



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

TO: Full Board

FROM: John B. King, Jr.

SUBJECT: Proposed Amendment of Section 155.22 of the Regulations of the Commissioner, relating to Qualified School Construction Bonds and Qualified Zone Academy Bonds

DATE: December 28, 2010

AUTHORIZATION(S):

SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents adopt as an emergency rule the proposed amendment of section 155.22 of the Commissioner's Regulations, relating to Qualified School Construction Bonds and Qualified Zone Academy Bonds?

Reason(s) for Consideration

Compliance with federal statutes.

Proposed Handling

The proposed amendment is being presented to the full Board for adoption as an emergency rule at the January 2011 Regents meeting.

Procedural History

The proposed amendment was adopted as an emergency rule at the September Regents meeting, effective September 21, 2010, and was revised and readopted as an emergency rule at the November 2010 Regents meeting.

Background Information

Internal Revenue Code section 54F (26 USC section 54F), as added by section 1521(a) of Part III of Subtitle F of Title 1 of Division B of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub.L. 111-5, 123 Stat. 115 provides for the issuance of Qualified School Construction Bonds for the construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which such a facility is to be constructed with part of the proceeds of such issue, by a State or local government within the jurisdiction of which such school is located. There is a national qualified school construction bond limitation of \$11 billion for each of the 2009 and 2010 calendar years. Within such national bond limitation amounts, the Secretary of the U.S. Treasury will allocate state limitation amounts to each state for the state's allocation to bond issuers within the state.

New York State is home to three city school districts, New York City, Buffalo and Rochester, that are large enough to qualify as part of the 100 largest nationwide school districts, and as such, these districts will receive direct federal Qualified School Construction Bond Allocations from the U.S. Treasury Secretary. Additionally, New York State received \$192 million in the 2009 and \$178 million in the 2010 calendar years to allocate to other districts in the State that did not receive a direct federal allocation.

The 2009 allocation was retained by the State to fund State expenditures for local district capital projects. The purpose of the proposed amendment to section 155.22 of the Commissioner's Regulations is to prescribe the procedures for New York State to allocate its \$174,782,000 2010 State limitation amount to those school district bond issuers not receiving a direct federal allocation.

In addition, the proposed amendment revises the provisions relating to Qualified Zone Academy Bonds (QZAB) to provide for a separate charter school allocation from the QZAB State limitation amount. The QZAB provisions are also updated to include QZAB issued under 26 USC 54E, as added by Pub.L. 110-343, 122 Stat. 3765, 3869. Prior to the addition of section 54E, QZAB were issued pursuant to 26 USC section 1397E.

A Notice of Proposed Rule Making was published in the State Register on September 1, 2010. A Notice of Revised Rule Making was published in the State Register on November 17, 2010. An Assessment of Public Comment is attached.

The proposed rule has been substantially revised in response to public comment to delete a requirement that limited the QSCB charter school allocation for a given calendar year to \$500,000 per charter school.

Under the State Administrative Procedure Act, the revised rule cannot be adopted on a permanent basis until after its publication in the State Register and expiration of a 30-day public comment period. Since the November 2010 emergency

rule will expire on January 22, 2011, another emergency adoption is necessary for the preservation of the general welfare to ensure that the emergency rule adopted at the November 2010 Regents meeting, as revised, remains continuously in effect until it can be adopted as a permanent rule. A Statement of the Facts and Circumstances Which Necessitate Emergency Action is attached. It is anticipated that a Notice of Revised Rule Making will be published in the State Register no later than January 19, 2011. Supporting materials are available upon request from the Secretary to the Board of Regents.

Recommendation

Staff recommend that the Regents take the following action:

VOTED: That section 155.22 of the Regulations of the Commissioner of Education be amended as submitted, effective January 23, 2011, as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare in order to ensure that the emergency rule adopted at the November 2010 Regents, as revised, meeting remains continuously in effect until such time as it can be adopted as a permanent rule.

