserve	Mandatory Voter Authorization	For Capital Expenses—e.g. construction, reconstruction and vehicle or equipment purchases. An expenditure resolution is subject to permissive referendum unless the reserve fund was established of a specific item or items. Must specify maximum amount, source(s) of funding and intended use(s).
Repair Reserve	Board Authorization	Voter approval is required to fund this reserve. Expenditures can only be made after a public hearing (except in emergency). Expenditures can be made only after a public hearing (except in emergency). Repairs of equipment or facilities of a type not recurring annually or shorter time frame.
Mandatory Reserve for Debt Service	Mandatory by Board Action	To pay outstanding debt on property sold with sale proceeds. Reserve must be established for the purpose of retiring the outstanding obligations which financed such property.
Reserve Fund for Bonded Indebtedness	Board Authorization	For payment of future debt service on bonds on resolution of Board for debt with a maximum maturity of not less than five years.
Insurance Reserve	Board Authorization	Provides funding for most losses for which district is authorized or required to purchase or maintain insurance. Cannot be used for losses for which another type of reserve may be established.
Workers' Compensation Reserve	Board Authorization	Funding is for the purpose of compensation and benefits authorized by the Workers Comp Law and for administering a self-insurance program.
Unemployment Payment Insurance Reserve	Board Authorization	Funding as required by law to pay into unemployment insurance fund in the amount equivalent to the claimant benefits paid. Excess in fund over sum sufficient to pay pending claims may be transferred to any other reserve fund.
Retirement Contribution Reserve	Board Authorization	Funding retirement contributions to the State retirement systems.
Employee Benefit Accrued Liability Reserve	Board Administration	Fund cash payments for monetary value of accrued and accumulated but unused and unpaid sick, personal, holiday, vacation and certain other forms of leave or time allowances.
Contingency and Tax Stabilization Reserve	Board Authorization subject to perm. ref.	Funds an unauthorized revenue loss chargeable to the General Fund subject to statutory limitations.

CHAPTER NINETEEN

Focus On Fire-Fighting Vehicles

Introduction

There are four (4) basic steps in order for a Fire District to finance the acquisition of a fire-fighting vehicle:

1. Board adoption of bond resolution and authorization to call a vote;
2. Voter approval of a proposition;
3. Publication of estoppel notice; and
4. Sale of Fire District obligations.

Each of these is discussed in some detail below, and it is somewhat repetitive of information in earlier general information chapters.

Calling the Vote

Voter approval is required in order for any Fire District to finance the acquisition of fire-fighting vehicles. Thus, the first step in such a financing is for a Board of Fire Commissioners to adopt a bond resolution and a resolution either to (a) call a special district meeting and election on a proposition to approve such a financing, or (b) determine to include such a proposition at the annual election of the Fire District. The bond resolution is subject to the affirmative vote of three-fifths (3/5) of the voting strength of the Board. The resolution calling for the referendum on that bond resolution is subject to the affirmative vote of a majority of the voting strength of the Board of Fire Commissioners. Each resolution is typically drafted by bond counsel to the Fire District in conjunction with the Fire District attorney.

Fire District voters vote upon a proposition to approve a bond resolution already adopted by a Fire District Board of Fire Commissioners.

The language of the proposition is always a matter deserving attention.

A proposition can authorize a specific object(s) or purpose(s) or a class of objects or purposes. If the Fire District specifies the exact number of vehicles it plans to acquire, that is "specific;" if you just authorize the acquisition of "fire-fighting vehicles," that is a "class." What is the difference? If a specific number of vehicles is authorized by the voters, that is what the board must acquire; if it turns out the amount of dollars authorized is insufficient for the number of vehicles, the Fire District has a problem on its hands. If, however, a class is authorized, i.e., “fire-fighting vehicles,” then greater flexibility ensues. Flexibility is generally preferable. While such problems are rare in vehicle votes, they can be quite embarrassing (and one can well imagine the issues which can arise in propositions for multi-facility building or reconstruction projects).

There are also essential legal elements of a proposition (magic language), the absence of any one of which can make even a successful vote invalid, including the issuance of obligations. This is bond counsel’s job.

Thus, in a nutshell, the proceedings calling for a vehicles vote deserve attention to detail by recognized bond counsel, in consultation with officials of the districts. Like many things, the end result looks simple, but it isn’t.

Voter Approval of Proposition

If a vehicles proposition is to be part of an annual vote, the notice requirements for the proposition vote piggyback on the existing rules for an annual Fire District election and only require the addition to the published meeting notices, of information about the vehicle proposition. Again, the wording is the job of bond counsel.

If a vehicle proposition is to be presented at a special election for that purpose, there is a basic set of rules governing calling and notice of the election, who can vote, hours of voting, form of ballot, place of voting, and vote officials and tabulation/presentation. These rules are basically congruent with those for an annual election.

These can be summarized as follows:

a. Notice: Notice at least twenty-seven (27) days prior to referendum and not more than thirty-four (34) days before in the official newspaper having general circulation in district.
b. Wording of Notice: Must contain where, when (date and hours), who can vote, form of proposition, details about absentee ballots and additional personal registration, if available. (Would also need status of project under SEQRA if not a vehicle vote.)
c. Who Can Vote: Same qualifications as at annual meeting.
d. Forms of Ballot: Paper or machine is permissible.
e. Where to Vote: Same place(s) as at annual meeting is preferable but not legally required.
f. When to vote: At least the consecutive hours between the hours of 6:00 p.m. and 9:00 p.m. and any consecutive hours thereafter.
g. Vote Officials: Permanent Chair, Inspectors of election, including chief inspector(s), and ballot clerks must be named if not already named for the year at least forty (40) days before the vote. Notice of this no longer needs publication as was true under prior law.

h. Vote Tabulation and Presentation: Written report by inspectors of elections and presented by chief inspector of election to Secretary for filing within twenty-four (24) hours if election districts, announced at meeting if single vote site, and board shall tabulate and announce results within twenty-four (24) hours thereof.

