

S T A T E O F N E W Y O R K

3363--A

2009-2010 Regular Sessions

I N S E N A T E

March 17, 2009

Introduced by Sen. KRUGER -- (at request of the New York State Housing Finance Agency) -- read twice and ordered printed, and when printed to be committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT in relation to redistributing 2008 bond volume allocations made pursuant to section 146 of the federal tax reform act of 1986, in relation to allocation of the unified state bond volume ceiling, and in relation to enacting the private activity bond allocation act of 2009 and providing for the expiration of certain provisions thereof

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Short title. This act shall be known and may be cited as
2 the "private activity bond allocation act of 2009".
3 S 2. Legislative findings and declaration. The legislature hereby
4 finds and declares that the federal tax reform act of 1986 established a
5 statewide bond volume ceiling on the issuance of certain tax exempt
6 private activity bonds and notes and, under certain circumstances,
7 governmental use bonds and notes issued by the state and its public
8 authorities, local governments, agencies which issue on behalf of local
9 governments, and certain other issuers. The federal tax reform act
10 establishes a formula for the allocation of the bond volume ceiling
11 which was subject to temporary modification by gubernatorial executive
12 order until December 31, 1987. That act also permits state legislatures
13 to establish, by statute, an alternative formula for allocating the
14 volume ceiling. Bonds and notes subject to the volume ceiling require an
15 allocation from the state's annual volume ceiling in order to qualify
16 for federal tax exemption.
17 It is hereby declared to be the policy of the state to maximize the
18 public benefit through the issuance of private activity bonds for the
19 purposes of, among other things, allocating a fair share of the bond

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets [] is old law to be omitted.

LBD09538-05-9

1 volume ceiling upon initial allocation and from a bond reserve to local
2 agencies and for needs identified by local governments; providing hous-
3 ing and promoting economic development; job creation; an economical
4 energy supply; resource recovery; and to provide for an orderly and
5 efficient volume ceiling allocation process for state and local agencies
6 by establishing an alternative formula for making such allocations.

7 S 3. Definitions. As used in this act, unless the context requires
8 otherwise:

9 1. "Bonds" means bonds, notes or other obligations.

10 2. "Carryforward" means an amount of unused private activity bond
11 ceiling available to an issuer pursuant to an election filed with the
12 internal revenue service pursuant to section 146(f) of the code.

13 3. "Code" means the internal revenue code of 1986, as amended.

14 4. "Commissioner" means the commissioner of the New York state depart-
15 ment of economic development.

16 5. "Covered bonds" means those tax exempt private activity bonds and
17 that portion of the non-qualified amount of an issue of governmental use
18 bonds for which an allocation of the statewide ceiling is required for
19 the interest earned by holders of such bonds to be excluded from the
20 gross income of such holders for federal income tax purposes under the
21 code.

22 6. "Director" means the director of the New York state division of the
23 budget.

24 7. "Issuer" means a local agency, state agency or other issuer.

25 8. "Local agency" means an industrial development agency established
26 or operating pursuant to article 18-A of the general municipal law, the
27 Troy industrial development authority and the Auburn industrial develop-
28 ment authority.

29 9. "Other issuer" means any agency, political subdivision or other
30 entity, other than a local agency or state agency, that is authorized to
31 issue covered bonds.

32 10. "Qualified small issue bonds" means qualified small issue bonds,
33 as defined in section 144(a) of the code.

34 11. "State agency" means the state of New York, the New York state
35 energy research and development authority, the New York job development
36 authority, the New York state environmental facilities corporation, the
37 New York state urban development corporation and its subsidiaries, the
38 Battery Park city authority, the port authority of New York and New
39 Jersey, the power authority of the state of New York, the dormitory
40 authority of the state of New York, the New York state housing finance
41 agency, the state of New York mortgage agency, and any other public
42 benefit corporation or public authority designated by the governor for
43 the purposes of this act.

44 12. "Statewide ceiling" means for any calendar year the highest state
45 ceiling (as such term is used in section 146 of the code) applicable to
46 New York state.

47 13. "Future allocations" means allocations of statewide ceiling for up
48 to two future years.

49 14. "Multi-year housing development project" means a project (a) which
50 qualifies for covered bonds; (b) which is to be constructed over two or
51 more years; and (c) in which at least twenty percent of the dwelling
52 units will be occupied by persons and families of low income.

53 S 4. Local agency set-aside. A set-aside of statewide ceiling for
54 local agencies for any calendar year shall be an amount which bears the
55 same ratio to one-third of the statewide ceiling as the population of
56 the jurisdiction of such local agency bears to the population of the

1 entire state. The commissioner shall administer allocations of such
2 set-aside to local agencies.

