
Form Conduit Indenture

2019 Second Edition



August 2019

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INTRODUCTION
TO
FORM CONDUIT INDENTURE¹
2019

SECOND EDITION

NATIONAL ASSOCIATION OF BOND LAWYERS

¹ This document, the Form Conduit Indenture, the Bibliography, and the Introduction should be read together in their entirety.

INTRODUCTION

The First Edition of the Form Conduit Indenture (the “Form Conduit Indenture”) and the associated Commentaries (the “Commentaries”) was undertaken by a committee (the “First Edition Committee”) of the National Association of Bond Lawyers (“NABL”) in 1994. Initially, the Committee was chaired by Association Member Carolyn Truesdell who enlisted a number of other NABL members. Ms. Truesdell collected numerous resource materials to assist the Committee in its work, and, with the assistance of certain members, identified various issues and questions to be dealt with in drafting the Form Conduit Indenture. Building on this foundation, Morris Knopf, who was appointed chair in 1995 by then NABL President William H. McBride, established a working subcommittee of Rick L. Frimmer, Michael Telle, Carolyn Truesdell, David A. Vind, Charles H. Waters, Jr. and Bruce P. Weisenthal, to draft particular Articles of the Form Conduit Indenture and Commentary relating thereto. The initial and subsequent drafts of the Form Conduit Indenture were further reviewed by the following members of the Committee: David R. Alderson, Michael J. Andreana, G. Allen Bass, David L. Blackner, Todd B. Brewer, Charles R. Brodbeck, Kathleen A. Collier, M. Jane Dickey, Colleen E. Hicks, Dianne Hobbs, Joseph H. Johnson, Jr., Frederick O. Kiel, Philip C. Lacey, William Mark Levinson, Robert B. Mitchell, Sujyot S. Patel, Bruce Rinehart, Walter J. St. Onge, William G. Tonkin and Steven M. Wagner. Beginning in 1996, Mr. McBride also has actively participated in the drafting process. The First Edition of the Form Conduit Indenture ultimately was published in 2000.

A second edition of this project was undertaken in 2017 by a committee (the “Second Edition Committee”) and together with the First Edition Committee, the “Committee”) led by Gordon Knox and comprised of Alina Arbuthnot, Teresa Metcalf Beasley, Eric R. Boyer, Amy King Conderas, William Hirata, Vanessa S. Lockin, Thomas Longino, Patricia D. Lott, Gregory Miller, Poonan Patidar, Jeff Qualkinbush, Alston Ray, Joseph (Jodie) E. Smith, Sara Tangen, Lisa M. Tatem, Blake Wade, Steven Washington, and Ben Wilson. The Board of Directors of NABL authorized distribution of the Form Conduit Indenture and Commentaries for consideration by NABL members.

For the Second Edition, the primary goals of the Committee were to review and update as needed the form language included in the first edition for the most common provisions of conduit trust documentation, including specifically those involving the trustee and the remedies provisions, and to provide updated Commentaries analyzing the meaning and function of the various provisions with drafting guidance for the use of lawyers in tax-exempt bond transactions. Additionally, the Commentaries have been expanded to include talking points to provide readers with additional considerations related to various provisions.

For ease of analysis, the Committee is providing a complete Form Conduit Indenture, with certain provisions to be provided or completed once the particular details of the transaction are identified. The Committee has, in several instances, drafted alternative examples of indenture provisions and has set forth those alternatives in brackets and bold-face. The Commentaries discuss and explain those alternatives, some of which may be controversial. Each drafter should consider the alternative provisions carefully before determining which approach to adopt. In addition, certain generic names, terms or definitions are set forth in brackets, capital letters and

bold-face type. Unless the context otherwise requires, the terms defined in the Form Conduit Indenture shall have the same meaning in the Commentaries.

The Form Conduit Indenture generally follows what is known as a “conduit” structure. The essential factor involved for documentation purposes is that the Issuer is not the real party in interest on the Bonds. A separate entity, here the Borrower, is the true obligor on the debt and the ultimate user of the proceeds of the Bonds. There would be significant differences in documentation if the Issuer were the real party in interest. The Form Conduit Indenture is structured as a two-party trust indenture which is typical for a conduit bond indenture. Non-conduit bonds are often issued under other structures, such as bond resolutions, which are not two-party documents. This project is not intended for use in a non-conduit transactions although there may be similar discussion points in both types of transactions.

The Form Conduit Indenture has not been drafted as a “master indenture” but rather as a straightforward indenture without numerous nuances and excessive detail. That said, provision for the issuance of Additional Bonds has been incorporated. The Form Conduit Indenture does not provide for uncertificated debt, does not include a lien or mortgage on assets, does not contain significant provisions concerning subordinate debt or series of bonds that do not rank *pari passu* and does not include extensive rate, financial or other covenants, since such covenants are typically provided for in the agreement with the conduit Borrower. The issues mentioned in the preceding sentence will be left to the individual drafter based upon the requirements of the particular financing. The Form Conduit Indenture assumes a fixed interest rate structure and does not contemplate any credit enhancement, bondholder tender rights or security, other than in certain funds and accounts established by the Form Conduit Indenture and by revenues specifically pledged under the Form Conduit Indenture.

The Committee determined not to include a continuing disclosure undertaking in the Form Conduit Indenture. Provisions relating to municipal bond insurance or other credit enhancement could be added as a separate Article in the Form Conduit Indenture, although other references to such credit enhancement would also be included throughout the document.

The Committee considered drafting an entire article for the Form Conduit Indenture relating to Bondholder committees to be utilized after an Event of Default. Such an article was not included because the Committee believes there is a consensus among practicing attorneys that specification of such a device is not necessary. The Trustee is sufficiently authorized as a part of its general remedial powers to utilize a Bondholder committee.

Documents such as the Form Conduit Indenture are often dated as of the first day of the month during which the Bonds are issued. Occasionally, documents will be dated as of the 15th of the month if the Bonds are to be delivered late in the month. Selecting an “as of” date simplifies drafting of financing documents, disclosure documents, opinions and closing certificates and avoids concerns about using the actual date of closing. Use of the first day of the month also avoids problems which may arise in recording or filing a document dated after the date of filing.

In updating the Commentaries, the Committee has made use of certain provisions of the *American Bar Foundation Commentaries on the Model Debenture Indenture Provisions* (1971) (the “ABA Commentaries”), which include the Model Debenture Indenture Provisions (the “Model Provisions”), and the *American Bar Foundation Mortgage Bond Indenture Form* (1981). The Committee has also reviewed the *Revised Model Simplified Indenture* (2000) prepared by the Ad Hoc Committee for Revision of the *1983 Model Simplified Indenture of the Section of Business Law*, American Bar Association (the “ABA Model Simplified Indenture”). In addition, the Commentaries may reference provisions of the Trust Indenture Act of 1939, as amended (the “TIA”). While the TIA is generally inapplicable to bonds issued by state and local governments, many terms of security documents for such bonds are consistent with and modeled after analogous corporate indentures. The Committee has attempted to provide citations to such other sources where appropriate. Notwithstanding that their purposes are somewhat different from those of the Form Conduit Indenture (the Model Provisions, the ABA Model Simplified Indenture, and the TIA are oriented entirely to corporate transactions), they are worthy of careful review by any public finance indenture scrivener.

The Form Conduit Indenture is intended to assist NABL members and is not intended to create a standard as to either scope or language. The Committee recognizes that indentures actually used in transactions will reflect varying state laws, regulations and practices, as well as factual differences and personal and law firm preferences. Coverage of any matter in the Form Conduit Indenture is not intended to suggest that the drafter must address that subject in an indenture. Similarly, the omission of any matter in the Form Conduit Indenture is not intended to suggest that it is improper for a drafter to include such matter in an indenture. The Committee’s intent has been to provide guidance rather than to prescribe precise language.

**COMMENTARY
AND TALKING POINTS REGARDING
FORM CONDUIT INDENTURE¹**

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COMMENTARY ON GRANTING CLAUSES³

The granting clauses in the Form Conduit Indenture, as do granting clauses in trusts generally, state the intent of the creator of the trust to vest in the trustee certain property rights and procedures for preserving those rights for the benefit of the trust beneficiaries. Under the Form Conduit Indenture, the trustor is a state or local government or instrumentality (the “Issuer”) and the beneficiaries are the holders of the Bonds to be issued under the Form Conduit Indenture.

The Form Conduit Indenture states the intent of the Issuer (and that of the Borrower, evidenced by the Borrower’s acknowledgment of the assignment in the Loan Documents) to create an absolute assignment of property rights to the Trustee, rather than the mere creation of a “security interest” under the Uniform Commercial Code. This approach reflects reliance on general trust and conveyancing principles and recognizes the adverse post-default consequences to the Trustee and the Bondholders that might otherwise ensue, as in federal bankruptcy proceedings, especially concerning balances and Eligible Investments held in Funds created under the Indenture.

The intent to assign property rights with only limited reserved rights (i.e., the right to a remainder interest when the obligations issued under the Form Conduit Indenture are fully discharged) is more consistent with traditional trust arrangements than are security agreements under the Uniform Commercial Code. The interest of the Trustee in the funds and accounts created under the Form Conduit Indenture is possessory and the Trustee’s duties with respect to these funds and accounts after default differ markedly from those of a secured creditor.

Talking Point: Trusts vs. Statutory Liens and Special Revenues. Creating the trust, and assigning property rights to the Trustee exclusively by contract, may be inconsistent with an intent to provide statutory liens or special revenue characterization that would be recognized in the event of a Chapter 9 Issuer bankruptcy.

In federal bankruptcy proceedings related to the Borrower, the right to use the funds and accounts held under the Form Conduit Indenture (particularly the Reserve Fund) is an important issue. If the Trustee is considered a mere secured creditor with respect to these funds and accounts, the funds and accounts would remain the property of the Borrower’s estate and could be used as cash collateral to operate the Borrower’s business. The Trustee (and the Bondholders) clearly desire to have control over the use of these funds and accounts. Indeed, the Reserve Fund may represent the only funds the Trustee has available to protect the rights of the Bondholders in the bankruptcy proceeding.

Federal bankruptcy courts considering the issue to date generally have recognized that the status of the funds and accounts as trust funds and not merely as collateral for a loan makes a difference in the court’s treatment of the funds and accounts. These courts have acknowledged both that the Borrower has rights in the funds and accounts and that the funds and accounts constitute part of the Borrower’s estate under Section 541 of the Bankruptcy Law. However,

³ All terms used herein have the same meaning as in the Form Conduit Indenture unless otherwise defined.

since the remainder interest of the Borrower in the funds and accounts can be shown to be remote (unless the Trustee is substantially over secured), courts will generally permit the Trustee to retain the funds and accounts and deny their use to the Borrower. Since courts are not consistent in this result, however, the Trustee should be cautious and seek advice of counsel, as the consequences of violating the automatic stay provisions of the Bankruptcy Law (or of causing taxability of the Bonds) could be serious for the Trustee. Notwithstanding the above, the Form Conduit Indenture uses security interest language in Section 11.1 with the intent of preserving fully the rights of the Bondholders and to place other creditors on notice of the relationships of the parties.

If real property is included in the Trust Estate, the parties should be aware of the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996, which amends 42 U.S.C. Section 9601 et seq. (“CERCLA”) and 42 U.S.C. Section 6991 (“RCRA”). This Act provides trustees some protection from liability under CERCLA and RCRA with respect to property held in trust. The protection is not absolute and many trustee banks may offer their own form language for the trust agreement or deed of trust with respect to environmental matters.

The Form Conduit Indenture anticipates that the Borrower will make any arbitrage rebate payments directly to the United States. Accordingly, although a Rebate Fund is created under the Form Conduit Indenture, it is not funded. If it is funded, the Committee believes that the current practice of excluding the Rebate Fund from the property interests assigned to the Trustee is not technically correct. Rather, the Committee believes that the Rebate Fund should be clearly assigned to the Trustee, as between the Borrower or Issuer and the Trustee, but that it should not be part of the Trust Estate pledged for the payment of the Bonds and the Trustee’s fees and expenses. This structure should result in a greater likelihood that the Rebate Fund will be available to pay the rebate due to the United States in the event of the Borrower’s financial difficulties.

COMMENTARY ON ARTICLE I – DEFINITIONS AND INTERPRETATIONS

This Article of the Form Conduit Indenture establishes definitions of capitalized terms and prescribes procedures and rules of construction to avoid duplication in the Form Conduit Indenture. The definitions are set forth in alphabetical order and the initial letter or letters of each defined term are capitalized. These are sample definitions and may be subject to negotiation, although the Committee has attempted to leave those definitions which are more likely to be subject to negotiation and variations to the discretion of the drafter. The Commentary set forth below generally discusses the open issues to be resolved by the drafter. The Committee believes the definitions not so discussed to be relatively straightforward.

“Act.” The drafter should insert a description of the applicable state enabling legislation.

“Affiliate(s).” This definition has been bracketed in order to indicate that its presence or absence is driven as much by the business transaction as by the fact that different areas of the law have different meanings for the word. For example, “affiliate” has a different meaning under the Code, the Bankruptcy Code and Federal securities laws. Accordingly, the precise definition in the Form Conduit Indenture will depend upon the context of its use.

“Attesting Officer.” The drafter should designate the appropriate officers including, where applicable, designees.

“Authorized Borrower Representative.” The drafter should designate appropriate officers.

“Authorized Denomination.” The drafter should designate the appropriate bond denominations. In the event the minimum denomination is \$100,000 with \$5,000 increments above that, care should be taken to address the impact of partial redemptions to avoid Bonds outstanding in unauthorized denominations. See Section 3.8 of the Form Conduit Indenture. The Municipal Securities Rulemaking Board filed an amendment to Rule G-15, which was subsequently approved by the Securities and Exchange Commission, that would prohibit transactions in denomination amounts smaller than the minimum Authorized Denomination subject to some limited exceptions. The drafter may wish to change this to say “\$100,000 or any multiple thereof” if the issue of Bonds is sufficiently large that having all the maturities and scheduled redemptions in multiples of \$100,000 is not a hardship. Federal securities laws, particularly SEC Rule 15c2-12 and SEC Rule 144A, may also be important considerations in selecting the “authorized denominations.” The Form Conduit Indenture does not use the concept of “integral” multiples. The use of “integral” is thought to be redundant and thus has been eliminated.

“Code” and “Regulations”. Current document practice for definitions and references to applicable tax statutes and related administrative and judicial embellishments appears to vary widely. The Committee has seen examples which:

- (a) Include specific references to prior tax codes – either by adding a definition of the prior code (*e.g.*, the “1954 Code”) or by adding general language to the definition of “Code” (*e.g.*, “or any corresponding provision of a predecessor statute”);
- (b) Do not include Internal Revenue Service regulations as a part of “Code;”
- (c) Include rulings and judicial determinations and decisions as a part of “Code;” and
- (d) Include successor statutes as a part of “Code.”

The Committee has chosen to include only reference to the current (presumably 1986) Code and to include applicable Regulations as a part of the base definition. If a prior code or statute is relevant, it may be added as a separate definition. This was decided to be a preferable practice since the prior code or statute is likely to be relevant only to certain particular covenants rather than to all the tax-related matters in the document. The Committee has chosen not to include rulings and judicial decisions as part of “Code.” Judicial determinations, particularly of lower courts, may not be followed in other jurisdictions.

The matter of adding a reference to successor statutes is more important than might otherwise appear. As noted in the discussion concerning Section 6.3, the Committee believes an

indenture should be clear as to whether the covenant on compliance with the Code includes or excludes a requirement to comply with the provisions of tax statutes adopted after issuance of the Bonds. Such a covenant should be set forth in the tax covenant provisions, if it is to be followed, rather than appear as a part of a general definition by including reference to “successor statutes” in the definition of “Code.”

The definition of “Regulations” makes applicable only those Regulations which apply to the Bonds as and when issued. The Internal Revenue Service has typically issued proposed regulations with two general types of effective dates. Some proposed regulations have effective date provisions which call for the final regulations to be effective for obligations issued a specified number of days after adoption of the regulations in final form. The other type, most notably the proposed pollution control regulations of 1968, provide they will be effective after a specific date. Only the latter type of proposed regulations can be judged as “applicable” to a bond issue with an issue date after the promulgation of the proposed regulations. The first type would not be applicable to the Bonds since, if adopted as final in their current form, the Bonds in question would have been issued prior to the effective date. A drafter should consider the effect of retroactive or prospective application of regulations to the bond issue.

“Defeasance Obligations.” The drafter should review applicable state law and consult with the Underwriter regarding the types of obligations to be included in this definition. In many situations, the Rating Services or bond insurers will dictate which obligations are acceptable. In general, defeasance obligations must have minimal risk of loss of principal. Some bond or tax counsel may not favor the bracketed language.

“Determination of Taxability.” The Committee believes that this definition, when present, is generally negotiated and thus no consensus exists as to standard language. Two examples are:

Short Form

In any final decree, judgment, determination or order of any federal court or federal administrative body, including the Internal Revenue Service, it is determined that the interest payable on the Bonds is includable for federal income tax purposes in the gross income of any Bondholder **[other than a Bondholder who is a “substantial user” of the Project or a “related person” within the meaning of the Code] [as a result of the Borrower’s failure to comply with any covenant, representation or warranty contained in the Agreement.] [Any such determination will not be considered final for this purpose unless any Bondholder involved in the proceeding or action resulting in the determination (a) gives the Issuer, Borrower and the Trustee prompt written notice of the commencement thereof and (b) if the Borrower agrees to pay all expenses in connection therewith, and to indemnify such Bondholder against all liabilities resulting from the Borrower’s contest of the determination, offers the Borrower an opportunity to contest the determination, either directly or in the name of the Bondholder, and until conclusion of all appellate reviews, if sought, or the expiration of the time within which to seek appellate review if not sought.]**

Long Form

A determination that interest accrued or paid on any Bonds is included in gross income for federal income tax purposes, which determination shall be deemed to have been made upon the occurrence of the first to occur of the following: (a) the date on which any Bondholder is advised in writing by the Commissioner or any District Director of the Internal Revenue Service that **[as a consequence of an action, or failure to act, by the Issuer or the Borrower,]** the interest on the Bonds is included in gross income for federal income tax purposes; (b) the date on which the Issuer or the Borrower receives notice from a Bondholder that the Bondholder has been advised (i) in writing that the Internal Revenue Service has issued a statutory notice of deficiency or similar notice to such Bondholder which asserts, in effect, that interest on the Bonds received by such Bondholder is included in the gross income of such Bondholder for federal income tax purposes **[as a result of an action, or failure to act, by the Issuer or the Borrower]** or (ii) by an opinion of independent counsel (approved by the Issuer) received by the Bondholder which concludes, in effect, that interest on the Bonds is included in gross income for federal income tax purposes **[as a result of an action, or failure to act, by the Issuer or the Borrower]**; (c) the day on which the Issuer is advised in writing by the Commissioner or any District Director of the Internal Revenue Service that there has been issued a public or private ruling of the Internal Revenue Service that the interest on the Bonds is included in gross income for federal income tax purposes **[as a result of an action, or failure to act, by the Issuer or the Borrower]**; or (d) the day on which the Issuer is advised in writing by counsel to a Bondholder that a final determination, from which no further right of appeal exists, has been made by a court of competent jurisdiction in the United States of America in a proceeding with respect to which the Issuer and the Borrower have been given written notice and an opportunity to participate and defend that the interest on the Bonds is included in gross income for federal income tax purposes **[as a result of an action, or failure to act, by the Issuer or the Borrower]**.

The alternatives in the two forms are fairly standard (at least to commence negotiations) for a conduit transaction, limiting the definition to occurrences triggered by the Issuer or the Borrower and providing a way for the Borrower to be involved in a contest. The Committee notes, however, that some or all of such provisions may be subject to negotiation during the drafting process if the Issuer, the Borrower or the Underwriter consider them beneficial.

Talking Point: Determination of Taxability. Not all conduit transactions have taxability triggers and/or calls, and practices can and do vary widely. Additionally, consideration should be given to whether a Determination of Taxability will occur as a result of a change in legislation or other circumstance not caused by the Borrower's actions or inactions.

“Eligible Investments.” The drafter should review applicable state law, consult with the Issuer, Borrower, Underwriter and, when applicable, with the Rating Services and/or bond insurer, to develop the list of investments. It is also appropriate to specifically authorize the Trustee to invest in certain of its own obligations and investment funds. Certain investments may qualify as Eligible Investments at the time of acquisition but subsequently cease to be Eligible Investments due to rating downgrades or other circumstances. The terms governing some of those investments may provide guidance to the Trustee concerning the liquidation of such investments, the receipt of additional collateral or alternative remedies. The drafter should consider inserting provisions specifying the action, if any, to be taken for investments which do not contain such guidance terms including mandatory or discretionary disposition of investments. Any such provisions would most appropriately be included in Section 5.2. If the definition of “Eligible Investments” is drafted such that an investment, once made, may subsequently cease to be an Eligible Investment, the Committee believes that the language of Section 5.2(a) must be revised

to avoid a covenant default upon the occurrence of such event. The Committee does not have an opinion whether such avoidance is desirable.

“Governing Body.” The drafter should insert the correct name of the governing body.

“Loan Documents.” The drafter should complete this definition based upon the particular financing structure. Loan Documents may include the loan or lease agreement, a guarantee agreement, a deed of trust or mortgage, a regulatory agreement, etc.

“Note.” This definition will be included if a promissory note is used to evidence the Borrower’s obligations under the Agreement.

“Outstanding.” The last sentence of the definition of “Outstanding” provides that Bonds held by or on behalf of the Borrower or an Affiliate are to be disregarded for certain purposes. See also Section 10.4. There are occasions when Borrowers make tender offers to acquire Bonds with the intent to vote such Bonds for consents, amendments or other purposes. The last sentence of the definition of “Outstanding” may lead to a conclusion that the Trustee cannot count votes made as a result of a tender offer depending upon the timing of the purchase and other provisions of the tender offer, unless all the Outstanding Bonds are then owed by the Borrower or an Affiliate.

“Project Costs,” “Cost of the Project” or “Costs.” The drafter should comply with the provisions of the Act, applicable tax law under the Code and the particular terms of the financing transaction when drafting this definition. For example, if interest on the Bonds during construction, or for a short period after completion, is to be funded at closing, this use should be specifically mentioned as a permitted Project Cost.

“Record Date.” The drafter may need to conform this definition.

“Required Reserve” and “Series Required Reserve.” The definition of Required Reserve is structured as an aggregate number composed of separate reserve requirements for each Series of Bonds, although the Reserve Fund secures all Outstanding Bonds on a parity basis. It is also possible to structure the aggregate requirement as a single amount based on the total of all Bonds then outstanding. This may not affect the size of the aggregate reserve unless relatively high interest rates are encountered for one or more of the Series. The last proviso in the definition of “Series Required Reserve” is intended to cover certain tax analysis points where the regular terms for the maximum permitted reserve are not appropriate (*e.g.*, the sales price of the Bonds incorporate an unusually large discount). If the proviso is not present (or a comparable provision is not present elsewhere), the language could force the funding of a reserve amount for Additional Bonds that results in yield restricted investment for a portion of the reserve. Issuers and Borrowers may wish to provide that the Required Reserve be reduced automatically in accordance with amortization of principal of the Bonds as the principal amount outstanding reduces. To accomplish such a provision will require a modification of subsection (a) of the definition of “Required Reserve.”

If it is desired that each series of Bonds have a separate reserve, changes will be required in the definition of “Required Reserve” as well as in Section 4.4.

Section 1.2. This Section is little noticed but of great importance. Proper drafting of this Section can greatly reduce confusion and unnecessary language in other portions of the document. The Committee has chosen to include only the most standard provisions in this Section. Frequently, indentures will have a number of other subsections dealing with various matters.

**COMMENTARY ON
ARTICLE II - AUTHORIZATION,
EXECUTION, AUTHENTICATION, REGISTRATION AND
DELIVERY OF BONDS**

This Article of the Form Conduit Indenture authorizes issuance of the Bonds and provides details concerning the Bonds including execution, authentication and delivery. It also sets out procedures for transferring and exchanging Bonds, paying mutilated, lost or destroyed Bonds, canceling and disposing of Bonds, using Book Entry Bonds and issuing Additional Bonds. Many of the provisions in Article II, including those for the Initial Bonds, might appear in a supplemental indenture if the indenture is drafted as a “master indenture.” The Committee judged this too complicated for a form document, although this device may be useful in particular situations. Many of the provisions in Article II would likely be restated in any supplemental indenture authorizing Additional Bonds, with appropriate modifications reflecting the terms of the Additional Bonds.

Section 2.1. Authorization of Bonds; Limitation. This Section authorizes the issuance of the Initial Bonds, establishes the principal amount of the Initial Bonds and provides that Additional Bonds may be issued. The Committee believes that if the Bonds issued pursuant to the Form Conduit Indenture are not tax-exempt, then the word “taxable” should appear in the name of the Bonds. The restriction on issuing junior or subordinate debt could affect future activities of the Borrower.

Section 2.2. Bonds [Limited/Special] Obligations. This Section states the nature of the obligation of the Issuer to pay the Bonds, which, under the Form Conduit Indenture, means payment from the Trust Estate. The description of the Bonds as limited or special obligations will depend upon the requirements of the Act or any other applicable state law and possibly the financing structure.

Section 2.3. Details of Bonds. This Section provides for the date of the Initial Bonds, numbering, interest rate(s), interest payment dates and principal payment dates. In addition, the method of payment of the Initial Bonds is set forth. The bracketed sentence in the third paragraph provides language for payment by wire transfer. As an alternative to the approach in the Form Conduit Indenture, the drafter could prepare an exhibit containing particular facts and details regarding the Bonds and incorporate that exhibit by reference. Using that approach, Section 2.3 would merely contain the standard terms.

Section 2.4. Execution of Bonds. This Section provides for the Bonds to be signed by the appropriate officers of the Issuer. Depending upon state law, the drafter would either require or permit the affixing or imprinting of a seal on the Bonds. This Section also provides that if an officer whose signature appears on the Bonds has ceased to be an officer at the date of delivery of the Bonds, the officer's signature would nevertheless be considered valid. Some states may also require certain specified state or local officers to sign or register the Bonds.

Section 2.5. Authentication of Bonds. This Section requires that the signature of a Responsible Officer of the Trustee be manually affixed on the Certificate of Authentication. The Certificate of Authentication is to provide conclusive evidence that a particular Bond has been authenticated and delivered under the Form Conduit Indenture. There is some question whether Section 2.5 is necessary in a book entry only issue, unless required by state law, as the authentication requirement primarily relates to the historical possibility of forged bearer bonds. With the prohibition of tax-exempt bearer bonds and the fact that the great majority of bonds are now held immobilized in the hands of a securities depository, it may seem anomalous to include the authentication requirement. However, some case law has construed the Trustee's authentication to be a check on the integrity of the closing process. In addition, certain representations and warranties under the Uniform Commercial Code attach to such authentication. The Committee concluded that the presence of this provision continues to be a prevalent practice and therefore included a sample paragraph. In some states, a non-authenticated Bond may be certified by a state official. The drafter should therefore ensure that such non-authenticated Bond is still considered issued and delivered, and therefore Outstanding and entitled to the rights and benefits of the Indenture.

In certain jurisdictions, a Trustee's authentication may not be required for the initially delivered bonds, and appropriate provisions should then be inserted in the Indenture.

Section 2.6. Forms of Bonds. This Section provides for the form of the Initial Bonds to be as set forth in Appendix A.

Section 2.7. Delivery of Initial Bonds. This Section provides that certain documentation shall be delivered to the Trustee before either release or authentication and delivery of the Initial Bonds. A number of additional requirements have been set forth in brackets which would be included depending upon the circumstances of the particular financing. There may be additional state or federal requirements for particular transactions with respect to the documentation and opinions to be provided at closing and the drafter should take these into consideration. In addition, it may be necessary in some states for the Borrower or the Issuer to obtain the approval of certain state officials regarding the issuance of Bonds. The list of items required under this Section may vary from the fundamental documents required to address the validity and enforceability of the Bonds, and the documents which Bond Counsel believes should be received by the Trustee prior to authentication of the Bonds, to a more extensive list, similar to a closing list prepared on behalf of the Underwriter in a bond purchase agreement. Bank examiners may review the Trustee's files to ensure that all documents required to be delivered under Section 2.7 are in the Trustee's possession, and the list should be drafted with that possibility in mind. Note that there are a number of different formulations for describing the tax opinion mentioned in

subsection (d). The selected language is intended to correspond with NABL's Model Bond Opinion.

Section 2.8. Registration of Transfer and Exchange of Bonds; Persons Treated as Bondholders. This Section establishes in detail the procedure for the registration, transfer and exchange of Bonds. With the advent of Book Entry Bonds, the sole Bondholder will be the Securities Depository. This Section also requires decisions to be made in drafting the Form Conduit Indenture regarding the responsibility for any expenses or other charges imposed for exchanging or transferring Bonds. The Form Conduit Indenture does not use the phrase "Registered Owners." This term appears in a high percentage of indentures but is thought to be of little utility in a non-bearer format. Bondholders may simply be identified as the persons shown on the Bond Register.

Section 2.9. Mutilated, Lost or Destroyed Bonds. This Section establishes the procedure for authenticating and delivering new Bonds where Bonds have been mutilated, lost or destroyed, as well as for authorizing the payment of any mutilated, lost or destroyed Bond if that Bond has matured or has been called for redemption. The term "stolen" frequently appears in indentures but without corresponding statutory justification except in a few states, and is thus not used. It is not necessary to the meaning of the section, as stolen Bonds can be treated as "lost."

Section 2.10. Cancellation and Disposition of Bonds. This Section directs the Trustee to cancel Bonds that have been paid or delivered for cancellation, including those Bonds delivered to the Trustee under Section 3.10. The Section also authorizes the Issuer or the Borrower to deliver Bonds for cancellation at any time and for any reason. The Trustee typically may treat canceled Bonds in accordance with its own document retention policies rather than be required to accomplish cremation or other destruction procedures.

Section 2.11. Securities Depository Provisions. This Section sets out procedures for delivery of Bonds to DTC under the Book Entry Bond provisions and for registration, transfer of beneficial ownership, and responsibilities of DTC. The drafter should (i) update this section to current DTC sections at that time and (ii) consider additional restrictions for bonds sold to sophisticated investors.

Section 2.12. Additional Bonds. This Section provides procedures for issuance of Additional Bonds and the documentation to be provided at the time of issuance and delivery of the Additional Bonds. Additional requirements may be imposed depending upon the requirements of the particular transaction. Items necessary to the Borrower or the Underwriter may be required by the bond purchase agreement or listed in other documentation. The list of items in this Section is intended to set forth conditions that must be satisfied so that the Bondholders' security is protected, since the Section imposes a contractual obligation that Additional Bonds will not be issued unless the listed conditions are satisfied. Included within brackets are conditions that may be eliminated under certain circumstances, such as where the Additional Bonds will be issued as taxable obligations.

COMMENTARY ON ARTICLE III - REDEMPTION OF BONDS

This Article of the Form Conduit Indenture establishes redemption procedures for the Bonds. These redemption provisions contain fundamental business terms relating to the Bonds and thus may vary from transaction to transaction. For a discussion regarding “preference-proof” funds to accomplish a redemption, see the Commentary on Article IX – Discharge and Defeasance. For a discussion of how the rules of The Depository Trust Company relate to redemption matters, see National Association of Bond Lawyers, *Demystifying DTC: The Depository Trust Company and the Municipal Bond Market* (2017).

Section 3.1. Redemption Dates and Prices. This Section provides that Bonds may not be called for redemption except as provided in the Form Conduit Indenture.

Section 3.2. Mandatory Sinking Fund Redemption of Initial Bonds. This Section provides for the periodic redemption of Initial Bonds. It also provides for crediting certain Bonds previously delivered for cancellation against the principal amount to be redeemed pursuant to the mandatory sinking fund redemption provisions. The bracketed language sets forth in more detail the manner of crediting Bonds in the event the amount to be credited exceeds the sinking fund redemption schedule as of any sinking fund redemption date.

Section 3.3. Optional Redemption of Initial Bonds. This Section provides a format for establishing redemption periods for the Initial Bonds to be redeemed on an optional basis. The provision that optional redemption may occur “in whole or in part at any time” avoids the historical language of “in whole at any time or in part on any interest payment date,” which the Committee believes related to the use of bearer bonds, although certain bond purchasers may negotiate the terms of this provision.

Sections 3.4 to 3.7. Extraordinary Redemptions. These Sections contain a number of the more common extraordinary redemption provisions, such as determination of taxability, surplus Bond proceeds and insurance and condemnation proceeds, although the drafter should tailor these extraordinary redemption provisions to the terms of the particular financing transaction.

A drafter may also consider other extraordinary redemption provisions, such as redemption from surplus revenues or loan prepayments in student loan and housing bond issues.

The Committee has drafted a representative example of a provision to be included in the Loan Agreement regarding those situations where the Borrower may direct the prepayment of the Loan and the redemption of the Bonds, as set forth below:

Section ____. **Extraordinary Optional Redemption.** The Borrower shall have, subject to the conditions hereinafter imposed, the option to direct the redemption of the entire unpaid principal balance of the Bonds in accordance with Section 3.____ and other applicable provisions of the Indenture upon the occurrence of any of the following events:

- a) The Project shall have been damaged or destroyed to such an extent that (1) it cannot

reasonably be expected to be restored, within a period of 6 months, to the condition thereof immediately preceding such damage or destruction or (2) its normal use and operation is reasonably expected to be prevented for a period of 6 consecutive months.

- b) Title to, or the temporary use of, all or a significant part of the Project shall have been taken under the exercise of the power of eminent domain, or sold in lieu thereof, (1) to such extent that the Project cannot reasonably be expected to be restored within a period of 6 months to a condition of usefulness comparable to that existing prior to the taking or (2) as a result of the taking, normal use and operation of the Project is reasonably expected to be prevented for a period of 6 consecutive months.
- c) As a result of any changes in the Constitution of the State, the Constitution of the United States of America, or state or federal laws or as a result of legislative or administrative action (whether state or federal) or by final decree, judgment or order of any court or administrative body (whether state or federal) entered after the contest thereof by the Issuer or the Borrower in good faith, this Agreement shall have become void or unenforceable or impossible of performance in accordance with the intent and purpose of the parties as expressed in this Agreement, or if unreasonable burdens or excessive liabilities shall have been imposed with respect to the Project or the operation thereof, including, without limitation, unreasonable burdens or excessive liabilities arising from federal, state or other ad valorem, property, income or other taxes not being imposed on the date of this Agreement (other than ad valorem taxes presently levied upon privately owned property used for the same general purpose as the Project).

