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Tax ALERT

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## HIRE Act Allows Issuers of Certain Tax Credit Bonds to Receive Direct Payment From the Federal Government

Congress has passed a law to unclog the markets for Qualified School Construction Bonds (QSCBs), Qualified Zone Academy Bonds (QZABs), Qualified Energy Conservation Bonds (QECBs) and New Clean Renewable Energy Bonds (NCREBs). For such bonds issued after December 31, 2009, the issuer can elect to receive a direct subsidy from the federal government in lieu of the tax credit otherwise available to bondholders. For QSCBs and QZABs, the federal payments are 100 percent of the lesser of the interest payments on the bonds or the otherwise available tax credits. For QECBs and NCREBs, the federal payments are 70 percent of the lesser of the interest payments on the bonds or the otherwise available tax credits. These provisions are part of H.R. 2847, the Hiring Incentives to Restore Employment (HIRE) Act, which was signed into law by President Obama on March 18, 2010.

### Background

On February 17, 2009 the American Recovery and Reinvestment Act of 2009 (commonly referred to as the Stimulus Act) was enacted. The Stimulus Act created or expanded a veritable alphabet soup of tax-favored bond programs including QSCBs, QZABs, QECBs and NCREBs. Generally speaking, the proceeds of each type of bond are available to be used as follows:

- QSCB proceeds are used for the construction,




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rehabilitation or repair of a public school facility; or for the acquisition of land on which a public school facility will be located; or for the acquisition of equipment to be used in the portions of the public school facility being financed with QSCB proceeds.

- QZAB proceeds are used for rehabilitating or repairing a public school facility in which a "qualified zone academy" is established, providing equipment for use at the academy, developing course materials for education to be provided at the academy, and training teachers and other school personnel in the academy. QZABs also require that certain private contributions be raised.
- QECB proceeds are generally used for:
  - Capital expenditures incurred to reduce energy consumption in publicly owned buildings by at least 20 percent, to implement green community programs, for rural development involving the production of electricity from renewable energy resources or for any qualified energy production facility;
  - Research expenditures to support the development of alternative fuels or technologies to reduce energy use in buildings;
  - Mass commuting facilities and related facilities that reduce the consumption of energy including expenditures to reduce pollution from vehicles used for mass commuting;
  - Demonstration projects designed to promote the commercialization of green building technology, conversion of agricultural waste into energy, advanced battery manufacturing technologies, technologies to reduce peak use of electricity or technologies for the capture and sequestration of carbon dioxide emitted from combusting fossil fuels in order to produce electricity; or
  - Public education campaigns to promote energy efficiency.
- NCREB proceeds are to be used for a qualified renewable energy production facility owned by a public utility, governmental body or cooperative electric company.

The Stimulus Act also created Direct Payment Build America Bonds (Direct Payment BABs), a form of taxable governmental bond for which an issuer elects to receive a direct payment from the federal government equal to 35 percent of each interest payment on the


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bonds. Credit markets have shown a voracious appetite for Direct Payment BABs. The incredible volume of Direct Payment BABs that has been issued results from the depth and efficiency of the direct 35-percent subsidy. In contrast, there has been little market demand for QSCBs, QZABs, QECBs and NCREBs since the Stimulus Act was enacted. At the behest of many municipal finance stakeholders, the HIRE Act responds to the enthusiasm for Direct Payment BABs and the relative ambivalence for QSCBs, QZABs, QECBs, and NCREBs by providing a direct subsidy for issuers of these bonds.

The ability of QSCB and QZAB issuers to receive federal payments up to 100 percent of each interest payment will make QSCBs and QZABs substantially more appealing. Although the federal payments of up to 70 percent of interest payments on QECBs and NCREBs are more limited, the direct payment mechanism is much more efficient than the preexisting tax credits and should make QECBs and NCREBs much more attractive too.

All of the requirements previously applicable to these bonds remain applicable, including the maximum maturity and sinking fund limitations.

### Technical Correction for QSCB Allocations

The HIRE Act also makes an important technical correction with respect to QSCB allocations. As originally enacted, while the Stimulus Act allowed a state to carry forward from year to year its unused QSCB volume cap allocation, a literal reading of the Stimulus Act (and as interpreted informally by the Internal Revenue Service) prevented large school districts that received QSCB volume cap allocations under the Stimulus Act (rather than from their states) from carrying forward their unused allocation. Instead, the large school district had to reallocate the volume cap to its state to avoid the expiration of that cap. The HIRE Act clarifies that unused portions of both types of allocation can be carried forward to subsequent years.

Squire Sanders stands ready to help you take advantage of the exciting new opportunities provided by the HIRE Act. Please contact the Squire Sanders public finance lawyer with whom you normally work or any of the Squire Sanders lawyers listed in this alert for more information.


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concerning such situations. Counsel should be consulted for legal planning and advice.