Board of Fire Commissioners Implementation of Public Vote

In a Fire District, since the bond resolution authorizing the issuance of bonds and/or bond anticipation notes in anticipation of the issuance of bonds has already been adopted, subject to voter approval, it is now time to publish a legal notice of estoppel of the bond resolution. There is no timing requirement as to how quickly after the vote such a notice must be published; however, it is generally considered inadvisable actually to go out and contract to acquire the vehicles until the twenty-day estoppel period has elapsed. Why? Because estoppel protects the Fire District and its debt obligations from any validity challenge other than on constitutional grounds once the twenty-day period after publication has elapsed. Thus, any procedural error inadvertently occurring in the process of authorization may not be used to challenge the borrowing after estoppel has passed. The twenty-day estoppel period begins to run on the date of publication. The estoppel notice is usually drafted by bond counsel.

What does a bond resolution do? The function of any bond resolution (including those adopted by a Fire District board prior to a vote) is, in essence, to authorize the financing of a capital project-in this case, fire-fighting vehicles. A vehicle bond resolution has several essential components:

a. an accurate description of the item(s) to be financed (detail down to the level of serial numbers is not necessary);
b. a statement as to whether the vehicle purchase is a specific object or purpose or more than one, a class of objects or purposes;
c. a statement of maximum estimated cost of the vehicles;
d. a plan of financing of the cost of the vehicles, i.e., how much to be financed, how much cash, if any, sources of cash contribution to cost;
e. a statement of the period of probable usefulness of the capital item.
f. a delegation of authority to the Fire District Treasurer, as chief fiscal officer, to arrange for the financing by bonds and/or notes for the vehicles (this is not mandatory but is customary to permit prompt activity when needed);
g. a pledge of the full faith and credit of the Fire District to pay any such obligations by using its unlimited taxing power; and
h. a requirement to publish the estoppel notice described above.

Such a bond resolution is subject to the affirmative vote of three-fifths (3/5) of the voting strength of the Board of Fire Commissioners. Voting strength means the total membership of the board, not simply those board members present at the meeting. After the vote, the estoppel notice described earlier should be published.

Sale of Fire District Obligations

At this point, a Fire District now has both voter and Board of Fire Commissioners authority to proceed with the sale of a debt obligation of the Fire District to acquire moneys needed to purchase vehicles and it has published the estoppel notice.

Now what? Firstly, if the Fire District has not involved its financing advisor in this capital project as yet, now may be the time to do so. (In the case of building projects, such involvement should begin far earlier, with Fire District officials, architect, bond counsel and financial advisor meeting at the Fire District *before* the vote to review various issues and options). Is a financial advisor necessary? Talk with your bond counsel on this point if the district is not sure. It is generally true that the good ones will pay for themselves in their assistance to access to the broadest universe of potential purchasers of a district's debt.

A second matter to note at this point: before this point in time when both the public vote and the adoption of the bond resolution are in place, the Fire District did not have the authority to enter into any contracts to purchase vehicles if the intention had been to pay for them through debt issuance. In addition, both local finance law in New York State and federal tax law overseeing tax-exempt debt issuance by municipalities including Fire Districts contain strict rules governing reimbursement of cash advances paid for capital items, for which later debt issuance is intended. Thus, both contractual obligation and initial expenditure for vehicles should be discussed with bond counsel *prior to* the respective event.

The sale and issuance of debt obligations to obtain funds to purchase a fire-fighting vehicle will require attention to several basic financing options:

a. "short-term" debt (bond anticipation notes) vs. "long-term" debt (serial bonds);
b. local private sale vs. public competitive sale;
c. production of an official statement, or not;
d. sale timing, issuance timing;
e. paydown of principal options including prepayment options;
f. lease purchase (installment sale) vs. outright purchase with separate borrowing.

We will discuss each of these briefly, except lease-purchases which is a separate topic completely in another chapter. Suffice it to say here, show me the rate!

BANs or Bonds. The district has the option to issue bonds or bond anticipation notes ("BANs"). BANs generally mature within one year, at which time they may be renewed, after the paydown of a portion of the principal due (principal paydowns must begin no later than the second anniversary of the first borrowing). Similar to a variable rate home mortgage in respect to interest rate risk, each year at renewal, the Fire District is subject to the then-current interest rate environment and the district's then-current rating by companies like Moody's who rate issuers. Nevertheless, as typically one-year obligations, the interest rate is always, or almost always historically, lower than longer term debt. Thus, a district might choose to issue one year BANs at the then-current one-year rate each year for five years. (After the fifth anniversary date of the initial borrowing, you must issue serial bonds for the balance or totally pay off the debt). This option would also permit a Fire District to use unexpected excess cash to pay down extra principal on any annual maturity date, prior to renewal.

The issuance of serial bonds to obtain funds to purchase a fire truck involves establishing at sale a single-interest rate or rates per maturity on a single date of sale, which then locks that rate or rates in for the life of the bonds. Likewise, the annual principal paydowns must be predetermined prior to sale in order to establish what the purchasers are going to be buying. There is usually no ability to pre-pay all or any portion of a serial bond issue with a five-year maximum maturity. On the other hand, in a period of rising interest rates, it is a very reasonable decision to set and lock rates for now before they increase. (If you personally are sure of which way interest rates are going at any particular time in the future, please do call me at my home number, I'd like to meet you and be your friend.)

Public or Private Sale. The sale of BANs and serial bonds can involve private local placement or public competitive sale, but if over $1,000,000, competitive sale of bonds (not notes) is legally required at this time. Unlike bonds, BANs may be sold at public sale or privately placed with local banks or regional investment banking houses, regardless of the size of the issue. Note: Serial bonds can only be privately placed if they do not exceed $1,000,000 in principal amount. (If you are a Fire District buying more than $1,000,000 worth of fire-fighting equipment, you are one awfully big Fire District and there are some!) One of the roles of a financial advisor is to assist in the determination of how to sell the debt, between the legally available options.