[d) Changes in the economic availability of raw materials, operating supplies, energy sources or supplies, or facilities (including, but not limited to, facilities in connection with the disposal of industrial wastes) necessary for the operation of the Project for the purposes for which it is intended shall have occurred or technological or other changes shall have occurred which the Borrower cannot reasonably overcome or control and which in the Borrower's reasonable judgment render the Project uneconomic for the purposes for which it is intended.]

To exercise its option provided for in this Section, the Borrower, within 90 days following the event authorizing the exercise of that option, **[or at any time during the continuation of the condition referred to in clause (d) above,]** shall give notice to the Issuer and to the Trustee specifying the date on which the Borrower will deliver the funds required for redemption, which date shall be not more than 90 days from the date that notice is mailed and shall make arrangements satisfactory to the Trustee for the giving of the required notice of redemption.

The amount payable by the Borrower in the event of its exercise of the option granted in this Section shall be the sum of the following:

- (i) An amount of money which, when added to the moneys and investments held to the credit of the Debt Service Fund [**after the transfer of any moneys from the Project Fund and the Reserve Fund**], will be sufficient pursuant to the provisions of the Indenture to pay, at par, and discharge all then Outstanding Bonds on the earliest applicable redemption date, plus
- (ii) An amount of money equal to all other payments, fees, and expenses relating to the Bonds accrued and to accrue until actual final payment and redemption of the Bonds, including amounts to be paid to the Trustee.

The requirement of (ii) above with respect to additional payments to accrue may be met if provisions satisfactory to the Trustee and the Issuer are made for paying those amounts as they accrue.

The Borrower also shall have the option, in the event that title to or the temporary use of a portion of the Project shall be taken under the exercise of the power of eminent domain, or sold in lieu thereof, even if the taking is not of such nature as to permit the exercise of the redemption option upon an event specified in (b) above, to direct the redemption, at a redemption price of 100% of the principal amount thereof prepaid, plus accrued interest to the redemption date, of that part of the outstanding principal balance of the Bonds (rounded downward to the nearest Authorized Denomination) as may be payable from the proceeds received by the Borrower (after the payment of costs and expenses incurred in the collection thereof) received in the eminent domain proceeding or related sale, provided, that, the Borrower shall furnish to the Issuer and the Trustee a certificate of an engineer stating that (1) the property comprising the part of the Project taken is not essential to continued operations of the Project in the manner existing prior to that taking, or (2) other improvements have been acquired or made which are suitable for the continued operation of the Project.

The rights and options granted to the Borrower in this Section may be exercised whether or not the Borrower is in default hereunder; provided, that such default will not relieve the Borrower from performing those actions which are necessary to exercise any such right or option granted hereunder.

Section 3.8. Selection of Bonds for Redemption. This Section establishes the method by which the Trustee will select Bonds for redemption if less than all of the Bonds are to be redeemed. The Borrower/Issuer may determine which Bonds are to be redeemed from various maturities if less than all of the Bonds are called for redemption. If less than all of the Bonds of any particular maturity are to be redeemed, the selection of Authorized Denominations within that maturity is to be by lot. During the drafting process, the Underwriter or the Borrower may request or require a different method of selecting Bonds for redemption such as inverse order of maturity, on a pro rata basis within a maturity, on a reasonably proportionate basis among all outstanding maturities or from such maturities as directed by the Borrower.

Section 3.9. Notice of Redemption. This Section sets out the requirements to be satisfied with respect to giving notice of redemption and also permits a Conditional Redemption. This approach regarding Conditional Redemption is recommended by the Committee, but other practitioners and financing participants may view this provision as inappropriate. Therefore, a drafter should consider the advantages and disadvantages of this approach, including the possibility that a bondholder, acting in reliance on a Conditional Redemption notice, may make arrangements for reinvesting amounts that ultimately are not available because of cancellation of a Conditional Redemption. The information to be stated in a notice of redemption as well as the manner of sending the notice and posting the notice to EMMA are also described in this Section. Many older indentures do not address the issue of whether a Conditional Redemption is permitted. Particularly in the case of a refunding, a Conditional Redemption can be essential in order to properly time the sending of the redemption notice and the delivery of the refunding bonds. The Form Conduit Indenture specifically addresses this issue by providing that neither the rescission of a Conditional Redemption nor the failure to make the funds available on the redemption date results in an Event of Default due to a failure to pay principal of or interest on the Bonds. The Form Conduit Indenture permits the Issuer/Borrower to rescind a Conditional Redemption on or prior to the scheduled redemption date, without any prior notice, but the drafter should consider whether some Bondholders will require that a rescission (and therefore notice to the Bondholders) occur earlier, in which case the provisions of subsection (d) should be revised accordingly. Including provisions specifying the terms of a Conditional Redemption in the Form Conduit Indenture is not meant to imply that indentures which are silent on this point do not permit Conditional Redemptions.

Section 3.10. Purchase at Any Time. This Section provides that the Trustee, upon written request, shall purchase Bonds in the open market at a price not exceeding the price established in the written request. The purchase is to be made with funds provided by the Issuer or the Borrower and not with any moneys comprising the Trust Estate or any Defeasance Obligations. Bonds so purchased are to be treated as canceled. The Issuer or the Borrower may also purchase Bonds and deliver them for cancellation without involvement of the Trustee. The provisions of Section 3.2 control the manner in which purchased Bonds are to be credited against future mandatory sinking fund redemption payments, which, depending upon the structure of the financing, may be either a credit against future mandatory sinking fund payments or a credit against other payments designated by the Issuer or the Borrower. For example, in a cash flow sensitive financing, such as a multi-family housing or single family issue, it is more likely that purchased bonds are required to be credited against future mandatory sinking fund payments.

Talking Point: Open Market Purchases and the Federal Securities Laws. Consideration should be given to the applicability of the federal securities laws to any open market purchases.⁴

⁴ See Robert A. Fippinger, “Chapter 14: Fraud Concepts in Public Finance”, *The Securities Law of Public Finance* (3rd Edition 2011); American Bar Association and National Association of Bond Lawyers, “Chapter 10: Secondary Market Disclosure”, *Disclosure Roles of Counsel* (3rd Edition 2009).

COMMENTARY ON ARTICLE IV – FUNDS AND ACCOUNTS

This Article of the Form Conduit Indenture creates and establishes the various funds and accounts into which the proceeds and revenues of the borrowing are to be deposited. Article IV also describes the types of funds created, the procedure and timing for the deposit of proceeds and revenues into the various funds and accounts and the timing and requirements for the transfer of moneys from the various funds and accounts and designates the use of investment earnings on amounts held in each fund.

Section 4.1. Creation of Funds. This Section formally creates the various funds and accounts into which the proceeds and revenues of the borrowing are to be deposited. In the Form Conduit Indenture, four funds are created: the Project Fund, the Debt Service Fund, the Reserve Fund, and the Rebate Fund, with the latter not immediately funded. A particular financing may require additional funds and accounts, such as a cost of issuance fund, or the use of more descriptive fund names.

Section 4.2. Project Fund. This Section contains a description of moneys to be deposited in the Project Fund and how such amounts are to be used, i.e., to pay for Project Costs and any future capital acquisitions and/or improvements (to the extent permitted by state and federal law) that may be funded through the issuance of Additional Bonds under the terms of the Form Conduit Indenture. In the Loan Agreement, the drafter should ensure that the Borrower agrees to be bound by the provisions of the Form Conduit Indenture regarding the disbursement and use of moneys in the Project Fund.

Subsection (a) provides a procedure for the Borrower to requisition moneys from the Project Fund to pay Costs of the Project. It contemplates that the detailed requisition procedure regarding the form of requisition and any other documentation required to obtain a disbursement from the Project Fund will be set forth in the Loan Agreement. Some existing case law supports the position that the Trustee does not have an obligation under this provision to verify the facts presented in a requisition request. See, e.g., *Master Consolidated Corporation v. BancOhio National Bank*, 575 N.E.2d 817 (Ohio 1991); but the Trustee must act reasonably in ascertaining the reliability of such certification. See, e.g., *Shawmut Bank N.A., et al v. Kress Associates, et al*, 33 F.3rd 1477 (9th Cir. 1994).

The Committee has drafted a representative example of a provision, and accompanying exhibit, to be included in the Loan Agreement for requesting disbursements from the Project Fund, as set forth below:

Section ____ . Disbursements.

- (a) Except as provided in the Indenture in case of certain Events of Default with respect to the Bonds, the Trustee shall disburse the money in the Project Fund in accordance with this Section.

- (b) The Trustee shall disburse amounts in the Project Fund to pay Project Costs or Issuance Costs upon receipt of a certificate in substantially the form provided in Exhibit to this Agreement signed by an Authorized Borrower Representative stating: (1) the requisition number, amount to be paid and the name of the Person to whom payment is to be made; (2) that there has been expended, or is being expended concurrently with the delivery of such certificate (or in the case of interest which the Trustee is directed to transfer to the Debt Service Fund after the Completion Date, will be expended within one year following the Completion Date), an amount on account of Project Costs or Issuance Costs at least equal to the amount set forth in such certificate; (3) that no other certificate in respect of such expenditure is being or previously has been delivered to the Trustee; (4) that at least 95% of the total of all amounts previously disbursed plus the amount requested by such certificate to be disbursed from the Project Fund have been and will be used to pay Qualifying Costs⁵; and (5) that the sum of the amount of such requisition in respect of Issuance Costs, if any, plus amounts previously requested to pay Issuance Costs, does not exceed 2% of the amount of the Sale Proceeds.

Any moneys in the Project Fund remaining after the Completion Date and payment, or provision for payment, in full of the Project Costs and Issuance Costs, at the direction of the Borrower Representative, shall be disposed of as provided in Section 4.2(b) of the Indenture.⁶

⁵ The definition of “Qualifying Costs” should incorporate validity under state law, federal law, and the Indenture. Watch, too, the 95% requirement in this section and in the form of requisition if funds other than bond proceeds are deposited into the Project Fund, as, in those instances, the 95% test may not be met on each draw.

⁶ Terms such as Completion Date, Sale Proceeds and Qualifying Costs will be defined in the Agreement.

EXHIBIT
LOAN AGREEMENT
FORM OF REQUISITION CERTIFICATE Requisition No.:

Attention: Corporate Trust Department:

This certificate is provided to you pursuant to Section _____ of the Loan Agreement, dated as of _____ (the "Agreement"), between [ISSUER] (the "Issuer") and [BORROWER] (the "Borrower"), and in accordance with Section 4.2 of the Trust Indenture, dated as of _____ (the "Indenture"), between the Issuer and [TRUSTEE]. _____ Capitalized terms used in this certificate have the same meanings given such terms in the Agreement.

On behalf of the Borrower, I, an Authorized Borrower Representative, do hereby certify as follows:

(i) There has been expended, or is being expended concurrently with the delivery of this certificate (or in the case of interest to be transferred to the Debt Service Fund after the Completion Date, will be expended within one year after the Completion Date), an amount on account of Project Costs or Issuance Costs at least equal to \$_____, which amount is hereby requisitioned for disbursement;

(ii) No other certificate in respect of the expenditures set forth in clause (i) above is being or has previously been delivered to the Trustee;

(iii) At least 95% of all amounts previously disbursed plus the amounts hereby requested to be disbursed from the Project Fund have been and will be used to pay Qualifying Costs; and

(iv) The sum of the amount of this requisition in respect of Issuance Costs plus the amounts previously requested to pay Issuance Costs, does not exceed 2% of \$ _____ (which amount equals the Sale Proceeds of the Bonds).

You are hereby directed to pay the amount of \$ _____ (which is the amount requisitioned by clause (i) above) from the Project Fund to (payee) by (method of payment). **[You are hereby directed to transfer \$ _____ to the Debt Service Fund for interest during construction.]**

[BORROWER]

By: _____

Authorized Borrower Representative

Subsection (b) provides that any moneys remaining in the Project Fund after the Project is completed shall be transferred to the Debt Service Fund to redeem Bonds pursuant to Section 3.5, unless the Borrower directs the moneys to be deposited in the Debt Service Reserve Fund or the Debt Service Fund, or to be applied to any other use permitted by Bond Counsel. This language is intended to avoid the ramifications of an overissuance for federal tax purposes. See Section 148(e) of the Code, and Treasury Regulations Section 1.148-2(g) and Treasury Regulations Sections 1.148-10(a)(4). Consideration should be given to whether to include a requirement that, in connection with disbursement of the remaining funds from the Project Fund, Bond Counsel deliver an opinion that such disbursement will not, in and of itself, adversely affect the federal income tax status of the Bonds.

Subsection (c) prohibits transfers from the Project Fund if certain Events of Default under the Form Conduit Indenture occur. This provision would preserve remaining moneys in the Project Fund for the benefit of Bondholders following an Event of Default and give the Trustee the choice of whether to use such money for construction or to defray Bondholder losses. The Trustee should seek advice of counsel to assure compliance with the Code.

Section 4.3. Debt Service Fund. This Fund is created under the Form Conduit Indenture to receive moneys from the proceeds of the Bonds representing accrued and capitalized interest and also to receive Revenues to be used to pay debt service due on the Bonds. The Debt Service Fund is to be used to pay interest on the Bonds when due and to pay principal of or any redemption premium on Bonds (whether at maturity or upon redemption).

The Form Conduit Indenture also provides for amounts in the Debt Service Fund to be used for the restoration of deficiencies in the Reserve Fund. Such amounts are intended to include those to be repaid to the provider of any credit facility, such as payments owed to a surety bond provider. The Form Conduit Indenture provides for parity treatment of such repayment obligations. Other language could be used which would make such repayment obligations either superior or subordinate to payment of debt service. Additionally, the drafter may wish to address whether fees, expenses and interest relating to the repayment obligations have the same priority as the repayment obligations themselves.

Section 4.4. Reserve Fund. This Section provides for the deposit of moneys (usually funded from Bond proceeds but, in some situations, received directly by the Borrower) to serve as additional security for the Bonds. The amount is equal to the “Series Required Reserve,” which is defined in the Form Conduit Indenture to mean not to exceed the least of: (i) 10% of the original principal amount of such Bonds; (ii) 125% of the average annual debt service on such Bonds; or (iii) 100% of the maximum annual debt service payable on such Bonds. These parameters are established in Treasury Regulation Section 1.148-2(f)(ii). Section 148(d)(2) of the Code limits the size of the Reserve Fund that may be financed out of proceeds of Bonds to an amount not to exceed 10% of the proceeds of the bond issue. If moneys in the Reserve Fund are to be available to pay fees and expenses incurred by the Trustee, the drafter should establish a contractual right to do so and any such right should be noted in disclosure documents.

Subsection (a) provides that any amounts withdrawn from the Reserve Fund shall be restored in no more than a specified number of substantially equal consecutive monthly

installments. This Section also contains requirements for the valuation of securities on deposit in the Reserve Fund so as to establish compliance with the Series Reserve Requirement. If the valuation shows a deficiency, then the deficiency must be restored in accordance with the provisions set out.

Subsection (b) contains provisions governing the expenditure of moneys on deposit in the Reserve Fund. These provisions include: (i) making up deficiencies in the Debt Service Fund; (ii) applying such amounts either as a credit against future payments owed by the Borrower or in any other manner requested if approved by an opinion of Bond Counsel; and (iii) crediting such amounts against the final debt service payment on the Bonds.

Subsection (c) provides for the establishment of separate accounts that may be established within the Reserve Fund for Additional Bonds. Section 4.5 of the Form Conduit Indenture provides that all moneys in the Reserve Fund are to be held for the equal and proportionate benefit of all Bondholders. In some financing situations, this parity requirement may not be appropriate.

Subsection (d) contains provisions allowing a credit facility to be substituted for moneys on deposit in the Reserve Fund, and details the requirements that must be satisfied with respect to such credit facility. There also may be constraints imposed by a Rating Service or required by federal tax law or state law.

The substitution of a surety bond or other credit facility for funds on deposit in the Reserve Fund is usually accomplished in order to ensure payment of Project Costs. This substitution raises tax implications for which an opinion of Bond Counsel is required. Care should be taken to specify what disposition is to be made of amounts released from the Reserve Fund upon substitution of a credit facility and, if there is to be both a credit facility and cash or investments in the Reserve Fund at the same time, which will be drawn on first. It is also helpful to specify the priority of payments to the provider of the credit facility. See the Commentary on Section 4.3.

Consideration should be given to whether specific authorization is beneficial to withdraw moneys from the Reserve Fund to be used to fund a defeasance escrow or otherwise in connection with a defeasance or redemption of bonds that results in an adjustment to the reserve requirement. Without such an authorization, the Trustee may resist releasing funds until after a defeasance or redemption and, potentially, the next valuation date.

Section 4.5. Revenues to be Held for All Bondholders, with Certain Exceptions. This Section provides that the moneys and investments held in all Funds are to be held in trust pursuant to the terms of the Form Conduit Indenture for the benefit of all of the holders of Outstanding Bonds, with the exception of special redemption funds established for specific Bonds being refunded or payments which have been made toward the debt service on specific Bonds.

Section 4.6. Rebate Fund. This Section specifies that it is the Borrower's responsibility to calculate and make all arbitrage rebate payments due under Section 148(f) of the Code directly

to the United States Government. The Rebate Fund will therefore not be funded initially because it is the Borrower's obligation to make the rebate payment directly to the United States Government. There is a proviso that a Rebate Fund may be funded for Additional Bonds if the Issuer and the Borrower desire to establish a specific Rebate Fund or for other reasons not set out in Section 4.6 of the Form Conduit Indenture if the Borrower fails to make rebate payments which are due to the United States Government. The drafter may wish to insert provisions making it clear that it is not the Trustee's duty to compute or pay arbitrage rebate. Details concerning the computation and payment of rebate are generally dealt with in the Agreement or the closing tax certificate. It is the Issuer's and/or the Borrower's obligation to make timely calculations and payments in order to preserve the tax-exempt status of the interest on the Bonds. Drafters may have different approaches to complying with the arbitrage rebate provisions of the Code.

Differences of opinion exist among drafters and trustees regarding the extent to which the administration of rebate responsibility and the establishment and maintenance of a Rebate Fund should be the domain of the Trustee. From a purely administrative standpoint, the Trustee would prefer to have as little to do with rebate compliance as possible. However, some drafters contend that allowing the Borrower simply to covenant to comply with the rebate requirements of the Code is allowing the Borrower to police itself. Bondholders are directly and adversely impacted by a breach of the Borrower's covenant regarding rebate compliance, and the Trustee is considered to be the only continuing party able to monitor the Borrower. The principal recourse would be to declare a default and pursue remedies.

The Form Conduit Indenture does not include detailed language regarding rebate and its administration. Instead, it reflects the more prevalent practice of referencing the Agreement, in which the procedures to be followed and the allocation of responsibility for compliance are stated. A drafter may, in certain circumstances, wish to consider more express indenture language regarding rebate procedures and responsibility.

Section 4.7. Repayment to the Borrower from Amounts Remaining in Any Funds.

This Section provides that subsequent to payment of all Outstanding Bonds and the payment of all other amounts required to be paid under the Form Conduit Indenture, any amounts remaining in the Debt Service Fund are to be paid to the Borrower. See the discussion of bankruptcy ramifications under "Granting Clauses."

Section 4.8. Disposition of Unclaimed Funds. This Section provides that any money deposited with the Trustee for the payment of debt service on the Bonds and remaining unclaimed for a designated number of years after the principal of, redemption premium or interest on any Outstanding Bonds has been paid shall be reported and disposed of by the Trustee in accordance with the applicable unclaimed property laws, or to the extent permitted by applicable law, shall be paid to the Issuer and/or the Borrower or otherwise disposed of. Following such disposition or payment, the liability of the Trustee and the Issuer with respect to such money ceases and the holders of the Bonds must look solely to the Borrower for payment of any amounts then due. As an alternative provision, the drafter may add the bracketed sentence relating to investment of unclaimed funds. The drafter should be aware that applicable escheat laws will differ and that the

SEC's due diligence regulations must be complied with. See SEC Release No. 34-39176, 62 F.R. 52229.

There is significant controversy concerning who is entitled to unclaimed funds under a trust agreement or indenture. Although the prohibition on tax-exempt bearer bonds and the prevalence of book entry securities seem to have reduced this problem, there remain questions for drafters of this section. Who "owns" unclaimed funds if they are never claimed? If unclaimed funds are returned to the Issuer or Borrower prior to the date on which they would otherwise escheat to the state, does escheat still lie? What, if any, are the responsibilities of the holders of unclaimed funds, whether the Issuer, the Borrower or the state, if the bondholder does appear after the end of the escheat period? If a bondholder has rights in this situation, may those rights be cut off by the language in the trust agreement or indenture?

It has been argued that unclaimed amounts "belong" to the Issuer or the Borrower who paid them to the paying agent.⁷ This concept may or may not be accepted in a particular state when tested in the courts. However, there seems to be no harm in trying to sustain this position with language in this Section requiring transfer of unclaimed amounts to the Issuer or the Borrower on a date prior to the end of the escheat period.⁸

Bond counsel should require separate periods of time for the escheat period beginning upon each payment on the Bonds. In addition, the transfer of unclaimed amounts should be mandatory because the Issuer or Borrower may be unaware funds have not been claimed.

There is an obvious interest on the part of the Trustee to make clear in this section that it is not ultimately responsible for unclaimed funds, or any interest earned from the investment thereof. Traditionally, trustees have felt entitled to the "float" on unclaimed amounts and, in the absence of specific language in the trust agreement, this is probably the result that will follow if there is a challenge. Increasingly, Issuers and Borrowers are inserting clarification on this point within the terms of the trust agreement or indenture.

Section 4.9. Additional Funds and Accounts. This Section gives flexibility to the Trustee to create additional funds and accounts as it may deem necessary for proper administration of the Form Conduit Indenture.

⁷ See "Ownership of Unclaimed Debt Service Monies" in *The Bond Lawyer, The Journal of the National Association of Bond Lawyers*, Volume 19, No. 2.

⁸ But see the recent case of *Clymer v. Summit Bancorp.*, 726 A.2d 983 (1998), citing *State v. Jefferson Yale Sulphur Co.*, 178 A.2d 329 (1972), where such a provision is declared to be *unenforceable*.

COMMENTARY ON ARTICLE V - INVESTMENT OR DEPOSIT OF FUNDS

This Article of the Form Conduit Indenture establishes guidelines and procedures for safeguarding, investing and valuing funds on deposit under the Form Conduit Indenture. Customarily, the Trustee must follow the direction of the Issuer or Borrower regarding the investment and payment of money as long as such direction is in accordance with the terms of the Form Conduit Indenture. The Trustee is liable if it invests money in other than Eligible Investments or, through its negligence, causes the loss of funds or misplaces funds. The TIA does not deal directly with the provisions found in Article V, although Section 314 of the TIA contains significant certification and legal opinion safeguards for the release of funds held in trust. The post-default, prudent person standard of care in Section 315 of the TIA may be relevant for the drafter to consider for investment responsibility if an Event of Default exists. See also Section 7.4 of the Form Conduit Indenture.

Section 5.1. Deposits and Security Therefor. This Section provides that all moneys on deposit under the Form Conduit Indenture are considered trust funds. Moneys so held are to be deposited with the commercial department of the Trustee, which will allow the Trustee to invest the moneys in a manner required by the Form Conduit Indenture and as permitted by applicable state law. The Trustee may, under certain circumstances, deposit moneys with any other depository authorized to receive the same and secure the moneys as provided in the Form Conduit Indenture. All security for deposits must be perfected in the manner required under applicable law to grant to the Trustee a perfected security interest in collateral securing such deposits. See, e.g., 12 U.S.C. § 92a(e), 12 C.F.R. § 9.10(b). It should be observed that moneys are often invested in an investment agreement which must be included in the definition of Eligible Investments.

A Trustee organized as a national bank would be subject to certain collateral requirements imposed by the Office of the Comptroller of Currency. See, e.g., 12 U.S.C. § 92a(e), 12 C.F.R. § 9.10(b). Similarly, a Trustee organized under the laws of a state may be subject to certain collateral requirements of that state regarding deposits of funds.

Section 5.2. Investment or Deposit of Funds. This Section provides specific guidance to the Trustee for the investment of Funds on deposit under the Form Conduit Indenture. Subsection (a) provides that moneys on deposit must be invested in Eligible Investments at all times. See the Commentary on Article I relating to “Eligible Investments” for the possibility of adding language in Section 5.2 which addresses the circumstances where an investment ceases to qualify as an “Eligible Investment.”

The Trustee is required to invest in Eligible Investments in such a manner as to permit withdrawal without penalty on or before the dates on which the amounts invested are reasonably expected to be needed for the purposes specified under the Form Conduit Indenture.

Subsection (b) provides that all purchases or sales of investments are to be made at the direction of the Borrower as long as that direction is to invest in Eligible Investments. If no direction is given, the Trustee may invest in certain specified Eligible Investments payable on demand.

Subsection (c) provides that investments may be transferred from one account to another without the necessity of liquidation in order to satisfy the provisions of the Form Conduit Indenture.

Subsection (d) provides that neither the Issuer nor the Trustee will be accountable for any depreciation in the value of the Eligible Investments or for any losses incurred upon any authorized disposition thereof.

Subsection (e) gives the Trustee authority to invest moneys on deposit in two or more Funds in a single investment, provided that the different portions of the investment allocable to each Fund can be accounted for separately.

Subsection (f) provides for transfers of investment income not needed for purposes of the Debt Service Fund and the Reserve Fund to the Project Fund to the extent that such transfers are needed to complete the Project. Such investment income may be applied to other purposes if the Trustee receives an opinion of Bond Counsel that such use will not cause interest on the Bonds to be includible in gross income for federal income tax purposes. The Form Conduit Indenture assumes that the Reserve Fund is fully funded at closing and provides for transfer of excess earnings on the Reserve Fund to the Debt Service Fund after completion of the Project.

Section 5.3. Valuation of Funds. This Section requires the Trustee to determine the value of the investments and assets in the different Funds and accounts established under the Form Conduit Indenture at certain intervals and to provide reports of such value in the form of periodic statements to the Borrower and/or Issuer. The Form Conduit Indenture provides that Eligible Investments having maturities of acceptably short remaining duration, which insulates Eligible Investments from excessive market risk, should be valued at par plus any accrued but unpaid interest. Consideration should be given to whether the provision should be extended to an investment which has ceased to be an Eligible Investment (if this possibility is permitted in the definition of “Eligible Investments” drafted by the drafter) to reflect the view that it may be in the interests of the Bondholders to hold such investment for a short period of time until it matures rather than to incur an immediate loss. See earlier discussion regarding determination of reserve requirement in connection with defeasance or redemption of Bonds and ability to use “freed-up” reserve fund moneys in conjunction with such defeasance or redemption.

COMMENTARY ON ARTICLE VI COVENANTS AND AGREEMENTS OF THE ISSUER

This Article of the Form Conduit Indenture sets forth certain covenants and agreements which are applicable to the Issuer. The covenants to be made by a conduit Issuer are likely to be significantly more narrow in scope than those made by corporate Borrowers. Conduit Issuer covenants and agreements focus on ensuring that the Trustee is entitled to rely contractually on material terms of the lending agreement between the Issuer and the Borrower.

Section 6.1. Covenants and Agreements of the Issuer. Although each Bond is a promise to pay principal, premium and interest, the additional covenant of subsection (a) is included in the Form Conduit Indenture to have the promise run directly to the Trustee so that the Trustee may

enforce payment on behalf of Bondholders.⁹ The agreement of the Issuer to permit the Trustee to enforce, in its name or the name of the Issuer, all rights (other than Unassigned Issuer's Rights) of the Issuer, as set forth in subsection (e), serves a similar purpose.

Because the Bonds are payable solely from the sources provided in it, the Form Conduit Indenture, as is the accepted custom, includes covenants in subsection (b) restricting the creation or existence of liens and encumbrances on the pledged revenues. Similarly, it is customary, as provided in subsection (c), for the Issuer to covenant to cooperate, at the Borrower's expense, with the Borrower in its efforts to preserve the lien on the pledged source of revenues. Each of these covenants protects the interest of the Bondholders in the pledged security for the Bonds. See also Section 11.1 of the Form Conduit Indenture and the accompanying discussion in the Commentaries.

Talking Point: Trustee Remedies Pre-Default. The scope of the Trustee's right to take enforcement actions, and be paid for them, in the absence of an ongoing default, is frequently the subject of negotiation between the parties.

The covenant in subsection (d) to permit inspection of Project books may not be of significant value in true conduit financings (i.e., industrial development bonds or multi-family housing bonds, etc.). However, in transactions involving substantial on-going governmental involvement, such as large state-operated single family mortgage bond programs, the covenant may be important to Bondholders because the Issuer may retain significant responsibilities for maintaining records impacting the cash-flow securing the Bonds.

Section 6.2. Observance and Performance of Covenants. Agreements, Authority and Actions. The first paragraph of this Section, like Sections 6.1(a) and 6.1(e), provides a mechanism for putting the Trustee in privity of contract with the Issuer's covenants, agreements, authority, actions, undertakings, stipulations and provisions in the Agreement, the Form Conduit Indenture, the Bond Legislation, the Bonds and the other official acts of the Issuer. Without this provision, the Trustee may lack standing to seek specific performance by the Issuer of any such covenant or agreement.

The representations and warranties which make up the remainder of this Section address issues with respect to the validity of the Bonds that are traditionally also addressed in the opinion of Bond Counsel. Some Issuers may object to the inclusion of these representations and warranties in the Form Conduit Indenture on the grounds that the representations and warranties address legal as opposed to factual issues, and are more properly addressed by Bond Counsel.

Section 6.3. Tax Covenants. There is considerable diversity of practice as to tax covenants. Some attorneys draft documents with detailed and specific covenants on all relevant

⁹ See Francis L. Stetson, "Preparation of Corporate Bonds, Mortgages, Collateral Trusts and Debenture Indentures," in *Some Legal Phases of Corporate Financing, Reorganization and Regulation* 38 (1917).

tax points, addressing private activity questions, use of proceeds, lack of artifices, and so on. Others merely have one or two covenants of a general and conclusive nature, often with an additional covenant to comply with the tax certificate entered into in connection with the closing. The Form Conduit Indenture takes the latter approach. The Committee believes these more general covenants allow for flexibility within the tax requirements and that specific covenants can always be added in particular cases.

The Committee also believes that although there is always (in tax-exempt transactions) a general covenant requiring the Issuer to take steps to maintain the tax-exempt status of the Bonds, there is disagreement on the meaning of such language. Some attorneys believe such covenants require the Issuer to take steps to comply with changes in the Code as those changes are made in the future. Other counsel do not believe this covenant requires such changes. If, for example, Congress were to adopt an amendment to the Code assessing a one percent (1%) tax on interest payments to be paid by the Issuer as a condition for the continued tax-exempt status of outstanding Bonds, would the covenant require the Issuer to comply? The Committee does not have a view on which approach is better, but does believe that this issue should be clarified and no doubt should remain in any document. The current form language in subsection (c), when read in conjunction with the definition of “Code,” does not require the Issuer to comply with requirements of new tax statutes even if applicable to the Bonds. To have the covenants otherwise construed, either the definition of “Code” should be revised or subsection (c) should be changed to include at the end “as it may be amended or of any successor statute.” Clearly, counsel should review this provision carefully to determine whether the language requires the Issuer to comply with future changes in tax law.

The Committee believes the Issuer’s covenant to take actions required to keep the Bonds tax exempt does not compel the Issuer to settle a matter raised by the Internal Revenue Service if the Issuer continues to have the view that its legal position is correct. In this situation, covenant compliance is met by either acquiescing or contesting the IRS determination until finality is achieved.

Section 6.4. Enforcement of Issuer’s Obligations. This Section contains language clarifying that the Issuer may exercise the rights described in the listed documents prior to a default without interference from the Trustee, but prohibits the Issuer from taking any such action which impairs the rights of Bondholders. This provision, in a purely conduit financing, may be unnecessary, particularly if the Issuer does not retain an active oversight of the Borrower. Certain municipal conduit Issuers, however, including certain State agencies charged with the responsibilities of issuing private activity bonds, do retain broad oversight of Borrowers, including requiring that Borrowers provide annual reports and other pertinent information and retaining the right to enforce certain lender-related laws. The agreement set forth in this Section is more appropriate for an Issuer who wishes to retain an active oversight role.

COMMENTARY ON ARTICLE VII EVENTS OF DEFAULT AND REMEDIES

This Article of the Form Conduit Indenture sets out the basic Events of Default and remedies, together with the rights and duties of the Trustee subsequent to the occurrence of an Event of Default. The basic Events of Default and remedies available to the Trustee, as set out in the Model Provisions, have remained in substantially the same form since originally promulgated and are those most frequently encountered in practice. Certain default portions of the Model Provisions are based, in turn, upon provisions of the TIA. Unless otherwise noted, the Sections of this Article are based upon the Model Provisions, with appropriate changes in wording, phraseology, defined terms and format due to the nature of conduit financings.

Article VII should be considered in light of the changed standard of conduct of the Trustee, as set out in Article VIII, that applies upon the occurrence of an Event of Default. Prior to an Event of Default, the Trustee is a contracting party obligated to exercise only ministerial duties. Upon the occurrence of an Event of Default, the Trustee becomes obligated to exercise such rights and powers, and to use the same degree of skill in their exercise, as a prudent person would exercise in the conduct of such person's own affairs. The full panoply of these Article VII remedies then becomes available to the Trustee.

Section 7.1 Events of Default Defined. This Section contains a list of the typical Events of Default: non-payment of interest and of principal, covenant defaults of the Issuer, involuntary and voluntary insolvency filing by or against the Issuer. The list presented is not intended to be exclusive and, in conduit financing, it may not be appropriate to include the Issuer's insolvency. Other areas to be considered for treatment as Events of Default might include those related to a credit enhancement device or a deed of trust, to the extent such were not included in any of the defined terms set out in subsection (d).