Timetable for Implementation

The November emergency rule will expire on January 22, 2011. If adopted by the Board of Regents at its January meeting, the third emergency rule will become effective on January 23, 2011. It is anticipated that the proposed rule will be presented for adoption as a permanent rule at the March 2011 Regents meeting.

Attachment

PROPOSED PROMULGATION OF SECTION 155.22 OF THE REGULATIONS OF
THE COMMISSIONER OF EDUCATION PURSUANT TO SECTIONS 101, 207 AND
305 OF THE EDUCATION LAW AND 26 USC SECTIONS 54E AND 54F, RELATING
TO QUALIFIED SCHOOL CONSTRUCTION BONDS AND QUALIFIED ZONE
ACADEMY BONDS
STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE
EMERGENCY ACTION

Internal Revenue Code section 54F (26 USC section 54F), as added by section 1521(a) of Part III of Subtitle F of Title 1 of Division B of the American Recovery and Reinvestment Act of 2009 (ARRA), Pub.L. 111-5, 123 Stat. 115, 355 provides for the issuance of Qualified School Construction Bonds for the construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which such a facility is to be constructed with part of the proceeds of such issue, by a State or local government within the jurisdiction of which such school is located. There is a national qualified school construction bond limitation of \$11 billion for each of the 2009 and 2010 calendar years. Within such national bond limitation amounts, the Secretary of the U.S. Treasury will allocate state limitation amounts to each state for the state's allocation to bond issuers within the state.

New York State is home to three city school districts, New York City, Buffalo and Rochester, that are large enough to qualify as part of the 100 largest nationwide school districts, and as such, these districts will receive direct federal Qualified School Construction Bond Allocations from the U.S. Treasury Secretary. Additionally, New York State received \$192 Million in the 2009 and \$178 Million in the 2010 calendar

years to allocate to other districts in the State that did not receive a direct federal allocation.

The 2009 allocation was retained by the State to fund State expenditures for local district capital projects. The purpose of the proposed amendment to section 155.22 of the Commissioner's Regulations is to prescribe the procedures for New York State to allocate its \$174,782,000 2010 state limitation amount to those school district bond issuers not receiving a direct federal allocation.

In addition, the proposed amendment revises the provisions relating to Qualified Zone Academy Bonds (QZAB) to provide for a separate Charter school allocation from the QZAB State limitation amount. The QZAB provisions are also updated to include QZAB issued under 26 USC 54E, as added by Pub.L. 110-343, 122 Stat. 3765, 3869. Prior to the addition of section 54E, QZAB were issued pursuant to 26 USC section 1397E.

The proposed amendment was adopted as an emergency action at the September 2010 Regents meeting. A Notice of Proposed Rule Making was published in the State Register on September 1, 2010. The proposed amendment was substantially revised and adopted as a second emergency action at the November 2010 Regents meeting, effective November 23, 2010. A Notice of Revised Rule Making was published in the State Register on November 17, 2010.

The proposed rule has been further revised in response to public comment to delete a requirement that limited the QSCB charter school allocation for a given calendar year to \$500,000 per charter school. Pursuant to the State Administrative Procedure Act (SAPA) section 202(4-a), the revised rule cannot be adopted by regular

(non-emergency) action until at least 30 days after publication of the revised rule in the State Register. Since the Board of Regents only meets at fixed intervals, the earliest the proposed amendment could be adopted by regular action would be at the March 7-8, 2011 Regents meeting. Since the November emergency adoption will expire on January 22, 2011, 60 days after its filing with the Department of State on November 23, 2010, there would be a lapse in the rule's effectiveness if adopted by regular action, which will, in turn, disrupt implementation of the QSCB program in New York State. A third emergency adoption is necessary for the preservation of the general welfare to ensure that the emergency rule adopted at the November 2010 Regents meeting, as revised, remains continuously in effect until the effective date of its adoption as a permanent rule.