3 S 5. State agency set-aside. A set-aside of statewide ceiling for all
4 state agencies for any calendar year shall be one-third of the statewide
5 ceiling. The director shall administer allocations of such set-aside to
6 state agencies and may grant an allocation to any state agency upon
7 receipt of an application in such form as the director shall require.

8 S 6. Statewide bond reserve. One-third of the statewide ceiling is
9 hereby set aside as a statewide bond reserve to be administered by the
10 director.

11 1. Allocation of the statewide bond reserve among state agencies,
12 local agencies and other issuers. The director shall transfer a portion
13 of the statewide bond reserve to the commissioner for allocation to and
14 use by local agencies and other issuers in accordance with the terms of
15 this section. The remainder of the statewide bond reserve may be allo-
16 cated by the director to state agencies in accordance with the terms of
17 this section.

18 2. Allocation of statewide bond reserve to local agencies or other
19 issuers.

20 (a) Local agencies or other issuers may at any time apply to the
21 commissioner for an allocation from the statewide bond reserve. Such
22 application shall demonstrate:

23 (i) that the requested allocation is required under the code for the
24 interest earned on the bonds to be excluded from the gross income of
25 bondholders for federal income tax purposes;

26 (ii) that the local agency's remaining unused allocation provided
27 pursuant to section four of this act, and other issuer's remaining
28 unused allocation, or any available carryforward will be insufficient
29 for the specific project or projects for which the reserve allocation is
30 requested; and

31 (iii) that, except for those allocations made pursuant to section
32 twelve of this act to enable carryforward elections, the requested allo-
33 cation is reasonably expected to be used during the calendar year, and
34 the requested future allocation is reasonably expected to be used in the
35 calendar year to which the future allocation relates.

36 (b) In reviewing and approving or disapproving applications, the
37 commissioner shall exercise discretion to ensure an equitable distrib-
38 ution of allocations from the statewide bond reserve to local agencies
39 and other issuers. Prior to making a determination on such applications,
40 the commissioner shall notify and seek the recommendation of the presi-
41 dent and chief executive officer of the New York state housing finance
42 agency in the case of an application related to the issuance of multi-
43 family housing or mortgage revenue bonds, and in the case of other
44 requests, such state officers, departments, divisions and agencies as
45 the commissioner deems appropriate.

46 (c) Applications for allocations shall be made in such form and
47 contain such information and reports as the commissioner shall require.

48 3. Allocation of statewide bond reserve to state agencies. The direc-
49 tor may make an allocation from the statewide bond reserve to any state
50 agency. Before making any allocation of the statewide bond reserve to
51 state agencies the director shall be satisfied:

52 (a) that the allocation is required under the code for the interest
53 earned on the bonds to be excluded from the gross income of bondholders
54 for federal income tax purposes;

55 (b) that the state agency's remaining unused allocation provided
56 pursuant to section five of this act or any available carryforward will

1 be insufficient to accommodate the specific bond issue or issues for
2 which the reserve allocation is requested; and

3 (c) that, except for those allocations made pursuant to section twelve
4 of this act to enable carryforward elections, the requested allocation
5 is reasonably expected to be used during the calendar year, and the
6 requested future allocation is reasonably expected to be used in the
7 calendar year to which the future allocation relates.

8 S 7. Access to employment opportunities. 1. All issuers shall require
9 that any new employment opportunities created in connection with indus-
10 trial or manufacturing projects financed through the issuance of quali-
11 fied small issue bonds shall be listed with the New York state depart-
12 ment of labor and with the one-stop career center established pursuant
13 to the federal Workforce Investment Act (Pub. L. No. 105-220) serving
14 the locality in which the employment opportunities are being created.
15 Such listing shall be in a manner and form prescribed by the commission-
16 er. All issuers shall further require that for any new employment oppor-
17 tunities created in connection with an industrial or manufacturing
18 project financed through the issuance of qualified small issue bonds by
19 such issuer, industrial or manufacturing firms shall first consider
20 persons eligible to participate in Workforce Investment Act (Pub. L. No.
21 105-220) programs who shall be referred to the industrial or manufactur-
22 ing firm by one-stop centers in local workforce investment areas or by
23 the department of labor. Issuers of qualified small issue bonds are
24 required to monitor compliance with the provisions of this section as
25 prescribed by the commissioner.

26 2. Nothing in this section shall be construed to require users of
27 qualified small issue bonds to violate any existing collective bargain-
28 ing agreement with respect to the hiring of new employees. Failure on
29 the part of any user of qualified small issue bonds to comply with the
30 requirements of this section shall not affect the allocation of bonding
31 authority to the issuer of the bonds or the validity or tax exempt
32 status of such bonds.