Subsections (a) and (b), respectively, are generally treated as sufficiently serious to support the acceleration by Bondholders provided for in Section 7.2(a). In some instances, a grace period may be provided for an interest payment default, as reflected in the bracketed language of subsection (a). Special care should be given to the treatment of defaults concerning mandatory sinking fund provisions since such provisions have elements of both covenant and principal payment terms, at least prior to the time when specific Bonds are called for redemption. Many indentures afford a cure period for such defaults consistent with interest payment defaults. Such grace periods are, however, uncommon in current practice, given their unworkability in a DTC context and their adverse effect upon the flow of funds. A grace period for payment of interest would also be inconsistent with the provision that a Borrower's failure to provide funds for payment subsequent to a call for irrevocable redemption creates an Event of Default upon the redemption date. The existence of any such grace period before acceleration may be declared does not diminish the obligation of the Issuer, set out in Section 6.1(a), and assumed by the Borrower, to pay interest on the date due. Thus, although the Bonds could not be accelerated prior to the expiration of any grace period, Bondholders could sue under Section 7.11 for the interest payment if it is not received on the date due. If an indenture provides for an increased interest rate upon default, the increased interest rate should become effective on the date the interest payment was due rather than upon expiration of the grace period. Finally, the

right of the Trustee to withhold notices of default under certain circumstances would not apply to payment defaults if the bracketed language in Section 7.16 is used.

Talking Point: Acceleration. Though common, acceleration may not be a remedy that is appropriate when the bonds are payable from an isolated revenue stream that cannot be accelerated.

In a conduit structure, the drafter may consider requiring that payments under the Loan Documents are to be made some period before the corresponding amounts are due on the Bonds. This would allow for grace periods to be in the Loan Documents, with the resultant flexibility for the Borrower, so long as they do not extend past the Bond payment dates under the Indenture.

Covenant defaults are typically considered less serious than payment defaults, and thus in subsection (c) are made subject to a 30-day (or more) grace period, allowing for written notice and opportunity to cure, under Section 7.7. The covenant to pay interest and principal is specifically excluded from the operation of this subsection. Notice to the Issuer and the Borrower of a covenant default may be given to the Issuer and the Borrower either by the Trustee or by the holders of at least 25% in aggregate principal amount of the Bonds Outstanding. See Section 7.7. This percentage requirement coincides with that of Section 8.2(h), which provides that the Trustee is not required to take notice of or deemed to have notice of such a default unless a Responsible Officer of the Trustee has received written notice of such from the Borrower or from the holders of at least 25% in aggregate principal amount of the Bonds Outstanding. Once the Trustee has acquired knowledge of the covenant default, however, the Trustee is obligated under Section 7.16 to give Immediate Notice thereof to the Issuer and the Borrower.

Subsection (d) serves to cross-default other transaction documents by making an event of default under such documents an Event of Default under the Form Conduit Indenture. There may be a variety of events of default under other documents subject to this subsection, such as force majeure or condemnation provisions, that may require prompt action by the Trustee. Therefore, unless specifically provided otherwise, an Event of Default under this subsection would not be subject to the grace period provided in subsection (c). Cross default provisions are typically negotiated for a given transaction.

It is specifically provided that a Determination of Taxability is not to be considered an Event of Default if the Bonds are redeemed pursuant to Section 3.4. This provision reflects the concept that a redemption in such circumstances is preferable to the calling of a default and the attendant consequences. The result of a Determination of Taxability may also be a gross-up in interest rate which may or may not also require or permit a redemption of bonds. If the Bonds are not subject to redemption upon the Determination of Taxability, this provision should be modified.

The Events of Default listed in subsection (e) relate to the Issuer. If the Issuer is a conduit entity, such Events of Default would appear to be unnecessary. However, adverse consequences may result from the events listed in subsection (e).

An analogous Events of Default provision relating to the Borrower should appear in the Agreement (to which the Borrower is a party), rather than in the Form Conduit Indenture (to which it is not). Such events of default of the Borrower would be Events of Default under subsection (d). Drafters should exercise caution in including Events of Default in the Agreement triggered by a Borrower's noncompliance with a related tax closing certificate or agreement. These certificates and agreements may include a margin of safety beyond that required under applicable law, and technical noncompliance with such more conservative requirements should not trigger an Event of Default under the Agreement and cross-default under the Form Conduit Indenture.

The Committee has drafted a representative example of provisions to be included in an Agreement, setting out events of default of the Borrower and remedies for them. That example is as follows:

ARTICLE

EVENTS OF DEFAULT AND REMEDIES

Section ____. **Events of Default.** Each of the following shall be an Event of Default:

(a) The Borrower shall fail to pay any Loan Payment on or prior to the date on which such Loan Payment is due and payable [**and such failure to pay continues for [____] calendar days thereafter**];

(b) The Borrower shall default in the performance of or breach of any agreement, covenant, warranty, or representation contained in this Agreement (other than as specified in subsection (a) above), and the continuation of such failure for a period of 30 days after notice thereof shall have been given to the Borrower by the Issuer or the Trustee, or for such longer period as the Issuer and the Trustee may agree to in writing; provided, that if the failure is other than the payment of money and is of such nature that it can be corrected but not within the applicable period, that failure shall not constitute an Event of Default so long as the Borrower institutes curative action within the applicable period and diligently pursues that action to completion;

(c) The Borrower shall (1) institute a voluntary case under the Bankruptcy Law; (2) consent to the appointment or taking possession by a receiver, liquidator, assignee, custodian, trustee, sequestrator or other similar official of the Borrower or any substantial portion of its property; (3) make any assignment for the benefit of creditors; (4) admit in writing its inability generally to pay its debts generally as they become due; or (5) take corporate action in furtherance of any of the foregoing;

(d) (1) A decree or order for relief by a court having jurisdiction of the Borrower adjudging the Borrower as insolvent or approving as properly filed a petition seeking reorganization, arrangement, adjustment or composition in respect of the Borrower in an involuntary case under the Bankruptcy Law, as now or hereafter constituted or any other federal or state bankruptcy, insolvency or similar law shall have been filed with respect to the Borrower; (2) a receiver, liquidator, assignee, custodian, trustee, sequestrator or other similar official of the Borrower or of any substantial portion of the Borrower's property shall have been appointed; or (3) a decree for the winding up or liquidation of the Borrower's affairs shall have been entered and such decree or order shall have continued unstayed and in effect for a period of sixty (60) consecutive days;

(e) There shall occur an "Event of Default" as defined in Section 7.1 of the Indenture.

[Notwithstanding the foregoing, if, by reason of Force Majeure (as hereinafter defined), the

Borrower is unable to perform or observe any agreement, term or condition hereof which would give rise to an Event of Default under subsection (b) hereof, the Borrower shall not be deemed in default during the continuance of such inability. However, the Borrower shall promptly give notice to the Trustee and the Issuer of the existence of an event of Force Majeure and the Borrower shall use its best efforts to remove the effects thereof; provided that the settlement of strikes or other industrial disturbances shall be entirely within its discretion. The term Force Majeure shall mean, without limitation, the following: [(i)] acts of God; strikes, lockouts or other industrial disturbances; acts of public enemies; orders or restraints of any kind of the government of the United States of America or of the State or any of their departments, agencies, political subdivisions or officials, or any civil or military authority; insurrections; civil disturbances; riots; epidemics; landslides; lightning; earthquakes; fires; hurricanes; tornadoes; storms; droughts; floods; arrests; restraint of government and people; explosions; breakage, malfunction or accident to facilities, machinery, transmission pipes or canals; partial or entire failure of utilities; shortages of labor, materials, supplies or transportation; [or (ii) any other cause, circumstance or event not reasonably within the control of the Borrower.]

Section ____. Remedies on Default. Whenever an Event of Default shall have happened and be continuing, any one or more of the following remedial steps may be taken:

(a) If acceleration of the principal amount of the Bonds has been declared pursuant to Section 7.2 of the Indenture, the Trustee shall declare all Loan Payments to be immediately due and payable, whereupon the same shall be and become immediately due and payable;

(b) The Issuer or the Trustee or the holders of [____ percent] in aggregate principal amount of the Outstanding Bonds may have access to, inspect, examine and make copies of the books, records, accounts and financial data of the Borrower pertaining to the Project; or

(c) The Issuer or the Trustee may pursue all remedies now or hereafter existing at law or in equity to collect all amounts then due and thereafter to become due under this Agreement [or the Note] or to enforce the performance and observance of any other obligation or agreement of the Borrower under those instruments.

Notwithstanding the foregoing, the Trustee, as assignee of the Issuer, shall not be obligated to take any step which in its opinion will or might cause it to expend time or money or otherwise incur liability unless and until a satisfactory indemnity bond has been furnished to the Trustee at no cost or expense to the Trustee. Any amounts collected as Loan Payments or applicable to Loan Payments and any other amounts which would be applicable to the payment of amounts due under this Agreement and the Indenture collected pursuant to action taken under this Section shall be paid into the Debt Service Fund and applied in accordance with the provisions of the Indenture or, if the Outstanding Bonds have been paid and discharged in accordance with the provisions of the Indenture, shall be paid as provided in the Indenture for

transfers of remaining amounts in the Debt Service Fund.

The provisions of this Section are subject to the further limitation that the rescission by the Trustee of its declaration that all of the Bonds are immediately due and payable may but need not constitute an annulment of any corresponding declaration made pursuant to paragraph (a) of this Section and a waiver and rescission of the consequences of that declaration and of the Event of Default with respect to which that declaration has been made, provided that no such waiver or rescission shall extend to or affect any subsequent or other default or impair any right consequent thereon.

Section ____. **No Remedy Exclusive.** No remedy conferred upon or reserved to the Issuer or the Trustee by this Agreement is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement [**or the Note**], now or hereafter existing at law, in equity or by statute. No delay or omission to exercise any right or power accruing upon any default shall impair that right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient. In order to entitle the Issuer or the Trustee to exercise any remedy reserved to it in this Article, it shall not be necessary to give any notice, other than any notice required by law or for which express provision is made herein.

Section ____. **Agreement to Pay Attorneys' Fees and Expenses.** If an Event of Default should occur and the Issuer or the Trustee should incur expenses, including attorneys' fees, in connection with the enforcement of this Agreement [**or the Note**] or the collection of sums due thereunder, the Borrower shall reimburse the Issuer and the Trustee, as applicable, for the reasonable expenses so incurred upon demand.

Section ____. **No Waiver.** No failure by the Issuer or the Trustee to insist upon the strict performance by the Borrower of any provision hereof shall constitute a waiver of the right to strict performance and no express waiver shall be deemed to apply to any other existing or subsequent right to remedy the failure by the Borrower to observe or comply with any provision hereof.

Section ____. **Notice of Default.** The Borrower or the Issuer shall notify the Trustee and Issuer (if such notice is from the Borrower) immediately if it becomes aware of the occurrence of any Event of Default hereunder or of any fact, condition or event which, with the giving of notice or passage of time or both, would become an Event of Default.

Section 7.2 Remedies Upon Default. This Section contains typical language enabling but not requiring the Trustee to accelerate the payment of principal of and interest on the Bonds on its own initiative, and requiring it to do so upon the direction of the holders of [**a majority/ 25%**] in aggregate principal amount of the Bonds then Outstanding. The Form Conduit

Indenture permits but does not require the Trustee alone to accelerate payment of the Bonds on the basis of either payment or non-payment Events of Default in the absence of Bondholder direction to do so. Direction by the holders to accelerate is subject to the requirement of Section 8.2(e) that security or indemnity be provided to the Trustee.

Acceleration of the entire principal amount pursuant to subsection (a) is a standard remedy. Acceleration of interest is limited, however, to that amount of interest which is accrued and unpaid as of the date of acceleration. The Form of Initial Bond (Appendix A) is typical in providing that interest is payable on the principal "... until payment of such principal amount shall be discharged as provided in the Indenture" Interest thus continues to be payable on each Interest Payment Date, since the principal, even though accelerated, remains unpaid. The Form Conduit Indenture provides that "... to the extent permitted by law [overdue installments of] interest shall bear interest until paid at the same rate set forth in such Initial Bond." See also Section 2.3 which provides for interest on overdue principal and redemption premium.

The Trustee could, depending upon the structure of the transaction, also be required to effect a mandatory redemption of Bonds by drawing upon a credit support device in certain instances, such as the insolvency of the Borrower, impending expiration of the credit support device, or declaration by the provider of an intention not to renew it. However, the requirement for a draw upon impending expiration of the credit support device or a declaration by the provider of its intention not to renew it will customarily be located in a different section of the indenture.

Subsection (b) confers upon both the Trustee and not less than **[a majority/25%]** in aggregate principal amount of Bondholders the power to direct rescission of a declared acceleration and restore the status quo, upon the fulfillment of certain conditions, if it appears to the required percentage of Bondholders that their interests may be better served by so doing. The percentage of Bondholders required to rescind acceleration of the Bonds should be equal to or greater than the percentage entitled to direct acceleration. In the conditions for rescission, the reference in clause (1)(B) to principal becoming due other than by a declaration of acceleration refers to principal which may have become due subsequent to default, such as by call for redemption or sinking fund redemption. The interest on interest referenced in clause (1)(C) is arguably a voluntary payment by the Borrower, made in order to cure default and secure rescission of acceleration, and not a function of applicable law. Clause (2) requires that all Events of Default (other than payment defaults, already addressed in clause (1)) also be cured or waived. The limitation of this clause to Events of Default, as opposed to "defaults," avoids the scenario of technical "defaults" blocking a rescission of acceleration desired by the required percentage of Bondholders. In a similar vein, a waiver of existing Events of Default is permitted, instead of requiring that Events of Default be cured. All rescission provisions should be carefully examined during the drafting process, although it should be noted that rescission of acceleration is a most unlikely occurrence. The drafter should note that following default the Trustee may be required to find a substitute trustee if the Trustee is also a creditor of the defaulting Borrower. See 12 C.F.R. Section 9.100.

Section 7.3 Additional Remedies. Subsection (a) confers upon the Trustee, either acting upon its own initiative or upon the written request of the holders of not less than [**a majority/25%**] in aggregate principal amount of the Bonds Outstanding, the power to exercise a broad range of additional remedies subsequent to the occurrence of an Event of Default, including the right to sue for past due principal and interest.

Subsection (b) applies prior to any Event of Default. It confirms and clarifies that the Trustee has the power to invoke remedies in general in the discharge of its duty to protect the Trust Estate even if such action is to be taken in the absence of an Event of Default.

The Committee considered the inclusion of a provision which would specifically authorize the Trustee to file securities actions on behalf of Bondholders. Such a provision could address situations, such as that in the Washington Public Power Supply System case¹⁰, in which the Trustee must overcome the absence of any such authorization. It is by no means certain, however, that the Trustee must or should have the right so to act. An informed decision regarding inclusion of such a provision should be made by the Trustee, based upon the advice of Counsel. Of particular interest to the Trustee in such cases will be other relationships the Trustee has to the participants in the transaction and the availability of resources to finance any such litigation, including Funds held under the Indenture. An example of such a provision is set forth below:

[The Trustee is authorized to file securities lawsuits on behalf of Bondholders if such filing is deemed appropriate within the Trustee's sole discretion. Any recovery thereunder shall be for the benefit of the Trust Estate, provided if the Trustee, in its sole discretion, determines that joining such suit with claims to be made by former Bondholders is likely to be for the benefit of the Trust Estate, such joinder may be made and the Trustee may pursue such suit on behalf of current and former Bondholders. Any recovery from such a suit shall be *pro rata* between current and former Bondholders, with recovery for current Bondholders allocated pursuant to Article VII.]

Section 7.4 Marshaling of Assets. All provisions of the Form Conduit Indenture relating to the utilization of Funds are suspended during the pendency of an Event of Default. The Trustee is instead entitled to utilize all moneys in all Funds in accordance with Article VII to pursue remedies, be made whole for its costs in pursuing remedies, pay Bondholders, etc. Requisitions for moneys in the Project Fund are not required to be honored, and moneys in the Reserve Fund would also be available for application pursuant to Article VII. See Section 7.8.

Talking Point: Marshaling of Assets. The Form Conduit Indenture includes a marshaling of assets authorization in Section 7.4. Practices in this regard are far from uniform and frequently negotiated. For example, some funds and accounts may be excluded from this provision. Specific requirement for reporting by the Trustee of expenditure of funds upon an

¹⁰ Michael Blumstein, "The Lessons of a Bond Failure". New York Times August 14, 1983.

Event of Default may be included, including a requirement for a description of expenses with invoice detail.

Section 7.5 Trustee May File Proofs of Claim. Subsection (a) enables the Trustee to act on behalf of the Bondholders in an insolvency proceeding by filing proofs of claim and collecting and distributing proceeds or property arising out of such a proceeding. The reference to the Borrower “... or any other obligor ...” is consistent with the definition of “obligor” in the TIA and precludes inadvertent omission of another obligor, such as a guarantor, which may be present. The parenthetical reference to payment of the Bonds makes clear that action by the Trustee under this subsection need not be predicated upon either payment default or demand for payment subsequent to any such payment default.

Subsection (b) contains the customary prohibition against the Trustee voting for, consenting to or adopting any plan of arrangement or reorganization or the like, such power always being reserved to the Bondholders.

Whether a Trustee may serve on a creditors’ committee is typically not addressed in an indenture, and whether it should do so is a matter which should be discussed with Counsel.

Section 7.6 Possession of Bonds Not Required. This Section authorizes and permits the Trustee to exercise rights and remedies without possession of the Bonds or the requirement that the Bonds be produced in court. It also authorizes and permits the Trustee to sue in its own name without joining Bondholders as parties.

Section 7.7 Notice and Opportunity to Cure Certain Defaults. This Section relates back to an Event of Default under Section 7.1(c). It provides that a covenant default does not become an Event of Default until there has been notice and a 30-day grace period within which to effect a cure, and that the initiation and maintenance of reasonable corrective action within the grace period forestalls the occurrence of an Event of Default. It is increasingly common to include an outside time limit for such corrective actions, so that an Event of Default cannot be indefinitely forestalled. Borrower covenants in the Agreement may contain their own grace periods which would apply before a default under such covenants became an Event of Default if the facts did not otherwise constitute an Event of Default under Section 7.1(d). The Trustee should obtain an Officer’s Certificate from the Borrower with respect to factual matters underlying the inability of the Borrower to correct the default within the 30 day period and the nature and scope of the actions instituted and pursued in the correction of any such default.

Section 7.8 Priority of Payment Following Event of Default. Subsection (a), which applies before acceleration or before full payment is due, sets out a customary priority of distribution of moneys available and becoming available to the Trustee subsequent to the occurrence of an Event of Default. This changed priority of payment applies whether principal and interest have become due on the Bonds “by their terms,” such as by maturity of a Series or a scheduled sinking fund redemption, or as a result of acceleration. Thus, Bondholders may receive less than the entire amount due, even though the Bonds have not been accelerated. The priority of application of such funds is made subject to subsection (c), described below.

Subsection (b), which applies to situations after acceleration or upon final maturity, provides for application of proceeds without preference or priority between principal and interest represents the customary intention of the parties. Subsection (c) permits the Trustee to establish and maintain a reserve fund for fees and expenses, and to distribute moneys in such fund as it may determine. The subsection also requires the Trustee to establish a Record Date for payment of past due principal and interest. As of the date selected, amounts available are to be applied by the Trustee to payment, and interest on the principal amount paid ceases to accrue.

Talking Point: Super-Priority for Trustee Fees. The activities for which a Trustee is entitled to be paid, both pre- and post-default, and the priority for payment, should be discussed thoroughly and documented carefully, as should (a) the mechanism for payment, whether they are invoiced to the Issuer/Borrower or swept from the Trust Estate, (b) any Trustee obligation to provide back-up documentation of all rates and charges, (c) any dispute mechanism, and (d) any hourly or other fee limitations (such as local prevailing rates).

Section 7.9 Bondholders May Direct Proceedings. This Section permits a majority of Bondholders, subject to the indemnity requirements of Section 8.2(e), to direct the Trustee's implementation of remedies. The Trustee may decline to follow any direction that would subject it to personal liability or expense. The duties of the Trustee to any minority groups of Bondholders opposing the majority are problematic, but the Trustee would be able to look to the protections provided in Sections 8.1(c)(3) and 8.2(j) as well as to case law where such actions were judicially approved.

Talking Point: Bondholder Direction. The percentage of Bondholders necessary to direct proceedings can and does vary by deal. Similarly, in the case of bond insurance, the ability of the insurer (with or without a requirement for payment) to act on behalf of insured bonds, particularly important in a bankruptcy, can and does vary. Additionally, whether the directions are in writing and accessible to the Issuer and the Borrower should be discussed.

This Section also confers additional protection upon the Trustee. Upon the occurrence of an Event of Default, the Trustee is governed by the prudent person standard of conduct which necessarily involves the exercise of discretion. The direction of a majority of Bondholders both obviates the exercise of discretion and enables the Trustee to avail itself of the protections of Section 8.1(c)(3). The Trustee may be more fully protected under this Section, if it may effectively resign upon receipt of Bondholder direction, or if a majority in principal amount of the Bondholders may remove the Trustee.

Section 7.10 Limitations on Rights of Bondholders. The purpose of this Section is to prevent individual Bondholders, or small groups of them, from filing frivolous lawsuits that would cause unnecessary expense to the Borrower and deplete its assets. The number of Bondholders required to proceed with suit should be consistent with that required to direct implementation of additional remedies under Section 7.3. Conversely, a suit should not be permitted to proceed if less than this number of Bondholders are willing to join in it. Subsection (b) requires that all rights and remedies are to be exercised for the equal and ratable benefit of all Bondholders. The 60-day period set out in subsection (a)(4) within which the Trustee is to act

should not be expected to run. Given the operation and effect of the prudent person standard of care applicable to the Trustee upon the occurrence of an Event of Default, it is unlikely that the Trustee would fail or refuse to act when requested to do so by the requisite number of Bondholders. Under that standard, it may be necessary for the Trustee to proceed with suit without indemnity.

The remedies which are the subject of this Section are those within the scope of Section 7.3. The restriction imposed by the second sentence of subsection (b) is intended to prevent initiation of extraordinary remedies that would prejudice other Bondholders, such as a suit for reformation of the Form Conduit Indenture. Reference is made to the Commentary on Section 7.11, which follows, for additional discussion of the nature and scope of suits which may be brought by Bondholders.

Section 7.11 Unconditional Right of Bondholder to Receive Payment. The prohibition set out in Section 7.8 is only against suits “under this Indenture.” Section 7.11 correspondingly affirms the right of the Bondholder to sue on the Bonds for payment of principal, redemption premium, if any, and interest on or after such becomes due. Such a suit by a single holder may prejudice other Bondholders not bringing suit, but the filing of such a suit is deemed to be the absolute right of a holder.

Section 7.12 Restoration of Rights and Remedies -- Section 7.13 Rights and Remedies Cumulative. These Sections have particular applicability to the Form Conduit Indenture if the Trust Estate contains mortgaged property. In such situations, the nature of the remedies available to the Trustee under the Form Conduit Indenture might include, in addition to the panoply of remedies otherwise available under Sections 7.2 and 7.3, the rights to enter, take possession of and sell the mortgaged property.

Section 7.14 Delay or Omission Not Waiver. Delay in exercising remedies may be incurred due to difficulty in communicating with Bondholders. Such delay may be encountered, for example, in Book-Entry only issues, in which the consent of Beneficial Owners must be obtained. This Section provides a defense against a claim of waiver or laches in these circumstances.

Section 7.15 Waiver of Defaults. This Section permits a majority of Bondholders to decide that waiver of a given Event of Default (other than an Event of Default involving failure to pay interest or principal) is preferable to the consequences which would otherwise ensue. The exception for payment defaults in subsection (a) reflects the unconditional right of the Bondholder to receive payment as set out in Section 7.11. Section 7.11, however, is limited to a right to receive payment at and after maturity. The parenthetical exception in subsection (a) prohibiting waiver of a payment default is not so limited, and would thus prohibit waiver of a failure to pay principal and interest after acceleration. Therefore, once the maturity of the Bonds has been accelerated under Section 7.2(a), default in its payment cannot be waived under Section 7.15.

Section 7.16 Notice of Events of Default. This Section is not based upon either the Model Provisions or the TIA. The Model Provisions reflect the language of the TIA in requiring that notice of defaults be given by the Trustee to holders of the securities. In the Form Conduit Indenture, in accord with customary practice, the Trustee is required to give Immediate Notice to the Issuer and the Borrower of any Event of Default of which it has or is deemed to have notice. The requirement to notify Bondholders of an Event of Default has intentionally been made optional, and may be omitted entirely. The Trustee is not customarily required to notify Bondholders of the occurrence of an Event of Default. Instead, it is assumed, without being mandated by written provisions, that the Trustee, in its discretion, will notify or not notify Bondholders, as may be proper under the circumstances. The giving or withholding of such notice, an action occurring subsequent to an Event of Default, would be discretionary on the part of the Trustee. It would be infrequently, if ever, that a prudent Trustee would decide to withhold an otherwise required notice to Bondholders of an Event of Default. This provision should not be confused with notice of “defaults” by the Trustee to Bondholders that have not yet “ripened” into Events of Defaults. Such a notice is not required and, if given precipitously, could be unnecessarily harmful to all parties.

The occurrence of an Event of Default will give rise to reporting requirements under Rule 15c2-12 adopted by the Securities and Exchange Commission under the Securities Exchange Act of 1934, as amended, if the Bonds issued under the Form Conduit Indenture are subject to that Rule. With respect to a conduit bond issue, the obligation to make such a report will most often be borne by the Borrower, since the Issuer of the Bonds is not likely to accept responsibility for compliance with Rule 15c2-12. The Trustee, in contrast, may be named a dissemination agent under the related continuing disclosure agreement, and, accordingly, may bear responsibility for the dissemination of any notice received by it, as dissemination agent, to the required parties identified in Rule 15c2-12.

Section 7.17 Undertaking for Costs. This Section provides that the parties to the Form Conduit Indenture, and each Bondholder, agree that a court may require, in its discretion, the filing of an undertaking to pay costs by any party litigant in any suit for the enforcement of any right or remedy under the indenture, or in any suit against the Trustee for any action taken or omitted by the Trustee. The court may also, in its discretion, assess reasonable costs, including reasonable attorneys’ fees, against any party litigation with due regard to the merits of the claim and the good faith of the claims or defenses made by the party to the suit. The provision does not apply, however, to any suit instituted by the Trustee or to any suit instituted by any Bondholder (or by a group of Bondholders holding in aggregate more than a majority in principal amount of the Outstanding Bonds). See TIA Section 315(e).

Section 7.18 Right to Cure. This Section confirms the right of the Borrower to perform any act in the place and stead of the Issuer in order to prevent the occurrence of an Event of Default. It is of particular importance in conduit issues in which the Issuer may have little or no involvement in the transaction subsequent to issuance of the Bonds.

COMMENTARY ON ARTICLE VIII – THE TRUSTEE

This Article of the Form Conduit Indenture sets out the duties, responsibilities and protections of the Trustee, and provides for the Trustee’s compensation, removal, replacement and succession. The standard of conduct for the Trustee, together with the rights, protections and successorship provisions, as set out in Article Six of the Model Provisions, have remained in substantially the same form since originally promulgated. Some of the Trustee sections of the Model Provisions are based, in turn, upon certain sections of the TIA. Unless otherwise noted, the Sections of this Article are based upon the Model Provisions, with appropriate changes in wording, phraseology, defined terms and format.

Section 8.1. Duties and Responsibilities of the Trustee. Subsections (a) and (b) set out the different standards of conduct applicable to the Trustee, depending upon whether an Event of Default has occurred and continues. Subsection (a) has been made specifically applicable both prior to the occurrence of an Event of Default and subsequent to the curing or waiver of any such Event of Default, and requires performance of only the duties specifically set forth in the Form Conduit Indenture. Subparagraph (a)(2) permits the Trustee to rely upon certificates or opinions furnished to it which comply with the requirements of the Form Conduit Indenture. In order to avail itself of this protection, the Trustee must first determine that the certificates or opinions furnished to it do so conform.

Subsection (b) establishes a “prudent person” standard of conduct applicable after occurrence of an Event of Default. This wording, consistent with contemporary practice, is not intended to modify or amend the former “prudent man” standard of conduct prevalent in the TIA and decisional law. The Trustee must determine, with the advice of Counsel, what actions are to be taken under this standard of conduct.

Subsection (c) establishes that the Trustee will be liable for negligence or willful misconduct, except in certain instances specified in subparagraphs (1) through (4). Subparagraph (1) is a reference to the standard of conduct set out in subsection (a) when there is no Event of Default. Subparagraphs (2) and (3) protect the Trustee against liability for, respectively, errors of judgment made in good faith by Responsible Officers and acting or omitting to act at the direction of Bondholders under any provision of the Indenture. Subparagraph (4) protects the Trustee against having to expend its own funds when it has reasonable grounds to believe that it will not be repaid.

Talking Point: Standard of Care. The level of care established for the Trustee can and does vary by deal, and is frequently subject to negotiation among the parties.

Language embodying a gross negligence standard of conduct is shown in brackets as an alternative provision in subsection (c) and in Sections 8.2(g), 8.5(b) and 8.5(c). In some jurisdictions such a standard may be a matter of practice, or the Trustee may be able to negotiate it. Depending upon applicable law, there may be a substantial difference in the burden of proof required to show gross, as opposed to ordinary, negligence, thus making the gross negligence standard a desirable one for the Trustee. Drafters need to confirm that the gross negligence

standard is permissible under the laws of the State since, like the TIA, many states do not permit fiduciaries to exculpate their own negligence. This would apply, at a minimum, to the post-default standard and would likely impact acts or omissions directly affecting the Trust Estate.

Subsection (e) is intended to make the protections of Section 8.1 applicable to all provisions of the Form Conduit Indenture relating to the Trustee's conduct.

Section 8.2 Certain Rights of the Trustee. This Section sets out customary protections encountered in current practice which are not based upon the TIA. These protections are subject to the provisions of Section 8.1. Comments regarding specific subsections are as follows:

Subsection (a) contains the customary protection of the Trustee in relying upon documents believed by it to be genuine and to have been properly executed. During the pendency of an Event of Default, reliance by the Trustee upon documents it received would be limited by the "prudent person" standard set out in Section 8.1(b). This limitation would apply to the form, content and sufficiency of any such documents.

Talking Point: Reasonable Reliance on Signed Documents. Consider whether the traditional reliance on written instruction is sufficient to guard against cyberfraud, where systems for transmitting signed documents may be hacked. Consider additional confirming procedures such as verbal confirmation.

Subsections (b) and (c) establish the procedure for the Trustee to obtain information from the Borrower.

Subsection (d) permits the Trustee to consult with Counsel, including Bond Counsel and Counsel to other parties, but the Trustee is protected only if it relies upon the written advice of such Counsel. While trustees have been absolved from liability based upon this language, e.g., *Dill v. Boston Safe Deposit & Trust Co.*, 175 N.E. 2d 911; 343 Mass. 97 (1961), exculpation should not be viewed as a certainty. Notwithstanding this language, trustees have been held liable in certain narrow situations for actions taken which were based on incorrect legal advice from Counsel. Discussions of the efficacy of this subsection are found in *Scott on Trusts*, 4th ed. (1988), § 201 and in *Bogert on Trusts*, 2d ed. (1993), §§ 541, 542.

Subsection (e) protects the Trustee in declining to act at the request or direction of Bondholders unless security or indemnity "satisfactory to the Trustee" as to its terms, coverage, duration, amount and otherwise has been provided.

Subsection (f) provides that the Trustee has no affirmative duty to make investigations into matters stated in documents delivered to it. However, the Trustee's duty to act under the prudent person standard subsequent to an Event of Default may involve making such investigations. The Trustee would be entitled to security under subsection (e), above, in making inquiry or investigating at Bondholder direction.

Subsection (g) absolves the Trustee from liability for agents and attorneys selected with due care. Recourse of the Bondholders would be directly against such persons only.

Subsection (h) provides that the Trustee is not required to take notice or deemed to have notice of an Event of Default other than payment defaults and those of which a Responsible Officer either has actual knowledge or has actually received written notice. Certain Events of Default, such as covenant defaults and the filing by or against the Issuer or the Borrower of insolvency proceedings, are by their nature such that the Trustee must be informed by others of their occurrence.

Subsection (i) establishes that the Trustee is not required to provide a bond or surety. Institutional trustees are customarily insured in the normal course of business against the risks inherent in so serving, such as defalcation.

Subsection (j) addresses the situation, which could arise under alternative provisions of the Form Conduit Indenture, in which the Trustee is required to act at the direction of the holders of less than a majority in aggregate principal amount of the Bonds Outstanding. Consequently, the Trustee may receive requests to act from two or more holders or groups of holders constituting less than a majority, and these requests may be conflicting. This subsection protects the Trustee in this instance.

Subsection (k) extends Trustee protections and indemnification to the Trustee's officers, directors, agents, attorneys, and employees, and provides that these rights, together with the Trustee's right to compensation, survive the Trustee's resignation or removal, defeasance or discharge of the Indenture and final payment of the Bonds.

Subsection (l) contains the customary provision that the permissive right of the Trustee to act under the Indenture is not to be construed as a duty or obligation to act.

Subsection (m) provides the customary protections to the Trustee in connection with disclosure and securities laws, and is complimentary to Section 8.3, which follows. The Trustee may agree to act as dissemination agent under a continuing disclosure or similar agreement and would look to the terms of such an agreement for appropriate protections in so serving. These protections customarily incorporate those protections accorded the Trustee under the Form Conduit Indenture.

Subsection (n) provides protections to the Trustee with respect to its reliance upon instructions, including value-bearing instructions, which are delivered using Electronic Means. The agreements of the Borrower contained in clauses (i) through (iv) of this subsection, in particular, protect the Trustee against strict liability under Article 4A of the UCC.

Section 8.3 Trustee Not Responsible for Recitals. These customary provisions provide that recitals in the Form Conduit Indenture and the Bonds, including, but not limited to, those related to the Bond proceeds and any money paid over by the Trustee in accordance with the Indenture, are those of the Issuer, as relied upon by representations from the

Borrower, and are not ascribed to the Trustee. However, the Comptroller of the Currency requires that the Trustee obtain at closing documentation supporting issuance of the Bonds. The documents required include authorizing resolutions, articles of incorporation and bylaws, specimen signatures, the bonds and attorneys' opinions. See Comptroller's Handbook for Fiduciary Activities (1990).

Section 8.4 Trustee May Own Bonds. This Section precludes the argument that the Trustee's fiduciary relationship to the Bondholders prevents it from owning Bonds or from dealing in commercial or other contexts with the Issuer or the Borrower. The benefits of this Section extend to affiliates of the Trustee, an appropriate provision given current bank organization.