Paydown of Principal Options. There are a few basic legal rules in this regard that must be considered:

a. The Two-Year Rule: The Fire District must begin to pay down principal within two (2) years of the original date of issuance, but may pay down its first principal earlier. (If you delay in the case of five-year items like buses, it does substantially increase what the last four payments will look like.)
b. Method of Amortization: These are fancy words for determining the overall structure of debt service over the payoff period. There are two methods: (1) substantially level annual debt service in which principal and interest payments are substantially equal in each year (not usually perfectly equal) similar to home mortgage payments except that BANs usually pay interest and principal annually and bonds usually pay interest semiannually and principal annually, or (2) what is known as "50% rule debt" in which principal is structured according to the Constitutionally based rule that no principal payment over time may exceed any prior smaller principal payment by more than 50% (i.e., $100 paid off in 2010, no principal payment thereafter may exceed $150). This rule was designed to prevent excessive backloading of principal payoffs onto later generations of taxpayers.

The municipal market has traditionally accepted serial bonds with ten-year call protection. Thus, if a Fire District finds it important to have an option to pay off vehicle debt early, they will want to keep the vehicle debt in BANs renewed annually.

Official Statements. Bond or note sales can involve production of an official statement in conjunction with a financial advisor. This is a booklet "prospectus" providing material information about the Fire District to potential purchasers. While generally unnecessary for smaller bond or note issues locally sold, it can open up the universe of potential purchasers (such as mutual funds) for larger bond or note issuers, and thus pay for itself. An official statement must be one hundred percent (100%) accurate in its presentation of the financial condition of a Fire District.

The SEC is very interested in anyone who fails to be entirely accurate. For this reason, reputable bond counsel with SEC expertise on staff is a practical necessity nowadays for the public sale of Fire District debt. What this necessarily implies is that, if your Fire District is going through a difficult financial patch and you would rather not disclose all of the unpleasant details in print, you may not want to get involved in a public sale of debt involving production of an official statement. In such cases, with certain constraints, you can privately place your debt with a local bank who already knows what is going on anyway.

Sale and Issuance Timing. These are largely financial, as opposed to legal determinations. There are legal notice requirements and timetables for public sales of debt, but these details can better be considered *in situ* when the Fire District is ready to proceed. The timing of a bond or BAN sale is primarily a function of the condition of the municipal debt markets.

Post Issuance Concerns. Any tax-exempt debt issued by a Fire District is subject to federal arbitrage and arbitrage rebate rules. There are exceptions for smaller issuers and for small issues. *See* Chapter Eleven.

CHAPTER TWENTY

Volunteer Fire Company Financings

Can a volunteer fire company holding corporate status as a not-for-profit corporation under New York State Law actually issue tax-exempt debt in its own name? Yes, it can.

Most people think of local governmental bonds and notes as strictly the domain of counties, cities, towns, villages, school districts and Fire Districts. By and large, this is true. Only political subdivisions of the State have the power to levy a tax to pay debt service on obligations and thus only political subdivisions can issue "general obligation" bonds and notes as described in Chapter One of this primer, which contain the pledge of the local government's "faith and credit."

However, a not-for-profit volunteer fire company can, in fact, issue debt obligations that are not "general obligations," yet are able to offer investors interest that is tax-exempt for federal income tax purposes, thereby lowering the fire company's borrowing cost. How is that? It is the result of one provision in the Internal Revenue Code of 1986 and certain provisions in the not-for-profit law of the State.

The federal tax law provision is Section 150(e) of the Code which reads as follows:

> "(e) **BONDS OF CERTAIN VOLUNTEER FIRE DEPARTMENTS.—For purpose of this part and section 103—**
>
> (1) In General—A bond of a volunteer fire department shall be treated as a bond of a political subdivision of a State if—
>
> (A) such department is a qualified volunteer fire department with respect to an area within the jurisdiction of such political subdivision, and
>
> (B) such bond is issued as part of an issue 95 percent or more of the net proceeds of which are to be used for the acquisition, construction, reconstruction, or improvement of a firehouse (including land which is functionally related and subordinate thereto) or fire truck used or to be used by such department.
>
> (2) Qualified Volunteer Fire Department—For purposes of this subsection, the term "qualified volunteer fire department" means, with respect to a political subdivision of a State, any organization—

(A) which is organized and operated to provide fire-fighting or emergency medical service in an area (within the jurisdiction of such political subdivision) which is not provided with any other fire-fighting services, and

(B) which is required (by written agreement) by the political subdivision to furnish fire-fighting services in such area.

For the purposes of subparagraph (A), other fire-fighting services provided in an area shall be disregarded in determining whether an organization is a qualified volunteer fire department if such other fire-fighting services are provided by a qualified volunteer fire department (determined with the application of this sentence) and such organization and the provider of such other services have been continuously providing fire-fighting services to such area since January 1, 1981.

(3) Treatment As Private Activity Bonds Only For Certain Purposes—Bonds which are part of an issue which meets the requirements of paragraph (1) shall not be treated as private activity bonds except for purposes of section 147(f) and 149(d)"

So, you see, under federal tax law if your volunteer fire company meets the requirements of being "qualified" as described above, then debt issued by the company will be treated like the obligation of a political subdivision like a town or a village, or a Fire District. That is to say, the interest paid on it to buyers (like banks) of your debt will not be taxed on their federal income tax returns. Thus, the interest rates that the company will need to pay to them to loan you money on any notes or bonds issued may well be *lower than*, for example, a commercial bank loan, or an ordinary (taxable) installment purchase agreement.

The relevant sections of the State not-for-profit law are Article 2 and Article 5 which states in relevant portions:

"Section 202. General and special powers:

(a) Each corporation, subject to any limitations provided in this chapter or any other statute of this state or its certificate of incorporation, shall have power in furtherance of its corporate purposes....