33 S 8. Overlapping jurisdictions. In a geographic area represented by a
34 county local agency and one or more sub-county local agencies, the allo-
35 cation granted by section four of this act with respect to such area of
36 overlapping jurisdiction shall be apportioned one-half to the county
37 local agency and one-half to the sub-county local agency or agencies.
38 Where there is a local agency for the benefit of a village within the
39 geographic area of a town for the benefit of which there is a local
40 agency, the allocation of the village local agency shall be based on the
41 population of the geographic area of the village, the allocation of the
42 town local agency shall be based upon the population of the geographic
43 area of the town outside of the village. Notwithstanding the foregoing,
44 a local agency may surrender all or part of its allocation for such
45 calendar year to another local agency with an overlapping jurisdiction.
46 Such surrender shall be made at such time and in such manner as the
47 commissioner shall prescribe.

48 S 9. Ineligible local agencies. To the extent that any allocation of
49 the local agency set-aside would be made by this act to a local agency
50 which is ineligible to receive such allocation under the code or under
51 regulations interpreting the state volume ceiling provisions of the
52 code, such allocation shall instead be made to the political subdivision
53 for whose benefit that local agency was created.

54 S 10. Municipal reallocation. The chief executive officer of any poli-
55 tical subdivision or, if such political subdivision has no chief execu-
56 tive officer, the governing board of the political subdivision for the

1 benefit of which a local agency has been established, may withdraw all
2 or any portion of the allocation granted by section four of this act to
3 such local agency. The political subdivision may then reallocate all or
4 any portion of such allocation, as well as all or any portion of the
5 allocation received pursuant to section nine of this act, to itself or
6 any other issuer established for the benefit of that political subdivi-
7 sion or may assign all or any portion of the allocation received pursu-
8 ant to section nine of this act to the local agency created for its
9 benefit. The chief executive officer or governing board of the political
10 subdivision, as the case may be, shall notify the commissioner of any
11 such reallocation.

12 S 10-a. Future allocations for multi-year housing development
13 projects. 1. In addition to other powers granted under this act, the
14 commissioner is authorized to make the following future allocations of
15 statewide ceiling for any multi-year housing development project for
16 which the commissioner also makes an allocation of statewide ceiling for
17 the current year under this act or for which, in the event of expiration
18 of provisions of this act described in section seventeen of this act, an
19 allocation of volume cap for a calendar year subsequent to such expira-
20 tion shall have been made under section 146 of the code: (a) to local
21 agencies from the local agency set-aside (but only with the approval of
22 the chief executive officer of the political subdivision to which the
23 local agency set-aside relates or the governing body of a political
24 subdivision having no chief executive officer) and (b) to other issuers
25 from that portion, if any, of the statewide bond reserve transferred to
26 the commissioner by the director. Any future allocation made by the
27 commissioner shall constitute an allocation of statewide ceiling for the
28 future year specified by the commissioner and shall be deemed to have
29 been made on the first day of the future year so specified.

30 2. In addition to other powers granted under this act, the director is
31 authorized to make future allocations of statewide ceiling from the
32 state agency set-aside or from the statewide bond reserve to state agen-
33 cies for any multi-year housing development project for which the direc-
34 tor also makes an allocation of statewide ceiling from the current year
35 under this act or for which, in the event of expiration of provisions of
36 this act described in section seventeen of this act, an allocation of
37 volume cap for a calendar year subsequent to such expiration shall have
38 been made under section 146 of the code, and is authorized to make
39 transfers of the statewide bond reserve to the commissioner for future
40 allocations to other issuers for multi-year housing development projects
41 for which the commissioner has made an allocation of statewide ceiling
42 for the current year. Any such future allocation or transfer of the
43 statewide bond reserve for future allocation made by the director shall
44 constitute an allocation of statewide ceiling or transfer of the state-
45 wide bond reserve for the future years specified by the director and
46 shall be deemed to have been made on the first day of the future year so
47 specified.

48 3. (a) If an allocation made with respect to a multi-year housing
49 development project is not used by October fifteenth of the year to
50 which the allocation relates, the allocation with respect to the then
51 current year shall be subject to recapture in accordance with the
52 provisions of section eleven of this act, and in the event of such a
53 recapture, unless a carryforward election by another issuer shall have
54 been approved by the commissioner or a carryforward election by a state
55 agency shall have been approved by the director, all future allocations

1 made with respect to such project pursuant to subdivision one or two of
2 this section shall be canceled.