Section 8.5 Compensation and Expenses of the Trustee. This Section is based upon the Model Provisions, but has been restructured to reflect the obligation of the Borrower to compensate and indemnify the Trustee as set out in the Agreement (to which the Borrower is a party) rather than in the Form Conduit Indenture (to which the Borrower is not a party). The language in the Agreement must mirror the language used here. An alternative to this essentially informational approach for the Form Conduit Indenture would be simply to incorporate by reference the obligations of the Borrower as set out in the Agreement.

Subsection (a) provides for the Trustee's compensation both prior to and subsequent to default and allows the Trustee to charge its customary higher fees for post-default administration. The Trustee's compensation is not limited by provisions of statutory trust codes and the like. The provision relating to services performed and expenses incurred in proceedings under the Bankruptcy Code has been added to facilitate recovery of fees and expenses as costs of administration in such proceedings. The concluding paragraph provides for a lien in favor of the Trustee, which can be exercised by right of set off, on all property or funds held or collected by the Trustee except the Rebate Fund. Under an unsecured indenture, it is unlikely that there would be any such property or funds.

Talking Point: Trustee Expenses. As noted above, the activities for which a Trustee is entitled to be paid, both pre- and post-default, and the priority for payment, should be discussed thoroughly and documented carefully. Reasonableness can and does vary by jurisdiction, as do requirements for prevailing rates.

Section 8.6 Qualifications of the Trustee. The variable encountered with respect to Trustee qualifications is the amount of capital and surplus to be required for a Trustee to qualify. The Committee has observed considerable variation in this figure. Generally, the amount should be high enough to provide the parties with an acceptable level of comfort but not so high as to preclude the appointment of a Trustee otherwise qualified. If the proposed trustee does not meet the capital and surplus requirement, it may nevertheless serve as trustee if its obligations and liabilities are guaranteed by an affiliate meeting that requirement. Another consideration in establishing this amount is consistency for a given Issuer. The appointment of a successor Trustee for all issues of a given Issuer may be made problematic by the presence of varying amounts of required capital and surplus in different issues. Reference to the Trustee having an

office in a particular place of payment has not been included in the Form Conduit Indenture but is found in many indentures. Such a provision, if present, may limit the choice of a successor Trustee. In addition, state law provisions relating to size or location may limit the selection of a Trustee.

Section 8.7 Resignation or Removal of Trustee; Appointment of Successor Trustee.

This Section is based upon the Model Provisions, but has been restructured to accommodate the standard resignation and removal scenarios typically encountered in practice.

Subsection (a) reflects the requirement of Section 8.6 that there must always be a Trustee, hence no resignation or removal may be effective until a successor has been appointed and has accepted appointment. The power to appoint the successor Trustee lies with the Issuer.

Under subsection (b), the Trustee may resign upon giving 60 days written notice to the Trustee, the Borrower and the holders of the Bonds, and, if a successor has not accepted appointment (or no such appointment has been made) within 30 days after notice of resignation has been given, the resigning Trustee **[or any holder of a Bond then Outstanding]** may petition a court of competent jurisdiction for the appointment of such successor.

Subsection (c) permits, prior to the occurrence and continuance of an Event of Default, the Issuer, the holders of a majority in principal amount of the Outstanding Bonds **[or the Borrower]**, to remove the Trustee and appoint a successor, for any reason or for no reason. Subsequent to the occurrence and continuance of an Event of Default, only the Holders of a majority in principal amount of Outstanding Bonds may remove the Trustee. This facilitates Bondholder action in the event of, for example, dissatisfaction with the Trustee's default administration, but prevents the Issuer or the Borrower, given their possible exposure upon default, from effectively dictating the Trustee's conduct by exercising the power of removal or threatening to do so.

During the drafting process, the Borrower may attempt to negotiate the power to remove the Trustee and/or appoint a successor Trustee. While the exercise of such powers by the Borrower might be less cumbersome from an administrative standpoint than dealing with a conduit Issuer, such provisions should be viewed with caution. In the event the relationship between the Borrower and the Trustee has not been smooth, for example, the Borrower may be seeking to secure a more compliant Trustee. A middle ground would be to permit such Borrower action only if no Event of Default **[or default]** had occurred or was continuing per the bracketed language in this subsection.

Subsection (d) permits the Issuer or the Borrower to remove the Trustee and appoint a successor, and any holder of a then Outstanding Bond to petition a court for the removal of the Trustee and appointment of a successor, all upon the circumstances set out, generally the Trustee's becoming ineligible, incapable of acting or insolvent.

Notwithstanding the power of the Issuer, the Borrower or Holders to remove the Trustee upon its becoming ineligible, the Trustee should conduct a post-default review to ascertain the

existence of any conflicting interest, such as being the issuer of a supporting letter of credit or having a lending relationship with the Borrower. 12 C.F.R. § 9.100 permits a national bank to act as both trustee and creditor until 90 days after default, if the bank maintains adequate controls to manage the potential conflicts of interest. In the event the conflict of interest cannot be cured subsequent to default, the Trustee must resign.

Subsection (e) requires that notice of resignation, removals and appointments be given to holders of Bonds Outstanding. In the event the Borrower or the Issuer fail to give such notice, the successor Trustee should do so. Such notice is not required to be given to the holders of the Outstanding Bonds by the Borrower or the Issuer as long as the Borrower files such notice on the Electronic Municipal Market Access website of the Municipal Securities Rulemaking Board.

Section 8.8 Acceptance of Appointment of Successor Trustee. This Section, ministerial in nature, provides an orderly means of transition to a successor Trustee and obligates the predecessor Trustee to provide certain certifications regarding information and documents in its possession at the time of the transition.

Section 8.9 Merger or Consolidation of Trustee. Although the law of merger or consolidation would itself confer successorship, this Section has customarily been present in indentures to make such succession explicit, particularly in view of the appointment and acceptance provisions of Sections 8.7 and 8.8. This Section assumes particular relevance today, given the extensive restructuring within the corporate trust industry and the ongoing sales of corporate trust books of business. Divestitures of corporate trust departments in bulk by certain financial institutions, together with merger activity encompassing trust institutions, have included the transfer of trust accounts from the original trust banking institutions to others. The Form Conduit Indenture should address whether the transfer of the Trustee's role is automatic or, alternatively, if the Borrower or the Issuer retains the right either to approve the designated successor in advance or to replace the designated successor either prior to or following the transfer.

Section 8.10 Notices to Bondholders; Waiver. The bracketed language in this Section is intended to be in compliance with the "Joint Recommendations for Communication with the Beneficial Owners of Defaulted Municipal Securities" published by a working group composed of representatives of NABL, The Bond Market Association (now known as the Securities Industry and Financial Markets Association), the American Bankers Association, the Government Finance Officers Association, the National Association of State Auditors, Comptrollers and Treasurers, and the National Federation of Municipal Analysts, as printed in the June 1, 1998, issue of *The Bond Lawyer: The Journal of the National Association of Bond Lawyers*, Vol. 19, No. 2 (the "Joint Recommendation"). The requirements put in place by the inclusion of such language -- providing a method for a beneficial owner to receive notices directly and taking certain steps to help notices get through the depository system -- do not apply until after an Event of Default unless the bracketed language appearing early in the third paragraph is used. These requirements are nevertheless unlikely to apply in typical redemption notice situations. The most common situations where they will apply are the initial notice that an Event of Default has occurred, notices ordered to be sent to beneficial owners as a result of court

proceedings, solicitations of consent, votes in favor of plans of reorganization and similar workout efforts, and notices detailing developments in the case including bond calls and tenders. The requirements are in addition to those set forth in Section 3.9. The drafter may wish to include such language in Section 2.11 or Section 8.10 of the Form Conduit Indenture. The costs of complying with these communication requirements are the responsibility of the Borrower pursuant to Section 8.5 or, in some rare situations, the Issuer, but shall be paid initially by the Trustee subject to appropriate reimbursement.

The Committee is of the view that inclusion of comparable language in indentures will be of overall benefit to governmental issuers and investors. As stated in the Joint Recommendation:

“These recommended uniform practices have been prepared after extensive discussions that explored the importance of communications related to defaulted municipal securities as well as the operational constraints affecting firms responsible for transmitting notices to beneficial owners. It is believed that most of these recommended uniform practices are usually implemented by many market participants with respect to defaulted municipal securities; however, . . . consistent application of these recommendations by all market participants will assure that beneficial owners receive notices related to defaulted municipal securities, which will benefit all market participants.”

COMMENTARY ON ARTICLE IX – DISCHARGE AND DEFEASANCE

This Article of the Form Conduit Indenture establishes a procedure for formal termination of the trust established under the Form Conduit Indenture when payment of all Bonds and other obligations due under the Form Conduit Indenture has been made. It also permits the discharge of the lien of the Form Conduit Indenture (other than with respect to moneys on deposit with the Trustee in a defeasance escrow) when funds for the discharge of the Bonds have been deposited in trust.

Section 9.1 Discharge. Although payment of all the Bonds would discharge the Issuer’s indebtedness under the Form Conduit Indenture, it would not automatically discharge the Form Conduit Indenture itself. Usual principles of trust law provide that a trust whose purposes have been accomplished may be terminated.¹¹ In order to provide a record of the formal termination of the trust, however, without the need for judicial proceedings, and to formally discharge the Issuer from the covenants and restrictions established by the Form Conduit Indenture, indentures generally contain a defeasance article such as Article IX.

Satisfaction of a lien of the indenture is of greater significance to the Issuer than satisfaction of the Bonds. If the Bondholders and the Trustee have been paid all that is owing to them, there are no persons who may enforce the Form Conduit Indenture covenants.

¹¹ *Scott on Trusts*, §§ 69.2, 70, 334 (1967).

Nonetheless, that fact does not operate automatically to satisfy the lien of record against the property pledged by the Issuer (including any lien on the property of the Borrower pledged to the Trustee), until the indenture is formally released.

This Section establishes the conditions for the Trustee's formal release of all its right, title and interest in the Trust Estate, and instructs the Trustee "to execute such documents to evidence such release as may be reasonably required by the Issuer." On occasion, Trustees may receive requests for releases directly from Borrowers who have satisfied all of their obligations under the related loan agreement or lease, and are eager to have any lien on their collateral released. The specific language employed may lead the Trustee to take the position that it is empowered to deliver the requested release only if instructed to do so by the Issuer (whose level of involvement in the financing at this stage may be minimal). Consideration should be given to including provisions in the Agreement which detail the mechanics for the Borrower's request for a release of collateral drafted in such a way so as to make the Borrower the assignee of the Issuer's right to direct a release.

Section 9.2 Defeasance. The traditional indenture provision which permits the Issuer to defease the covenants of the Form Conduit Indenture by depositing with the Trustee cash and/or Defeasance Obligations sufficient to pay all principal of, redemption premium and interest on the Bonds when due evolved from indenture provisions which recognized that, as a practical matter, cancellation of all debt instruments is often not completed until long after maturity. That delay was due largely to misplacement or loss of securities by securities holders. The defeasance of the covenants through a deposit of funds with the Trustee was intended to address that delay.

Today, defeasance escrow provisions are most commonly utilized in connection with refundings of municipal bonds. The language of the Form Conduit Indenture is intended to permit the discharge of the Form Conduit Indenture well in advance of maturity upon satisfaction of certain conditions precedent having the effect of ensuring timely payment. Although the Bonds remain unpaid, the security for repayment of the Bonds provided under the Form Conduit Indenture is released, and new security in the form of a defeasance escrow becomes the sole source of payment for the defeased Bonds.

The conditions precedent to such a defeasance commonly include receipt by the Trustee in trust of (i) moneys or Defeasance Obligations sufficient to pay the principal of or redemption premium on any Bonds becoming due, either at maturity or by call for redemption or otherwise, together with all interest accruing on the Bonds to the due date, and (ii) adequate provision for the payment of all fees, costs and expenses of the Issuer and the Trustee. The Form Conduit Indenture permits the Trustee to rely on a verification report from an independent certified public accountant as to the sufficiency of the moneys or securities deposited, but does not require one to be provided in order for a defeasance to occur under the Form Conduit Indenture. In the case of variable rate bonds, the amount to be so deposited generally will be required to be sufficient to pay interest on the variable rate bonds at the highest permissible interest rate established by the indenture. Furthermore, in the case of a partial defeasance, the terms of the indenture may not permit the Trustee to identify which Bonds (or portions of Bonds of a particular maturity) are treated as defeased until the Trustee is permitted to call such Bonds for redemption. For this

reason, consideration should be given in those cases to addressing in the notice of redemption both the mechanics for making such selection and the effect of the partial defeasance on any mandatory redemption provisions applicable to such Bonds. For an excellent discussion of the defeasance provisions as construed by a court, see Hutchinson, Shockey, Erley & Co. v. Evansville – Vanderburgh County Building Authority, 644 N.E.2d 1228 (1994), an Indiana Supreme Court decision.

A drafter may wish to consider adding provisions which address procedures for a “strip” refunding of Bonds. Such provisions would grant authority to the Trustee to select the Bonds or portion thereof to be refunded, obtain new CUSIP numbers, establish the defeasance deposit and give notice to affected Bondholders both at the time of selection and then just prior to redemption in the manner already provided for in the Form Conduit Indenture.

Under standard accounting rules, there is a difference between a “legal” defeasance and an “economic” defeasance. An economic defeasance means money and securities have been set aside for payment in an amount sufficient to make all current or future payments. However, in that situation the defeasance is revocable and the document incorporating the obligation of the person to pay, here the Note or Loan Documents, is not discharged. In a legal defeasance, the operative documents embodying the obligation to pay do cease to be effective and the sole source of payment of the Bondholders is transferred to the cash and securities deposited in accordance with the indenture and any escrow agreement.

Some counsel, in part based upon state law, believe that defeasance of municipal bonds can only be accomplished with a legal defeasance. Such counsel believe the Issuer has no further duty to Bondholders, even if, for example, the escrow agent holding the cash and securities absconds with the money.

For Federal income tax purposes, it is clear that, for instruments that do not bear tax-exempt interest, the substitution of securities in an irrevocable escrow for creditors is treated as a significant modification of the terms of the indebtedness if the Issuer (which, for this purpose, includes a conduit Borrower) is released from further obligation on the debt. See Treas. Reg. § 1.10013(c)(2)(i) and -3(d), Example 6; § 1.1001-3(e)(5)(ii)(A). Accordingly, a legal defeasance of such debt requires the creditors to value the escrow securities and recognize gain or loss under Section 1001 of the Code. However, there is an exception to this rule for tax-exempt bonds. Treas. Reg. § 1.1003-3(e)(5)(ii)(B)(1) provides that, if the defeasance occurs by operation of the original terms of the obligation and the Issuer places in trust escrow securities which are reasonably expected to provide enough cash flow to satisfy the payment obligations, the defeasance of the tax-exempt bond will not be treated as a significant modification. The clarification in the Federal tax regulations that a legal defeasance does not adversely affect the status of tax-exempt bonds assists Bond Counsel in structuring defeasances which comport with the accounting rules.

In conduit financings, the Borrower may elect to redeem or defease the Bonds with other than the proceeds of refunding Bonds. If so, the failure to “preference-proof” the deposited funds could lead to a failed defeasance. If the conduit Borrower used its own funds or proceeds

of taxable borrowings to redeem or defease Bonds and an Event of Bankruptcy occurred within the preference period under the Bankruptcy Code or under state insolvency laws, the Borrower or its creditors could demand the return of the moneys used to redeem or defease the Bonds. In insured transactions, the Bond Insurer insures against (i.e., takes the credit risk of) the Borrower's bankruptcy and agrees to pay the Bondholders when due. In refundings, the proceeds generally are deemed to be the property of the Issuer, not the Borrower, or at least are considered "earmarked" and held in trust, and thus no preference issues should arise. See, e.g., *In re Bohlen Enterprises, Ltd.*, 859 F.2d 561, 566 (8th Cir. 1988) and *Coral Petroleum v. Banque Paribas – London*, 797 F.2d 1351, 1356 (5th Cir. 1986) rehearing denied, 801 F.2d 398 (1986). The failure to preference-proof in uninsured transactions may present substantial difficulties for the Trustee and /or the Bondholders. Since more Borrowers are using non-Bond proceeds for redemptions and defeasances, attorneys should consider the merits of requiring "preference-proof" funds for redemptions and defeasances. Similarly, the Borrower may retain rights to redeem Bonds or to substitute Defeasance Obligations. Such rights raise the question whether, in the event of the Borrower's insolvency, the Defeasance Obligations would be part of the Borrower's estate.

If such a requirement is included in the Form Conduit Indenture, "Preference-Proof Funds" could be defined as either: (i) funds held by the Trustee for more than [_____ days] (the minimum required under Federal or state law, whichever is greater); (ii) the proceeds of new bonds (whether or not Additional Bonds under this Indenture) issued by the Issuer; or (iii) funds which an opinion of bankruptcy Counsel states are not subject to the preference provisions of the Bankruptcy Code or the laws of the State.

COMMENTARY ON ARTICLE X SUPPLEMENTAL INDENTURES AND AMENDMENTS

This Article of the Form Conduit Indenture sets out the procedures and requirements for supplementation and amendment, and details the circumstances under which consent of Bondholders is required. The execution of a supplemental indenture is as formal as the execution of the indenture itself, requiring board resolutions, opinions of counsel and, in most cases, consent of the bondholders.

Section 10.1 Supplemental Indentures Without Bondholders' Consent. Because of the difficulty of obtaining consent of Bondholders, Bond Counsel will often be asked to draft and opine to supplements and amendments to be executed without consent of the Bondholders. Often one of the most difficult decisions the Bond Counsel, the Issuer and the Trustee must make is whether the particular supplement or amendment fits under the conditions of this Section. The Form Conduit Indenture sets out more circumstances under which the Form Conduit Indenture may be supplemented or amended without consent of the Bondholders than are contained in corporate debt indentures. This reflects the differences between corporate and municipal debt.

Subsections (a), (b), (c), (d), and (e) of this Section typically are included. Additional provisions, including both those in the Form Conduit Indenture, as well as others that might be proposed, will vary according to the transaction and the parties and attorneys involved. A useful

basic rule of what can be included in this Section is that the changes must be those “which clearly do not adversely affect the interests” of the Bondholders.

Subsection (d) may be anachronistic, but in the case of a mortgage indenture, the laws of the state where the property is held may require appointment of a local co-trustee. Subsection (e) is a hold-over from older, more traditional indentures. However, as securities laws change, this provision could be useful at some future time even in municipal debt issues.

Subsections (f) and (g) are often found in municipal bond indentures. Subsection (g) has the advantage of providing flexibility, but the Trustee may object to having such discretion. If an amendment is to rely on this provision, the Trustee may require an opinion of Counsel, which opinion, however, should not place the lawyer in the position of making a factual, rather than legal, determination. As to any factual determination, such opinion generally should rely upon a certificate of a person qualified to make such determination (*e.g.*, a financial advisor or investment banker). In addition, the Trustee should review the opinion for reasonableness in order to satisfy its “good faith” requirement. See Section 8.2(d).

Subsection (i) permits amendments of the Book Entry Bonds provisions.

Subsection (j) permits amendments that conform the text of the Indenture to any summary of the Indenture, subject to certain limitations.

In a rated issue, it may be useful to add a provision permitting amendments to maintain a rating in order to avoid difficult questions of fact and law as to whether a change required by the Rating Service “adversely affects” the Bondholders.

The last sentence of this Section protects the Trustee from being required to agree to a change that would harm it, such as taking on more responsibilities or liabilities without an appropriate increase in fee.

Section 10.2 Supplemental Indentures Requiring Bondholders’ Consent. The percentage of Bondholders required to consent to certain changes is a matter of negotiation, with input to be received from the Underwriter regarding marketability.

The language in the first sentence of this Section regarding an amendment affecting less than all of the Bonds Outstanding is not commonly found in indentures, but can provide flexibility, particularly for “open indentures” where only one series or maturity would be affected by the amendment. The proviso at the end of the first sentence is also not standard, but could be useful in an open indenture transaction or in other circumstances where a change might be made in connection with a mandatory tender of the Bonds.

The second sentence of this Section describes the Form Conduit Indenture provisions that are not subject to change without consent of all affected Bondholders, since they are essential rights of the Bondholders. These basic financial provisions are required in any indenture qualified under the TIA. Sinking fund payment changes, however, may not require 100%

consent. As drafted, clause (c) prohibits any lien on the Trust Estate other than the one established under the Form Conduit Indenture. In some transactions, a junior or subordinate lien may be permitted and the language should be changed so to indicate. Also, see Section 2.12 of the Form Conduit Indenture. Clause (d) is now quite common in indentures. Clause (e) provides protection to the Bondholders against changing the percentage of Bondholders required to consent to amendments. However, there may be circumstances where the issuance of Additional Bonds and the sale of such Additional Bonds to supportive Bondholders could be utilized to obtain the consent of the required percentage of Bondholders. Clause (f) is included to prevent diluting the approval requirement in connection with waiver of certain defaults.

A 1999 case construing TIA Section 316(b) held that, in determining whether 100% bondholder consent is required, it is necessary to evaluate the effects of one or more proposed indenture amendments in the aggregate and not to review each proposed amendment in isolation. See *Federated Strategic Income Fund, et al. v. Mechala Group Jamaica Ltd.*, 99 CIV 10517 (U.S.D.C. N.Y. 1999). Although the Form Conduit Indenture contains several provisions which require 100% Bondholder consent to effect certain amendments, it does not contain a provision which precisely follows the provision required by TIA Section 316(b) to the effect that no amendment, without 100% bondholder consent, may impair or affect the right of any bondholder to receive payment of principal and interest on or after the respective due dates. Even so, the analysis of this case may be instructive.

Talking Point: Protections for Minority Bondholders. These provisions are designed to protect minority bondholders. In certain high yield transactions, one or more parties may request modification of this 100% standard, replacing it with a collective action clause permitting modification (presumably post-default workouts) with less than 100%. All parties should carefully consider any such request, and any change from the common 100% standard should be clearly disclosed to all bondholders.

The penultimate sentence of this Section provides that any individual Bondholder may consent to the extension of the time for payment on such person's Bond, but only if such Bondholder agrees to be subordinated in right of payment following an Event of Default to Bondholders who have not consented to such an extension.

Section 10.3 Consents of Bondholders and Opinions. Although not all indentures include this Section, or may include it in another Article, it is good practice to set out the procedure for providing information to Bondholders and obtaining consents in connection with amendments and supplements. It is particularly important to contractually bind subsequent holders through this language. This Section may also contain procedures for dealing with DTC and the Beneficial Owners. See, however, Sections 2.12 and 8.10 of the Form Conduit Indenture and the accompanying Commentary. The requirement to provide the Trustee with certain opinions is bracketed because this should be discussed among the parties to understand the cost and appropriateness of requiring such opinions compared to allowing the Trustee to rely on such opinions if issued.

The provision in the last sentence of the first paragraph of this Section regarding revocation of consent in writing is not typical, and its benefits should be discussed among the Issuer, the Trustee and the Underwriter. The second paragraph of this Section is also not typical but is increasingly being recommended by underwriters to increase the Issuer's flexibility.

The provision in the third paragraph is in response to the amendments made to MSRB Rule G-11 in December, 2013, prohibiting underwriters from consenting to certain amendments to the indenture on behalf of the Bondholders unless expressly authorized by the indenture. Although the rule allows underwriters to consent to amendments if the indenture expressly authorizes such underwriter consents (and the offering documents for the Initial Bonds expressly disclosed that bond owner consents could be provided by underwriters of Additional Bonds issued under the indenture), consider the appropriate scope of underwriter consents.

Talking Point: Issuer Notices and Reserved Rights. Issuers and their counsel should pay careful attention to notice provisions, including post-default issues related to notice of communications ostensibly just between the Trustee and Bondholders. In addition, State law matters related to rights and powers to be retained by the Issuer may vary by jurisdiction.

Section 10.4 Exclusion of Certain Bonds. This Section contains the customary provisions excluding from the consent process and deeming not Outstanding all Bonds which are held by or for the account of the Issuer or, alternatively, the Borrower, including Bonds held by an Affiliate. The Issuer or Borrower is obligated to furnish the Trustee with a certificate describing all Bonds to be excluded pursuant to this Section. For further discussion, see the Commentary relating to the definition of "Outstanding."

Section 10.5 Notation on Bonds. This is a traditional provision to assure that subsequent Bondholders are informed of changes to the Indenture. It may be somewhat anachronistic in an age of Book Entry Bonds when Bondholders do not actually hold their Bonds.

Section 10.6 Delivery of Counsel's Opinion with Respect to Supplemental Indentures. This provision protects the Trustee and assures an attorney's review of any amendments or supplements. The language in clauses (a) and (b) may vary in different transactions. The last sentence of this Section echoes the Trustee protections given by Section 8.2(d) of the Form Conduit Indenture. The Committee believes attorneys should resist delivering opinions that are inherently factual, such as those dealing with questions of adequate debt service coverage for the issuance of Additional Bonds. Further, some Committee members, depending on the circumstances, believe that the question of whether an amendment to an indenture or an action proposed to be taken under the terms of an indenture is materially adverse is factual and therefore an inappropriate subject for an opinion. Other members of the Committee are of the view that a determination of material adverse effect involves elements of construction of a contract and would therefore be an appropriate opinion. See also the Commentary to Sections 10.1 and 10.3 of the Form Conduit Indenture and the related TIA provisions.

Section 10.7 Amendments to Loan Documents Not Requiring Bondholders' Consent. Practice varies as to whether provisions dealing with amendments to the Loan Documents are included in the indenture. It is generally good practice to set out the requirements in the indenture and then to reference them in the applicable Loan Documents. By including these provisions in the Form Conduit Indenture, the Trustee and Issuer/Borrower are more likely to be aware of them and to protect the interests of the Bondholders. This Section generally parallels the types of provisions found in Section 10.1.

Section 10.8 Amendments to Loan Documents Requiring Bondholders' Consent. This Section parallels Section 10.2 and the percentage of Bondholder consents required should be the same. It also incorporates certain provisions from Section 10.3 regarding Bondholder notification and consent procedures.

Section 10.9 Delivery of Opinion of Counsel's Opinion with Respect to Amendments. This Section parallels Section 10.6, and the Commentary on that Section should be consulted. In some transactions, a "no adverse tax effect" opinion may also be required separately.

Section 10.10 Effect of Supplemental Indentures. This Section confirms that, following execution and delivery of a supplemental indenture, the Form Conduit Indenture is so modified and all past, present and future Bondholders are bound by the new terms.

COMMENTARY ON ARTICLE XI – MISCELLANEOUS PROVISIONS

This Article of the Form Conduit Indenture sets out miscellaneous administrative provisions customarily placed in the concluding article of indentures.

Section 11.1 Security Agreement; Financing Statements. While the granting clauses of the Form Conduit Indenture phrase the grant of the Issuer's right, title and interest in and to the Trust Estate under an absolute assignment (see Granting Clauses discussion), this Section grants the Trustee a security interest in the Trust Estate as well. See also Section 6.1(c). This security interest is intended to enable the Trustee to provide notice filings under the Uniform Commercial Code so as to alert third parties to the interest of the Trustee in the Trust Estate. The Trustee, at the Borrower's expense, is to obtain, at the time the Bonds are delivered and at other required intervals, an opinion of Counsel setting forth the actions to be taken in order to protect, perfect and preserve its security interest. This language is not intended to diminish the assignment to the Trustee of the Trust Estate as principal, not as agent or secured creditor of the Issuer.

Section 11.1 is worded to be usable regardless of whether a given state has adopted the common UCC provision exempting a security interest arising in public finance transactions from the requirement of filing for perfection. There is a 1999 revision to Article 9 of the Model Uniform Commercial Code which, if adopted in a state, will complicate perfection of a security interest. That revision provides for changing the public finance exemption to be applicable "*to the extent*" another statute governs creation or perfection, to extend the effective period for a financing statement to 30 years for some governmental transactions (but not all) and, under a

transition provision, to require old transactions to file financing statements in order to retain priority. The particular state law should be reviewed by a drafter for potential modifications to Section 11.1.

Section 11.2 Limitation of Rights. The language in this Section may be of importance in making future determinations with respect to any third-party beneficiary rights under the Form Conduit Indenture, e.g., the rights of mortgagors in a single family bond transaction.

Section 11.3 Severability. This Section prevents the entire contract from being held void if one or more provisions is held invalid under the governing law. It is of particular importance in a mortgage indenture.

Section 11.4 Notices. This Section provides a convenient place to set out the addresses of the parties, including both the principal office and payment office, if different, of the Trustee. In drafting, the lawyers and other parties should give careful consideration to modern means of communication.

Section 11.5 Holidays. This Section is important to provide a clear statement of the procedure to be followed when payment dates or other dates for required actions occur on non-business days. Use of the defined term “Business Day” can also eliminate problems of interpretation.

Section 11.6 Counterparts. This standard language authorizes counterpart signatures, which can be essential when the parties signing the documents are in different locations.

Section 11.7 Applicable Law. In most bond transactions, state law and the Uniform Commercial Code will require that contracts signed by the Issuer be interpreted under the laws of the Issuer’s jurisdiction. In some instances an indenture with an out-of-state trustee may incorporate New York or other law applicable to the Trustee. However, this choice of law would be limited to the duties of the Trustee, and would not apply to the basic provisions of the Form Conduit Indenture and the Bonds.

Section 11.8 Limitation of Liability of Officials of the Issuer. These provisions generally are peculiar to municipal Issuers because of the limited nature of the Issuer’s obligations, particularly in conduit or revenue bond issues.

The Committee has drafted a representative example of a provision regarding recourse against officials of the Issuer but, as noted in Section 11.8, such provision should be tailored to State law and any specific provisions required by the conduit Issuer. The example is as follows:

“No recourse shall be had under or upon any obligation, covenant, or agreement contained in this Indenture, or in any Bond, or under any judgment obtained against the Issuer, or by the enforcement of any assessment or by any legal or equitable proceeding by virtue of any constitution or statute or otherwise or under any circumstances, under or independent of this Indenture, shall be had against any trustee, official, or employee, as such, present or future, of the Issuer, either directly or through the Issuer, or otherwise, for the payment for or to the Issuer or any receiver thereof, or for or to the Owner of any Bond issued hereunder or otherwise of any sum that may be due and unpaid by the Issuer upon any such Bond. Any and all personal liability of every nature, whether at common law or in equity, or by statute or by constitution or otherwise, or any trustee, official, or employee, as such, to respond by reason of any act or omission on his part or otherwise, for the payment for or to the Issuer or any receiver thereof, or for or to any Owner of Bonds issued hereunder or otherwise, of any sum that may remain due and unpaid upon the Bonds hereby secured or any of them, is hereby expressly waived and released as a condition of and consideration for the execution of this Indenture and the issue of such Bonds.”

Section 11.9 Successors and Assigns. This is another standard protective provision, but a successor Trustee must nevertheless comply with the requirements of Section 8.7.

Section 11.10 Form of Documents Delivered to Trustee. This provision, often not found in municipal indentures can be helpful, particularly to the Trustee, in connection with later actions under the Form Conduit Indenture.

Section 11.11 Consent of Holders. Again, this provision may be anachronistic with respect to Book-Entry Bonds. See also Sections 2.12 and 8.10 of the Form Conduit Indenture regarding beneficial holders, DTC, etc.

SIGNATURES

Different Issuers and different Trustees may require one or two signatures. It is important to review the relevant state statute, the bylaws (if any) and the authorizing resolutions of the Issuer and the Trustee. The “IN WITNESS WHEREOF” paragraph should correctly describe the actual number of signatures and the titles of the signing parties. The use of seals and notarial acknowledgments will depend upon state law requirements and custom of the Issuer and the Trustee.

TRUST INDENTURE^{§§§}

between

[ISSUER]

and

[TRUSTEE]

[\$ _____]

[ISSUER]

**[DESIGNATION] BONDS, SERIES [YEAR]
([BORROWER] PROJECT)**

Dated as of _____, _____

^{§§§} This document, the Commentary and Talking Points Regarding Form Conduit Indenture, the Bibliography and the Introduction should be read together in their entirety.

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TRUST INDENTURE

THIS TRUST INDENTURE (the “Indenture”) dated as of _____, _____ is made by and between the [ISSUER] (the “Issuer”), a [TYPE OF ENTITY] organized and existing under the laws of the State of [NAME OF STATE], and [TRUSTEE] (the “Trustee”), [a national banking association/a [NAME OF STATE] banking corporation] authorized to exercise corporate trust powers:

WITNESSETH:

[RECITALS TAILORED TO PARTICULAR ACT]

WHEREAS, the Issuer has determined that, in the issuance and sale of the Initial Bonds, it will be acting to further the public purposes of the Act; and

WHEREAS, all things necessary to make the [Initial Bonds], when issued, executed and delivered by the Issuer and authenticated by the Trustee, to the extent required pursuant to this Indenture, the valid, binding and legal [special/limited] obligations of the Issuer, and to constitute this Indenture as a valid assignment and pledge of the revenues herein pledged to the payment of the principal of, redemption premium, if any, and interest on the Bonds and a valid assignment and pledge of certain rights of the Issuer has been done and performed, and the creation, execution and delivery of this Indenture, and the execution, issuance and delivery of the Initial Bonds, subject to the terms hereof, have in all respects been duly authorized;

NOW, THEREFORE, THIS INDENTURE WITNESSETH, that to secure the payment of principal of, redemption premium, if any, and interest on the Bonds according to their true intent and meaning, and all other amounts due from time to time under this Indenture, including those due to the Trustee, to secure the performance and observance of all of the covenants, agreements, obligations and conditions contained in the Bonds and in this Indenture, and to declare the terms and conditions upon and subject to which the Bonds are and are intended to be issued, held, secured and enforced and in consideration of the premises and the acceptance by the Trustee of the trusts created herein and of the purchase and acceptance of the Bonds by the Bondholders and for other good and valuable consideration, the receipt of which is acknowledged, the Issuer has executed and delivered this Indenture and [absolutely and irrevocably pledges and assigns to the Trustee and to its successors in trust, on the basis set forth herein, and its and their assigns, all right, title and interest of the Issuer in and to the Trust Estate as defined in Article I];

TO HAVE AND TO HOLD unto the Trustee and its successors in trust and its and their assigns forever;

BUT IN TRUST, NEVERTHELESS, and subject to the provisions hereof,

(a) for the equal and proportionate benefit, security and protection of all

Bonds,

(b) for the enforcement of the payment of the principal of, redemption premium, if any, and interest on the Bonds, and all other amounts due from time to time under this Indenture, including those due to the Trustee, when payable, according to the true intent and meaning thereof and of this Indenture, and

(c) to secure the performance and observance of and compliance with the covenants, agreements, obligations, terms and conditions of this Indenture and the Loan Documents,

in each case, without preference, priority or distinction, as to lien or otherwise except as provided herein, of any one Bond over any other by reason of designation, number, date of the Bonds or of authorization, issuance, sale, execution, authentication, delivery or maturity thereof, or otherwise, so that each Bond and all Bonds shall have the same right, lien and privilege under this Indenture and shall be secured equally and proportionately by this Indenture, it being intended that the lien and security of this Indenture shall take effect from the date hereof, without regard to the date of the actual issue, sale or disposition of the Bonds, as though upon that date all of the Bonds were actually issued, sold and delivered to purchasers for value; provided, however, that, upon satisfaction of and in accordance with the provisions of Article IX, the rights assigned hereby shall cease, determine and be void to the extent described therein; otherwise, such rights shall be and remain in full force and effect;

[PROVIDED, FURTHER, that the pledge of the right, title and interest of the Issuer in and to the Trust Estate is given subject to the right of the Issuer to issue Additional Bonds secured on a parity basis with the Initial Bonds by the Trust Estate; and]

IT IS DECLARED that all Bonds issued under and secured by this Indenture are to be issued, authenticated and delivered, and that all Revenues assigned or pledged hereby are to be dealt with and disposed of under, upon and subject to, the terms, conditions, stipulations, covenants, agreements, obligations, trusts, uses and purposes provided in this Indenture; and the Issuer has agreed and covenanted, and agrees and covenants with the Trustee and with each and all Bondholders, as follows:

ARTICLE 1 DEFINITIONS AND INTERPRETATIONS

SECTION 1.1 Definitions.