(4) To purchase, receive, take by grant, gift, devise, bequest or otherwise, lease, or otherwise acquire, own, hold, improve, employ, use and otherwise deal in and with, real or personal property, or any interest therein, wherever situated.

(5) To sell, convey, lease, exchange, transfer or otherwise dispose of, or mortgage or pledge, or create a security interest in, all or any of its property, or any interest therein, wherever situated....

(9) To make contacts, give guarantees and incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds and other obligations and secure any of its obligations by mortgage or pledge of all or any of its property or any interest therein, wherever situated....

(16) To have and exercise all powers necessary to effect any or all of the purposes for which the corporation is formed."

"**Section 506. Bonds and security interests.**

(a) No corporation shall issue bonds except for money or other property, tangible or intangible, or labor or services actually received by or performed for the corporation or for its benefit or in its formation or reorganization, or a combination thereof. In the absence of fraud in the transaction, the judgment of the board as to the value of the consideration received by the corporation shall be conclusive.

(b) A corporation may pay reasonable interest on its bonds, may issue its bonds at a reasonable discount and may pay a reasonable premium for the redemption thereof prior to maturity, but the holders of its bonds shall not be entitled at any time to receive any part of the income or profit of the corporation nor at maturity to receive more than the principal sum thereof plus interest due and accrued thereon. In the absence of fraud in the transaction, the judgment of the board as to the reasonableness of any such interest, discount or premium shall be conclusive. However, with respect to bonds not a part of a public offering, notwithstanding the terms of the instrument, no member of a corporation shall be entitled to receive, directly or indirectly, as a holder or beneficiary of such bond, prior to maturity or redemption, more than simple interest thereon at a rate equal to the higher of (1) the maximum interest authorized pursuant to section 5-501 of the general obligations law or (2) one percent over the prime rate of interest generally prevailing on the interest due date in the Federal Reserve District of New York, nor at maturity or redemption, more than the principal sum thereof plus any interest, not exceeding the maximum interest herein specified, due and accrued thereon..

(c) A corporation may, in its certificate of incorporation or by-laws, confer upon the holders of any bonds issued or to be issued by the corporation, rights to inspect the corporate books and records and, upon default of interest or principal, to vote in the election of directors. The certificate of incorporation or the by-laws may apportion the number of votes that may be cast with respect to bonds on the basis of the amount of bonds held.

(d) The board may authorize any mortgage or pledge of, or the creation of a security interest in, all or any part of the corporation's personal property, or any interest therein. Unless the certificate of incorporation provides otherwise, no vote or consent of the members shall be required to approve such action by the board."

"**Section 509. Purchase, sale, mortgage, and lease of real property.**

No purchase of real property shall be made by a corporation and no corporation shall sell, mortgage or lease real property, unless authorized by the vote of two-thirds of the entire board, provided that if there are twenty-one or more directors, the vote of a majority of the entire board shall be sufficient."

These provisions authorize a volunteer fire company organized under the not-for-profit corporation law to borrow under state law. Keep in mind, all the Constitutional and statutory rules about Fire District debt discussed in earlier chapters do not apply to you.

Therefore, the first step in considering a volunteer fire company borrowing is to examine the company's Certificate of Incorporation, its constitution and its By-laws, as well as obtain a "Bring-Down Certificate" from the Secretary of State to confirm that the company's Certificate of Incorporation remains effective and that the company is thus a "subsisting corporation." (It has generally been found useful to be sure the corporation borrowing the money actually exists; banks, in particular, are keen to be repaid after all the phantom borrowing that resulted in the 2008 credit crunch.)

Next let us look at the federal tax law requirements, on the assumption that the company is a viable not-for-profit company.

You will have noticed that Section 150(e) of the Code states that volunteer fire company bonds are not treated as "private activity bonds," i.e., they get treatment like any ordinary local governmental bond, except for the application of Section 147(f) and 149(d) of the Internal Revenue Code. You knew there was a catch right? This one is not difficult. Only Section 147(f) is of particular relevance and interest here. (Section 149(d) relates to refinancings).

Section 147(f) of the Code requires (a) a public hearing be held and (b) approval by the local legislative body or chief executive thereafter prior to any debt issuance by the company. Even though it would be the company debt, federal tax law requires that the local political subdivision with which the fire company has a contract to provide fire-fighting services "approve" the debt. This approval does not make that political subdivision liable on the company debt in whole or any part. The wording and timing of the Notice of Public Hearing must comply with certain detailed requirements of U.S. Treasury Department regulations and part of the role of bond counsel is to ensure that the notice and the hearing are in compliance.

The other federal tax law considerations at the outset of a financing is that you must be a "qualified" volunteer fire company and that the capital improvement or item to be financed must be one that the tax law considers eligible for the federal tax exemption. Most volunteer fire companies in New York State should meet the Code definition of "qualified." Any fire house construction or reconstruction project or fire-fighting vehicles or equipment purchase is likely to qualify as eligible. Again, these are questions for bond counsel.

So, in a nutshell, if the fire company meets the requirements described in Section 150(e) quoted above and is a subsisting not-for-profit corporation in New York State, with no restrictions as to debt issuance in its establishment or governing documents, then the volunteer fire company is in a position to consider tax-exempt debt issuance (including lease purchase transactions and mortgage notes) for its capital project or equipment.

Next, we come to the critical juncture of finding a local bank, investment bank, capital leasing department of certain banks or other financial institution interested in purchasing your debt. Since a volunteer fire company is not a political subdivision, this is not as easy as it is for a Fire District.

