

MIDWESTERN DISASTER AREA BONDS PROVIDE TAX-EXEMPT FINANCING OPPORTUNITIES FOR PRIVATE BUSINESSES

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Midwestern disaster area bonds ("MDA Bonds") were authorized by the Heartland Disaster Tax Relief Act of 2008, and are federally tax-exempt qualified private activity bonds that may be issued to finance qualifying private business projects. The range of projects that can be financed is substantially broader than what was permissible under prior law, and would include projects such as manufacturing facilities, retail businesses, office and commercial development, medical facilities, or warehouse and distribution facilities.

MDA Bonds must be issued **before January 1, 2013** by a state in which a Midwestern disaster area is located or any political subdivision of such state, and must be designated as a MDA Bond by the governor of such state. Typically, MDA Bonds will be issued as conduit financings for the benefit of the private business owner who will assume full responsibility for repayment of the MDA Bonds without recourse to the governmental issuer.

Allocations of MDA Bonds

Midwestern Disaster Areas. MDA Bond allocations were made to states within "Midwestern disaster areas," areas in which the President declared a major disaster on or after May 20, 2008, and before August 1, 2008 by reason of severe storms, tornados or flooding and which were determined by the President to warrant individual or individual and public assistance with respect to damages attributable to such severe storms, tornados or flooding. Areas affected and eligible for MDA Bond allocations include certain counties in Arkansas, Illinois, Indiana, Iowa, Missouri, Nebraska and Wisconsin.

Eligible Wisconsin Area. In Wisconsin, 30 counties have been declared a "Midwestern disaster area": Adams, Calumet, Columbia, Crawford, Dane, Dodge, Fond du Lac, Grant, Green, Green Lake, Iowa, Jefferson, Juneau, Kenosha, La Crosse, Manitowoc, Marquette, Milwaukee, Monroe, Ozaukee, Racine, Richland, Rock, Sauk, Sheboygan, Vernon, Walworth, Washington, Waukesha and Winnebago (the "Affected Counties").

Wisconsin Allocation Process. Wisconsin has received an overall allocation of over \$3.8 billion. Wisconsin allocations for MDA Bond issuance authority will be made through the Wisconsin Department of Commerce (the "Department of Commerce"). The Department of Commerce has not released final guidance regarding the application process, but the Department of Commerce has indicated a proposal has been submitted to the Governor's Office which provides for a \$50 million allocation to each of the Affected Counties prior to January 1, 2011. Under the proposal, the remaining balance would be available for allocations to any of the Affected Counties. On January 1, 2011, allocations would be made from the entire unused balance (including any unused amounts from the \$50 million allocations to each of the Affected Counties) for qualifying projects in any of the Affected Counties.

95% of Proceeds Must be Used for MDA Projects

At least 95% of the net proceeds of MDA Bonds must be used for Qualified Project Costs and Qualifying Projects (described in more detail below).

Qualifying Projects

Projects With Private Business Users: Users Must Have Suffered a Loss or be Designated by the Governor as Replacing a Business Which has Suffered a Loss. In the case of a project involving a private business use, either (i) the project must be used by a person who suffered a loss in a trade or business attributable to the severe storms, tornados, or flooding giving rise to any Presidential declaration, or (ii) the person using the project must be designated by the Governor as a person carrying on a trade or business replacing a trade or business with respect to which another person suffered such a loss.

Public Utility Projects. In the case of a project relating to public utility property, the project must involve repair or reconstruction of public utility property damaged by the severe storms, tornados, or flooding.

Mortgage Financings. In the case of mortgage financings, qualified mortgage bond issues will be MDA Bonds if 95% or more of the net proceeds of the issue are to be used to provide financing for mortgagors who suffered damages to their principal residences attributable to such severe storms, tornados, or flooding.

Qualified Project Costs

Low-Income Residential Projects. The cost of any qualified residential rental project located in the Midwestern disaster area.

Nonresidential Real Property. The cost of acquisition, construction, reconstruction, and renovation of nonresidential real property (including fixed improvements associated with such property) located in the Midwestern disaster area. Eligible nonresidential real property projects could include, but are not limited to,

such projects as manufacturing facilities; retail businesses and shopping centers; restaurants; office buildings; warehouses and storage facilities; medical office buildings and other medical facilities; commercial development; and agricultural facilities.

Public Utility Property. The cost of acquisition, construction, reconstruction, and renovation of public utility property located in the Midwestern disaster area.

Moveable Fixtures and Equipment

MDA Bond proceeds may *not* be used for movable fixtures and equipment.

Designated By Governor

MDA Bonds must be designated as such by the Governor.

State Law Requirements

MDA Bonds must be authorized under applicable state law (e.g., Section 66.1103 of the Wisconsin Statutes, the industrial development revenue bond (“IRB”) statute or Sections 66.1333 and 66.1335, the redevelopment authority and community development authority statutes) and must follow requirements of the applicable state law (such as the limitations on reimbursement prior to adoption of an Initial Resolution, the publishing and filing requirements set forth in the IRB statutes).

Additional Tax-Exempt Bond Requirements

As qualified private activity bonds, MDA Bonds must meet a number of additional requirements applicable to traditional governmental tax-exempt bonds and/or private activity bonds. These requirements include:

- **2% Issuance Cost Limit.** Issuance costs (legal costs, underwriter's discount, fiscal/paying agent fees, trustee fees, etc.) are limited to 2% of the proceeds of the issue.
- **Average Maturity Limitation.** Average maturity of MDA Bonds cannot exceed 120% of the average reasonably expected economic life of the financed facilities.
- **Acquisition Limitations.** No more than 25% of MDA Bond proceeds can be used (directly or indirectly) to acquire land (or an interest therein). If proceeds are to be used to acquire an existing building, the borrower must make rehabilitation expenditures equal to at least 50% of the cost of acquiring such building within two years after the later of the date the building is acquired or the date the bonds are issued.

- **Certain Facilities Prohibited.** Proceeds cannot be used to finance any airplane, skybox or other private luxury boxes, health club facility, golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other gambling facility, or liquor store.
- **Reimbursement Rules.** The reimbursement restrictions generally applicable to tax-exempt bonds apply to MDA bonds, although if the IRB statute is to be used as the State law financing vehicle, more stringent reimbursement rules will apply.
- **TEFRA Public Approval Required.** A public hearing on the MDA Bonds, preceded by publication of a notice 14 days in advance of the hearing, is required in connection with MDA Bonds.
- **Not Subject to Volume Cap.** MDA Bonds are not subject to the aggregate annual state private activity bond volume cap limits.
- **No Capital Expenditure Limits.** MDA Bonds could be issued for manufacturing facilities which would otherwise exceed the capital expenditure limits.

Considerations for Financial Institutions

- **No Bank-Qualification.** MDA Bonds cannot be bank-qualified under Section 265 of the Internal Revenue Code of 1986.
- **Bank Interest Expense Disallowance.** The temporary 2% safe harbor, created by the American Recovery and Reinvestment Act of 2009, that allows financial institutions to purchase tax-exempt investments (both governmental and private activity) without a 100% interest expense disallowance, applies to MDA Bonds issued in 2009 and 2010.

Please call any of the Quarles & Brady Public Finance lawyers if you have any questions or would like to discuss MDA Bonds in more detail.