3 (b) The commissioner and the director shall have the authority to make
4 future allocations from recaptured current year allocations and canceled
5 future allocations to multi-year housing development projects in a
6 manner consistent with the provisions of this act. Any such future allo-
7 cation shall, unless a carryforward election by another issuer shall
8 have been approved by the commissioner or a carryforward election by a
9 state agency shall have been approved by the director, be canceled if
10 the current year allocation for the project is not used by December 31,
11 2009.

12 (c) The commissioner and the director shall establish procedures
13 consistent with the provisions of this act relating to carryforward of
14 future allocations.

15 4. The aggregate future allocations from either of the two succeeding
16 years shall not exceed six hundred fifty million dollars for each such
17 year.

18 S 11. Year end allocation recapture. On or before October first of
19 each year, each state agency shall report to the director and each local
20 agency and each other issuer shall report to the commissioner the amount
21 of bonds subject to allocation under this act that will be issued prior
22 to the end of the then current calendar year, and the amount of the
23 issuer's then total allocation that will remain unused. As of October
24 fifteenth of each year, the unused portion of each local agency's and
25 other issuer's then total allocation as reported and the unallocated
26 portion of the set-aside for state agencies shall be recaptured and
27 added to the statewide bond reserve and shall no longer be available to
28 covered bond issuers except as otherwise provided herein. From October
29 fifteenth through the end of the year, each local agency or other issuer
30 having an allocation shall immediately report to the commissioner and
31 each state agency having an allocation shall immediately report to the
32 director any changes to the status of its allocation or the status of
33 projects for which allocations have been made which should affect the
34 timing or likelihood of the issuance of covered bonds therefor. If the
35 commissioner determines that a local agency or other issuer has overes-
36 timated the amount of covered bonds subject to allocation that will be
37 issued prior to the end of the calendar year, the commissioner may
38 recapture the amount of the allocation to such local agency or other
39 issuer represented by such overestimation by notice to the local agency
40 or other issuer, and add such allocation to the statewide bond reserve.
41 The director may likewise make such determination and recapture with
42 respect to state agency allocations.

43 S 12. Allocation carryforward. 1. No local agency or other issuer
44 shall make a carryforward election utilizing any unused allocation
45 (pursuant to section 146(f) of the code) without the prior approval of
46 the commissioner. Likewise no state agency shall make or file such an
47 election, or elect to issue or carry forward mortgage credit certif-
48 icates, without the prior approval of the director.

49 2. On or before November fifteenth of each year, each state agency
50 seeking unused statewide ceiling for use in future years shall make a
51 request for an allocation for a carryforward to the director, whose
52 approval shall be required before a carryforward election is filed by or
53 on behalf of any state agency. A later request may also be considered by
54 the director, who may file a carryforward election for any state agency
55 with the consent of such agency.

1 3. On or before November fifteenth of each year, each local agency or
2 other issuer seeking unused statewide ceiling for use in future years
3 shall make a request for an allocation for a carryforward to the commis-
4 sioner, whose approval shall be required before a carryforward election
5 is filed by or on behalf of any local or other agency. A later request
6 may also be considered by the commissioner.

7 S 13. New York state bond allocation policy advisory panel. 1. There
8 is hereby created a policy advisory panel and process to provide policy
9 advice regarding the priorities for distribution of the statewide ceil-
10 ing.

11 2. The panel shall consist of five members, one designee being
12 appointed by each of the following: the governor, the temporary presi-
13 dent of the senate, the speaker of the assembly, the minority leader of
14 the senate and the minority leader of the assembly. The designee of the
15 governor shall chair the panel. The panel shall monitor the allocation
16 process throughout the year, and in that regard, the division of the
17 budget and the department of economic development shall assist and coop-
18 erate with the panel as provided in this section. The advisory process
19 shall operate through the issuance of advisory opinions by members of
20 the panel as provided in subdivisions six and seven of this section. A
21 meeting may be held at the call of the chair with the unanimous consent
22 of the members.

23 3. (a) Upon receipt of a request for allocation or a request for
24 approval of a carryforward election from the statewide reserve from a
25 local agency or other issuer, the commissioner shall, within five work-
26 ing days, notify the panel of such request and provide the panel with
27 copies of all application materials submitted by the applicant.

28 (b) Upon receipt of a request for allocation or a request for approval
29 of carryforward election from the statewide reserve from a state agency,
30 the director shall, within five working days, notify the panel of such
31 request and provide the panel with copies of all application materials
32 submitted by the applicant.