Before even arranging for a public hearing, the company Treasurer should contact local bankers and the company's local counsel about what may be possible (or talk with municipal leasing bankers). Bond counsel can also usually provide a list of contacts at regional investment banking firms that may have an interest in purchasing or privately placing fire company debt. Because a volunteer fire company does not have the general power of property taxation, bond purchasers may require a mortgage or other security interest on fire company property (even though in real financial difficulty it would be hard to imagine a local bank as holder of a volunteer fire company bond foreclosing on a fire station in order to recover its loaned money.) If the borrowing is a significant amount, say $1,000,000 or over, it may be useful to have a financial advisor on board to help with the debt sale.

The steps in a volunteer fire company tax-exempt financing are thus as follows:

1. Check the establishment proceedings and other documentation and the current by-laws for provisions on debt.
2. Check your basic documentation file also for your company's federal tax status. Are you a Section 501(c)(3) or (c)(4) organization? Check to be sure your contract to provide fire-fighting services is in full force and effect.
3. Hire competent Bond Counsel. (Please note the word "competent").
4. Ask the Secretary of State for a "bring-down" certificate so you are sure of your current existing status.
5. Adopt a resolution requesting the local political subdivision to hold a public hearing on your behalf and with your participation.
6. Hold a public hearing in conjunction with your local political subdivision on at least fourteen (14) days published notice. The notice must include: (a) a functional description of the project, including street address of building or location for equipment, (b) maximum estimated cost, (c) sources of funding, including amount of debt, and (d) the owner/operator of the project.
7. Thereafter, obtain either a resolution of that political subdivision's legislative body or a certificate of its chief executive officer approving the issuance of the particular maximum amount of debt for the particular purpose as described in the public hearing notice.
8. Adopt a resolution of your board of directors by a two-thirds (2/3) or simple majority vote (depending on certain circumstances) to: (a) authorize the issuance of debt obligations in the particular maximum amount and for the particular purposes, (b) authorize the President and Treasurer of the company to sign necessary documentation to sell such debt, and (c) approve any needed security agreement.
9. Hire competent financial advisor if necessary.
10. Sell debt or place debt with purchasing bank, investment bank, other financial institution or very rich local residents.
11. Build firehouse; buy new truck.
12. Celebrate.

And, oh, yes, remember to budget to repay the loan. Please.

CHAPTER TWENTY-ONE

The State Emergency Services Revolving Loan Program

The New York State Emergency Services Revolving Loan Program was established in 1994 (Chapter 599 of the Laws of 1994) under Section 97-pp of the State Finance Law to make loans to cities, villages, Fire Districts, counties and towns and not-for-profit fire/ambulance corporations at an annual fixed interest rate of not to exceed 2.5 percent. Principal and interest payments made by recipients are deposited in a State Revolving Loan Account and loaned once again to new applicants; therefore, funding levels in the account will vary throughout any given year depending upon the amount of repayment money, interest accrued and the number of new loans made. The period of the loan is to be set according to the period of probable usefulness provided for the financed item in the Local Finance Law, but the Local Finance Law is not otherwise applicable. Indeed, the State can require a security interest in any equipment purchased with loan proceeds, something not permitted in Local Finance Law financings.

A city, village, Fire District or incorporated not-for-profit fire/ambulance company is eligible to apply for a loan. Where a fire protection district exists, a town or a county may apply subject to the limitations specified in Town Law Section 184 and County Law Section 225-a, respectively, on their own behalf for equipment to be *used by* (not to be owned by) a not-for-profit under contract, but such loan moneys cannot be given to the not-for-profit in this context. Not-for-profits can apply in their own name since the statutory amendment in 1999.

The following purposes are covered under this loan program:

1. **Fire fighting apparatus**
   Elevated equipment, pumpers, tankers, ladder trucks, hazardous materials emergency responsive vehicles or other such specially equipped motor vehicles used for fire protection, together with the fixtures and appointments necessary to support their functions.
   Maximum Loan Amount: $225,000 or 75 percent of cost, whichever is less.

2. **Ambulance or rescue vehicles**
   Motor Vehicles equipped and used to support fire and emergency service operations. Includes a vehicle specifically for carrying accessory equipment.

Maximum Loan Amount: $150,000 or 75 percent of cost, whichever is less.

3. **Personal protective equipment (PPE) and/or communication equipment**
   Clothing and devices that comply with OSHA standards used to protect personnel who provide emergency services from injury. Includes, but is not limited to: helmets, coats, boots, eye shields, gloves and self-contained respiratory protection devices. Voice or original transmission system or telemetry system used to enhance firefighter safety on the grounds of a fire or of other emergency.
   Maximum Loan Amount: Not to exceed $100,000 for either category individually or combined.

4. **Repair of fire fighting apparatus, ambulances or rescue vehicles**
   Maximum Loan Amount: $75,000 or 100 percent of cost, whichever is less.

5. **Accessory equipment**
   Equipment necessary to support fire fighting or emergency rescue activities which is not communication equipment, protective equipment or motor vehicles.
   Maximum Loan Amount: Not to exceed $75,000.

6. **Renovation, rehabilitation or repair of facilities that house fire fighting equipment, ambulances, rescue vehicles and related equipment**
   Maximum Loan Amount $150,000 or 75 percent of cost, whichever is less.

7. **Construction costs of facilities that house fire fighting equipment, ambulances, rescue vehicles and related equipment.**
   Maximum Loan Amount: $300,000 or 75 percent of cost, whichever is less. (May not be used for designs, planning, applications or other costs not directly related to land purchase or construction).

8. **Construction costs associated with the establishment of facilities for the purpose of live fire training.**
   Maximum Loan Amount: $150,000 or 75 percent of the cost, whichever is less.

Loans may not be used to pay off other outstanding debt and an applicant can only receive one loan in each five-year period. A Fire District is without authority to apply for these loans on behalf of a private Fire Company or Ambulance Company, with such entity actually receiving the loan proceeds. Formal Opinion No. 99-F3 of the Office of the Attorney General. Such entity can however apply directly since Amendment of the statute by Chapter 471 of the Laws of 1999.