Unless the context otherwise requires, the terms defined in this Article I shall, for all purposes of this Indenture and of any indenture supplemental hereto, have the meanings herein specified:

“*Act*” means [ENABLING LEGISLATION].

[“*Additional Bonds*” means the additional parity bonds authorized to be issued by the Issuer pursuant to Section 2.12.]

“*Affiliate*” of any specified entity means **[INSERT DEFINITION FOR TRANSACTION]**.

“*Agreement*” means the Loan Agreement, dated as of the date of this Indenture, between the Issuer and the Borrower, as amended or supplemented from time to time.

“*Attesting Officer*” means the **[Clerk, Assistant Clerk, Secretary, Assistant Secretary, etc.]** of the Issuer.

“*Authorized Borrower Representative*” means the **[President, Chief Executive Officer, Vice President, etc.]** of the Borrower.

“*Authorized Denomination*” means \$5,000 and any multiple thereof **[means \$100,000 and any multiple of \$5,000 in excess thereof]**.

“*Bankruptcy Law*” means **[Title 11]** of the United States Code, as it is amended from time to time and any successor to or replacement of such Title and any other applicable federal or state bankruptcy, insolvency or other similar law.

“*Beneficial Owner*” means, for any Bond which is held as a Book Entry Bond, the beneficial owner of such Bond.

“*Bond*” or “*Bonds*” means the Initial Bonds and any Additional Bonds issued under this Indenture.

“*Bond Counsel*” means, with respect to the Bonds, **[FIRM]**, **[CITY, STATE]**, or any other firm of attorneys **[experienced in the matters covered by the opinion]** selected by the **[Issuer/Borrower]** and **[not unacceptable/acceptable]** to the **[Issuer and the]** Trustee.

“*Bondholder*” or “*holder of Bonds*” or “*Owner of Bonds*” means the Person in whose name a Bond is registered in the Bond Register.

“*Bond Legislation*” means the **[Bond Legislation as defined in the Agreement/authorizing action of the Issuer]**.

“*Bond Register*” and “*Bond Registrar*” shall have the respective meanings specified in Section 2.8.

“*Book Entry Bonds*” means that part of a Series for which a Securities Depository or its nominee is the Bondholder.

“*Borrower*” means [BORROWER], a [TYPE OF ENTITY] organized and existing under the laws of the State of [NAME OF STATE], and, to the extent permitted by the Agreement, its lawful successors and assigns.

“*Business Day*” means any day of the year other than (a) a Saturday or Sunday, (b) any day on which banks located in [City/State of Issuer] or the city in which the Office of the Trustee is located are required or authorized by law to remain closed, (c) any day on which the New York Stock Exchange is closed, or (d) any day on which the Federal Reserve payment system is not operational.

“*Code*” means the Internal Revenue Code of 1986, as amended, and the Regulations.

“*Conditional Redemption*” means a redemption where the [Borrower/Issuer] has stated in the redemption notice to the Trustee that (a) the redemption is conditioned upon deposit of funds or (b) the [Borrower/Issuer] has retained the right to rescind the redemption, as further described in Section 3.9.

“*Counsel*” means an attorney or law firm (who may be counsel for the Issuer or the Borrower), acceptable to the Trustee.

“*Debt Service Fund*” means the trust fund so designated which is described in Section 4.3.

“*Defeasance Obligations*” means (a) noncallable, nonredeemable direct obligations of the United States of America, [and] (b) obligations the timely payment of the principal of, and interest on, which is fully and unconditionally guaranteed by the United States of America, [and] (c) securities or receipts evidencing ownership interests in obligations or specified portions (such as principal or interest) of obligations described in (a) or (b).] **[MAY BE TAILORED TO THE PARTICULAR TRANSACTION].**

“*Depository Participants*” means any Person for which the Securities Depository holds Bonds as securities depository.

“*Determination of Taxability*” means **[LIKELY TO BE DRAFTED BY BOND COUNSEL, TAILORED TO THE PARTICULAR TRANSACTION AND NEGOTIATED RAMIFICATIONS OF DETERMINATION].**

“*DTC*” shall have the meaning given to such term in Section 2.11.

“*Electronic Means*” means the following communication methods: e-mail, facsimile transmission, secure electronic transmission containing applicable authorization codes, passwords and/or authentication keys issued by the Trustee or another method or system specified by the Trustee as available for use in connection with its services under this Indenture.

“*Electronic Notice*” means notice transmitted by Electronic Means, in writing, or by telephone (promptly confirmed in writing), and received by the party addressed.

“*Eligible Investments*” means **[TO BE TAILORED TO THE PARTICULAR TRANSACTION]**.

“*Event of Bankruptcy*” means the filing of a petition in bankruptcy (or other commencement of a bankruptcy or similar proceedings) by or against the Issuer, **[the Borrower/ additional parties]** as debtor, under Bankruptcy Law.

“*Event of Default*” means any of the events specified in Section 7.1 to be an Event of Default. A “default” means any event which, with the giving of notice or the lapse of time or both, would constitute an Event of Default.

“*Executive*” means the **[TO BE TAILORED TO THE PARTICULAR TRANSACTION]**.

“*Funds*” means the Project Fund, the Debt Service Fund, the Reserve Fund and the Rebate Fund, and (a) any account within each such Fund, and (b) any other Fund designated as such with respect to a Series.

“*Governing Body*” means the **[GOVERNING BODY]** of the Issuer.

“*Indenture*” means this Trust Indenture as amended or supplemented from time to time.

“*Initial Bonds*” means the Issuer’s \$ **[DESIGNATION]** Bonds, Series **[YEAR]** **[BORROWER]** Project).

“*Interest Payment Date*” means, for the Initial Bonds, the **[first/fifteenth]** day of _____ and _____ of each year **[beginning _____]** and, for any Additional Bonds, the days designated in the supplemental indenture authorizing such Additional Bonds.

“*Issuance Costs*” means costs incurred by or on behalf of the Borrower in connection with the making of the Loan by the Issuer to the Borrower and the issuance of the Bonds.

“*Issue Date*” means, with respect to the Initial Bonds, the date of issuance and delivery of the Initial Bonds to the Underwriter and, with respect to any Additional Bonds, the date of issuance and delivery of such Additional Bonds to the initial purchasers thereof.

“*Issuer*” means the **[ISSUER]** and its successors and assigns.

“*Issuer Representative*” means **[Issuer Representative as defined in the Agreement]**.

[“Letter of Representations” means when all the Bonds of a Series are Book

Entry Bonds, the [related Letter of Representations _____, executed by the Issuer [, the Borrower] and the Trustee and delivered to the Securities Depository and any amendments thereto or successor agreements between the Issuer [, the Borrower] and the Trustee and any successor Securities Depository, relating to a system of Book Entry Bonds to be maintained by the Securities Depository with respect to the Bonds of such Series.] [Blanket Letter of Representations dated, executed by the Issuer and delivered to the Securities Depository and any amendments thereto or successor blanket agreements between the Issuer and any successor Securities Depository, relating to a system of Book Entry Bonds to be maintained by the Securities Depository with respect to any bonds, notes or other obligations issued by the Issuer.]

“*Loan*” means the loan by the Issuer to the Borrower of the proceeds received from the sale of the Bonds.

“*Loan Documents*” means the Agreement [, **the Note and the Deed of Trust/Mortgage**].

“*Loan Payments*” means the amounts required to be paid by the Borrower in repayment of the Loan pursuant to the provisions of the Loan Documents, or all amounts realized by the Trustee thereunder in accordance with Article VII.

[“Note” means the [unsecured] non-negotiable promissory note of the Borrower, dated as of the date of the [Initial] Bonds, in the form attached to the Agreement as Exhibit A and in the principal amount of \$_____, evidencing the obligation of the Borrower to make Loan Payments.]

“*Office of any Paying Agent*” means the office of any Paying Agent designated in writing to the Trustee.

“*Office of the Trustee*” means the designated corporate trust office or offices of the Trustee, which office or offices at the date of acceptance by the Trustee of the duties and obligations imposed on the Trustee by this Indenture are set out in Section 11.4.

“*Officer’s Certificate*” of the Issuer or the Borrower means, respectively, a written certificate, statement, request, direction or order signed in the name of the Issuer by its Executive, Attesting Officer, an Issuer Representative, or such other person as may be designated and authorized in writing to sign for the Issuer and forwarded to the Trustee, or signed in the name of the Borrower by any [**officer/partner/member**] thereof or any other person or persons as may be designated and authorized in writing to sign for the Borrower, and forwarded to the Trustee.

“*Outstanding*,” in connection with Bonds means, as of the date in question, all Bonds authenticated and delivered under this Indenture, except:

- (a) Bonds theretofore cancelled or delivered to the Trustee for cancellation under Section 2.10;

(b) Bonds which are deemed to be no longer Outstanding in accordance with Article IX; and

(c) Bonds in substitution for which other Bonds have been authenticated and delivered pursuant to Article II.

[In determining whether the owners of a requisite aggregate principal amount of Bonds Outstanding have concurred in any request, demand, authorization, direction, notice, consent or waiver under the provisions hereof, Bonds which are held by or on behalf of the Borrower or an Affiliate (unless all of the Outstanding Bonds are then owned by the Borrower or an Affiliate) shall be disregarded for the purpose of any such determination.]

“*Paying Agent*” means _____ or any other national banking association, state bank, bank and trust company or trust company appointed by the Borrower, with the consent of the Issuer and meeting the qualifications of, and subject to the obligations of, the Paying Agent in this Indenture. Initially, the Trustee shall be the Paying Agent.

“*Person*” or “*person*” means an individual, corporation, firm, association, partnership, limited partnership, limited liability partnership, limited liability company, trust, or other legal entity or group of entities, including a governmental entity or any agency or political subdivision thereof.

“*Project*” means the Project, as defined in the Agreement.

“*Project Costs*,” “*Cost of the Project*” or “*Costs*” means **[TO BE TAILORED TO THE ACT AND THE PARTICULAR TRANSACTION]**.

“*Project Fund*” means the trust fund so designated which is established in Section 4.2.

“*Project Purposes*” means the Project Purposes, as defined in the Agreement.

“*Rating Service*” means any nationally recognized securities rating service that shall have assigned a rating that is then in effect with respect to the Bonds upon application of the Issuer or the Borrower.

[“*Rebate Amount*” has the meaning ascribed in Section 1.148-3(b) of the Regulations and generally means the excess as of any date of the future value of all receipts on nonpurpose investments over the future value of all payments on nonpurpose investments all as determined in accordance with Section 1.148-3 of the Regulations.]

“*Rebate Fund*” means the fund so designated which is established in Section 4.6.

“*Record Date*” means, (a) with respect to any Interest Payment Date the Trustee’s close of business on the **[15th day of the calendar month next preceding such] [15th day next preceding the] [TO BE TAILORED TO THE PARTICULAR TRANSACTION]** Interest

Payment Date, regardless of whether such day is a Business Day, and (b) with respect to any other payment date or other date requiring a Record Date hereunder, a date selected by the Trustee.

“*Regulations*” means any applicable Internal Revenue Service Regulations promulgated in proposed, temporary or final form. Proposed regulations are “applicable” only if, in the event they are adopted in final form, such regulations would apply to the Bonds.

“*Required Reserve*” means, as of any date, [the aggregate of the Series Required Reserve(s) for all Series of Bonds for which any Bonds of such Series are at the time Outstanding.][**TO BE TAILORED TO THE PARTICULAR TRANSACTION**]

“*Reserve Fund*” means the trust fund so designated which is described in Section 4.4.

“*Responsible Officer*,” when used with respect to the Trustee, means any officer in the corporate trust department (or any successor thereto) of the Trustee, or any other officer or representative of the Trustee customarily performing functions similar to those performed by any of such officers and also means, with respect to a particular corporate trust matter, any other officer of the Trustee to whom such matter is referred because of that officer’s knowledge of and familiarity with the particular subject.

“*Revenues*” means (a) the Loan Payments, (b) all amounts payable to the Trustee with respect to the principal of, redemption premium, if any, or interest on, the Bonds (1) by the Borrower as required under the Agreement and (2) upon deposit in the Debt Service Fund from the proceeds of the Bonds and (c) investment income with respect to any moneys held by the Trustee in the Project Fund, the Debt Service Fund and the Reserve Fund. The term “Revenues” does not include any moneys or investments or investment income in the Rebate Fund.

“*Securities Depository*” means a person that is registered as a clearing agency under Section 17A of the Securities Exchange Act of 1934 or whose business is confined to the performance of the functions of a clearing agency with respect to exempted securities, as defined in Section 3(a)(12) of such Act for the purposes of Section 17A thereof.

“*Series*” means the Initial Bonds and any series of Additional Bonds so designated pursuant to Section 2.12.

“*Series Required Reserve*” means, (a) for the Initial Bonds, an amount equal to [\$ _____], (b) for any Series of Additional Bonds, an amount, determined at the time of issuance of such Additional Bonds, not to exceed the least of (1) 10% of the original principal amount of such Additional Bonds (unless original issue premium or original issue discount exceeds two percent (2%) of the original principal amount, then determined on the basis of initial purchase price to the public), (2) 125% of the average annual debt service payment on such Additional Bonds, (3) 100% of the maximum annual debt service payable on such Additional Bonds, or (4) an amount which, when added to the existing Series Required Reserves for Outstanding Bonds, will not cause the total Required Reserve to exceed maximum annual debt

service payable on the Outstanding Bonds and the Additional Bonds; provided the Series Required Reserve for any Series of Additional Bonds may be revised to a lesser amount in accordance with requirements of Regulations specifying the maximum amount in a reserve fund permitted to be invested without regard to investment yield, **[TO BE TAILORED TO THE PARTICULAR TRANSACTION]**

“*State*” means the State of **[NAME OF STATE]**.

“*Trust Estate*” means all right, title and interest of the Issuer in and to (a) the Loan Documents (except for Unassigned Issuer’s Rights), (b) Revenues, (c) Funds (except for the Rebate Fund) and (d) all other property of every name and nature from time to time hereafter by delivery or by writing mortgaged, pledged, delivered or hypothecated as and for additional security for the Bonds under this Indenture by the Issuer or by anyone on its behalf or with its written consent in favor of the Trustee.

“*Trustee*” means **[NAME OF BANK OR TRUST COMPANY] [a national banking association/a _____ banking corporation]** and any successor trustee under this Indenture, acting in its trust capacity.

“*Unassigned Issuer’s Rights*” means Unassigned Issuer’s Rights as defined in the Agreement.

“*Underwriter*” means, with respect to the Initial Bonds, **[NAME OF UNDERWRITER or UNDERWRITERS’ REPRESENTATIVE]** and, with respect to any Series of Additional Bonds, the initial purchaser of such Additional Bonds.

SECTION 1.2 Rules of Interpretation.

For purposes of this Indenture, except as otherwise expressly provided or the context otherwise requires:

(a) The words “herein,” “hereof” and “hereunder” and other similar words refer to this Indenture as a whole and not to any particular Article, Section or other subdivision.

(b) The definitions in this Article are applicable whether the terms defined are used in the singular or the plural.

(c) All accounting terms which are not defined in this Indenture have the meanings assigned to them in accordance with then applicable **[generally accepted accounting principles]**.

(d) Any pronouns used in this Indenture include both the singular and the plural and cover both genders.

(e) Any terms not defined in this Indenture but which are defined in the Agreement [**Loan Documents**] have the same meaning in this Indenture as are given to them in the Agreement [**Loan Documents**].

(f) Any terms defined elsewhere in this Indenture have the meanings attributed to them where defined.

(g) Words referring to the redemption or calling for redemption of Bonds shall not be deemed to refer to the payment of Bonds at their stated maturity.

(h) The captions or headings herein are for convenience only and in no way define, limit or describe the scope or intent, or control or affect the meaning or construction, of any provisions or sections hereof.

(i) Any references to Section numbers are to Sections of this Indenture unless stated otherwise.

**ARTICLE 2
AUTHORIZATION, EXECUTION,
AUTHENTICATION, REGISTRATION AND DELIVERY OF BONDS**

SECTION 2.1 Authorization of Bonds; Limitation.

The Initial Bonds are hereby authorized to be issued as [revenue bonds] of the Issuer in the aggregate principal amount of \$_____ designated “[DESIGNATION] Bonds, Series [YEAR] ([BORROWER] Project).” Additional Bonds are hereby authorized to be issued pursuant to Section 2.12 and supplemental indentures described in Article X. No obligations may be issued by the Issuer or the Borrower (a) which are senior in claim on the Trust Estate to the Bonds, (b) which, other than Additional Bonds, have a claim on the Trust Estate in parity with the Bonds [or (c) which are junior or subordinate in claim on the Trust Estate to the Bonds]. [TO BE TAILORED TO THE PARTICULAR TRANSACTION]

SECTION 2.2 Bonds [Limited/Special] Obligations.

The Bonds shall be [limited/special] obligations of the Issuer, payable solely from the Trust Estate. The Bonds shall constitute a valid claim of the respective owners thereof against the Trust Estate, which is pledged to secure the payment of the principal of, redemption premium, if any, and interest on the Bonds, and which shall be utilized for no other purpose, except as expressly authorized in this Indenture. The Bonds shall not constitute general obligations of the Issuer and under no circumstances shall the Bonds be payable from, nor shall the holders thereof have any rightful claim to, any income, revenues, funds or assets of the Issuer other than those expressly pledged hereunder as security for the payment of the Bonds. [Add state specific language for limited obligation debt as necessary]

SECTION 2.3 Details of Bonds.

The Initial Bonds shall be issued in Authorized Denominations, shall be dated the Issue Date, shall be numbered from R-1 upward, and shall bear interest (calculated on the basis of a 360-day year of twelve 30-day months) payable on each Interest Payment Date at the rates per annum and shall mature on 1, in the years and amounts as follows:

<u>Amount</u>	<u>Year</u>	<u>Rate</u>	<u>Amount</u>	<u>Year</u>	<u>Rate</u>
\$		%	\$		%

All Initial Bonds shall bear interest (a) from [_____ 1, ____/the Issue Date], if authenticated prior to the first Interest Payment Date, or (b) otherwise from the Interest Payment Date that is, or that immediately precedes, the date on which such Initial Bond is authenticated (unless payment of interest is in default, in which case such Initial Bond shall bear interest from the date to which interest has been paid).

The principal of, redemption premium, if any, and interest on the Initial Bonds shall be payable in lawful money of the United States of America. Principal of and redemption premium, if any, on the Initial Bonds shall be payable by the Paying Agent upon presentation and surrender of the Initial Bonds as they become due at the Principal Office of the Paying Agent. Subject to the provisions of Section 2.11, interest on Initial Bonds shall be payable by the Paying Agent to the Bondholders of Initial Bonds by check or draft mailed to such Bondholders at their addresses as they appear on the Bond Register on the Record Date. **[Principal of, redemption premium, if any, and interest payable to any person holding Initial Bonds in aggregate principal amount of [\$] or more will be paid, upon the written request of any such Bondholder in form and substance satisfactory to the Paying Agent, by wire transfer of immediately available funds to an account within the United States of America designated by such Bondholder on or before the Record Date.]**

If any principal of, redemption premium, if any, or interest on any Initial Bond is not paid when due (whether at maturity, [by acceleration] or call for redemption or otherwise), then the overdue installments of principal and, to the extent permitted by law, interest and redemption premium, if any, shall bear interest until paid at **[the same rate set forth in such Initial Bond.] [a rate of ___% per annum]**.

Details of Additional Bonds shall be as set forth in supplemental indentures providing for their issuance.

SECTION 2.4 Execution of Bonds.

The Bonds shall be signed by the manual or facsimile signature of the Executive of the Issuer and attested by the manual or facsimile signature of the Attesting Officer of the Issuer. The Bonds **[shall/may]** bear the seal (if any) of the Issuer or a facsimile thereof will be affixed to or imprinted on the Bonds. In case any officer whose signature or a facsimile of whose signature shall appear on any Bond shall cease to be such officer before the delivery of such Bond, such signature or facsimile shall nevertheless be valid and sufficient for all purposes as if such officer had remained in office until such delivery.

SECTION 2.5 Authentication of Bonds.

The Bonds shall bear a certificate of authentication, substantially in the form set forth in Appendix A, duly executed by the Trustee. The Trustee shall authenticate each Bond with the manual signature of a Responsible Officer of the Trustee, but it shall not be necessary for the same Responsible Officer to authenticate all of the Bonds of a Series. Only such authenticated Bonds shall be entitled to any right or benefit under this Indenture. Such certificate on any Bond issued hereunder shall be conclusive evidence that the Bond has been duly issued and is secured by the provisions hereof.

SECTION 2.6 Forms of Bonds.

The Initial Bonds shall be substantially in the form set forth in Appendix A with such appropriate variations, legends, omissions and insertions as permitted or required by this Indenture. The form of each Series of Additional Bonds shall be as set forth in the supplemental indenture providing for their issuance.

SECTION 2.7 Delivery of Initial Bonds.

The Trustee shall **[authenticate and deliver]** the Initial Bonds when there have been filed with it the following:

(a) A copy certified by the Attesting Officer of the Issuer of the Bond Legislation authorizing (1) the execution and delivery of the Agreement **[and the assignment of the Agreement and the Note]**, (2) the execution and delivery of this Indenture, and (3) the issuance, sale, execution and delivery of the Initial Bonds;

(b) An original executed counterpart of this Indenture;

(c) An original executed counterpart of the Agreement;

(d) An opinion or opinions of Bond Counsel, addressed to the Issuer and the Trustee, to the effect that this Indenture and the Initial Bonds have each been validly authorized, are binding and enforceable against the Issuer, subject to bankruptcy and equitable principles, that the issuance of the Initial Bonds has been duly authorized **[and that interest on the Initial Bonds is not included in gross income for federal income tax purposes under the Code] [and is exempt from income taxation by the State of [NAME OF STATE]]**;

(e) A request and authorization of the Issuer, signed by its Executive, to the Trustee to authenticate and deliver the Initial Bonds to such person or persons named therein upon payment for the account of the Issuer of a specified sum;

(f) An opinion of Counsel to the Borrower, addressed to the Issuer, the Trustee and Bond Counsel, to the effect that the Loan Documents have been duly authorized, executed and delivered by the Borrower and are enforceable against the Borrower, subject to bankruptcy and equitable principles;

[(g) The original executed Note, assigned by the Issuer to the Trustee;]

[(h) An original executed counterpart of the Deed of Trust/Mortgage;]

[(i) An opinion or certificate to the effect that necessary State law approvals, consents or opinions have been obtained (which may be included in the opinion or opinions of Bond Counsel provided pursuant to subparagraph (d)).]

Simultaneously with the delivery of the Initial Bonds, the Trustee shall apply, or arrange for the application of, the proceeds thereof in accordance with an Officer's Certificate of the Issuer, and dated the Issue Date.

Additional Bonds shall be delivered only upon compliance with Section 2.12 and the provisions of the supplemental indentures providing for their issuance.

SECTION 2.8 Registration of Transfer and Exchange of Bonds; Persons Treated as Bondholders.

The Trustee shall act as initial bond registrar (the "Bond Registrar") and in such capacity shall maintain a bond register (the "Bond Register") for the registration and transfer of Bonds. Upon surrender of any Bonds at the Office of the Trustee, together with an assignment duly executed by the current Bondholder of such Bonds or such Bondholder's duly authorized attorney or legal representative in such form as shall be satisfactory to the Trustee, such Bonds may, at the option of the Bondholder, be exchanged for an equal aggregate principal amount of Bonds of the same Series and maturity, of Authorized Denominations and bearing interest at the same rate and in the same form as the Bonds surrendered for exchange, registered in the name or names requested by the assignee of the then Bondholder; provided the Trustee is not required to exchange or register the transfer of Bonds after the giving of notice calling such Bond for redemption, in whole or in part. The Issuer shall execute and the Trustee shall authenticate any Bonds whose execution and authentication is necessary to provide for exchange of Bonds pursuant to this Section 2.8 and the Issuer may rely on a representation from the Trustee that such execution is required.

[Any exchange or registration of transfer of Bonds shall be at the expense of the [Issuer/Borrower] except that] [T]he Trustee may make a charge to any Bondholder requesting such exchange or registration in the amount of any tax or other governmental charge required to be paid with respect thereto [but will not impose any other charge].

Prior to due presentment for registration of transfer of any Bond, the Trustee shall treat the Person shown on the Bond Register as owning a Bond as the Bondholder and the Person exclusively entitled to payment of principal thereof, redemption premium, if any, and interest thereon and, except as otherwise expressly provided herein, the exercise of all other rights and powers of the owner thereof, and neither the Issuer, the Borrower, the Trustee nor any agent of the Issuer, the Borrower or the Trustee shall be affected by notice to the contrary.

SECTION 2.9 Mutilated, Lost or Destroyed Bonds.

If any Bond has been mutilated, lost or destroyed, the Issuer shall execute, and the Trustee shall authenticate and deliver to the Bondholder, a new Bond of like date and tenor in exchange and substitution for, and upon cancellation of, such mutilated Bond or in lieu of and in

substitution for such lost or destroyed Bond but only if the Bondholder has paid the reasonable expenses and charges of the Issuer and the Trustee in connection therewith and, in the case of a lost or destroyed Bond, (a) filed with the Trustee evidence satisfactory to the Trustee that such Bond was lost or destroyed and (b) furnished to the Trustee, the Issuer and the Borrower indemnity satisfactory to each. If any such Bond has matured or been called for redemption and is payable, instead of issuing a new Bond the Trustee may pay the same without issuing a replacement Bond. Any Bond issued pursuant to this Section 2.9 shall be deemed part of the Series of Bonds in respect of which it was issued and an original additional contractual obligation of the Issuer and the Borrower.

SECTION 2.10 Cancellation and Disposition of Bonds.

The Issuer or the Borrower may deliver Bonds to the Trustee for cancellation at any time and for any reason and the Trustee is hereby authorized to cancel such Bonds. All Bonds that have been paid (whether at maturity [or by acceleration], upon redemption or pursuant to Section 3.10) or delivered to the Trustee for cancellation shall not be reissued. Unless otherwise directed by the Issuer or the Borrower, the Trustee shall treat such Bonds in accordance with its document retention policies or as may be directed by state law.

SECTION 2.11 Securities Depository Provisions.

(a) Except as provided in paragraphs (b) and (c) of this Section 2.11, the registered owner of all Initial Bonds shall be, and the Initial Bonds shall be registered in the name of Cede & Co. (“Cede”), as nominee of The Depository Trust Company, New York, New York (together with any substitute securities depository appointed pursuant to paragraph (c)(3) of this Section 2.11, “DTC”). Payment of the interest on any Initial Bond shall be made in accordance with the provisions of this Indenture to the account of Cede on the Interest Payment Dates for the Initial Bonds at the address indicated for Cede in the registration books of the Bond Registrar.

(b) The Initial Bonds shall be issued in the form of a separate single fully registered Bond in the amount of each separate stated maturity of the Bonds. Upon initial issuance, the ownership of each such Initial Bond shall be registered in the registration books of the Issuer kept by the Bond Registrar, in the name of Cede, as nominee of DTC. With respect to Initial Bonds so registered in the name of Cede, the Issuer, the Bond Registrar and any Paying Agent shall have no responsibility or obligation to any DTC participant or to any beneficial owner of any of such Initial Bonds. Without limiting the immediately preceding sentence, the Issuer, the Bond Registrar and any Paying Agent shall have no responsibility or obligation with respect to (i) the accuracy of the records of DTC, Cede or any DTC participant with respect to any beneficial ownership interest in the Initial Bonds, (ii) the delivery to any DTC participant, beneficial owner or other person, other than DTC, of any notice with respect to the Initial Bonds, including any notice of redemption, or (iii) the payment to any DTC participant, beneficial owner or other person, other than DTC, of any amount with respect to the principal or redemption price of, or interest on, any of the Initial Bonds. The Issuer, the Bond Registrar and any Paying Agent may treat DTC as, and deem DTC to be, the absolute owner of each Initial Bond for all purposes whatsoever, including (but not limited to) (1) payment of the principal or

redemption price of, and interest on, each Initial Bond, (2) giving notices of redemption and other matters with respect to such Bonds and (3) registering transfers with respect to such Bonds. So long as the Initial Bonds are registered in the name of Cede, the Paying Agent shall pay the principal or redemption price of, and interest on, all Initial Bonds only to or upon the order of DTC, and all such payments shall be valid and effective to satisfy fully and discharge the Issuer's obligations with respect to such principal or redemption price, and interest, to the extent of the sum or sums so paid. Except as provided in subsection (c) of this Section 2.11, no person other than DTC shall receive a Bond evidencing the obligation of the Issuer to make payments of principal or redemption price of, and interest on, any such Initial Bond pursuant to this Indenture. Upon delivery by DTC to the Bond Registrar of written notice to the effect that DTC has determined to substitute a new nominee in place of Cede, and subject to the transfer provisions of this Indenture, the word "Cede" in this Indenture shall refer to such new nominee of DTC.

Except as provided in paragraph (c)(3) of this Section 2.11, and notwithstanding any other provisions of this Indenture, the Initial Bonds may be transferred, in whole but not in part, only to a nominee of DTC, or by a nominee of DTC to DTC or a nominee of DTC, or by DTC or a nominee of DTC to any successor securities depository or any nominee thereof.

(c)

(1) DTC may determine to discontinue providing its services with respect to the Initial Bonds at any time by giving written notice to the Issuer, the Bond Registrar, and the Paying Agent, which notice shall certify that DTC has discharged its responsibilities with respect to the Initial Bonds under applicable law.

(2) The Issuer, in its sole discretion and without the consent of any other person, may, by notice to the Bond Registrar, terminate the services of DTC with respect to the Initial Bonds if the Issuer determines that the continuation of the system of book-entry-only transfers through DTC is not in the best interests of the beneficial owners of the Initial Bonds or the Issuer; and the Issuer shall, by notice to the Bond Registrar, terminate the services of DTC with respect to the Initial Bonds upon receipt by the Issuer, the Bond Registrar, and the Paying Agent of written notice from DTC to the effect that DTC has received written notice from DTC participants having interests, as shown in the records of DTC, in an aggregate principal amount of not less than fifty percent (50%) of the aggregate principal amount of the then outstanding Initial Bonds to the effect that: (i) DTC is unable to discharge its responsibilities with respect to the Initial Bonds; or (ii) a continuation of the requirement that all of the outstanding Initial Bonds be registered in the registration books kept by the Bond Registrar in the name of Cede, as nominee of DTC, is not in the best interests of the beneficial owners of the Initial Bonds.

(3) Upon the termination of the services of DTC with respect to the Initial Bonds pursuant to subsection (c)(2)(ii) hereof, or upon the discontinuance or termination of the services of DTC with respect to the Initial Bonds pursuant to subsection (c)(1) or subsection (c)(2)(i) hereof the Issuer may within 90 days thereafter appoint a substitute

securities depository which, in the opinion of the Issuer, is willing and able to undertake the functions of DTC hereunder upon reasonable and customary terms. If no such successor can be found within such period, the Initial Bonds shall no longer be restricted to being registered in the registration books kept by the Bond Registrar in the name of Cede, as nominee of DTC. In such event, the Issuer shall execute and the Bond Registrar shall authenticate Bond certificates as requested by DTC of like principal amount, maturity and Series, in authorized denominations to the identifiable beneficial owners in replacement of such beneficial owners' beneficial interest in the Bonds.

(4) Notwithstanding any other provision of this Indenture to the contrary, so long as any Bond is registered in the name of Cede, as nominee of DTC, all payments with respect to the principal or redemption price of, and interest on, such Bond and all notices with respect to such Bond shall be made and given, respectively, to DTC.

(5) In connection with any notice or other communication to be provided to holders of Bonds registered in the name of Cede pursuant to this Indenture by the Issuer or the Bond Registrar with respect to any consent or other action to be taken by such Bondholders, the Issuer shall establish a record date for such consent or other action by such Bondholders and give DTC notice of such record date not less than fifteen (15) days in advance of such record date to the extent possible.

SECTION 2.12 Additional Bonds.

