

MEMORANDUM FROM



To: Clients and Friends of the Firm
Date: June 1, 2020
Subject: Assembly Bill 10294 – A/Senate Bill 8181-A/Establishes State Disaster Emergency Loan Fund

On May 27, 2020, legislation was adopted and sent to the Governor¹ authorizing IDAs to establish a “State Disaster Emergency Loan Program,” to make loans to small businesses or not-for-profit corporations, and to make grants supporting COVID-19 response actions.

Please note the following summary of the proposed legislation and list of issues to consider in connection with complying with the proposed legislation.

Summary of Legislation

Background	<p>Senate Bill 8181-A, which was substituted for Assembly Bill 10294-A (the “Proposed Legislation”) will amend Section 858 of the General Municipal Law (“GML”) by adding a new Section 859-c to the GML.</p> <p>The amendments to Section 858 of the GML will provide authorization for industrial development agencies (“IDAs”) to make certain grants and loans.</p> <p>The new Section 859-c will create a “State Disaster Emergency Loan Program”.</p> <p>As noted above, the Proposed Legislation has been passed by both the Assembly and the Senate, and has been forwarded to the Governor for his signature. The Proposed Legislation will <u>not</u> become law until the Governor takes action. Accordingly, the below summary is expressly subject to the condition that the Governor takes action to provide for the Proposed Legislation to become law.</p>
Loans	<p>The Proposed Legislation authorizes IDAs to make loans to small businesses or not-for-profit corporations subject to the requirements contained in the State Disaster Emergency Loan Program.</p>
Grants	<p>The Proposed Legislation also authorizes IDAs to provide grants to small businesses and not-for-profit corporations.</p>
Definitions	<p>“Eligible entity” means both small businesses and not-for-profit corporations that:</p> <ul style="list-style-type: none">• Are physically located in New York State; and• Were in operation prior to the State disaster emergency. <p>“Grace period” means the 60-day period after a State disaster emergency ends.</p> <p>“Small business” means a business with not more 50 employees.</p>

¹ Assembly Bill 10294-A was passed by the Assembly. A companion bill, Senate Bill 8181-A was passed by the Senate, also on May 27, 2020. The legislation has been delivered to the Governor’s office for signing.

	<p>“Small not-for-profit corporation” means a not-for-profit corporation formed pursuant to the not-for-profit corporation law with not more than 50 employees.</p> <p>“State disaster emergency” means the period in which Executive Order 202 of 2020, as amended, is in effect to address the outbreak of COVID-19.</p>
Requirements Regarding Grants	<p>Grants may be provided for the following:</p> <ul style="list-style-type: none"> • Acquiring personal protective equipment, or • Installing fixtures necessary to prevent the spread of COVID-19. <p>Grants may be provided during the period that Executive Order 202 of 2020, as amended, is in effect.</p> <p>IDAs may not provide a small business or not-for-profit corporation with more than \$10,000 in grants pursuant to the Proposed Legislation.</p> <p>In order to be eligible for a grant, a small business or a not-for-profit corporation must meet the following requirements:</p> <ul style="list-style-type: none"> • Was a financially viable entity prior to the State disaster emergency; • Conducts business in the area served by the IDA; and • Has been negatively affected by the State disaster emergency.
State Disaster Emergency Loan Program	<p>IDAs may administer a State Disaster Emergency Loan Program to provide loans from available revenues to “eligible entities”. IDAs may not create more than one State Disaster Emergency Loan Program.</p>
Requirements for Making a Loan	<p>IDAs may make a loan to an eligible entity upon application from such entity through the State Disaster Emergency Loan Program, provided the IDAs have determined that the applicant:</p> <ul style="list-style-type: none"> • Was a financially viable entity prior to the State disaster emergency; and • Conducts business in the area served by the IDA; and • Has been negatively affected by the State disaster emergency. <p>IDAs may consider the following before approving the application of an eligible entity for a loan under the State Disaster Emergency Loan Program:</p> <ul style="list-style-type: none"> • Creditworthiness of the applicant prior to the State disaster emergency • The level of negative impact of the State disaster emergency on the operations and finances of the applicant • Applicant’s proposed plan to use the funds received through the State Disaster Emergency Loan Program • Applicant’s ties to their community and the impact of their work in the area served by the IDA