This loan program is separate and distinct from the types of debt authorized for Fire Districts by the Local Finance Law. While the maximum maturity of these loans is to be set in accordance with the provisions in the Local Finance Law, the other terms and conditions, including how the debt is to be paid off over time, *i.e.* the loan amortization structure, are between the Fire District and the Department of State, Emergency Services Loan Board. A Fire District must apply to the Department of State for one of these loans. *See* www.dos.state.ny.us/fire/loan.htm. NYS Department of State Office of Fire Prevention and Control. Attn: Loan Department, Albany, New York 12231-0001. Phone: (518) 474-6746.

An application for this type of loan must include a resolution of the Board of Fire Commissioners which should include the following elements:

1. The purpose of the loan: A description of the capital project or equipment, its maximum estimated cost, and its proposed source(s) of funding.
2. Authorization to apply for the loan: The governing body of each applicant must authorize a person by name and title (and his/her designee if appropriate) to submit an application to the NYS Emergency Services Loan Program. The resolution should also authorize the chief fiscal officer to execute all financial and administrative documents relating to the actual loan. The delegation(s) of authority must be clear and sufficient.
3. Funding request: The resolution must indicate the maximum amount of money being applied for through the program. This amount should correspond to the "Amount of Loan Requested" on the application form.
4. Voting page and certifications: The resolution must include a page indicating the "aye" and "nay" votes recorded by name of each member of the Board of Fire Commissioners and certification of the vote by the board secretary. The board secretary should also provide a certificate that the resolution is a true and correct copy of same on file in the minutes of the Fire District.

While bond counsel can assist a Fire District in drafting this resolution, the program does not presently require an opinion of bond counsel that the loan is validly authorized, executed and delivered. The law does, however, require that the loan application, and then the loan, be "otherwise consistent with" the Fire District's powers. (However, the statute does not require by its terms a referendum to approve this type of debt). A Fire District should consult with local counsel before submitting the application and have local counsel review the loan documentation prior to the entering into such an obligation with the State.

APPENDIX A

Transactional Players and Their Roles

Beneficial Bond Holder/Owner:	The actual person, pension fund, corporation or mutual fund who owns the note or bond.
Bond Counsel:	Provides validity and tax opinion on Fire District debt for the benefit of the buyer. Drafts bond related elections and authorization proceedings and sale and closing documentation.
Bond Insurer:	A company that promises to pay debt service on debt it insures if the issuer does not. Sometimes purchased by winning bidders in competitive bond sales or can be part of a negotiated transaction.
Bureau of Public Debt:	Division of the U.S. Treasury Department that issues debt to municipalities for advance refunding escrows.
Chief Fiscal Officer:	The Treasurer.
DTC:	The Depository Trust Company, a corporation formed by banks and investment banks to act as a depository and central processing function for debt sold in book-entry only (i.e. electronic form without each holder getting its own physical paper bonds or note certificate; ownership recorded electronically).

Escrow Agent/Holder:	Bank located and authorized to do business in the State and acting as holder of U.S. Treasury securities in escrow for refunded bond debt service.
Financial Advisor:	Consultant to Fire District on financings, structuring bond and note issues and related matters, including preparation of Official Statements and disclosure law annual compliance of materials.
Finance Board:	Board of Fire Commissioners.
Fiscal Agent:	Often same as paying agent. Keeps record of owners of a bond or note issue and conversions if needed. The Fire District officer named in LFL to this role can delegate to an authorized bank.
General Obligations:	The only type of debt a municipality or school district or Fire District may issue in New York State, pledging the faith and credit and unlimited taxing power of the municipality or school district or Fire District.
Investment Banker:	A person employed by an underwriter to develop negotiated transactions in notes or bonds with municipalities, and Fire Districts; usually an officer of an investment bank or a regular bank.
Issuer:	The local political subdivision i.e., Fire District.
Letter of Credit Bank:	Sometimes used in the note market (like bond insurance).
Local Counsel:	Fire District Attorney.
National Repository:	Filing locale for updated material information about a Fire District. Municipal Securities Rulemaking Board as of July 1, 2009.
Objects or Purposes:	Legal term for a capital project or capital items.

Paying Agent:	Who pays debt service to the holder (or DTC) as and when due.
Rating Agencies:	Independent companies which rate bonds and notes, such as Moody's, Standard & Poor's and Fitch Ratings.
Rebate Compliance Provider:	Vendor, usually the financial advisor that helps the Fire District determine its arbitrage rebate liability if any.
State Comptroller:	You know what these people do (oversees all the financial aspects of the local government).
Taxpayer:	You know who these people are (we-working citizens and residents, including Gus. You know Gus. Every Board has one. He sits in the back of the room and doesn't like anything you do. If he had as much money as time, you'd be in court constantly.)
Trustee Bank:	See Escrow Agent, Paying Agent, Fiscal Agent: A bank or trust company located and licensed to do business in the State.
Underwriter:	A bank or investment bank which is a "broker dealer" buying municipal debt for resale.
Underwriter's Counsel:	Lawyers for the buyers in a negotiated transaction.
Verification Agent:	An independent, specialized accounting firm which verifies that money deposited in the escrow account in an advance refunding is sufficient to pay the intended principal and interest on refunded debt.

APPENDIX B

Sample Bond Counsel Opinion of General Obligation Debt

September 27, 2009

Duke Fire District in the Town of Wayne,
Earl County,
State of New York

Re: Duke Fire District in the Town of Wayne, Earl County, New York
$4,155,000 Fire District (Serial) Bonds, 2009

Ladies and Gentlemen:

We have been requested to render our opinion as to the validity of an issue of $4,155,000 Fire District (Serial) Bonds, 2009 (the "Obligations"), of the Duke Fire District in the Town of Wayne, Earl County, State of New York (the "Obligor"), dated September 15, 2009, initially issued in registered form in denominations such that one bond shall be issued for each maturity of bonds in such amounts as hereinafter set forth, bearing interest at the rate of three and eighty-five hundredths per centum (3.85%) per annum, payable on March 15, 2010 and semi-annually thereafter on September 15 and March 15, and maturing in the amount of $225,000 on September 15, 2010, $230,000 on September 15, 2011, $250,000 on September 15, 2012, $275,000 on September 15 in each of the years 2013 to 2018, both inclusive, and $300,000 on September 15 in each of the years 2019 to 2024, both inclusive. [**Description of the debt obligation**].