It is anticipated that the emergency rule will be presented for adoption as a permanent rule at the March 7-8, 2011 Regents meeting, after publication of a new Notice of Revised Rule Making in the State Register and expiration of the 30-day public comment period prescribed in the State Administrative Procedure Act.

AMENDMENT OF SECTION 155.22 OF THE REGULATIONS OF THE
COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 305 and 3713 and 26 USC
sections 1397E, 54E and 54F

Section 155.22 of the Regulations of the Commissioner of Education is
amended, effective January 23, 2011, as follows:

§ 155.22. Qualified zone academy bonds and Qualified school construction bonds.

(a) Qualified zone academy bonds (QZAB).

[(a)] (1) Purpose. The purpose of this [section] subdivision is to establish
procedures, consistent with State and Federal law, for the allocation and issuance of
qualified zone academy bonds as authorized by 26 USC [section] sections 1397E and
54E (26 USC section 1397E: United States Code, [1994] 2006 edition, [supplement III,
volume 3] volume 17; Superintendent of Documents, U.S. Government Printing Office,
Washington, D.C. 20402-9328; [1998] 2008; 26 USC section 54E: Public Law 110-
343, Div. C, Title III, section 313(a), 122 Stat. 3765, 3869-3872; Superintendent of
Documents, U.S. Government Printing Office, Washington, D.C. 20402-9328; 2008; -
available at the Office of Facilities Planning, Education Building Annex, Room 1060,
State Education Department, Albany, New York 12234).

[(b)] (2) Definitions. As used in this [section] subdivision:

[(1)] (i) Qualified zone academy bond (or QZAB) means a bond, as defined in
26 USC [section 1397E(d)(4)] sections 1397E(d) or 54E(a) , the proceeds of which can
be used for rehabilitating or repairing the public school facility in which a qualified zone
academy is established, providing equipment for use at such academy, developing

course materials for education to be provided at such academy and/or training teachers and other school personnel in such academy.

[(2)] [(ii)] Qualified zone academy means a public school, or academic program within a public school, which is established by and operated under the supervision of an eligible school district and which meets the requirements of 26 USC [section] sections 1397E(d)(4) or 54E(d)(1).

[(3)] [(iii)] Qualified contribution means a contribution as defined in 26 USC [section] sections 1397E(d)(2)(B) or 54E(d)(4), made by a private entity to a qualified zone academy.

[(4)] [(iv)] Eligible school district means an eligible local education agency, as defined in 26 USC [section] sections 1397E(d)(4)(B) or 54E(d)(2), which meets the requirements of subdivision (d) of this section.

[(5)] [(v)] Project or capital construction project means a project:

[(i)] [(a)] for a qualified purpose, as defined in 26 USC [section] sections 1397E(d)(5) or 54E(d)(3);

[(ii)] [(b)] that is financed through qualified zone academy bonds issued pursuant to 26 USC [section] sections 1397E or 54E; and

[(iii)] [(c)] that has voter authorization or board authorization, as required.

[(6)] [(vi)] State limitation amount allocation means the amount of the qualified zone academy bond limitation allocated to the State pursuant to 26 USC [section] sections 1397E(e)(2) or 54E(c)(2).

[(c)] [(3)] State responsibilities.

[(1)] (i) Allocation. The commissioner shall determine annually the respective amounts of the State limitation amount allocation to be allocated to approved qualified zone academies within eligible school districts.

[(i)] (a) Fifty percent of the State limitation amount allocation shall be allocated to approved qualified zone academies located within the City School District of the City of New York in accordance with the procedures set forth in [subparagraph (iii)] clause (d) of this [paragraph] subparagraph.

(b) Charter school allocation. Charter schools shall be eligible to receive from the State limitation amount a total allocation amount that is proportionate to the percentage of students enrolled in charter schools, as determined by dividing the total number of students enrolled in charter schools by the total number of students enrolled in grades K-12 in the public schools, and expressing the resulting decimal number as a percentage rounded up to the next whole number, provided that such amount shall not be less than \$2,000,000. Such total allocation amount shall be allocated to approved qualified zone academies located within charter schools in accordance with the procedures set forth in clause (d) of this subparagraph.