The Issuer will not issue any other bonds or obligations having a lien on the Trust Estate except for Additional Bonds issued pursuant to this Section [**and Section _____ of the Agreement**]. Additional Bonds may be issued, in one or more Series designated by the Issuer, and the Trustee shall [**authenticate and**] deliver such Additional Bonds when there have been filed with it the following:

(a) A copy certified by the Attesting Officer of the Issuer of the Bond Legislation authorizing (1) the execution and delivery of any amendments to the Loan Documents required by the issuance of such Additional Bonds, (2) the execution and delivery of a supplemental indenture providing for, among other things, the date, rate or rates of interest on, interest payment dates, maturity dates and redemption provisions of such Additional Bonds, and (3) the issuance, sale, execution and delivery of the Additional Bonds;

(b) An original executed counterpart of the supplemental indenture;

(c) Original executed counterparts of any amendments or supplements to the Agreement [**and the Note**];

(d) An opinion of Counsel to the Borrower, addressed to the Issuer, the Trustee and Bond Counsel, to the effect that the amendments to the Loan Documents have been duly authorized, executed and delivered by the

Borrower and are enforceable against the Borrower, subject to bankruptcy and equitable principles;

(e) An opinion or opinions of Bond Counsel, addressed to the Issuer and the Trustee, to the effect that issuance of the Additional Bonds is permitted under this Indenture, the supplemental indenture and the Additional Bonds have each been validly authorized, are binding and enforceable against the Issuer, subject to bankruptcy and equitable principles, the issuance of the Additional Bonds has been duly authorized, **[interest on the Additional Bonds is not included in gross income for federal income tax purposes under the Code] [and is exempt from income taxation by the State of [NAME OF STATE]]**, and issuance of the Additional Bonds will not adversely affect the income tax status of interest on Bonds Outstanding;

(f) A request and authorization of the Issuer, signed by its Executive, to the Trustee to authenticate and deliver the Additional Bonds to such person or persons named therein after confirmation of payment to the Trustee for the account of the Issuer of a specified sum with directions as to the disposition of such of such sum; and

(g) A certificate of the Issuer, signed by its Executive, that the Issuer is not in default under this Indenture, and evidence satisfactory to the Trustee that upon issuance of the Additional Bonds amounts will be deposited in the Funds hereunder as required by the Supplemental Indenture authorizing the issuance of the Additional Bonds.

Simultaneously with the delivery of the Additional Bonds, the Trustee shall apply, or arrange for the application of, the proceeds thereof in accordance with an Officer's Certificate of the Issuer dated the Issue Date.

ARTICLE 3 REDEMPTION OF BONDS

SECTION 3.1 Redemption Dates and Prices.

The Initial Bonds may not be called for redemption by the Issuer except as provided in this Article III. Additional Bonds may not be called for redemption by the Issuer except as provided in the supplemental indenture providing for their issuance.

SECTION 3.2 Mandatory Sinking Fund Redemption of Initial Bonds.

The Trustee shall redeem Initial Bonds maturing on 1, _____, on 1 in the years and in the principal amounts and at a price of 100% of the principal amount of the Initial Bonds to be redeemed plus interest accrued to the redemption date, as follows:

Year

Amount

*Final Maturity

On or before the thirtieth (30th) day prior to each such sinking fund redemption date, the Trustee shall proceed to call the principal amount of the Initial Bonds indicated above for redemption on the next sinking fund redemption date, and give notice of such call. At its option, to be exercised by delivery of an Officer's Certificate of the **[Issuer/Borrower]** to the Trustee not less than [65] days preceding the applicable sinking fund redemption date, the Issuer **[or the Borrower on behalf of the Issuer]** may (a) deliver to the Trustee for cancellation, Initial Bonds of the applicable maturity date subject to redemption pursuant to the terms of the mandatory sinking fund redemption provided in this Section in an aggregate principal amount desired or (b) receive credit in respect of its sinking fund redemption obligation for any Initial Bonds of the applicable maturity date subject to redemption pursuant to the terms of the mandatory sinking fund provided in this Section, which prior to said date have been canceled (otherwise than through the operation of the sinking fund redemption schedule) by the Trustee and not theretofore applied as a credit against such sinking fund redemption obligation. Each Initial Bond of the applicable maturity date so delivered or previously redeemed shall be credited by the Trustee at the principal amount thereof against the obligation of the Issuer on such sinking fund redemption date, and the principal amount of Initial Bonds to be redeemed by operation of such sinking fund redemption schedule on such date shall be accordingly reduced [**; and any excess over the principal amount of Initial Bonds to be redeemed by operation of the sinking fund redemption schedule on any sinking fund redemption date shall be credited [as specified in a certificate of the [Borrower/Issuer or, in the absence of such certificate] against the next scheduled sinking fund redemption.]**]

SECTION 3.3 Optional Redemption of Initial Bonds.

The Initial Bonds maturing on or after 1, ____, are subject to redemption by the Issuer **[at the direction of the Borrower]** on or after 1, ____, in whole or in part at any time from any moneys that may be available for such purpose, upon payment of the following redemption prices (expressed as a percentage of principal amount of Initial Bonds to be redeemed) plus interest accrued to the redemption date:

<u>Redemption Period</u>	<u>Redemption Price</u>
____ 1, ____, through _____, ____, inclusive	____%
____ 1, ____, through _____, ____, inclusive	____%
____ 1, ____, and thereafter	____%

SECTION 3.4 [Mandatory Redemption Upon Determination of Taxability.

The Initial Bonds shall be subject to mandatory redemption prior to maturity by the Issuer, as a whole and not in part, on the earliest practicable date for which notice can be

given following the occurrence of a Determination of Taxability, at a redemption price equal to [____ %] of the principal amount thereof plus accrued interest to the redemption date.]

SECTION 3.5 [Mandatory Redemption from Surplus Bond Proceeds.

To the extent that moneys are transferred from the Project Fund to the Debt Service Fund pursuant to Section 4.2(b) for purposes of redeeming the Initial Bonds, the Initial Bonds are subject to mandatory redemption in part in Authorized Denominations on the next scheduled Interest Payment Date at a redemption price equal to 100% of the aggregate principal amount of the Initial Bonds to be redeemed plus accrued interest to the redemption date.]

SECTION 3.6 [Extraordinary Redemption from Insurance and Condemnation Proceeds.

The Initial Bonds are subject to redemption in whole at any time or in part (and if in part in Authorized Denominations; provided that no Initial Bond may be redeemed in part if the principal amount to be Outstanding following such partial redemption is not an Authorized Denomination) from any net insurance or condemnation proceeds deposited with the Trustee for the purpose of redemption pursuant to Section ____ of the Agreement. Such redemption shall occur on any Business Day selected by the [Borrower/Trustee] for which adequate notice pursuant to Section 3.9 may be given, at a redemption price equal to 100% of the aggregate principal amount of the Bonds to be redeemed plus accrued interest to the redemption date.]

SECTION 3.7 [Other] Extraordinary Redemption of Initial Bonds.

[PROVISIONS MUST BE TAILORED TO THE PARTICULAR TRANSACTION.]

SECTION 3.8 Selection of Bonds for Redemption.

If less than all of the Bonds are called for redemption, they shall be redeemed [from maturities in such order as determined by the [Borrower/Issuer] [proportionately by maturity], and by lot within any maturity (provided, however, that if an Event of Default has occurred and is continuing any Bonds called for redemption, other than Sinking Fund Redemption, shall be redeemed in proportion by maturity and within maturities by lot), subject to selection by the Trustee as provided below. The portion of any Bond to be redeemed shall be an Authorized Denomination or any multiple thereof and in selecting Bonds for redemption, each Bond shall be considered as representing that number of Bonds which is obtained by dividing the principal amount of such Bond by the minimum Authorized Denomination. If a portion of a Bond shall be called for redemption, a new Bond in principal amount equal to the unredeemed portion thereof shall be issued to the Bondholder upon the surrender thereof. If for any reason the principal amount of Bonds called for redemption would result in a redemption of Bonds less than the Authorized Denomination, the Trustee, to the extent possible within the principal amount of Bonds to be redeemed, is hereby authorized to adjust the selection of Bonds for such purpose in order to minimize any such redemption.

SECTION 3.9 Notice of Redemption.

(a) When Bonds (or portions thereof) are to be redeemed pursuant to Section 3.3 or [3.7], the **[Issuer/Borrower]** shall give or cause to be given notice of the redemption of the Bonds to the Trustee no later than **[45]** days prior to the redemption date or such shorter time as may be acceptable to the Trustee. In the case of an optional redemption under Section 3.3, the notice may state (1) that it is conditioned upon the deposit of moneys, in an amount equal to the amount necessary to effect the redemption, with the Trustee no later than the **[date that is [five (5)] Business Days prior to the]** redemption date or (2) that the **[Issuer/Borrower]** retains the right to rescind such notice **[on or prior to the scheduled redemption date]** (in either case, a “Conditional Redemption”), and such notice and optional redemption shall be of no effect if such moneys are not so deposited or if the notice is rescinded as described in subsection (d) of this Section. The Trustee, at the expense of the Borrower, shall send notice of any redemption, identifying the Bonds to be redeemed, the redemption date and the method and place of payment and the information required by subsection (b) of this Section, to each holder of a Bond called for redemption to the holder’s address listed on the Bond Register. Such notice shall be sent by the Trustee by first class mail between **[20]** and **[60]** days prior to the scheduled redemption date. With respect to Book Entry Bonds, if the Trustee sends notice of redemption to the Securities Depository pursuant to the Letter of Representations, the Trustee shall not be required to give the notice set forth in the immediately preceding sentence. If notice is given as stated in this paragraph (a), failure of any Bondholder to receive such notice, or any defect in the notice, shall not affect the redemption or the validity of the proceedings for the redemption of the Bonds.

(b) In addition to the foregoing, the redemption notice shall contain with respect to each Bond being redeemed, (1) the CUSIP number, (2) the date of issue, (3) the interest rate, (4) the maturity date, and (5) any other descriptive information determined by the Trustee to be needed to identify the Bonds. If a redemption is a Conditional Redemption, the notice shall so state. The Trustee shall also electronically post each notice of redemption at least [twenty (20)] days before the redemption date to the Municipal Securities Rulemaking Board’s EMMA website. **[Each redemption notice shall also be sent to participants of the Securities Depository and to Beneficial Owners as provided in Section 8.10.]**

(c) On or before the date fixed for redemption, subject to the provisions of subsections (a) and (d) of this Section, moneys shall be deposited with the Trustee to pay the principal of, redemption premium, if any, and interest accrued to the redemption date on the Bonds called for redemption. Upon the deposit of such moneys, unless the **[Issuer/Borrower]** has given notice of rescission as described in subsection (d) of this Section, the Bonds shall cease to bear interest on the redemption date and shall no longer be entitled to the benefits of this Indenture (other than for payment and transfer and exchange) and shall no longer be considered Outstanding.

(d) Any Conditional Redemption may be rescinded **[in whole or in part]** at

any time prior to the **[[fifth] Business Day prior to the]** redemption date if the **[Issuer/Borrower]** delivers an Officer's Certificate to the Trustee instructing the Trustee to rescind the redemption notice. The Trustee shall give prompt notice of such rescission to the affected Bondholders. Any Bonds subject to Conditional Redemption where redemption has been rescinded shall remain Outstanding, and the rescission shall not constitute an Event of Default. Further, in the case of a Conditional Redemption, the failure of the Issuer or Borrower to make funds available in part or in whole on or before **[the date that is [five] Business Days prior to]** the redemption date shall not constitute an Event of Default, and the Trustee shall give Electronic Notice to the Securities Depository or the affected Bondholders that the redemption did not occur and that the Bonds called for redemption and not so paid remain Outstanding.

SECTION 3.10 Purchase at Any Time.

The Trustee, upon the written request of the **[Issuer/Borrower]** shall purchase Bonds as specified by the **[Issuer/Borrower]** in the open market at a price not exceeding a price set by **[Issuer/Borrower]**. Such purchase of Bonds shall be made with funds provided by the **[Issuer/Borrower]** and not with any portion of the Trust Estate or any Defeasance Obligations. Upon purchase by the Trustee, such Bonds shall be treated as delivered for cancellation pursuant to Section 2.10. Nothing in this Indenture shall prevent the **[Issuer/Borrower]** from purchasing Bonds on the open market without the involvement of the Trustee and delivering such Bonds to the Trustee for cancellation pursuant to Section 2.10. Bonds purchased pursuant to this Section which are subject to the mandatory sinking fund redemption schedule in Section 3.2 **[shall/may]** be credited against future mandatory sinking fund redemption payments in accordance with Section 3.2. The principal amount of Bonds to be redeemed by optional redemption under this Indenture may be reduced by the principal amount of Bonds purchased by the Borrower or the Issuer, at the request of the Borrower, and delivered to the Trustee for cancellation at least forty-five (45) days prior to the redemption date.

ARTICLE 4 FUNDS AND ACCOUNTS

SECTION 4.1 Creation of Funds.

The following funds are hereby established and created and the proceeds of the Bonds and all Revenues received by the Trustee are to be deposited by it into such Funds as described herein and held in trust for the purposes set forth herein:

- (a) Project Fund.
- (b) Debt Service Fund.
- (c) Reserve Fund.
- (d) Rebate Fund.

SECTION 4.2 Project Fund.

The Project Fund shall be used for the payment of Project Costs and Issuance Costs [**and any future capital acquisitions and improvements or Issuance Costs to be paid from the proceeds of Additional Bonds**]. The Project Fund shall consist of the amounts required or permitted to be deposited therein pursuant to any provision hereof or of the Loan Documents, and the proceeds of the Initial Bonds shall be deposited therein in the amount set out in an Officer's Certificate of the Issuer. Separate accounts within the Project Fund shall be maintained by the Trustee for future capital acquisitions and improvements if the Issuer or the Borrower determines that separate accounts are desirable with respect to particular capital acquisitions and improvements or designated portions of capital acquisitions and improvements. Payments from the Project Fund, including any account so established, shall be made by the Trustee as follows:

(a) Payments from the Project Fund shall be made only upon receipt by the Trustee of a requisition executed by the Borrower in the form required by the Agreement.

(b) Upon completion [**or abandonment**] of the Project (as evidenced by a certificate of the Borrower delivered to the Trustee), any moneys remaining in the Project Fund shall be transferred to the Debt Service Fund to redeem Bonds pursuant to Section 3.5, unless the Borrower directs that such moneys be deposited into the Reserve Fund, or applied to any other use, accompanied in either case by an opinion of Bond Counsel to the effect that such application will not adversely affect any applicable exclusion from gross income for federal income tax purposes of the interest on any Series of Bonds.

(c) Notwithstanding anything to the contrary herein, to the extent an Event of Default under Section 7.1 hereof shall have occurred and be continuing, moneys on deposit in the Project Fund shall be applied by the Trustee in accordance with Section 7.4 hereof.

SECTION 4.3 Debt Service Fund.

(a) The Trustee shall deposit into the Debt Service Fund (1) the portion of the proceeds of the Initial Bonds representing accrued and capitalized interest as set out in an Officer's Certificate of the Issuer, (2) all payments hereafter made by the Borrower for deposit in such Fund pursuant to the Agreement (including any insurance or condemnation moneys required to be deposited therein pursuant to the Agreement) and (3) all other amounts required or permitted hereunder to be deposited in the Debt Service Fund.

(b) Moneys on deposit in the Debt Service Fund shall be applied as follows:

(1) to the payment of interest, when due, on all Outstanding Bonds, including any accrued interest due in connection with redemptions of Bonds;

(2) to the payment, when due, of the principal of or redemption

premium on the Bonds then payable at maturity or upon redemption; and

(3) to the payments of any deficiencies in the Reserve Fund in accordance with the requirements of Section 4.4, including for reimbursement to the provider of any credit facility deposited in the Reserve Fund pursuant to Section 4.4(d).

SECTION 4.4 [Reserve Fund.

(a) The Trustee initially shall deposit in the Reserve Fund an amount equal to the Series Required Reserve on the Initial Bonds from **[the proceeds of the Bonds/moneys provided by the Borrower]**. Except as provided in subsection (d) of this Section, in connection with the issuance of any Additional Bonds, Required Reserve shall be recomputed for all Bonds then to be Outstanding, including the Additional Bonds then being issued, and any required increase in the amount on deposit in such Fund shall be funded at issuance for the Additional Bonds. The amount of any withdrawal for the purpose of subsection (b)(1) of this Section shall be restored by the Borrower in no more than [_____] (____)] substantially equal, consecutive, monthly installments, each payable on the last Business Day of the month, commencing with the month in which the withdrawal is made; provided that, if any withdrawal is made and if, prior to the restoration of the amount withdrawn, an additional withdrawal is made, such additional withdrawal shall be restored in equal monthly installments over the remainder of the restoration period for the initial withdrawal. In addition, if the fair market value of the investments in the Reserve Fund is less than the Required Reserve on any valuation date in accordance with Section 5.3, the difference between such Required Reserve and the value of the Reserve Fund shall be restored by the Borrower in no more than [_____] (____)], consecutive, monthly installments, each payable on the last Business Day of the month, commencing with the month in which the valuation revealing the deficiency is made. Upon the making of any monthly deposit to restore a withdrawal or deficiency, the **[Borrower/Issuer]**, at its cost, may direct the Trustee to recompute the value of the assets in the Reserve Fund, in which event the remaining amount to be restored, if any, after taking the new valuation into account shall be deposited in equal monthly installments over the balance of the restoration period.

(b) Moneys on deposit in the Reserve Fund shall be applied as follows:

(1) On the date of each required payment from the Debt Service Fund, moneys in the Reserve Fund shall be applied to cure any deficiency in the Debt Service Fund with respect to payments of principal of and interest on the Bonds when due and payable;

(2) Upon delivery of an Officer's Certificate of the Borrower delivered to the Trustee, any amount in the Reserve Fund in excess of the Required Reserve on any valuation date shall be (A) transferred to the Debt Service Fund and credited against the payments next becoming due (in direct order) under the Agreement in respect of the principal of and redemption premium, if any, or interest on the Initial Bonds or any

Additional Bonds, or (B) applied as may be specified in an Officer's Certificate of the Borrower if such Certificate is accompanied by an opinion of Bond Counsel to the effect that such application will not cause interest on any Series of Bonds to be includable in gross income for federal income tax purposes; and

(3) In each month during the 12-month period preceding the final maturity date of any Series of Bonds, moneys held in the Reserve Fund shall be credited against the payments otherwise due under the Agreement in respect of principal of, redemption premium, if any, and interest on such Series of Bonds and shall be transferred to the Debt Service Fund for the payment of such principal, redemption premium and interest; provided, however, that no such credit shall be given and no such transfer shall be made if and to the extent that, immediately prior to such crediting and transfer, the amount on deposit in the Reserve Fund is not at least equal to the Required Reserve, less the amounts previously transferred to the Fund during such 12-month period pursuant to this subparagraph (3).

(c) Any deposit made in connection with the issuance of Additional Bonds hereunder may, if authorized under the supplemental indenture providing for the issuance of the Additional Bonds, be deposited into a separate, segregated account within the Reserve Fund, provided that all accounts within the Reserve Fund shall be held for the equal and proportionate benefit of all Bondholders and that the aggregate amount on deposit in all such accounts shall meet the requirements of this Section. Any supplemental indenture providing for the establishment of such separate accounts may contain such further provisions as may be necessary or appropriate for the proper administration of such accounts, including provisions establishing priorities for the application of amounts on deposit in the various accounts (including investment income) for the purposes set forth in this Section.

(d) The Borrower shall be permitted to substitute a letter of credit, surety bond or other credit enhancement (each, a "credit facility") for funds on deposit in the Reserve Fund, provided that:

(1) the credit facility (including any replacement credit facility) is issued by a bank, trust company, national banking association or insurance company whose unsecured long term debt obligations (in the case of a bank, trust company or national banking association) or whose claims paying abilities (in the case of an insurance company) are rated by a Rating Service, at the time the credit facility is issued and at the time of each extension or renewal thereof, in a rating category at least equal to the rating category assigned by such Rating Service to the Bonds [**at the Closing Date/at the time of substitution**], determined without regard to credit enhancement, if applicable, but in no event lower than an "investment grade" rating category, or the Rating Service otherwise provides evidence to the Trustee that the credit facility shall not result in a decrease or

withdrawal of the rating on the Bonds;

(2) the issuer of the credit facility does not receive as security for any reimbursement obligation in respect of the credit facility any lien, security interest or other similar right or interest in any property within the Trust Estate which is superior to the rights of the Trustee in respect of such property;

(3) the credit facility (including any replacement credit facility, if provided by a different issuer) has an initial term of not less than three (3) years and any extension, renewal or replacement (if provided by the same issuer) thereof has a term of not less than one year;

(4) the Trustee is authorized and has the duty and right to draw on the credit facility to satisfy the purposes for which the Reserve Fund was established; and

(5) The Trustee shall receive an opinion of Counsel to the effect that all of the requirements set forth above have been satisfied and an opinion of Bond Counsel to the effect that the substitution of the credit facility will not, in and of itself, adversely affect the tax exempt status of the Bonds.

Upon such substitution, funds on deposit in the Reserve Fund which, when added to the face amount of the credit facility, exceed the Series Required Reserve on all Outstanding Bonds shall be applied as provided in subsection (b)(2) above. Thereafter, the credit facility shall be considered a part of the Reserve Fund and the amount available thereunder shall be included in any calculation of the amount required to be retained in the Reserve Fund; provided that, (A) if the sum of the amount available under the credit facility and the amount of moneys on deposit in the Reserve Fund exceeds the amount required to be on deposit pursuant to subsection (a) of this Section, the Borrower shall be permitted to (i) cause the amount available under the credit facility to be reduced by an amount equal to such excess, or (ii) direct that the excess moneys be applied as permitted under subsection (b)(2) of this Section, and (B) if the credit facility is not extended, renewed or replaced at least **[six (6) months]** prior to its scheduled expiration or termination date, the Trustee shall, not later than ___ days prior to such date, draw on the credit facility for the full amount thereof.

(e) If there are cash and Eligible Investments on deposit in the Reserve Fund in addition to a credit facility, such cash and Eligible Investments will be drawn on prior to any draws on such credit facility.]

SECTION 4.5 Revenues to Be Held for All Bondholders, With Certain Exceptions.

Until applied as herein provided and except where moneys have been deposited with or paid to the Trustee pursuant to an instrument restricting the application of such moneys to particular Bonds, the moneys and investments held in all Funds (other than amounts required to

be on deposit in the Rebate Fund) established hereunder and the proceeds of any remedies exercised under Article VII hereof shall be held in trust pursuant to the terms of this Indenture for the equal and proportionate benefit of the holders of all Outstanding Bonds, except that: (a) on and after the date on which the interest or redemption premium on or principal of any particular Bond or Bonds is due and payable from the Debt Service Fund or, with respect to which a call for redemption has been given and funds for such redemption have been deposited with the Trustee [**and, if a Conditional Redemption, the rescission date has passed,**], the unexpended balance of the amount deposited or reserved in the Debt Service Fund for the making of such payments shall, to the extent necessary therefor, be held solely for the benefit of the Bondholder or Bondholders entitled thereto; and (b) any special redemption fund established in connection with the defeasance of any Bonds in accordance with Article IX shall be held for the benefit of the holders of Bonds being defeased.

SECTION 4.6 Rebate Fund.

Pursuant to the Agreement, the Borrower has covenanted to calculate and pay directly to the government of the United States of America all amounts due for payment of “arbitrage rebate” under Section 148(f) of the Code with respect to the Initial Bonds. Accordingly, no amounts shall be deposited in the Rebate Fund, provided, however, that the [**Issuer/Borrower**] may in the future deposit with the Trustee or direct the Trustee to deposit in the Rebate Fund amounts held in any Fund hereunder for any or all Series of Bonds (which direction shall specify the procedures for collection and payment of amounts due in respect of arbitrage rebate) if (a) required under any amendments to Section 148(f) of the Code, (b) the Borrower fails to make any required arbitrage rebate payments to the government of the United States of America, or (c) the Issuer and the Borrower otherwise agree that the funding of the Rebate Fund is desirable and appropriate. The Rebate Fund is a trust fund, but amounts therein do not constitute part of the Trust Estate. Amounts on deposit in the Rebate Fund may be used solely to make payments to the United States of America under Section 148 of the Code and to pay costs related to the calculation of the amounts due. Upon satisfaction of the Borrower’s covenants described above, any amounts remaining in the Rebate Fund shall be applied in accordance with Section 4.7.

SECTION 4.7 Repayment to the Borrower from Amounts Remaining in Any Funds.

Any amounts remaining in any Funds (a) after all of the Outstanding Bonds shall be deemed paid and discharged under the provisions of this Indenture, and (b) after payment of all fees, charges and expenses of the Trustee, the Bond Registrar and any Paying Agents and of all other amounts required to be paid under this Indenture or the Loan Documents, shall be paid to the Borrower as provided in the Agreement to the extent that such amounts are in excess of those necessary to effect the payment and discharge of the Outstanding Bonds and payment of the Rebate Amount, if any.

SECTION 4.8 Disposition of Unclaimed Funds.

Notwithstanding any provisions of this Indenture, and subject to applicable unclaimed property laws, any money deposited with the Trustee or any Paying Agent in trust for the payment of principal of, redemption premium of or interest on the Bonds remaining unclaimed

for [] years after the payment thereof: **[(a) shall be reported and disposed of by the Trustee in accordance with applicable unclaimed property laws; or (b)]** to the extent permitted by applicable law, shall be paid to **[the Issuer][the Borrower][other disposition]**, whereupon all liability of the Issuer and the Trustee with respect to such money shall cease, and the holders of the Bonds shall thereafter look solely to the Borrower for payment of any amounts then due. **[All moneys held by the Trustee or any Paying Agent and subject to this Section shall be held uninvested and without liability for interest thereon.]**

SECTION 4.9 Additional Funds and Accounts.

In addition to the funds and accounts specifically authorized under this Article, the Trustee shall have the authority to create and maintain such other funds and accounts as it may deem necessary for proper administration of the Trust Estate.

ARTICLE 5 INVESTMENT OR DEPOSIT OF FUNDS

SECTION 5.1 Deposits and Security Therefor.

All moneys received by the Trustee under this Indenture for deposit in any Fund established hereunder shall be considered trust funds. All moneys on deposit with the Trustee shall, to the extent not insured, be secured in the manner required or permitted by State or other applicable law. Subject to the foregoing requirements as to security, if at any time the commercial department of the Trustee is unwilling to accept such deposits or unable to secure them as provided above, the Trustee may deposit such moneys with any other depository which is authorized to receive and secure them as aforesaid and the deposits of which are insured by the Federal Deposit Insurance Corporation. All security for deposits shall be perfected in such manner as may be required or permitted under applicable law in order to grant to the Trustee a perfected lien on or security interest in such security.

SECTION 5.2 Investment or Deposit of Funds.

Moneys on deposit in the Funds established pursuant to Article IV shall be invested and reinvested by the Trustee as follows:

(a) All moneys on deposit in Funds shall be invested in Eligible Investments which shall mature, or be subject to repurchase, withdrawal without penalty or redemption at the option of the holder on or before the dates on which the amounts invested are reasonably expected to be needed for the purposes hereof.

(b) All purchases or sales of Eligible Investments shall be made at the direction of the Borrower (given in writing or orally, confirmed in writing), **[or in the absence of such direction, by the Trustee] [in certain specified Eligible Investments payable on demand].**

(c) (1) Any securities or investments held by the Trustee may be transferred by the Trustee, if required in writing by the **[Borrower/Issuer]**, from any of the Funds or accounts mentioned in Article IV to any other Fund or account mentioned in Article IV at the then current market value thereof without having to be sold and purchased or repurchased; provided, however, that after any such transfer or transfers, the investments in each such Fund or account shall be in accordance with the provisions as stated in this Indenture; and (2) whenever any other transfer or payment is required to be made from any particular Fund, such transfer or payment shall be made from such combination of maturing principal, redemption premiums, liquidation proceeds and withdrawals of principal as the Trustee deems appropriate for such purpose.

(d) Neither the Issuer nor the Trustee shall be accountable for any depreciation in the value of Eligible Investments or for any losses incurred upon any authorized disposition thereof.

(e) Subject to the foregoing, the Trustee is expressly authorized to invest moneys in two or more Funds in a single investment, provided that a portion of the investment allocable to each such Fund, and all payments received with respect to such allocable portion, shall be applied in accordance with the applicable provisions governing such Fund hereunder.

(f) Unless otherwise provided in an applicable supplemental indenture, prior to the completion of the Project, investment income on amounts on deposit in the Reserve Fund and the Debt Service Fund shall be transferred to the Project Fund to the extent that no deficiency will exist in the Reserve Fund or the Debt Service Fund after such transfer or shall be applied to such other purpose or purposes as directed by the Borrower with an opinion of Bond Counsel addressed to the Trustee to the effect that such application will not cause interest on the Bonds to be includable in gross income for federal income tax purposes. After completion of the Project, investment income on amounts on deposit in the Reserve Fund shall be transferred to the Debt Service Fund to the extent that no deficiency will exist in the Debt Service Reserve Fund after such transfer. In all other situations, earnings from investment shall remain in the respective Fund where earned.

(g) The parties hereto acknowledge that to the extent regulations of the Comptroller of the Currency or other applicable regulatory entity grants the Borrower the right to receive brokerage confirmations of security transactions as they occur at no additional cost, the Borrower hereby specifically waives receipt of such confirmations to the extent permitted by law.

SECTION 5.3 Valuation of Funds.

The Trustee shall determine the market value of the assets in each of the Funds established hereunder on, or on a date not earlier than three days prior to, (a) _____ 1 of each year and (b) the date of issuance for a Series of Additional Bonds. As soon as practicable after each such valuation date, the Trustee shall furnish to the **[Issuer and the]** Borrower a report of the

status of each Fund as of such date. The Trustee shall also advise the Borrower at such time of the amount then available in the Debt Service Fund as a credit against the Borrower's obligation to make any deposits to the Debt Service Fund prior to the next valuation date. In computing the value of assets in any Fund, investments shall be valued at the fair market value thereof and shall include accrued but unpaid interest on each investment, and all investments (valued as aforesaid) and accrued interest thereon shall be deemed a part of such Funds. All Eligible Investments that mature within [six (6)] months of any valuation date or are payable on demand shall be valued at par plus any accrued and unpaid interest. Upon the request of the Borrower, the Trustee shall also provide the Borrower with monthly or other periodic statements showing amounts deposited into and withdrawn from each Fund, the investments made with amounts in each Fund and the investment income received from such investments.

ARTICLE 6 COVENANTS AND AGREEMENTS OF THE ISSUER

SECTION 6.1 Covenants and Agreements of the Issuer.

In addition to any other covenants and agreements of the Issuer contained in this Indenture or the Agreement, the Issuer further covenants and agrees with the Bondholders and the Trustee as follows:

(a) Payment of Principal, Interest and Redemption Premium. The Issuer will pay all principal of, redemption premium, if any, and interest on the Bonds or cause them to be paid, solely from the sources provided herein, on the dates, at the places and in the manner provided in this Indenture and the Agreement.

(b) Revenues and Assignment of Revenues. The Issuer will not assign the Revenues or create or authorize to be created any debt, lien or charge thereon, other than the assignment thereof under this Indenture.

(c) Recordings and Filings. At the expense of the Borrower, the Issuer will cooperate with the Borrower in performing the Borrower's obligation to cause this Indenture, or any related instruments or documents relating to the assignment made by the Issuer under this Indenture to secure the Bonds, to be recorded and filed in the manner and in the places which may be required by law in order to preserve and protect fully the security of the holders of the Bonds and the rights of the Trustee hereunder.

(d) Inspection of Project Books. All books, instruments and documents in the Issuer's possession relating to the Project and the Revenues shall be open to inspection at all times during the Issuer's regular business hours by any accountants or other agents of the Trustee which the Trustee may designate from time to time or by the holders of [____%] or more in principal amount of any Series of the Bonds then Outstanding, or a designated representative thereof.

(e) Rights and Enforcement of the Agreement. The Trustee may enforce, in its

name or in the name of the Issuer, all rights of the Issuer for and on behalf of the Bondholders, except for Unassigned Issuer's Rights, and may enforce all covenants, agreements and obligations of the Borrower under and pursuant to the Agreement, **[regardless of whether the Issuer is in default in the pursuit or enforcement of those rights, covenants, agreements or obligations.]** The Issuer, however, will do all things and take all actions on its part necessary to comply with covenants, agreements, obligations, duties and responsibilities on its part to be observed or performed under the Agreement, and will take all actions within its authority to keep the Agreement in effect in accordance with the terms thereof.

SECTION 6.2 Observance and Performance of Covenants, Agreements, Authority and Actions.

The Issuer hereby agrees to observe and perform at all times all covenants, agreements, authority, actions, undertakings, stipulations and provisions to be observed or performed on its part under the Agreement, this Indenture, the Bond Legislation and the Bonds which are executed, authenticated and delivered under this Indenture, and under all proceedings of its Governing Body pertaining thereto.

The Issuer represents and warrants that:

(a) It is duly authorized by the Constitution and laws of the State, including particularly and without limitation the Act, to issue the Bonds, to execute and deliver this Indenture and the Loan Documents to which it is a party and to provide the security for payment of the principal of, redemption premium, if any, and interest on the Bonds in the manner and to the extent set forth in this Indenture.

(b) All actions required on its part to be performed for the issuance, sale and delivery of the Bonds and for the execution and delivery of this Indenture and the Loan Documents to which it is a party have been or will be taken duly and effectively; provided no representation is made as to compliance with any state securities or "Blue Sky" laws.

(c) The Bonds will be valid and enforceable **[special/limited]** obligations of the Issuer according to their terms, subject to bankruptcy and equitable principles.

SECTION 6.3 Tax Covenants.

(a) The Issuer covenants that it (1) will take, or use its best efforts to require to be taken, all actions that may be required of the Issuer for the interest on the Bonds to be and remain not included in gross income for federal tax purposes and (2) will not take or authorize to be taken any actions within its control that would adversely affect that status under the provisions of the Code. Without limiting the foregoing, the Issuer covenants that it will comply with the Tax Certificate executed by the Issuer in connection with the closing the Bonds.

(b) Notwithstanding the foregoing, the Issuer hereby reserves the right to elect to issue one or more Series of Additional Bonds, the interest on which is not exempt from federal income taxation, if such election is made prior to the issuance of such Additional Bonds, and the

covenants contained in this Section shall not apply to such Series of Bonds.

(c) The Trustee covenants that in those instances where it exercises discretion over the investment of funds, it shall not knowingly make any investments inconsistent with the foregoing covenants.