Bonds maturing on or before September 15, 2018 are not subject to redemption prior to maturity. Bonds maturing on or after September 15, 2019 are subject to redemption prior to maturity as a whole or in part (and by lot if less than all of a maturity is to be redeemed) at the option of the Fire District on September 15, 2018 or on any interest payment date thereafter at par, plus accrued interest to the date of redemption. [**Description of the early redemption features, if any**].

We have examined:

(1) the Constitution and statutes of the State of New York;

(2) the Internal Revenue Code of 1986, including particularly Sections 103 and 141 and 150 thereof, and the applicable regulations of the United States Treasury Department promulgated thereunder (collectively, the "Code");

(3) an arbitrage certificate executed on behalf of the Obligor which includes, among other things, covenants, relating to compliance with the Code, with the owners of the Obligations that the Obligor will, among other things, (i) take all actions on its part necessary to cause interest on the Obligations not to be includable in the gross income of the owners thereof for Federal income tax purposes, including, without limitation, restricting, to the extent necessary, the yield on investments made with the proceeds of the Obligations and investment earnings thereon, making required payments to the Federal Government, if any, and maintaining books and records in a specified manner, where appropriate, and (ii) refrain from taking any action which would cause interest on the Obligations to be includable in the gross income of the owners thereof for Federal income tax purposes, including, without limitation, refraining from spending the proceeds of the Obligations and investment earnings thereon on certain specified purposes; and

(4) a certificate executed on behalf of the Obligor which includes, among other things, a statement that compliance with such covenants is not prohibited by, or violative of, any provision of local or special law, regulation or resolution applicable to the Obligor.

We also have examined a certified copy of proceedings of the finance board of the Obligor and other proofs authorizing and relating to the issuance of the Obligations, including the form of the Obligations. In rendering the opinions expressed herein we have assumed the accuracy and truthfulness of all public records, documents and proceedings, including factual information, expectations and statements contained therein, examined by us which have been executed or certified by public officials acting within the scope of their official capacities, and have not verified the accuracy or truthfulness thereof. We also have assumed the genuineness of the signatures appearing upon such public records, documents and proceedings and the certifications thereof. [**Description of the law and documentation reviewed**].

In our opinion:

(a) The Obligations have been authorized and issued in accordance with the Constitution and statutes of the State of New York and constitute valid and legally binding general obligations of the Obligor, all the taxable real property within which is subject to the levy of ad valorem taxes to pay the Obligations and interest thereon, without limitation as to rate or amount; provided, however, that the enforceability (but not the validity) of the Obligations (i) may be limited by any applicable bankruptcy, insolvency or other law now existing or hereafter enacted by said State or the Federal government affecting the enforcement of creditors' rights, and (ii) may be subject to the exercise of judicial discretion in appropriate cases. [**Validity Opinion**].

(b) The Obligor has the power to comply with its covenants with respect to compliance with the Code as such covenants relate to the Obligations; provided, however, that the enforceability (but not the validity) of such covenants may be limited by any applicable bankruptcy, insolvency or other law now existing or hereafter enacted by said State or the Federal government affecting the enforcement of creditors' rights. [**Covenant authority of the issue**].

(c) Interest on the Obligations is excluded from gross income for federal income tax purposes under Section 103 of the Internal Revenue Code of 1986, and is exempt from personal income taxes imposed by the State of New York and any political subdivision thereof (including The City of New York). Interest on the Obligations is not a specific preference item for purposes of the federal individual or corporate alternative minimum taxes, not is it included in adjusted current earnings in calculating corporate alternative minimum taxable income. We express no opinion regarding other tax consequences related to the ownership or disposition of, or the accrual or receipt of interest on, the Obligations. [**Federal Tax Status Opinion**]

Certain agreements, requirements and procedures contained or referred to in the Arbitrage Certificate and other relevant documents may be changed and certain actions (including, without limitation, economic defeasance of the Obligations) may be taken or omitted under the circumstances and subject to the terms and conditions set forth in such documents. [**Qualifications**].

The opinions expressed herein are based on an analysis of existing laws, regulations, rulings and court decisions and cover certain matters not directly addressed by such authorities. Such opinions may be affected by actions taken or omitted or events occurring after the date hereof. Accordingly, this opinion is not intended to, and may not, be relied upon in connection with any such actions, events or matters. Our engagement with respect to the Obligations has concluded with their issuance, and we disclaim any obligation to update this opinion. We have assumed, without undertaking to verify, the accuracy of the factual matters represented, warranted or certified in the documents. Furthermore, we have assumed compliance with all covenants and agreements contained in the Arbitrage Certificate, including without limitation covenants and agreements compliance with which is necessary to assure that future actions, omissions or events will not cause interest on the Obligations to be included in gross income for federal income tax purposes or no longer exempt for purposes of personal income taxes imposed by the State of New York or any political subdivision thereof (including The City of New York). We call attention to the fact that the rights and obligations under the Obligations and the Arbitrage Certificate and their enforceability may be subject to bankruptcy, insolvency, reorganization, arrangement, fraudulent conveyance, moratorium or other laws relating to or affecting creditors' rights, to the application of equitable principles, to the exercise of judicial discretion in appropriate cases and to the limitations on legal remedies against municipal corporations such as the Obligor in the State of New York. We express no opinion with respect to any indemnification, contribution, penalty, choice of law, choice of forum, choice of venue, or waiver provisions contained in the foregoing documents. [**Assumptions underlying the opinion**].