[(ii)] (c) The remaining [fifty percent of the] State limitation amount allocation, after allocation of the amounts specified in clauses (a) and (b) of this paragraph, shall be allocated to approved qualified zone academies located within the remaining school districts in the State in accordance with the procedures set forth in [subparagraph (iii)] clause (d) of this [paragraph] subparagraph.

[(iii)] (d) Procedures for allocation of State limitation amount.

[(a)] (1) All applications received from eligible school districts by the date prescribed pursuant to [subdivision (d)] paragraph (4) of this [section] subdivision shall be ranked in order of highest to lowest percentage of students attending the respective qualified zone academy schools or participating in the respective qualified zone academy programs, who are eligible for free or reduced-cost lunches under the school lunch program established under the National School Lunch Act. Charter school applications shall be separately ranked.

[(b)] (2) Subject to the provisions of [subparagraphs (i) and (ii)] clauses (a), (b) and (c) of this [paragraph] subparagraph, the available State limitation amount allocation shall be allocated to approved qualified zone academies in the order of rank, from highest to lowest, as established in [clause (a)] subclause (1) of this [subparagraph] clause, in an amount equal to the amount to be financed by the QZABs to be issued for each respective project, until such allocation is exhausted.

[(c)] (3) Eligible school districts that timely apply for but do not receive an allocation for qualified zone academies within their districts because the number of applicants exceeds the amount available from the State limitation amount allocation shall receive priority, in the order in which they are ranked, pursuant to [clause (a)] subclause (1) of this [subparagraph] clause, with respect to the next available allocation.

[(d)] (4) Notwithstanding any other provision of this subdivision to the contrary, in the event the commissioner determines that the State limitation amount allocation for any year will not be exhausted because of the failure of eligible school districts receiving an allocation to spend their allocation, the commissioner may adjust the

percentages specified in [subparagraphs (i) and (ii)] clauses (a), (b) and (c) of this [paragraph] subparagraph as needed to assure that such State allocation is exhausted; provided that school districts whose allocation for the prior year was reallocated pursuant to this clause shall be given priority in the order in which they are ranked pursuant to [clause (a)] subclause (1) of this [subparagraph] clause in the allocation of any allocated but unspent funds in the current year.

(2) (ii) Capital construction projects involving the repair, renovation or alteration of public school facilities that are approved by the commissioner, and established as qualified zone academies pursuant to the provisions of [subdivision (d) of this section] paragraph (4) of this subdivision, shall be eligible to receive building aid pursuant to the provisions of Education Law section 3602(6).

[(3)] (iii) The commissioner shall establish annually the database to be used to determine whether a school district qualifies pursuant to 26 USC [section] sections 1397E(d)(4)(A)(iv)(II) or 54E(d)(1)(D)(ii) as meeting the student eligibility rate in school lunch programs established under the National School Lunch Act.

[(d)] (4) School district responsibilities.

[(1)] (i) Eligible school districts, in which a qualified zone academy or academies are located, may apply, in a form prescribed and by a date established by the commissioner, for approval to receive an allocation for such qualified zone academy or academies from the State limitation amount allocation. Such application shall include, but is not limited to:

[(i)] (a) a certification by the school district within which the qualified zone academy or academies are located that the school(s) or academic program(s) meet

the requirements for a qualified zone academy pursuant to 26 USC [sections] sections 1397E(d)(4) or 54E(d)(1);

[(ii)] (b) a certification by the school district that the bonds to be issued meet the requirements for a qualified zone academy bond pursuant to 26 USC [sections] sections 1397E(d)(1) or 54E(a);

[(iii)] (c) a description of the capital construction project(s) to be financed through the issuance of qualified zone academy bonds;

[(iv)] (d) copies of written commitments from private entities to make qualified contributions, as described in 26 USC [sections] sections 1397E(d)(2)(B) or 54E, having a present value, as of the date of the issuance of the bond issue, of not less than 10 percent of the proceeds of the issue; and

[(v)] (e) the written approval of the superintendent of schools and the [Board of Education] board of education for such bond issuance or, in the case of charter schools, from the chief school officer and the board of trustees.