[Section 6.4 Enforcement of Issuer's Obligations. So long as no Event of Default hereunder shall have occurred and be continuing, the Issuer may exercise all its rights under the Loan Documents or any other lease, agreement or contract, or supplement or amendment thereto, provided that, except as permitted hereby or by the Loan Documents, the Issuer shall not amend any of the same so as to affect adversely the Issuer's ability to perform its covenants under this Indenture or change the payments or term of the Loan Documents or the security interest thereby and hereby created. The Issuer shall file with the Trustee copies of the Agreement, together with all amendments or supplements thereto, whether or not the Trustee's consent is required thereto, and shall give prompt notice to the Trustee of any default by any of the parties thereto of which it has actual knowledge.]

ARTICLE 7 EVENTS OF DEFAULT AND REMEDIES

SECTION 7.1 Events of Default Defined.

Each of the following is an "Event of Default" hereunder:

(a) Default in the payment of any installment of interest on any Bond when it becomes due and payable **[and continuance of such default for a period of __ days];**

(b) Default in the payment of principal of (or redemption premium, if any, on) any Bond when it becomes due and payable;

(c) Subject to the provisions of Section 7.7, default in the performance, or breach, of any covenant, warranty or representation of the Issuer contained in this Indenture (other than a default under subsections (a) and (b) of this Section);

(d) The occurrence of any Event of Default under **[the Agreement][the Loan Documents];** or

(e) (1) **[An Event of Bankruptcy of the Issuer/Borrower];** (2) the appointment of a receiver, liquidator, assignee, custodian, trustee, sequestrator or other similar official of the Issuer or of any substantial portion of its property; or (3) the ordering of the winding up or liquidation of the affairs of the Issuer.

[If a Determination of Taxability occurs, there shall be no Event of Default resulting therefrom if the Bonds are redeemed pursuant to Section 3.4.]

SECTION 7.2 Remedies Upon Default.

(a) If an Event of Default under Section 7.1 occurs and is continuing, the Trustee may, and upon the written request to the Trustee by the holder or holders of not less than **[a majority/25%]** in aggregate principal amount of the Bonds then Outstanding shall, subject to the requirements of Section 8.2(e), by written notice to the Issuer and the Borrower, **[declare the principal of the Bonds and all interest accrued thereon to the date of acceleration to be immediately due and payable]**.

(b) [At any time after such a declaration of acceleration has been made and before the entry of a judgment or decree for payment of the money due, the Trustee may, or the holders of not less than **[a majority/25%]** in aggregate principal amount of the Bonds then Outstanding, may by written notice to the Issuer and the Trustee, and subject to the requirements of Section 8.2(e), direct the Trustee to, rescind and annul such declaration and its consequences if:

(1) there has been paid to or deposited with the Trustee by or for the account of the Issuer, or provision satisfactory to the Trustee has been made for the payment of a sum sufficient to pay: (A) all overdue installments of interest on the Bonds; (B) the principal of, and redemption premium, if any, on any Bonds which have become due other than by such declaration of acceleration and interest thereon; (C) to the extent lawful, interest upon overdue installments of interest and redemption premium, if any; and (D) all sums paid or advanced by the Trustee hereunder, together with the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and Counsel prior to the date of notice of rescission; and

(2) all Events of Default, other than the nonpayment of principal of, redemption premium, if any, and interest on the Bonds which have occasioned such acceleration, have been cured or waived.]

(c) No such rescission and annulment shall affect any subsequent default or impair any consequent right.

SECTION 7.3 Additional Remedies.

(a) The Trustee, upon the occurrence of an Event of Default may, and upon the written request of the holders of not less than **[a majority/25%]** in aggregate principal amount of the Bonds Outstanding, and subject to the requirements of Section 8.2(e), shall: (a) exercise any or all rights of the Issuer under the Loan Documents; and (b) proceed to protect and enforce its rights and the rights of the holders of the Bonds under this Indenture by a suit or suits in equity or at law, either for the specific performance of any covenant or agreement contained in this Indenture or in the Loan Documents or in aid of the execution of any power herein or therein granted, or for the enforcement of any other appropriate legal or equitable remedy, and the

Trustee in reliance upon the advice of Counsel may deem most effective to protect and enforce any of the rights or interests of the holders of the Bonds under the Bonds or this Indenture.

(b) Without limiting the generality of the foregoing, the Trustee shall **[at all times]** have the power to institute and maintain such proceedings as it may deem expedient: (1) to prevent any impairment of the Trust Estate by any acts which may be unlawful or in violation of this Indenture or the Loan Documents, and (2) to protect its interests and the interests of the Bondholders in the Trust Estate and in the issues, profits, revenues and other income arising therefrom, including the power to maintain proceedings to restrain the enforcement of or compliance with any governmental enactment, rule or order which may be unconstitutional or otherwise invalid, if the enforcement of, or compliance with, such enactment, rule or order would impair the Trust Estate or be prejudicial to the interests of the Bondholders or the Trustee.

SECTION 7.4 Marshalling of Assets.

[Upon the occurrence of an Event of Default, all moneys in all Funds (other than moneys in the Rebate Fund) shall be available to be utilized by the Trustee in accordance with this Article and Section 8.5 hereunder.] During the continuance of any such Event of Default, all provisions of this Indenture relating to the utilization of Funds, including but not limited to those set out in Article IV, shall be superseded by this Article. Subsequent to the curing or waiver of any such Event of Default, the provisions of this Indenture relating to utilization of Funds, including the provisions of Article IV, shall be reinstated. **[TO BE TAILORED TO THE PARTICULAR TRANSACTION.]**

SECTION 7.5 Trustee May File Proofs of Claim.

(a) In case of the pendency of any receivership, insolvency, liquidation, bankruptcy, reorganization, arrangement, adjustment, composition or other judicial proceeding under the Bankruptcy Code relating to the Issuer or the Borrower, any other obligor upon the Bonds or any property of the Issuer or Borrower, the Trustee (whether or not the principal of the Bonds shall then be due and payable by acceleration or otherwise, and whether or not the Trustee shall have made any demand upon the Issuer or the Borrower for the payment of overdue principal, redemption premium, if any, and interest) shall be entitled and empowered, by intervention in such proceeding or other means:

(1) to file and prove a claim for the whole amount of the principal, redemption premium, if any, and interest owing and unpaid in respect of the Bonds then Outstanding or for breach of this Indenture or the Loan Documents and to file such other papers or documents as may be necessary or advisable in order to have the claims of the Trustee (including any claim for the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and Counsel) and of the holders allowed in such proceeding; and

(2) to collect and receive any moneys or other property payable or deliverable on any such claims and to distribute the same; and any receiver,

assignee, trustee, liquidator, sequestrator or similar official in any such judicial proceeding is hereby authorized by each holder to make such payments to the Trustee, and, in the event that the Trustee shall consent to the making of such payments directly to the holders, to pay to the Trustee any amount due it for the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and Counsel, and any other amounts due the Trustee under Section 8.5.

(b) No provision of this Indenture empowers the Trustee to authorize or consent to or accept or adopt on behalf of any holders of the Bonds any plan of reorganization, arrangement, adjustment or composition affecting any of the Bonds or the rights of any holder thereof, or to authorize the Trustee to vote in respect of the claim of any holder in any proceeding described in subsection (a) of this Section.

SECTION 7.6 Possession of Bonds Not Required.

All rights under this Indenture, the Loan Documents and the Bonds may be enforced by the Trustee without possession of any Bonds or the production of them at trial or other proceedings. Any proceedings instituted by the Trustee may be brought in its name for itself or as representative of the Bondholders without the necessity of joining Bondholders as parties, and any recovery resulting from such proceedings shall, subject to Section 7.8, be for the ratable benefit of the Bondholders.

SECTION 7.7 Notice and Opportunity to Cure Certain Defaults.

No default under Section 7.1(c) (other than the occurrence of a Determination of Taxability, to which this Section 7.7 shall not be applicable) shall constitute an Event of Default until written notice of such default shall have been given to the Borrower by the Trustee or by the holders of at least 25% in aggregate principal amount of the Bonds Outstanding, and the Borrower shall have had thirty (30) days after receipt of such notice to correct such default or cause such default to be corrected, and shall have failed to do so. In the event, however, that the default be such that it cannot be corrected within such thirty (30) day period, it shall not constitute an Event of Default if corrective action is instituted by the Borrower within such period and diligently pursued (as determined by the Trustee) until the default is corrected [provided such cure period does not exceed ___ days]. The Trustee shall send a copy of each such notice to the Issuer, but receipt of such notice by the Issuer shall not be a condition precedent to further action by the Trustee.

SECTION 7.8 Priority of Payment Following Event of Default.

(a) If at any time after the occurrence of an Event of Default the moneys held by the Trustee under this Indenture (other than amounts in the Rebate Fund) shall not be sufficient to pay the principal of and interest on the Bonds as the same become due and payable, such moneys, together with any moneys then available or thereafter becoming available for such purpose, whether through the exercise of remedies

in this Article or otherwise, shall, subject to subsections (b) and (c) of this Section, be applied by the Trustee as follows:

(1) **[first, to the payment of all amounts due the Trustee under Section 8.5;]**

(2) second, to the payment of all installments of interest on the Bonds then due and payable in the order in which such installments became due and payable, and, if the amount available shall not be sufficient to pay in full any particular installment, then to the payment, ratably, according to the amounts due on such installments, without discrimination or preference;

(3) third, to the payment of the unpaid principal amount of any of the Bonds which shall have become due and payable, in the order of due dates (other than Bonds called for redemption or contracted to be purchased for the payment of which moneys are held pursuant to the provisions of this Indenture), with interest upon the principal amount of the Bonds from the respective dates upon which they shall have become due and payable, and, if the amount available shall not be sufficient to pay in full the principal of such Bonds due and payable on any particular due date, together with such interest, then to the payment first of such interest, ratably, according to the amount of principal due on such date, without any discrimination or preference; and

(4) fourth, to the payment of principal of, interest on and redemption premium if any, on Bonds called for redemption under Section 3.3, if any.

(b) If the principal of all Bonds shall have become due and payable, whether by their terms or by a declaration of acceleration, all such moneys shall be applied by the Trustee as follows:

(1) first, to the payment of all amounts due the Trustee under Section 8.5 hereof; and

(2) second, to the payment of the principal and interest then due and unpaid upon the Bonds, without preference or priority of principal over interest or of interest over principal, or of any installment of interest over any other installment of interest, or of any Bond over any other Bond, ratably, according to the amounts due respectively for principal and interest, without any discrimination or preference.

(c) Whenever moneys are to be applied pursuant to the provisions of this Section, the Trustee may, in its discretion, establish and maintain a reserve for future

fees and expenses, and may apply moneys to be distributed at such times, and from time to time, as the Trustee shall determine, having due regard for the amount of such moneys available for application and the likelihood of additional moneys becoming available for such application in the future. Whenever the Trustee shall apply such funds to the payment of debt service on the Bonds, it shall fix a date (which shall be an Interest Payment Date unless it shall deem another date more suitable) upon which such application is to be made and upon such date interest on the amounts of principal to be paid on such dates, and for which moneys are available, shall cease to accrue. The Trustee shall also select a Record Date for such payment date. The Trustee shall give such notice as it may deem appropriate of the deposit with it of any moneys and of the fixing of any such Record Date and payment date, and shall not be required to make payment to the holder of any Bond until such Bond shall be presented to the Trustee for appropriate endorsement or for cancellation if fully paid.

SECTION 7.9 Bondholders May Direct Proceedings.

The owners of **[a majority]** in aggregate principal amount of the Bonds Outstanding shall, subject to the requirements of Section 8.2(e), have the right, by an instrument or instruments in writing executed and delivered to the Trustee, to direct the method and place of conducting all remedial proceedings by the Trustee hereunder, provided that such direction shall not be in conflict with any rule of law or this Indenture and that the Trustee shall have the right to decline to follow any such direction which in the opinion of the Trustee would subject the Trustee to personal liability or expense. Notwithstanding the foregoing, the Trustee shall have the right to select and retain Counsel of its choosing to represent it in any such proceedings. The Trustee may take any other action which is not inconsistent with any direction under this Section.

SECTION 7.10 Limitations on Rights of Bondholders.

(a) No Bondholder shall have any right to pursue any other remedy under this Indenture or the Bonds unless: (1) an Event of Default shall have occurred and is continuing; (2) the owners of not less than **[a majority/25%]** in aggregate principal amount of all Bonds then Outstanding have requested the Trustee, in writing, to exercise the powers hereinabove granted or to pursue such remedy in its or their name or names; (3) the Trustee has been offered indemnity satisfactory to it against costs, expenses and liabilities reasonably anticipated to be incurred; (4) the Trustee has declined to comply with such request, or has failed to do so, within sixty (60) days after its receipt of such written request and offer of indemnity; and (5) no direction inconsistent with such request has been given to the Trustee during such 60-day period by the holders of a majority in aggregate principal amount of the Bonds Outstanding.

(b) The provisions of subsection (a) of this Section are conditions precedent to the exercise by any Bondholder of any remedy hereunder. The exercise of such rights is further subject to the provisions of Sections 7.9, 7.11 and 7.14. No one or more Bondholders shall have any right in any manner whatever to enforce any right under this Indenture, except in the manner herein provided. All proceedings at law or in equity with

respect to an Event of Default shall be instituted and maintained in the manner herein provided for the equal and ratable benefit of the Bondholders of all Bonds Outstanding.

SECTION 7.11 Unconditional Right of Bondholder to Receive Payment.

Notwithstanding any other provision of this Indenture, any Bondholder shall have the absolute and unconditional right to receive payment of principal of, redemption premium, if any, and interest on the Bonds on and after the due date thereof, and to institute suit for the enforcement of any such payment.

SECTION 7.12 Restoration of Rights and Remedies.

If the Trustee or any Bondholder has instituted any proceeding to enforce any right or remedy under this Indenture or the [Loan Documents] [Agreement], and any such proceeding has been discontinued or abandoned for any reason, or has been determined adversely to the Trustee or such Bondholder, then the Borrower, the Trustee and the Bondholders shall, subject to any determination in such proceeding, be restored to their former positions hereunder, and all rights and remedies of the Trustee and the Bondholders shall continue as though no such proceeding had been instituted.

SECTION 7.13 Rights and Remedies Cumulative.

No right or remedy herein conferred upon or reserved to the Trustee is intended to be exclusive of any other right or remedy, but each such right or remedy shall, to the extent permitted by law, be cumulative of and in addition to every other right or remedy given hereunder or now or hereafter existing at law, in equity or otherwise. The assertion or employment of any right or remedy hereunder shall not prevent the concurrent assertion or employment of any other appropriate right or remedy.

SECTION 7.14 Delay or Omission Not Waiver.

No delay or omission by the Trustee or any Bondholder to exercise any right or remedy accruing upon any Event of Default shall impair any such right or remedy or constitute a waiver of such Event of Default. Every right and remedy given by this Article or by law to the Trustee or the Bondholders may be exercised from time to time, and as often as may be deemed expedient, by the Trustee or the Bondholders, as the case may be.

SECTION 7.15 Waiver of Defaults.

- (a) The holders of [a majority] in aggregate principal amount of the Outstanding Bonds may, by written notice to the Trustee and subject to the requirements of Section 8.2(e), waive any existing default or Event of Default and its consequences, except an Event of Default under Section 7.1(a) or (b). Upon any such waiver, the default or Event of Default shall be deemed cured and shall cease to exist for all purposes. No waiver of any default or Event of Default shall extend to or effect any subsequent default or Event of Default or shall impair any right or remedy consequent thereto.

- (b) Notwithstanding any provision of this Indenture or the **[Loan Documents/Agreement]**, in no event shall any Person, other than all of the affected Bondholders, have the ability to waive any Event of Default under this Indenture or the **[Loan Documents/Agreement]** if such event results or may result, in the opinion of Bond Counsel, in interest on any of the Bonds becoming includable in gross income for federal income tax purposes.

SECTION 7.16 Notice of Events of Default.

If an Event of Default occurs of which the Trustee has or is deemed to have notice under Section 8.2(h), the Trustee shall give Electronic Notice thereof to the Issuer and the Borrower. **[Within days thereafter (unless such Event of Default has been cured or waived), the Trustee shall give notice of such Event of Default to each holder of Bonds then Outstanding, provided, however, that except in the instance of an Event of Default under Section 7.1(a) or (b), the Trustee may withhold such notice to Bondholders if and so long as the Trustee in good faith determines that the withholding of such notice is in the interests of Bondholders, and provided, further, that notice to Bondholders of any Event of Default under Section 7.1(c) shall be subject to the provisions of Section 7.7 and shall not be given until the grace period has expired.]**

SECTION 7.17 Undertaking for Costs.

Subject to the provisions of Section 8.5 hereof, the parties to this Indenture agree, and each Bondholder by such Person's acceptance of the Bonds shall be deemed to have agreed, that any court of competent jurisdiction may in its discretion require, in any suit for the enforcement of any right or remedy under this Indenture, or any suit against the Trustee for any action taken or omitted by it as Trustee, the filing by any party litigant in such suit of any undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorneys' fees, against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant; provided, however, that the provisions of this Section 7.17 shall not apply to any suit instituted by the Trustee or to any suit instituted by any Bondholder or group of Bondholders holding in the aggregate more than a majority in aggregate principal amount of the Outstanding Bonds.

SECTION 7.18 Right to Cure.

If the Issuer shall, for whatever reason, at any time fail to pay any amount or perform any act which it is obligated to pay or perform and, as a result, a default or Event of Default occurs or may occur, the Borrower shall have the right to perform such act or pay such amount on behalf of the Issuer and thereby cure or prevent such default or Event of Default.

**ARTICLE 8
THE TRUSTEE**

SECTION 8.1 Duties and Responsibilities of the Trustee.

(a) Prior to the occurrence of an Event of Default of which it has or is deemed to have notice hereunder, and after the curing or waiver of any Event of Default which may have occurred:

(1) the Trustee undertakes to perform such duties and only such duties as are specifically set forth in this Indenture, and no implied covenants or obligations shall be read into this Indenture against the Trustee; and

(2) in the absence of bad faith on its part, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon certificates or opinions furnished to the Trustee that conform to the requirements of this Indenture; however the Trustee is under a duty to examine such certificates and opinions to determine whether they conform to the requirements of this Indenture.

(b) In case an Event of Default of which the Trustee has or is deemed to have notice hereunder has occurred and is continuing, the Trustee shall exercise such of the rights and powers vested in it by this Indenture, and use the same degree of care and skill in its exercise, as a prudent person would exercise or use in the conduct of such person's own affairs.

(c) No provision of this Indenture shall be construed to relieve the Trustee from liability for its own [**grossly**] negligent action, its own [**grossly**] negligent failure to act, or its own willful misconduct, except that:

(1) this subsection shall not be construed to limit the effect of subsection (a) of this Section;

(2) the Trustee is not liable for any error of judgment made in good faith by a Responsible Officer, unless it is proven that the Trustee was [**grossly**] negligent in ascertaining the pertinent facts;

(3) the Trustee is not liable with respect to any action it takes or omits to be taken by it in good faith in accordance with the direction of the Bondholders under any provision of this Indenture relating to the time, method and place of conducting any proceeding for any remedy available to the Trustee, or exercising any trust or power conferred upon the Trustee under this Indenture; and

(4) no provision of this Indenture shall require the Trustee to expend or risk its own funds or otherwise incur any liability [**in the performance of any**

of its duties hereunder, or in the exercise of any of its rights or powers,] if it has reasonable grounds for believing that the repayment of such funds or adequate indemnity against such risk or liability is not reasonably assured to it.

(d) The Trustee shall maintain records of all investments and disbursements of proceeds in the funds and accounts established pursuant to this Indenture through the date ending six (6) years following the date on which all the Bonds and Additional Bonds have been retired.

(e) Whether or not expressly so provided, every provision of this Indenture relating to the conduct or affecting the liability of or affording protection to the Trustee is subject to the provisions of this Section.

SECTION 8.2 Certain Rights of the Trustee.

Except as otherwise provided in Section 8.1:

(a) in the absence of bad faith on its part, the Trustee may rely and is protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, direction, consent, order, approval, bond, debenture or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties;

(b) any request, direction, order or demand of the Borrower under this Indenture shall be sufficiently evidenced by an Officer's Certificate (unless other evidence thereof is specifically prescribed) and any resolution of the board of directors of the Borrower may be sufficiently evidenced by a copy thereof certified by **[an Authorized Borrower Representative]**, the Executive or an Attesting Officer of the Borrower, as appropriate;

(c) whenever in the administration of this Indenture the Trustee deems it desirable that a matter be proved or established prior to taking, suffering or omitting any action hereunder, the Trustee (unless other evidence thereof is specifically prescribed) may, in the absence of bad faith on its part, rely upon an Officer's Certificate;

(d) the Trustee may consult with Counsel and the written advice of such Counsel or an opinion of Counsel shall be full and complete authorization and protection for any action taken, suffered or omitted by it in good faith and in accordance with such advice or opinion;

(e) the Trustee is under no obligation to exercise any of the rights or powers vested in it by this Indenture at the request or direction of any of the Bondholders unless such holders have offered to the Trustee security or indemnity satisfactory to the Trustee as to its terms, coverage, duration, amount and otherwise with respect to the costs, expenses and liabilities which may be incurred by it in compliance with such request or direction, and the provision of such indemnity shall be mandatory for any remedy taken upon direction of the holders of **[a majority/25%]** in aggregate principal amount of the Bonds;

(f) the Trustee is not required to make any inquiry or investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report, notice, request, direction, consent, order, approval, bond, debenture or other paper or document but the Trustee, in its discretion, may make such further inquiry or investigation into such facts or matters as it may see fit and, if the Trustee determines to make such further inquiry or investigation, it is entitled to examine the books, records and premises of the Issuer and the Borrower, in person or by agent or attorney;

(g) the Trustee may execute any of its trusts or powers or perform any duties under this Indenture either directly or by or through agents or attorneys, and may in all cases pay, subject to reimbursement as provided in Section 8.5, such reasonable compensation as it deems proper to all such agents and attorneys reasonably employed or retained by it, and the Trustee shall not be responsible for any misconduct or **[gross]** negligence of any agent or attorney appointed with due care by it;

(h) the Trustee is not required to take notice or deemed to have notice of any default or Event of Default hereunder, except Events of Default under Section 7.1(a) and (b), unless a Responsible Officer of the Trustee has actual knowledge thereof or has received notice in writing of such default or Event of Default from the Issuer, the Borrower or the holders of at least 25% in aggregate principal amount of the Outstanding Bonds, and in the absence of any such notice, the Trustee may conclusively assume that no such default or Event of Default exists;

(i) the Trustee is not required to give any bond or surety with respect to the performance of its duties or the exercise of its powers under this Indenture;

(j) in the event the Trustee receives inconsistent or conflicting requests and indemnity from two or more groups of holders of Bonds, each representing less than a majority in aggregate principal amount of the Bonds Outstanding, pursuant to the provisions of this Indenture, the Trustee, in its sole discretion, may determine what action, if any, shall be taken;

(k) the Trustee's immunities and protections from liability and its right to indemnification in connection with the performance of its duties under this Indenture shall extend to the Trustee's officers, directors, agents, attorneys and employees. Such immunities and protections and right to indemnification, together with the Trustee's right to compensation, shall survive the Trustee's resignation or removal, the defeasance or discharge of this Indenture and final payment of the Bonds;

(l) the permissive right of the Trustee to take the actions permitted by this Indenture shall not be construed as an obligation or duty to do so;

(m) except for information provided by the Trustee concerning the Trustee, the Trustee shall have no responsibility for any information in any offering memorandum or other disclosure material distributed with respect to the Bonds, and the Trustee shall have no responsibility for compliance with any state or federal securities laws in connection with the Bonds; and

(n) the Trustee shall have the right to accept and act upon instructions, including funds transfer instructions (the “Instructions”), given pursuant to this Indenture and delivered via Electronic Means. If the Borrower elects to give the Trustee Instructions using Electronic Means and the Trustee in its discretion elects to act upon such Instructions, the Trustee’s understanding of such Instructions shall be deemed controlling. Pursuant to the Agreement, the Borrower understands and agrees that the Trustee cannot determine the identity of the actual sender of such Instructions and that the Trustee shall conclusively presume that directions that purport to have been sent by an Authorized Borrower Representative listed on the Officer’s Certificate provided to the Trustee have been sent by such Authorized Borrower Representative. The Borrower shall be responsible for ensuring that only Authorized Borrower Representatives transmit such Instructions to the Trustee and that the Borrower and all Authorized Borrower Representatives are solely responsible to safeguard the use and confidentiality of applicable user and authorization codes, passwords and/or authentication keys upon receipt by the Borrower. The Trustee shall not be liable for any losses, costs or expenses arising directly or indirectly from the Trustee’s reliance upon and compliance with such Instructions notwithstanding such directions conflict or are inconsistent with a subsequent written instruction. The Borrower agrees: (i) to assume all risks arising out of the use of Electronic Means to submit Instructions to the Trustee, including without limitation the risk of the Trustee acting on unauthorized Instructions, and the risk of interception and misuse by third parties; (ii) that it is fully informed of the protections and risks associated with the various methods of transmitting Instructions to the Trustee and that there may be more secure methods of transmitting Instructions than the method(s) selected by the Borrower; (iii) that the security procedures (if any) to be followed in connection with its transmission of Instructions provide to it a commercially reasonable degree of protection in light of its particular needs and circumstances; and (iv) to notify the Trustee immediately upon learning of any compromise or unauthorized use of the security procedures.

SECTION 8.3 Trustee Not Responsible for Recitals.

The recitals contained in this Indenture and in the Bonds (other than the certificate of authentication on the Bonds) are statements of the Issuer, as relied upon by representations from the Borrower, and the Trustee assumes no responsibility for their correctness. The Trustee makes no representations as to the value, condition or sufficiency of any assets pledged or assigned as security for the Bonds, the right, title or interest of the Issuer therein, the security provided thereby or by this Indenture, the technical or financial feasibility of the Project, the compliance of the Project with the Act, or the tax-exempt status of the Bonds. The Trustee is not accountable for the use or application by the Issuer or the Borrower of any of the Bonds, the Bond proceeds, or for the use or application of any moneys paid over by the Trustee in accordance with any provision of this Indenture or the Agreement.

SECTION 8.4 Trustee May Own Bonds.

The Trustee, in its commercial banking or in any other capacity, may in good faith buy, sell, own, hold and deal in any of the Bonds and may join in any action which any Bondholder may be entitled to take with like effect as if it were not the Trustee. The Trustee, in its

commercial banking or in any other capacity, may also engage in or be interested in any financial or other transaction with the Issuer or the Borrower and may act as depository, trustee or agent for any committee of Bondholders secured hereby or other obligations of the Issuer as freely as if it were not Trustee. The provisions of this Section shall extend to affiliates of the Trustee.

SECTION 8.5 Compensation and Expenses of the Trustee.

The Borrower has covenanted and agreed, pursuant to the Agreement:

(a) **[to pay to the Trustee reasonable compensation for all services rendered by it hereunder and under the other agreements relating to the Bonds to which the Trustee is a party in accordance with terms agreed to from time to time, and, subsequent to default, in accordance with the Trustee's then-current fee schedule for default administration (the entirety of which compensation shall not be limited by any provision of law regarding compensation of a trustee of an express trust);]**

(b) **[to reimburse the Trustee upon its request for all reasonable expenses, disbursements and advances incurred or made by the Trustee in accordance with any provision of this Indenture, any other agreement relating to the Bonds to which it is a party or in complying with any request by the Borrower, the Issuer or any Rating Service with respect to the Bonds, including the reasonable compensation, expenses and disbursements of its agents and Counsel, except any such expense, disbursement or advance attributable to the Trustee's [gross] negligence, willful misconduct or bad faith; and]**

(c) to indemnify, defend and hold the Trustee harmless from and against any loss, liability or expense incurred without negligence, willful misconduct or bad faith on its part, arising out of or in connection with the acceptance or administration of the office of Trustee under this Indenture and the Loan Documents, including the costs of defending itself against any claim or liability in connection with the exercise or performance of any of its powers or duties hereunder or thereunder.

In the event the Trustee incurs expenses or renders services in any proceedings under Bankruptcy Law relating to the Issuer or the Borrower, the expenses so incurred and compensation for services so rendered are intended to constitute expenses of administration under Bankruptcy Law.

[As security for the performance of the obligations of the Borrower under this Section, the Trustee shall have a lien prior to the lien securing the Bonds, which it may exercise through a right of setoff, upon all property or funds held or collected by the Trustee pursuant to this Indenture (other than moneys in the Rebate Fund).] The obligations of the Borrower to make the payments described in this Section shall survive discharge of this Indenture, the resignation or removal of the Trustee and payment in full of the

Bonds. Any exercise of setoff or otherwise shall be conditioned upon the Trustee providing to the Issuer reasonably detailed information regarding the nature of the expense incurred.

SECTION 8.6 Qualifications of Trustee.

There shall at all times be a trustee hereunder which shall be a corporation or banking association organized and doing business under the laws of the United States of America or of any state, authorized under such laws to exercise corporate trust powers, which has a combined capital and surplus of at least **[\$50,000,000]**, or is an affiliate of, or has a contractual relationship with, a corporation or banking association meeting such capital and surplus requirement which guarantees the obligations and liabilities of the proposed trustee, and which is subject to supervision or examination by federal or state banking authority.

If such corporation or banking association publishes reports of condition at least annually, pursuant to law or the requirements of any supervising or examining authority above referred to, then for purposes of this Section, the combined capital and surplus of such corporation or banking association shall be deemed to be its combined capital and surplus as set forth in its most recent report of condition so published. If at any time the Trustee shall cease to be eligible in accordance with the provisions of this Section, it shall resign promptly in the manner and with the effect specified in this Article.

SECTION 8.7 Resignation or Removal of Trustee; Appointment of Successor Trustee.

(a) No resignation or removal of the Trustee and no appointment of a successor Trustee pursuant to this Article shall become effective until the acceptance of appointment by the successor Trustee under Section 8.8.

(b) The Trustee may resign at any time by giving sixty (60) days' written notice to the Issuer, the Borrower and holders of the Outstanding Bonds. Upon receiving such notice of resignation, the Issuer shall promptly appoint a successor Trustee by an instrument in writing. If an instrument of acceptance has not been delivered to the resigning Trustee within 30 days after the giving of such notice of resignation, the resigning Trustee **[or any holder of a Bond then Outstanding]** may petition a court of competent jurisdiction for the appointment of a successor Trustee.

(c) Prior to the occurrence and continuance of an Event of Default hereunder, or after the curing or waiver of any such Event of Default, the Issuer, the holders of a majority in aggregate principal amount of the Outstanding Bonds **[or the Borrower]**, may remove the Trustee and shall appoint a successor Trustee. In the event there shall have occurred and be continuing an Event of Default hereunder, the holders of a majority in aggregate principal amount of the Outstanding Bonds may remove the Trustee and shall appoint a successor Trustee. In each instance such removal and appointment shall be accomplished by an instrument or concurrent instruments in writing signed by the Issuer or such holders **[or the Borrower]**, as the case may be, and delivered to the Trustee, the Issuer, the Borrower and holders of the Outstanding Bonds.

(d) If at any time: (1) the Trustee shall cease to be eligible and qualified under Section 8.6 and shall fail or refuse to resign after written request to do so by the Issuer [, **the Borrower**] or the holder of any Bond, or (2) the Trustee shall become incapable of acting or shall be adjudged insolvent, or a receiver of the Trustee or its property shall be appointed, or any public officer shall take charge or control of the Trustee, its property or affairs for the purpose of rehabilitation, conservation or liquidation, then in either such case (A) the Issuer [**or the Borrower**] may remove the Trustee and appoint a successor Trustee in accordance with the provisions of subsection (c) of this Section; or (B) any holder of a Bond then Outstanding may, on behalf of the holders of all Outstanding Bonds, petition a court of competent jurisdiction for removal of the Trustee and appointment of a successor Trustee.

(e) The Issuer [**Borrower**] shall give written notice of each resignation or removal of the Trustee and each appointment of a successor Trustee to each holder of Bonds then Outstanding as listed in the Bond Register. Each such notice shall include the name and address of the applicable corporate trust office of the successor Trustee. Notwithstanding anything to the contrary herein, no notice to the holders of the Outstanding Bonds with respect to the resignation or removal of the Trustee is required provided that as the Borrower files notice of such Trustee resignation or removal with the Municipal Securities Rulemaking Board's EMMA website.

SECTION 8.8 Acceptance of Appointment by Successor Trustee.

(a) Every successor Trustee appointed hereunder shall execute, acknowledge and deliver to the Issuer, the Borrower and the predecessor Trustee an instrument accepting its appointment. The resignation or removal of the retiring Trustee shall thereupon become effective, and the successor Trustee shall, without further act, deed or conveyance become vested with all the estates, properties, rights, powers and duties of the predecessor Trustee. Upon the request of the Issuer, the Borrower or the successor Trustee, the predecessor Trustee shall execute and deliver an instrument transferring to the successor Trustee all the estates, properties, rights, powers and duties of the predecessor Trustee under this Indenture, and shall duly assign, transfer, deliver and pay over to the successor Trustee all the Trust Estate and moneys and other property then held under this Indenture, subject, however, to the lien provided for in Section 8.5.

(b) As a condition precedent to the appointment of the successor Trustee, the predecessor Trustee shall certify to the successor Trustee, the Issuer and the Borrower: (i) that the fund balances are accurate and correct; (ii) that, to the best of the predecessor Trustee's knowledge, all of the documents the predecessor Trustee is providing the successor Trustee in connection with the Bonds are true and accurate in all material respects; and (iii) either (x) that, to the best of the predecessor Trustee's knowledge, there does not currently exist any Event of Default, or (y) in the event there currently exists any Event(s) of Default, the predecessor Trustee shall provide the successor Trustee, the Issuer and the Borrower an itemized list of such Event(s) of Default. The successor Trustee shall promptly give written notice of its appointment to the holders of all Bonds Outstanding in the manner prescribed herein, unless such notice has previously been given.

(c) No successor Trustee shall accept appointment as provided in this Section unless, as of the date of such acceptance, it is eligible and qualified under the provisions of Section 8.6.

SECTION 8.9 Merger, Succession or Consolidation of Trustee.

Any corporation or association: (a) into which the Trustee is merged or with which it is consolidated; (b) resulting from any merger or consolidation to which the Trustee is a party; or (c) succeeding to all or substantially all of the corporate trust business of the Trustee, shall be the successor Trustee without the execution or filing of any document or the taking of any further action. Any such successor must nevertheless be eligible and qualified under the provisions of Section 8.6.

