BOND ACTION MEMO

Tax Law

June 20, 2013

The Start-Up NY Program

On June 18, 2013, a bill entitled "Start-Up NY Program" (the "Bill") was introduced to the N.Y. State Legislature. The Bill, a revised version of the "Tax-Free NY Program" bill introduced by Governor Cuomo just eleven days earlier, does more than change the name of Governor Cuomo's latest economic initiative.

In a Bond Action Memo, "The Tax-Free NY Program", dated June 13, 2013, we summarized the terms of that bill. The following is an updated summary of the new Bill and of how the Start-Up NY Program would operate if the Bill is approved in its current form:

The Tax Benefits

Eligible businesses that open within designated tax-free communities proximate to an eligible university, college or other institution designated in the Bill ("Eligible Institution") will be exempt from New York taxes, including sales, property, business and corporate taxes, and franchise fees, and their employees will be exempt from state and local income taxes. The exemptions for businesses will last ten years. Employees of businesses are exempt for five years, followed by another five years so long as their income remains below a specified threshold.

The Bill caps the aggregate number of net new jobs statewide that can qualify for tax free treatment at 10,000 each year. During each year of the Start-Up NY Program, the Commissioner of Economic Development (the "Commissioner") will allocate a maximum number of new net jobs that are eligible for personal income tax benefits to each business that qualifies to participate in the Start-Up NY Program. Once the cap of 10,000 net new jobs is reached in a given year, the Commissioner will stop granting eligibility for personal income tax benefits. Businesses that were denied personal income benefits in a given year because of the cap will be granted these benefits in the next year before any new applications are considered.

In order to enable participating businesses to attain the tax benefits offered by the Start-Up NY Program, an Eligible Institution must submit to the Commissioner an application to sponsor a Tax-Free NY area, including a plan detailing how vacant space would be used in the Start-Up NY Program. Eligible Institutions that are selected to sponsor a Tax-Free NY area ("Sponsoring Institutions") must then solicit eligible businesses to use the Tax-Free NY area and eligible businesses must in turn submit applications detailing that they will use the space in the manner designated by the Sponsoring Institution, and that they will meet the eligibility criteria of the Start-Up NY Program.

Eligible Institutions

The Bill distinguishes between private and public Eligible Institutions in setting forth eligibility requirements.

Public Institutions. All state universities and community colleges ("SUNYs") are eligible to sponsor a Tax-Free NY area except for: (1) SUNYs that are Empire State campuses; (2) campuses and properties of Downstate Medical Centers in Nassau, Suffolk and Westchester counties and New York City unless that property is affiliated with a New York State business incubator; (3) property of the College of Optometry or Maritime College in Nassau, Suffolk and Westchester counties and New York City; and (4) property located in Nassau, Suffolk and Westchester Counties of a community college that has its main campus located in New York City. However, the Saratoga Springs Empire State College campus is eligible to participate in the Start-Up NY Program. Further, five of the City University of New York ("CUNY") campuses, one for each borough of New York City, are potentially eligible, with the Eligible Institution chosen by the CUNY Board of Trustees based on the CUNY school's location in an economically distressed community. The Commissioner is responsible for establishing a list of economically distressed communities for this purpose.

Public Eligible Institutions are not subject to an aggregate limitation as to the amount of space that can be used for Tax-Free NY areas, and each public Eligible Institution is free to sponsor a Tax-Free NY area on any vacant space in a campus building or on campus land; provided that a public Eligible Institution cannot create vacant space by eliminating or re-locating an existing program. Any New York State business incubator that has a bona-fide affiliation with a public Eligible Institution may qualify as a Tax-Free NY area. Further, public Eligible Institutions, except for those located in Nassau, Suffolk or Westchester counties, may apply to sponsor up to 200,000 square feet of vacant land or vacant building space located within one mile of its campus as a Tax-Free NY area. Additionally, 200,000 square feet of vacant land or vacant space used by a public Eligible Institution in affiliation with or partnership with Maritime College may be eligible to be a Tax-Free NY area. In any event, 200,000 square feet is the maximum aggregate amount of land or space that any public Eligible Institution may designate as a Tax-Free NY area that is not located on the institution's campus. Public Eligible Institutions can also apply to the Commissioner for a determination that land or building space outside the one-mile radius is eligible for the program.

Private Institutions. All private Eligible Institutions located in New York are eligible to sponsor a Tax-Free NY area; provided that ***only an aggregate of three million square feet will be allowed for all private Eligible Institutions under the Start-Up NY Program***. Of the three million square feet allowed to private Eligible Institutions, an initial amount of 75,000 square feet shall be allocated to each of the following: Nassau, Suffolk and Westchester counties and the five boroughs of New York City. The 75,000 square feet allocated to each of these locations may be increased to 150,000 square feet, but any increase will not be included in the three million aggregate allowed to private Eligible Institutions. The Bill provides that additional land that is directly adjacent to a city university campus or a SUNY or private Eligible Institution campus in Nassau, Suffolk or Westchester counties, which is owned or leased by such institution, may also be eligible to be a Tax-Free NY area.

The space utilized by private Eligible Institutions may include any vacant space in a campus building or on campus land, New York State business incubators with a bona-fide affiliation with a private Eligible Institution, and any vacant land or vacant building space that is not located Nassau, Suffolk or Westchester County or the New York City. The Bill requires the distribution of the three million square feet of land to be managed in a way designed to ensure regional balance and balance among eligible rural, urban and suburban areas in the state.