33 4. (a) Following receipt of a request for allocation from a local
34 agency or other issuer, the commissioner shall notify the panel of a
35 decision to approve or exclude from further consideration such request,
36 and the commissioner shall state the reasons. Such notification shall be
37 made with or after the transmittal of the information specified in
38 subdivision three of this section and at least five working days before
39 formal notification is made to the applicant.

40 (b) Following receipt of a request for allocation from a state agency,
41 the director shall notify the panel of a decision to approve or exclude
42 from further consideration such request, and shall state the reasons.
43 Such notification shall be made with or after the transmission of the
44 information specified in subdivision three of this section and at least
45 five working days before formal notification is made to the state agen-
46 cy.

47 5. The requirements of subdivisions three and four of this section
48 shall not apply to adjustments to allocations due to bond sizing chang-
49 es.

50 6. In the event that any decision to approve or to exclude from
51 further consideration a request for allocation is made within ten work-
52 ing days of the end of the calendar year and in the case of all requests
53 for consent to a carryforward election, the commissioner or director, as
54 is appropriate, shall provide the panel with the longest possible
55 advance notification of the action, consistent with the requirements of
56 the code, and shall, wherever possible, solicit the opinions of the

1 members of the panel before formally notifying any applicant of the
2 action. Such notification may be made by means of telephone communi-
3 cation to the members or by written notice delivered to the Albany
4 office of the appointing authority of the respective members.

5 7. Upon notification by the director or the commissioner, any member
6 of the panel may, within five working days, notify the commissioner or
7 the director of any policy objection concerning the expected action. If
8 three or more members of the panel shall submit policy objections in
9 writing to the intended action, the commissioner or the director shall
10 respond in writing to the objection prior to taking the intended action
11 unless exigent circumstances make it necessary to respond after the
12 action has been taken.

13 8. On or before the first day of March, in any year, the director
14 shall report to the members of the New York state bond allocation policy
15 advisory panel on the actual utilization of volume cap for the issuance
16 of bonds during the prior calendar year and the amount of such cap allo-
17 cated for carryforwards for future bond issuance. The report shall
18 include, for each local agency or other issuer and each state agency the
19 initial allocation, the amount of bonds issued subject to the allo-
20 cation, the amount of the issuer's allocation that remained unused, and
21 the allocation of the statewide bond reserve, carryforward allocations
22 and recapture of allocations. Further, the report shall include projec-
23 tions regarding private activity bond issuance for state and local
24 issuers for the calendar year, as well as any recommendations for legis-
25 lative action.

26 S 14. Severability. If any clause, sentence, paragraph, section, or
27 part of this act shall be adjudged by any court of competent jurisdic-
28 tion to be invalid, such judgment shall not affect, impair, or invali-
29 date the remainder thereof, but shall be confined in its operation to
30 the clause, sentence, paragraph, section, or part thereof directly
31 involved in the controversy in which such judgment shall have been
32 rendered.

33 S 15. Notwithstanding any provisions of this act to the contrary (1)
34 provided that a local agency or other issuer certifies to the commis-
35 sioner on or before October 1, 2009 that it has issued private activity
36 bonds described in this section and the amount thereof which used state-
37 wide ceiling, a commitment or allocation of statewide ceiling to a local
38 agency or other issuer made to or so used by such local agency or other
39 issuer pursuant to the federal tax reform act of 1986 on or after Janu-
40 ary 1, 2009 and prior to the effective date of this act, in an amount
41 which exceeds the local agency set-aside established by section four of
42 this act, shall be first chargeable to the statewide bond reserve estab-
43 lished pursuant to section six of this act, and (2) a commitment or
44 allocation of statewide ceiling to a state agency made to or used by
45 such agency pursuant to the internal revenue code, as amended, on or
46 after January 1, 2009 and prior to the effective date of this act, shall
47 be first chargeable to the state agency set-aside established pursuant
48 to section five of this act, and, thereafter, to the statewide bond
49 reserve established by section six of this act.

50 S 16. Nothing contained in this act shall be deemed to supersede,
51 alter or impair any allocation used by or committed by the director or
52 commissioner to a state or local agency or other issuer pursuant to the
53 federal tax reform act of 1986 and prior to the effective date of this
54 act.

55 S 17. This act shall take effect immediately; provided, however, that
56 sections three through thirteen of this act shall expire January 1,

1 2010; except that the provisions of subdivision eight of section thir-
2 teen of this act shall expire March 1, 2010 and the provisions of subdi-
3 visions two and three of section twelve of this act shall expire Febru-
4 ary 15, 2010, and, provided further that section ten-a of this act shall
5 continue in full force and effect and shall be subject to the applicable
6 provisions of this act notwithstanding the expirations of law set forth
7 in this section.