SECTION 8.10 Notices to Bondholders; Waiver.

Where this Indenture provides for notice to Bondholders of any event, **[after an Event of Default]** such notice shall be sufficiently given (unless otherwise herein expressly provided) if in writing and mailed, first-class postage prepaid, to each Bondholder affected by each event, at his or her address as it appears on the Bond Register, not later than the latest date, and not earlier than the earliest date, prescribed for the first giving of such notice. In any case where notice to Bondholders is given by mail, neither the failure to mail such notice, nor any default in any notice so mailed to any particular Bondholder shall affect the sufficiency of such notice with respect to other Bondholders. Where this Indenture provides for notice in any manner, such notice may be waived in writing by the Person entitled to receive such notice, either before or after the event, and such waiver shall be the equivalent of such notice. Waivers of notice by Bondholders shall be filed with the Trustee, but such filing shall not be a condition precedent to the validity of any action taken in reliance upon such waiver.

[For so long as the Bonds are registered solely in the name of the Securities Depository or its nominee, the Trustee, on behalf of the Issuer (at the expense of the Borrower), shall maintain a register (the “Beneficial Owner Register”) in which the Trustee shall record the name and address of any person that is identified to the Trustee as a beneficial owner of an interest in the Bonds and for which the Trustee has: (i) information sufficient to permit delivery of first class mail and (ii) either: (x) a certificate executed, as depository or securities intermediary, by any trust company, bank, banker or member of a national securities exchange (wherever situated), if such certificate is in form satisfactory to the Trustee, or (y) a certificate or affidavit of the Person executing such instrument or writing as a beneficial owner if such certificate or affidavit is in form satisfactory to the Trustee or (z) such other instrument or writing as the Trustee deems sufficient for the purposes of this Section. The Trustee, the Issuer and the Borrower shall not be responsible for the accuracy of the Beneficial Owner Register, and no Person listed in the Beneficial Owner Register shall be entitled to any rights under this Indenture other than the right to receive notices in the manner provided in the following paragraph.]

[For so long as the Bonds are registered solely in the name of the Securities Depository or its nominee, where this Indenture provides for notice to the Bondholders of the existence of, or during the continuance of, any Event of Default [or at any time upon the written request of the Issuer or the Borrower], the Trustee, at the expense of the Borrower, shall: (i) establish the Record Date” for determination of the Persons entitled to receive such notice; (ii) request a securities position listing from the Securities Depository showing the Depository Participants holding positions in the Bonds affected by such notice as of the Record Date for such notice; (iii) mail, first class postage prepaid, copies of the notice as provided above to each Depository Participant identified in the securities position listing as holding a position in the Bonds as of the Record Date for the notice, to each Person listed in the Beneficial Owner Register, to each nationally recognized municipal securities information repository and state information depository (within the meaning of Rule 15c2-12 of the United States Securities and Exchange Commission under the Securities Exchange Act of 1934), and to any Person identified to the [Issuer] [Trustee] as a nonobjecting beneficial owner pursuant to the immediately following clause; (iv) request that the Depository Participant retransmit the notice to all Persons for which it served as nominee on the Record Date, including nonobjecting beneficial owners, or retransmit the notice to objecting beneficial owners and provide a listing of nonobjecting beneficial owners for whom the Depository Participant served as nominee on the Record Date to the [Issuer] [Trustee], (v) provide on behalf of the Borrower and not as its agent, an undertaking of the Borrower to pay to any Depository Participant or other nominee (other than the Securities Depository) the reasonable costs of transmitting the notice to Persons for whom the Depository Participant acts as nominee; and (vi) provide as many copies of the notice as may be requested by any nominee owner of the Bonds. Any default in performance of the duties required by this paragraph shall not affect the sufficiency of notice to the Bondholders given in accordance with the first paragraph of this Section, nor the validity of any action taken under this Indenture in reliance on such notice to Bondholders.]

Where this Indenture provides for notice to the Bondholders of any event, the form of the notice shall prominently include a title block, separate from the body of the notice, which shall include the following information: (i) the complete title of the Bonds; (ii) the complete name of the Issuer and of the Borrower; (iii) the entire nine-digit CUSIP number, if any, of each affected maturity of the Bonds; (iv) the Record Date; and (v) a summary that is no more than the maximum number of characters permitted by the Securities Depository, if such Bonds are held by the Securities Depository.

Any notice required or permitted by this Indenture to be given to the Securities Depository shall be given to it in the manner provided by this Section for giving notice to Bondholders, and also shall be given in ASCII (or other format requested by the Securities Depository) format on magnetic medium, and shall be sent to: The Depository Trust Company, Proxy Department, 55 Water Street, 50th Floor, New York, New York 10041-0099, (teletype: (212) 855-5181), or such other address as may be specified by the Securities Depository in writing to the Trustee.

ARTICLE 9
DISCHARGE AND DEFEASANCE

SECTION 9.1 Discharge.

When all the Bonds shall have been fully paid as stipulated herein and therein or deemed paid as provided in this Article and the Issuer shall have caused to be paid to the Trustee all other sums of money due or to become due according to the provisions hereof (or shall have made arrangements satisfactory to the Trustee for such payment), then this Indenture and the lien created hereby shall be discharged and satisfied, and thereupon the Trustee shall execute and deliver to the Issuer such instruments in writing as shall be requisite to evidence the discharge and cancellation of this Indenture and the Trust Estate; provided, however, that the Trustee shall remain obligated to hold in trust any amounts then remaining held by it for repayment of the Bonds in the Debt Service Fund or any other fund and to pay to the holders of the Bonds any amounts held by the Trustee for the payment of the principal of, premium, if any, and interest on the Bonds according to the provisions of this Indenture and to pay any remaining amounts to the Issuer.

SECTION 9.2 Defeasance.

A Bond (or portion thereof), except as otherwise provided in the Supplemental Indenture authorizing the issuance of Additional Bonds, shall be deemed to have been paid within the meaning of and with the effect expressed in this Section if (i) money for the payment or redemption of such Bond shall be held by the Trustee (through deposit of moneys for such payment or redemption or otherwise), whether at or prior to the maturity or the redemption date of such Bond, or (ii) if the maturity or redemption date of such Bond shall not have arrived (A) provision shall have been made by the Issuer for the payment of the principal and interest on such Bond on the due dates for such payments by deposit with the Trustee (or other method satisfactory to the Trustee) of moneys and/or Defeasance Obligations, the principal of and the interest on which when due (together with any available moneys) will provide for such payment, and the Issuer shall have made provision satisfactory to the Trustee for the mailing of a notice to the Holder of such Bond that such moneys are so available for such payment and (B) if such Bond is to be redeemed prior to the maturity thereof, the Issuer shall have taken all action necessary to redeem such Bond and notice of such redemption shall have been duly given or provisions satisfactory to the Trustee shall have been made for the giving of such notice. The Trustee may rely upon a verification report by a verification agent [**MINIMUM QUALIFICATION OF VERIFICATION TO BE TAILORED TO THE PARTICULAR TRANSACTION**].

ARTICLE 10
SUPPLEMENTAL INDENTURES AND AMENDMENTS

SECTION 10.1 Supplemental Indentures Without Bondholders' Consent.

The Issuer and the Trustee may from time to time and at any time enter into trust indentures supplemental to this Indenture, without the consent of or notice to any Bondholder, to effect any one or more of the following:

(a) cure any ambiguity or defect or omission or correct or supplement any provision herein or in any supplemental indenture;

(b) grant to or confer upon the Trustee for the benefit of the Bondholders any additional rights, remedies, powers, authority or security that may lawfully be granted to or conferred upon the Bondholders or the Trustee which are not contrary to or inconsistent with this Indenture as then in effect or to subject to the pledge and lien of this Indenture additional revenues, properties or collateral including Defeasance Obligations;

(c) add to the covenants and agreements of the Issuer in this Indenture other covenants and agreements thereafter to be observed by the Issuer or to surrender any right or power herein reserved to or conferred upon the Issuer which are not contrary to or inconsistent with this Indenture as then in effect;

(d) permit the appointment of a co-trustee under this Indenture;

(e) modify, alter, supplement or amend this Indenture in such manner as shall permit the qualification of this Indenture, if required, under the Trust Indenture Act of 1939 or the Securities Act of 1933, as from time to time amended, or any similar federal statute hereafter in effect;

(f) **[To make such additions, deletions or modifications as may be necessary or desirable to maintain the exclusion from gross income for federal income tax purposes of interest on the Bonds];**

(g) make any other change herein that is determined by any of the Borrower, the Issuer or the Trustee, provided an Event of Default has not occurred or is continuing, to be not materially adverse to the interests of the Bondholders **[and which does not involve a change described in Section 10.2 requiring consents of specific Bondholders]; [or]**

(h) implement the issuance of Additional Bonds as provided by Section 2.12 **[./; or]**

(i) if a Series of Bonds are all Book Entry Bonds, amend, modify, alter or

replace the Letter of Representations as provided in Section 2.11 or other provisions relating to Book Entry Bonds;

(j) **[to conform the text of this Indenture [or the Agreement] to any description or summary of such document in any official statement or other offering document with respect to the Bonds to the extent that such description or summary was intended to be a verbatim recitation of a provision of this Indenture [or the Agreement.]]**

The Trustee shall not be obligated to enter into any such supplemental indenture which adversely affects the Trustee's own rights, duties or immunities under this Indenture.

SECTION 10.2 Supplemental Indentures Requiring Bondholders' Consent.

The Issuer and the Trustee, at any time and from time to time, may execute and deliver a supplemental indenture for the purpose of making any modification or amendment to this Indenture, but only with the written consent, given as provided in Section 10.3, of the holders of at least **[two-thirds] [a majority]** in aggregate principal amount of the Bonds Outstanding at the time such consent is given, and in case less than all of the Bonds then Outstanding are affected by the modification or amendment, of the holders of at least **[two-thirds] [a majority]** in aggregate principal amount of the Bonds so affected and Outstanding at the time such consent is given; provided, however, that if such modification or amendment will, by its terms, not take effect so long as any Bonds so affected remain Outstanding, the consent of the holders of such Bonds shall not be required and such Bonds shall not be deemed to be Outstanding for the purpose of any calculation of Outstanding Bonds under this Section. **[Notwithstanding the foregoing, no modification or amendment contained in any such supplemental indenture shall permit any of the following, without the consent of each Bondholder whose rights are affected thereby: (a) a change in the terms of stated maturity or redemption of any Bond or of any installment of interest thereon; (b) a reduction in the principal amount of or redemption premium on any Bond or in the rate of interest thereon or a change in the coin or currency in which such Bond is payable; (c) the creation of a lien on or a pledge of any part of the Trust Estate, or the money or assets pledged under this Indenture or any part thereof; (d) the granting of a preference or priority of any Bond or Bonds over any other Bond or Bonds; (e) a reduction in the aggregate principal amount of Bonds of which the consent of the Bondholders is required to effect any such modification or amendment; or (f) a change in the provisions of Section 7.15.]** Notwithstanding the foregoing, the holder of any Bond may extend the time for payment of the principal of or interest on such Bond; provided, however, that upon the occurrence of an Event of Default, funds available hereunder for the payment of the principal of and interest on the Bonds shall not be applied to any payment so extended until all principal and interest payments which have not been extended have first been paid in full. Notice of any supplemental indenture executed pursuant to this Section **[or Section 10.1]** shall be given to the Bondholders promptly following the execution thereof by the **[Issuer] [Trustee]**.

SECTION 10.3 Consents of Bondholders and Opinions.

Each supplemental indenture executed and delivered pursuant to the provisions of Section 10.2 shall take effect only when and as provided in this Section 10.3. A copy of such supplemental indenture (or brief summary thereof or reference thereto in form approved by the Trustee), together with a request to Bondholders for their consent thereto in form satisfactory to the Trustee, shall be sent by the **[Trustee/Issuer or the Borrower]** to Bondholders, at the expense of the Borrower, by **[registered or certified/first class]** mail, postage prepaid, provided that a failure to mail such request shall not affect the validity of the supplemental indenture when consented to as provided hereinafter. Such supplemental indenture shall not be effective unless and until there shall have been filed with the Trustee [(a) the written consents of Bondholders of the percentage of Bonds specified in Section 10.2 given as provided in Section 11.11[, and (b) the opinion of Counsel described in Section 10.6.] Any such consent shall be binding upon the Bondholder giving such consent and upon any subsequent holder of such Bonds and of any Bonds issued in exchange therefor or in lieu thereof (whether or not such subsequent Bondholder has notice thereof), unless such consent is revoked in writing by the Bondholder giving such consent or a subsequent holder of such Bonds by filing such revocation with the Trustee prior to the date the Trustee receives the material required in subsections (a) and (b) of this Section.

Notwithstanding anything else herein, if a supplemental indenture is to become effective under Section 10.2 on the same date as the date of issuance of Additional Bonds, the consents of the [underwriters or] purchasers of such Additional Bonds shall be counted for purposes of Section 10.2 and this Section.

[Underwriters of any Additional Bonds issued after the issuance of the Initial Bonds may, on behalf of all holders of the Initial Bonds and any Additional Bonds issued after the issuance of the Initial Bonds (and without notice to or consent of the Initial Bonds and any Additional Bonds issued after the issuance of the Initial Bonds), consent to [the following amendments: _____] [any amendment of this Indenture [or the Agreement] other than an amendment to this Indenture [or the Agreement] that requires the consent of all holders of Bonds issued under this Indenture, and other than _____.]]

SECTION 10.4 Exclusion of Certain Bonds.

Bonds which are to be disregarded under the last sentence of the definition of “Outstanding” shall not be deemed Outstanding for the purpose of consent or other action or any calculation of Outstanding Bonds provided for in this Article. At the time of any consent or other action taken under this Article or elsewhere in this Indenture, the Issuer, the Borrower or an Affiliate shall furnish the Trustee an Officer’s Certificate of the Issuer, the Borrower or an Affiliate, upon which the Trustee may rely, describing all Bonds so to be excluded.

SECTION 10.5 Notation on Bonds.

Bonds authenticated and delivered after the effective date of any action taken as provided in this Article may, and, if the Issuer **[or the Borrower]** so determines, shall bear a

notation by endorsement or otherwise in form approved by the Trustee as to such action, and in that case upon demand of the holder of any Outstanding Bond at such effective date and presentation of such Bond for the purpose at the Office of the Trustee, or upon any transfer of any Bond Outstanding at such effective date, suitable notation shall be made on such Bond or upon any Bond issued upon any such transfer by the Trustee as to any such action. If the Issuer shall so determine, new Bonds so modified as in the opinion of the Trustee and the Issuer to conform to such action shall be prepared, authenticated and delivered, and upon demand of the holder of any Bond then Outstanding shall be exchanged, without cost to such Bondholder for Bonds then Outstanding, upon surrender of such Bonds for Bonds of an equal aggregate principal amount and of the same Series, maturity and interest rate, in any Authorized Denomination.

SECTION 10.6 Delivery of Counsel's Opinion with Respect to Supplemental Indentures.

The Trustee in executing or accepting the additional trusts permitted by this Article or the modifications thereby of the trusts created by this Indenture may rely, and shall be fully protected in relying, on an opinion of Counsel acceptable to it stating that (a) the execution of such supplemental indenture is authorized or permitted by this Indenture and (b) all conditions precedent to the execution and delivery of such supplemental indenture have been complied with, and (c) an opinion of Bond Counsel that the execution and performance of such supplemental indenture shall not, in and of itself, adversely affect the federal income tax status of the Bonds. **[The Trustee may accept and rely upon such opinion of Counsel as conclusive evidence that any supplemental indenture executed pursuant to the provisions of this Article complies with the requirements of this Article.]**

SECTION 10.7 Amendments to Loan Documents Not Requiring Bondholders' Consent.

Without the consent of or notice to the Bondholders, the Issuer and the Trustee may consent to any amendment, change or modification of the Loan Documents as may be required (a) by the provisions of the Agreement or this Indenture, (b) for the purpose of curing any ambiguity, inconsistency or defect or omission in the Loan Documents, (c) in connection with an amendment or to effect any purpose for which there could be an amendment of this Indenture pursuant to Section 10.1, (d) in connection with implementing the issuance of Additional Bonds, or (e) in connection with any other change therein which is not to the material prejudice of the Trustee or the Bondholders.

SECTION 10.8 Amendments to Loan Documents Requiring Bondholders' Consent.

Except for the amendments, changes or modifications contemplated in Section 10.7, neither the Issuer nor the Trustee shall consent to any amendment, change or modification of the Loan Documents without the giving of notice as provided in Section 10.3 (in the same manner as is required for supplemental indentures) of the proposed amendment, change or modification and receipt of the written consent thereto of the Bondholders of not less than two-thirds [a majority] in aggregate principal amount of the Bonds then Outstanding.

The notices to and consent of the Bondholders to any amendments shall be obtained as provided in Section 10.3 with respect to supplemental indentures. Notice of any amendment pursuant to this Section shall be given to the Bondholders promptly following the execution thereof.

SECTION 10.9 Delivery of Opinion of Counsel with Respect to Amendments.

In consenting to an amendment, change or modification to the Loan Documents permitted by this Article X, the Issuer and the Trustee shall be entitled to receive, and (subject, with respect to the Trustee, to Section 8.1) shall be fully protected in relying upon, an opinion of Counsel acceptable to each of them stating that (a) the execution of such consent, amendment, change or modification is authorized or permitted by this Indenture and the applicable Loan Document, and (b) all conditions precedent to the execution and delivery of such consent, amendment, change or modification have been complied with **[and an opinion of Bond Counsel that the delivery and performance of such amendment, change or modification shall not, in and of itself, adversely affect the federal income tax status of the Bonds]. [The Trustee and the Issuer may accept and rely upon such opinion of Counsel as conclusive evidence that any such consent, amendment, change or modification complies with the provisions of this Article.]**

SECTION 10.10 Effect of Supplemental Indentures.

Upon the execution and delivery of any supplemental indenture under this Article, this Indenture shall be modified in accordance therewith, and such supplemental indenture shall form a part of this Indenture for all purposes; and every holder of any Bond theretofore or thereafter authenticated and delivered hereunder shall be bound thereby.

ARTICLE 11 MISCELLANEOUS PROVISIONS

SECTION 11.1 Security Agreement; Financing Statements.

In addition to the assignment by the Issuer of its rights in the Trust Estate to the Trustee, the Issuer hereby acknowledges that, in order to more fully protect, perfect and preserve the rights of the Trustee and the Bondholders in the Trust Estate, the Issuer grants to the Trustee a security interest in the Trust Estate and the proceeds thereof. The Issuer agrees to cooperate with the Trustee in filing financing statements, and continuations thereof, in such manner and in such places as may be required by law and the Loan Documents in order to perfect such security interest. At the time of the issuance of the Bonds and at the required intervals under applicable State law, the Trustee, at the expense of the Borrower, **[shall/may]** obtain an opinion of Counsel setting forth what, if any, actions by the Issuer or Trustee should be taken in order to protect, perfect and preserve such security interest. The Trustee shall cooperate with the Issuer and the Borrower as necessary, including the execution of any necessary financing statements and continuations thereof.

The following information is supplied to facilitate filings under the Uniform Commercial Code of the State:

The secured party is [NAME OF TRUSTEE]. Its address from which information concerning the security interest may be obtained and its mailing address is: [ADDRESS OF TRUSTEE]. The debtor is [NAME OF ISSUER]. Its mailing address is: [ADDRESS OF ISSUER].

SECTION 11.2 Limitation of Rights.

With the exception of rights herein expressly conferred, nothing expressed or mentioned in or to be implied from this Indenture or the Bonds is intended or shall be construed to give to any Person other than the parties hereto, the Borrower and the Bondholders any legal or equitable right, remedy or claim under or in respect to this Indenture. This Indenture and all of the covenants, conditions and provisions hereof are intended to be and are for the sole and exclusive benefit of the parties hereto, the Bondholders, and the Borrower as herein provided. Notwithstanding the above, the rights of the Borrower hereunder shall be construed in all cases as junior to the rights of the Bondholders.

SECTION 11.3 Severability.

If any term or provision of this Indenture or the Bonds shall be invalid, inoperative or unenforceable as applied in any particular case in any jurisdiction or jurisdictions or in all jurisdictions, or in all cases because it conflicts with any other provision or provisions hereof or any constitution or statute or rule of public policy, or for any other reason, such circumstances shall not have the effect of rendering the provision in question inoperative or unenforceable in any other case or circumstance, or of rendering any other provision or provisions herein contained invalid, inoperative, or unenforceable to any extent whatever, and such term and provision shall be valid and enforced to the fullest extent permitted by law.

SECTION 11.4 Notices.

Except as otherwise provided herein, all notices, certificates or other communications hereunder shall be in writing and shall be deemed given upon receipt, by hand delivery, mail, overnight delivery, or Electronic Means addressed as follows:

Borrower:

Issuer:

Trustee:

In case by reason of the suspension of regular mail service, it shall be impracticable to give notice by first class mail of any event to any Bondholder, the Issuer or the Borrower when such notice is required to be given pursuant to any provisions of this Indenture, then any manner of giving such notice as shall be satisfactory to the Trustee shall be deemed to be sufficient giving of such notice. The Issuer, the Trustee and the Borrower may, by notice pursuant to this Section, designate any different addresses to which subsequent notices, certificates or other communications shall be sent. A duplicate copy of each notice, approval, consent, request,

complaint, demand or other communication given hereunder by the Issuer, the Borrower or the Trustee to any one of the others shall also be given to the others.

Notwithstanding the foregoing, notices to the Trustee shall be effective only upon receipt.

SECTION 11.5 Holidays.

If the date for making any payment or the last date for performance of any act or the exercising of any right, as provided in this Indenture, is not a Business Day, such payment may be made or act performed or right exercised on the next succeeding Business Day with the same force and effect as if done on the nominal date provided in this Indenture and no interest shall accrue on the payment so deferred during the intervening period.

SECTION 11.6 Counterparts.

This Indenture may be executed in any number of counterparts, each of which when so executed and delivered shall constitute an original, but all of which, when taken together, shall constitute but one and the same instrument, and shall become effective when copies hereof shall be delivered to each of the parties hereto, which copies, when taken together, bear the signatures of each of the parties hereto.

SECTION 11.7 Applicable Law.

This Indenture shall be governed in all respects including validity, interpretation and effect by, and shall be enforceable in accordance with, the laws of the United States of America and of the State.

SECTION 11.8 Limitation of Liability of Officials of the Issuer.

Notwithstanding anything to the contrary contained herein, for payment of the obligations of the Issuer under this Indenture and the Bonds, the Trustee, the Bondholders and any other party entitled to seek payment from the Issuer under or to enforce this Indenture and the Bonds will be entitled to look solely to amounts on deposit with and held by the Trustee for the benefit of the Bondholders, subject to the terms of this Indenture, the Project and such collateral, if any, as may now or hereafter be given to secure the payment of the obligations of the Issuer under this Indenture and the Bonds, and no other property or assets of the Issuer or any officer or director of the Issuer shall be subject to levy, execution or other enforcement procedure for the satisfaction of the remedies hereunder, or for any payment required to be made under this Indenture and the Bonds, or for the performance of any of the covenants or warranties contained herein.

[Paragraph tailored to State law]

SECTION 11.9 Successors and Assigns.

All of the covenants, promises and agreements in this Indenture contained by or on behalf of the Issuer, or by or on behalf of the Trustee, shall bind and inure to the benefit of their respective successors and assigns, whether so expressed or not.

SECTION 11.10 Form of Documents Delivered to Trustee.

In any case where several matters are required to be certified by, or covered by an opinion of, any specified Person, it is not necessary that all such matters be certified by, or covered by the opinion of, only one such Person, or that they be so certified or covered by only one document, but one such Person may certify or give an opinion with respect to some matters and one or more other such Persons as to other matters, and any such Person may certify or give an opinion as to such matters in one or several documents.

Any Officer's Certificate of the Issuer or the Borrower may be based, insofar as it relates to legal matters, upon a certificate or opinion of, or representations by, Counsel, unless such official or officer knows, or in the exercise of reasonable care should know, that the certificate or opinion or representations with respect to the matters upon which his or her certificate or opinion is based are erroneous. Any opinion of Counsel may be based, insofar as it relates to factual matters, upon a certificate or opinion of, or representations by, an official or officials of the Issuer or an officer or officers of the Borrower stating that the information with respect to such factual matters is in the possession of the Issuer or the Borrower, unless such Counsel knows, or in the exercise of reasonable care should know, that the certificate or opinion or representations with respect to such matters are erroneous.

Where any person is required to make, give or execute two or more applications, requests, consents, certificates, statements, opinions or other instruments under this Indenture, they may, but need not, be consolidated and form one instrument.

SECTION 11.11 Consent of Holders.

Any consent, request, direction, approval, objection or other instrument required by this Indenture to be signed and executed by the Bondholders may be in any number of concurrent writings of similar tenor and must be signed or executed by such Bondholders in person or by agent appointed in writing. Proof of the execution of any such consent, request, direction, approval, objection or other instrument or of the writing appointing any such agent and of the ownership of Bonds, if made in the following manner, shall be sufficient for any of the purposes of this Indenture, and shall be conclusive in favor of the Trustee with regard to any action taken by it under such request or other instrument, namely:

- (a) The fact and date of the execution by any Person of any such writing may be proved by the certificate of any officer in any jurisdiction who by law has power to take acknowledgments within such jurisdiction that the Person signing such writing acknowledged the execution thereof, or by an affidavit of any witness to such execution.

(b) The **[Issuer/Borrower/Trustee]** may establish a Record Date for the purpose of identifying Bondholders entitled to issue any such consent, request, direction, approval or instrument.

IN WITNESS WHEREOF, the Issuer has caused this Indenture to be signed in its name by its Executive and attested by its Attesting Officer, and the Trustee, in acceptance of the trusts created hereunder, has caused this Indenture to be signed in its corporate name by its officer thereunder duly authorized all as of the day and year first above written.

ISSUER

By: _____

By: _____

TRUSTEE

By: _____

APPENDIX A

FORM OF INITIAL BOND

[FORM OF FRONT OF BOND]

R _____

UNITED STATES OF AMERICA
STATE OF **[NAME OF STATE]**
[NAME OF ISSUER]
[DESIGNATION] BOND, SERIES [YEAR]
([BORROWER] PROJECT)

MATURITY DATE:

DATED:

CUSIP NO. _____

INTEREST RATE:

PRINCIPAL AMOUNT:

DOLLARS

BONDHOLDER:

The **[ISSUER]**, a **[TYPE OF ENTITY]** of the State of **[NAME OF STATE]** (the “Issuer”), for value received, hereby promises to pay (but only out of the Revenues, as defined in the Indenture hereinafter mentioned, and other assets pledged therefor as hereinafter mentioned) to the registered owner identified above, or registered assigns, on the maturity date identified above (subject to any right of prior redemption hereinafter mentioned), the principal amount identified above in lawful money of the United States of America; and to pay interest on the principal amount hereof in like lawful money from the date of initial authentication and delivery hereof until payment of such principal amount shall be discharged as provided in the Indenture, at the rates per annum as set forth, payable, on _____ 1 and _____ 1 (or, if such day is not a Business Day, on the next succeeding Business Day) in each year, commencing _____ 1, _____ (each, an “Interest Payment Date”). The principal hereof is payable upon presentation hereof upon maturity, redemption or acceleration, at the principal corporate trust office of **[TRUSTEE, CITY, STATE]** (together with any successor as paying agent under the Indenture, the “Paying Agent”). Interest hereon is payable by check or draft mailed to the owner of Bonds (as defined in the Indenture) hereof, or by wire transfer if the owner hereof owns at least [\$_____] in aggregate principal amount of Bonds as provided in the Indenture. Such interest is payable to the person whose name appears on the bond registration books of the Trustee, as Bond Registrar, as the owner hereof as of the close of business on the fifteenth calendar day of the calendar month preceding an Interest Payment Date, at such person’s address as it appears on such registration books.

[INSERT LANGUAGE REQUIRED BY ACT TO DEFINE TYPE OF OBLIGATION AND ISSUER’S RESPONSIBILITY]

Reference is hereby made to the reverse side of this Bond for additional provisions of this Bond.

It is hereby certified and recited that any and all conditions, things and acts required to exist, to have happened and to have been performed precedent to and in the issuance of this Bond do exist, have happened and have been performed in due time, form and manner as required by

the Trust Indenture dated as of _____, _____ (the “Indenture”) between the Issuer and [TRUSTEE], as trustee, paying agent and registrar (herein “Trustee,” “Paying Agent” and “Bond Registrar,” respectively) and by the Constitution and laws of the State, and that the amount of this Bond is not in excess of the amount of Bonds permitted to be issued under the Indenture.

This Bond shall not be entitled to any benefit under the Indenture, or become valid or obligatory for any purpose, until the certificate of authentication hereon shall have been signed by the Trustee.

IN WITNESS WHEREOF, the Issuer has caused this Bond to be executed in its name and on its behalf by the manual or facsimile signature of its Executive and attested by the manual or facsimile signature of its Attesting Officer **[and its corporate seal (or a facsimile thereof) to be impressed or imprinted hereon]** all as of the date of original issuance hereof.

[ISSUER]

(SEAL)

Attest:

By: _____

Executive

Attesting Officer

[FORM OF CERTIFICATE OF AUTHENTICATION]

This is one of the Bonds referred to in the within-mentioned Indenture, and is one of the Issuer's **[DESIGNATION]** Bonds, Series **[YEAR]** (**[BORROWER]** Project).

TRUSTEE

Date of Authentication: _____ By: _____

Authorized Signatory

[FORM OF REVERSE SIDE OF THE BONDS]

This Bond is one of a duly authorized issue of bonds of the Issuer designated as “[ISSUER] [DESIGNATION] Bonds, Series [YEAR] ([BORROWER] Project)” (the “Initial Bonds”), issued in the aggregate principal amount of \$ _____, pursuant to the provisions of a _____ of the Issuer adopted on _____, _____ (the “Bond Legislation”), and pursuant to the Indenture. The Initial Bonds are issued for the purpose of funding a loan to [BORROWER] (the “Borrower”) for the purpose of **[Insert Appropriate Language]**. The terms and conditions of the loan of the proceeds of the Initial Bonds to the Borrower for such purposes and the repayment of such loan are contained in a Loan Agreement dated as of _____, _____ (as amended, the “Agreement”) between the Issuer and the Borrower.

Reference is hereby made to the Indenture and the Agreement (copies of which are on file at the principal corporate trust office of the Trustee in [CITY, STATE]) and all indentures and agreements supplemental thereto and to the Bond Legislation for a description of the rights thereunder of the Bondholders of the Initial Bonds of the nature and extent of the security, of the rights, duties and immunities of the Trustee and of the rights and obligations of the Issuer and the Borrower thereunder, to all the provisions of which Indenture the Bondholder of this Initial Bond, by acceptance hereof, assents and agrees.

The Initial Bonds and the interest thereon are payable from Revenues that are available to the Trustee pursuant to the Indenture, as and to the extent provided in the Indenture. The Initial Bonds and the interest thereon are secured by a pledge and assignment of said Revenues and of amounts held in certain funds and accounts established pursuant to the Indenture, subject only to the provisions of the Indenture permitting the application thereof for the purposes and on the terms and conditions set forth in the Indenture.

The Initial Bonds further are secured by an assignment to the Trustee of the rights, title and interest of the Issuer in the Agreement. **[In addition, the Borrower has executed and delivered to the Trustee a Mortgage/Deed of Trust dated as of _____, _____ (the “Mortgage/Deed of Trust”), which creates a lien on and security interest in certain Mortgaged Property (defined therein), including the Borrower’s interest in the real estate on which the Project is located.]**

The Initial Bonds are **[special/limited]** obligations of the Issuer and are not a lien or charge upon the funds or property of the Issuer, except to the extent of the aforementioned pledge and assignment. Under certain circumstances set forth in the Indenture and the Agreement, the Issuer may issue Additional Bonds (as defined in the Indenture) pursuant to the Indenture ranking on a parity with the Initial Bonds (the Initial Bonds and any Additional Bonds are referred to

herein collectively as the “Bonds”). Reference is hereby made to the Indenture, the Agreement [and the Mortgage/Deed of Trust] for a description of the rights, duties and obligations of the Issuer, the Trustee, the Borrower, and the owners of the Bonds and the terms upon which the Bonds are issued and secured.

_____ The Initial Bonds maturing in the year _____ are subject to mandatory sinking fund redemption on and after _____ 1, _____, at a redemption price equal to the principal amount thereof redeemed plus accrued interest to the redemption date in the principal amounts set forth in the Indenture.

_____ The Initial Bonds maturing on or after _____ 1, _____ are also subject to redemption by the Issuer prior to maturity any time on or after _____ 1, _____, in whole or in part (and if in part from maturities in such order as determined by the Issuer, and by lot within any maturity, subject to selection by the Securities Depository or the Trustee), at the following redemption prices (expressed as a percentage of the principal amount thereof) plus accrued interest to and including the redemption date:

<u>Redemption Period</u>	<u>Redemption Price</u>
_____ 1, _____ through _____ 1, _____, inclusive	_____%
_____ 1, _____ through _____ 1, _____, inclusive	_____%
_____ 1, _____ and thereafter	_____%

[Insert any Extraordinary Redemption Provisions]

If this Bond is called for redemption and payment is duly provided therefor as specified in the Indenture, interest shall cease to accrue hereon from and after the date fixed for redemption.

Notice of any redemption of Bonds shall be given by mail to the Registered Owners of Bonds to be redeemed not less than twenty (20) days nor more than sixty (60) days prior to the date fixed for redemption.

[FORM OF ASSIGNMENT]

For value received (the undersigned does) hereby sell, assign and transfer unto _____ the within-mentioned registered Bond and hereby irrevocably constitute(s) and appoint(s) _____ attorney, to transfer the same on the books of the Bond Registrar with full power of substitution in the premises.

Bondholder

NOTE: The signature on this assignment must correspond with the name as it appear upon the face of the within Bond in every particular, without alteration or enlargement or any change whatever.

Dated: _____

Signature guaranteed:

NOTE: Signature(s) must be guaranteed by an “eligible guarantor institution” meeting the requirements of the Trustee, which requirements include membership or participation in the Medallion Signature Program.

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FOR
FORM CONDUIT INDENTURE
2019
SECOND EDITION
NATIONAL ASSOCIATION OF BOND LAWYERS

Revised: August 2019

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