The scope of our engagement in relation to the issuance of the Obligations has extended solely to the examination of the facts and law incident to rendering the opinions expressed herein. Such opinions are not intended and should not be construed to express or imply any conclusion that the amount of real property subject to taxation within the boundaries of the Obligor, together with other legally available sources of revenue, if any, will be sufficient to enable the Obligor to pay the principal of or interest on the Obligations as the same respectively become due and payable. Reference should be made to the Official Statement prepared by the Obligor in relation to the Obligations for factual information which, in the judgment of the Obligor, could materially affect the ability of the Obligor to pay such principal and interest. While we have participated in the preparation of such Official Statement, we have not verified the accuracy, completeness or fairness of the factual information contained therein and, accordingly, we express no opinion as to whether the Obligor, in connection with the sale of the Obligations, has made any untrue statement of a material fact or omitted to state a material fact necessary in order to make any statements made, in the light of the circumstances under which they were made, not misleading. [**What the opinion does not cover**].

Very truly yours,

APPENDIX C

Fire District Improvement Program Time Line

1. **SEQRA Determination:** SEQRA is an acronym for State Environmental Quality Review Act. This law was enacted to ensure that any capital project will not have a significant adverse impact upon the environment. Every Fire District capital project should be in compliance with SEQRA before the Board of Fire Commissioners adopts any proceeding to undertake the capital project, including a resolution calling a bond referendum.

   The conduct of the SEQRA process is usually within the scope of duties of the Fire District's general counsel. Bond counsel, of course, should be available to assist in this regard. The SEQRA process begins with the District declaring "lead agency" and typically, if other than a type II action, ends with the adoption of a negative declaration by the Board of Fire Commissioners.

   Time Parameters: Consult District's general counsel and the project architect—the time parameters are difficult to gauge as it can differ from project to project depending upon what "type" of "action" the project is under SEQRA. It is a relative "slam dunk" for a type II action, suggesting the mere determination that the project constitutes a type II action, thus, requiring no further determinations; for an uncomplicated, unlisted action, the process can take approximately thirty (30) to sixty (60) days. If more complicated, the process could approach the length of time for a type I action; a type I action could take as long as four (4) months or more if a full environmental assessment form or draft environmental impact statement is required.

   This is the largest procedural hurdle in the capital construction process—this should be done before the Fire District commits to a referendum date and certainly it should be done in a Fire District before the Board of Fire Commissioners adopts the bond resolution concerning which the referendum will be held.

2. **Fax *and* send each evidence of SEQRA compliance** (generally, this will be the negative declaration) to bond counsel by the Fire District Secretary.

3-a. **Board of Fire Commissioners may need to hold an information meeting/public hearing** on at least fourteen (14) days notice if the district has a volunteer fire company organized under not-for-profit corporation law. It probably will want to in any event.

3-b. **Board of Fire Commissioners adopts a resolution providing for the submission of a bond proposition at a special or at the annual district meeting/election.** Please note—Fire District adopts bond resolution at this time, subject to mandatory referendum. (3/5 affirmative vote).

4. **Publish notice of referendum twenty-seven (27) to thirty-four (34) days in advance of referendum date** in one or more newspapers having general circulation in Fire District; post same on the Fire District website and the websites of the municipality or municipalities within which the Fire District serves and on such town's bulletin boards and the Fire District bulletin board—*allow* eight (8) weeks.

5. **After voter approval of bond resolution, publish Legal Notice of estoppel in official newspaper(s) of Fire District—***allow* one (1) week from date of adoption to date of publication.

6. **After twenty (20) days has expired from publication of Legal Notice of estoppel, District is in a position to issue obligations**—*allow* three (3) weeks.

7. **To sell bond anticipation notes or serial bonds with an official statement *allow* minimum of four** (4) **weeks to six (6) weeks**—consult financial advisor.

8. ***Allow* seven** (7) **days minimum from sale of notes to delivery of notes, ten (10) to fourteen (14) days for serial bonds (from sale to delivery).**

The entire process, on average, could take seven (7) to sixteen (16) months from start to finish, not counting time spent by the Board of Fire Commissioners in the planning stage.

About the Authors

Thomas E. Myers, a New York Public Finance partner, has extensive experience in financings for various New York municipalities, school districts, and fire districts in connection with over $6 billion in general obligation financings. Mr. Myers' practice also focuses on financings for industrial development bonds, local development corporations, housing bonds, resource recovery and water/sewer authority revenue bonds. Mr. Myers has extensive experience as underwriter's and placement agent's counsel on a wide variety of public finance matters. In addition, Mr. Myers was special counsel in connection with tax lien and tobacco settlement securitizations by various New York counties. Mr. Myers was named Dealmaker of the Year by *The American Lawyer* in 2001 for his innovative work on the first pooled counties tobacco securitization. He is a graduate of Marquette University and the Syracuse College of Law, past chair of the Municipal Law Section of the New York State Bar Association and a frequent speaker at meetings of various municipal organizations. You can contact him at 1-212-506-5212 or tmyers@orrick.com.

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Mr. Goodfriend's specialized areas of New York municipal law interest include open spaces programs and financings, town and county improvement district formation, consolidation and improvement, innovative lease-purchase financings, school district bond resolution referendum law, library projects, village local improvement programs and the drafting of local laws and propositions, as well as state legislation on behalf of clients.

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Mr. Myers and Mr. Goodfriend are the authors of the Bond Basics series of primers for counties, cities, towns, villages and fire districts, as well as school districts and library districts in New York State, which distill their combined 50 years of public finance legal experience. Mr. Myers and Mr. Goodfriend may also be reached at their toll-free number, 1-800-295-8506.

ABOUT ORRICK

Orrick, Herrington & Sutcliffe LLP has maintained a substantial law practice in the area of public finance for nearly a century. Our lawyers provide bond counsel services to fire districts throughout New York State and are committed to providing cost-effective and innovative services and solutions for all types of public finance matters.

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