Eligible Institution Application Process

The President or Chief Executive of an Eligible Institution that would like to sponsor a Tax-Free NY area must submit a plan to the Commissioner that: (1) specifies the land or space the Eligible Institution wants to include in the Tax-Free NY area; (2) describes the types of businesses that may locate in that space; (3) explains how those businesses align with and further the academic mission of the Eligible Institution; (4) explains how participation by those types of businesses would have positive community and economic benefits; and (5) describes the process the Eligible Institution will follow in selecting the businesses. Further, an Eligible Institution must consult with the municipality where space is located prior to including land or buildings that lie outside of its campus boundaries in its application to the Commissioner.

Plans submitted by public Eligible Institutions are subject to approval of the Commissioner, while plans submitted by private Eligible Institutions are subject to approval of the Start-Up NY approval board (the "Board"), which will examine the merits of the plans and approve or reject each plan by majority vote. The Board is a three-member board with the Governor, the speaker of the Assembly and the temporary president of the Senate each appointing a member. Although the Bill provides that the Board will not give preference to a plan based on the time of its submission, the Commissioner must stop accepting applications for approval of tax-free areas when the three million square foot mark is reached. As a result, timely submission will be critical. The Bill does provide that the Board will give preference to Eligible Institutions that include underutilized properties within their proposed tax-free areas.

In addition to the Tax-Free NY areas designated by Eligible Institutions, the Board will designate up to twenty strategic state assets as Tax-Free NY areas. Each asset must be affiliated with an Eligible Institution, will require support of the affiliated Eligible Institution and may not exceed a maximum of 200,000 square feet of vacant land or space. However, any space designated to a strategic asset will not count against any other aggregate space limitations contained in the Bill.

Eligibility Criteria and Application for Businesses

An Eligible Institution that receives approval to sponsor a Tax-Free NY area, and becomes a Sponsoring Institution, may begin soliciting and accepting applications from businesses interested in operating in the Tax-Free NY area ("Applicant Businesses"). The Sponsoring Institution will provide Applicant Businesses with an application in a form prescribed by the Commissioner containing the information the Commissioner determines is necessary to evaluate the application. All Applicant Businesses must submit an application to a Sponsoring Institution by December 31, 2020.

To qualify as an eligible business, an Applicant Business must demonstrate that in its first year it will create new jobs. It must then maintain the new jobs after its first year of operation. Furthermore, in years subsequent to the first year of operation, an Applicant Business must show that the Applicant Business's average number of employees equal or exceed the sum of: (1) the average number of employees of the Applicant Business and its related persons in New York for the year immediately preceding the year during which the application was submitted; and (2) the net new jobs of the Applicant Business in a Tax-Free NY area during that year. The Bill also includes additional "new business" requirements for an Applicant Business to participate in the Start-Up NY Program in Nassau, Suffolk or Westchester counties.

The Bill adds a new anti-competitive behavior prohibition to the Start-Up NY Program. This prohibition prevents a Sponsoring Institution from accepting an application from any business that "would compete with other business in the same community but outside the tax-free NY area." The Bill's language regarding this prohibition is vague, leaving the prohibition's implementation open to speculation; however, the Commissioner is required to promulgate rules and regulations that should clarify the prohibition's meaning.

An Applicant Business must be new to New York State. It cannot be engaged in a line of business that it or a related entity conducted in New York State in the last five years. If an Applicant Business operated in New York State at a previous point in time, the Commissioner can make an exception if the Applicant Business can demonstrate that the Applicant Business can substantially restore the jobs it had previously moved out of state. An Applicant Business can participate in the Start-Up NY Program if it is an existing New York State business that expands its operations into a tax-free area, subject to the Commissioner's determination that the business will create new jobs and will not eliminate or move existing jobs. Further, existing businesses that completed residency in a New York State business incubator may qualify for the program subject to the approval of the Commissioner even if they are not new businesses.

An application submitted by an Applicant Business must include: (1) the name, address and employer identification number of the Applicant Business; (2) a description of land or space the Applicant Business will use; (3) the terms of the lease agreement between the Sponsoring Institution and the Applicant Business; (4) a certification by the Applicant Business that it meets the eligibility criteria for participation in the program; (5) a statement as to whether the Applicant Business competes with businesses in the same community but outside the Tax-Free NY area; and (6) a description of how the Applicant Business plans to recruit employees from the local workforce.

Further, the Applicant Business must agree to share tax, employee and related party information with the Department of Economic Development (the "Department") and to provide the Department and the Sponsoring Institution access to any books or records needed to monitor compliance with the Start-Up NY Program. Applications will include performance benchmarks for the new jobs and consequences for failure to meet those benchmarks.

Applications submitted to Sponsoring Institutions will be reviewed by the Commissioner within 60 days and may be rejected if the Applicant Business: (1) does not meet eligibility criteria; (2) has not complied with requirements of the application; or (3) has failed to demonstrate that its participation will have positive community and economic benefits. If an application is not rejected within 60 days, the Applicant Business will be deemed to have been accepted to the Start-Up NY Program. Acceptance forms and notifications of acceptance will be provided by the Sponsoring Institution.

Next Steps

Although the Bill was only recently introduced by the Governor, public and private universities and colleges in New York should be aware of its provisions and how to comply with its application requirements, in order to be prepared if/when the Bill is approved. Developing a plan and demonstrating how sponsoring a Tax-Free NY area will align with and promote an institution's educational activities will be essential if an institution seeks to participate in the program. ***It is especially important for private universities and colleges to get an early start, because the amount of space that can be approved for use by these organizations is limited.***

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