[(2)] (ii) Any capital construction project to be financed through the issuance of qualified zone academy bonds shall be submitted for review to the Office of Facilities Planning in the State Education Department.

[(3)] (iii) Nothing in this regulation shall prevent the use of qualified zone academy bonds for projects that are not capital construction projects, provided that such projects meet all the other requirements of this section, including voter or board authorization, as may be required.

(b) Qualified school construction bonds (QSCB).

(1) Purpose. The purpose of this subdivision is to establish procedures, consistent with State and Federal law, for the allocation and issuance of qualified school construction bonds to local educational agencies, as authorized by section 54F of the Internal Revenue Code (26 USC section 54F), as added by section 1521(a) of Part III of Subtitle F of Title I of Division B of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5, 123 STAT. 115, 355-357; Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402-9328; 2009 - available at the Office of Facilities Planning, Education Building Annex, Room 1060, State Education Department, Albany, New York 12234).

(2) Definitions. As used in this subdivision:

(i) Qualified School Construction Bond (or QSCB) means a bond as defined in 26 USC §54F(a);

(ii) State limitation amount allocation means the amount of the national qualified school construction bond limitation that is allocated to the State pursuant to 26 USC section 54F(d)(1).

(3) Qualified school construction bond allocation. The commissioner shall determine annually the respective amounts of the State limitation amount allocation to be allocated to local educational agencies, pursuant to the following:

(i) Except as provided in paragraph (4) of this subdivision, local educational agencies located in cities with populations of more than one hundred twenty-five thousand inhabitants that receive a direct allocation pursuant to 26 USC section 54(f)(d)(2) shall not receive an additional allocation pursuant to this subdivision for the same calendar year for which such direct allocation is made.

(ii) Local educational agencies located in cities with populations of more than one hundred twenty-five thousand inhabitants that did not receive a direct allocation pursuant to 26 USC section 54(F)(d)(2) shall receive an allocation proportionate to the respective amount each such agency received under section 1124 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. section 6333; United States Code, 2006 edition, volume 13; Superintendent of Documents, U.S. Government Printing Office, Stop SSOP Washington, DC 20402-9328; 2008;) for the most recent fiscal year ending before the calendar year for which such allocation is made; provided that any such allocation made to the City School District of the City of Yonkers or to the City School District of the City of Syracuse shall not exceed \$15 million.

(iii) Allocations with respect to charter schools shall be made as follows:

(a) Charter school allocation amount. Charter schools shall be eligible to receive from a total allocation amount that is proportionate to the percentage of students enrolled in charter schools, as determined by dividing the total number of students enrolled in charter schools by the total number of students enrolled in grades K-12 in the public schools, and expressing the resulting decimal number as a percentage rounded up to the next whole number, provided that such amount shall not be less than \$5,000,000.

(b) All charter schools are eligible and may apply, in a form prescribed and by a date established by the commissioner, for approval to receive an allocation from the charter school allocation amount. Such application shall include, but is not limited to:

(1) a certification by the charter school that the bonds to be issued meet the requirements for a qualified school construction bond pursuant to 26 USC section 54F(a);

(2) a description of the capital construction project(s) to be financed through the issuance of qualified school construction bonds; and

(3) the written approval of the chief school officer of the charter school and its board of trustees for such bond issuance.

(c) All applications received from such charter schools by the date prescribed pursuant to clause (b) of this subparagraph shall be ranked in order of highest to lowest percentage of students in each such charter school who are eligible for free or reduced-cost lunches under the school lunch program established under the National School Lunch Act.

(d) The charter school allocation amount specified in clause (a) of this subparagraph shall be allocated to such charter schools in the order of rank of their respective applications, from highest to lowest, as established in clause (c) of this subparagraph, in an amount equal to the amount to be financed by the QSCB to be issued for each respective project, until such allocation is exhausted.

(e) Charter schools that timely apply for but do not receive an allocation pursuant to this subparagraph because the number of applicants exceeds the amount available from the charter school allocation amount shall receive priority, in the order in which they are ranked, pursuant to clause (c) of this subparagraph, with respect to the next available allocation.

(iv) Allocations with respect to all other local educational agencies shall be made as follows:

(a) All such local educational agencies are eligible and may apply, in a form prescribed and by a date established by the commissioner, for approval to receive an allocation from the State limitation amount allocation. Such application shall include, but is not limited to:

(1) a certification by the local educational agency that the bonds to be issued meet the requirements for a qualified school construction bond pursuant to 26 USC section 54F(a);

(2) a description of the capital construction project(s) to be financed through the issuance of qualified school construction bonds; and

(3) the written approval of the superintendent of schools and the board of education for such bond issuance.

(b) All applications received from such local educational agencies by the date prescribed pursuant to clause (a) of this subparagraph shall be ranked in order of highest to lowest percentage of students in each such local educational agencies who are eligible for free or reduced-cost lunches under the school lunch program established under the National School Lunch Act.

(c) The available State limitation amount allocation remaining after allocation of the amounts specified in subparagraphs (ii) and (iii) of this paragraph, shall be allocated to such local educational agencies in the order of rank of their respective applications, from highest to lowest, as established in clause (b) of this subparagraph, in an amount equal to the amount to be financed by the QSCB to be issued for each

allocation amount for a given calendar year shall not exceed \$5 million per local educational agency.

(d) Local educational agencies that timely apply for but do not receive an allocation pursuant to this subparagraph because the number of applicants exceeds the amount available from the State limitation amount allocation shall receive priority, in the order in which they are ranked, pursuant to clause (b) of this subparagraph, with respect to the next available allocation.

(4) Adjustment for unused allocations. Notwithstanding any other provision of this subdivision to the contrary:

(i) in the event a large local educational agency (LEA) that received a direct allocation pursuant to 26 USC section 54(f)(d)(2) for any calendar year, reallocates such allocation to the State pursuant to 26 USC section 54F(d)(2)(D) for such calendar year, the commissioner may adjust the amounts allocated pursuant to paragraph (3) of this subdivision as needed to assure exhaustion of the State limitation amount for such calendar year (excluding any amounts carried forward to a successive calendar year or years by the State or a large LEA); and/or

(ii) in the event the commissioner determines that the State limitation amount allocation for any calendar year will not be exhausted because of the failure of one or more of such local educational agencies receiving an allocation to spend such allocation, the commissioner may adjust the amounts allocated pursuant to paragraph (3) of this subdivision as needed to assure that such State limitation amount allocation for such calendar year is exhausted; provided that

(iii) with respect to adjustments made pursuant to subparagraphs (i) and/or (ii) of this paragraph, such reallocated amount(s) and/or unspent allocated amount(s) shall be allocated, until exhausted, in the following order:

(a) first, to local educational agencies specified in subparagraph (iv) of paragraph (3) of this subdivision;

(b) second, to local educational agencies specified in subparagraph (iii) of paragraph (3) of this subdivision;

(c) third, to local educational agencies specified in subparagraph (ii) of paragraph (3) of this subdivision; and

(d) fourth, to local educational agencies specified in subparagraph (i) of paragraph (3) of this subdivision.

(5) Qualified school construction bonds must be used within three years after issuance.

(6) Any capital construction project to be financed through the issuance of qualified school construction bonds shall be submitted for review to the Office of Facilities Planning in the State Education Department.

(7) Capital construction projects funded in whole or in part with a qualified school construction bond and involving the repair, renovation or alteration of public school facilities that are approved by the commissioner, shall be eligible to receive building aid pursuant to the provisions of Education Law section 3602(6).