	<ul style="list-style-type: none"> • Applicant’s assurance that efforts will be made to retain jobs during the State disaster emergency • Other potential sources of funding available to the applicant
Terms of Loan	<p>Prior to the administering of a State Disaster Emergency Loan Program, an IDA shall develop and adopt by resolution, the terms and conditions of such loans, provided that:</p> <ul style="list-style-type: none"> • The amount of any loan shall not exceed \$25,000 (and provided further that the total amount of all loans received by an eligible entity shall not exceed \$25,000); and • The loan agreement shall not (i) require repayment during the grace period, or (ii) charge interest on the principal amount; and • The loan agreement shall require that the eligible entity repay the loan in full not later than one year after the end of the grace period; and • The loan agreement shall not contain a fee or penalty for the prepayment or early payment of the loan.
Priority for Highly Distressed Areas	<p>IDAs shall give priority under the State Disaster Emergency Loan Program to applications from applicants servicing highly distressed areas (as defined in Section 854 of the GML).</p>
Only One Loan	<p>No applicant shall be permitted to receive more than one loan from more than one IDA.</p>
Coordination Among IDAs	<p>Any IDAs that serve within the same municipalities shall coordinate the distribution of loans in the State Disaster Emergency Loan Program.</p>
Credit Counseling	<p>IDAs shall offer credit counseling services or refer eligible entities to not-for-profit credit counselors.</p>
Recordkeeping	<p>Each IDA shall maintain records related to the State Disaster Emergency Loan Program, including a record of loans issued and of payments received, and include such information in the annual PARIS filing.</p> <p>Each IDA that establishes a State Disaster Emergency Loan Program shall submit a report on the State Disaster Emergency Loan Program including, but not limited to, the number and aggregate amount of loans given, loans fully repaid, any outstanding loans, defaults and bad debts, to the following within one year after the State disaster emergency ends: the Governor, the Speaker of the Assembly and the Temporary President of the Senate.</p>
Interest Deferral	<p>Any interest deferred or not charged relating to a loan issued under the State Disaster Emergency Loan Program shall be exempt from all state taxes that may be applicable to such interest amounts. IDAs shall disclose to eligible entity borrowers in loan documents that there may be federal tax consequences to the program loans.</p>
No New Applications After State Disaster Emergency Ends	<p>No new loan applications for loans under the State Disaster Emergency Loan Program shall be accepted after the State disaster emergency ends.</p>
Effective Date:	<p>The Proposed Legislation is effective immediately (once signed by the Governor) and shall expire and be deemed repealed on December 31, 2021.</p>

Please note the following list of preliminary issues we have identified that IDAs need to consider and discuss with counsel in connection with the compliance with the Proposed Legislation.

	Issue	Summary Discussion
1.	Administration of Program	Under other sections of the GML, IDAs have the power to enter into contracts and to hire consultants. It would appear, therefore, that IDAs could contract with outside parties for assistance in undertaking the loan and grant programs outlined in the Proposed Legislation. Our view, however, would be that the IDA should be involved in the actual approval of the loan and/or the grant and not delegate that task to an outside consultant.
2.	Available revenues	The Proposed Legislation provides that IDAs may administer a State Disaster Emergency Loan Program from “available revenues”. Available revenues are not defined in the Proposed Legislation, but it would appear to include moneys generated by IDAs through the collection of administration fees.
3.	Definition of Personal Property and Fixtures	We would suggest using the typical definitions contained in federal tax law.
4.	Acquiring and installing	Note that the Proposed Legislation describes “acquiring” personal property and “installing” fixtures. Can grant moneys be used to acquire fixtures?
5.	Number of employees	The Proposed Legislation is not clear on how the number of employees is determined. Namely, FTEs? Include part-time employees?
6.	Interest on Loan	Although there is some ambiguity in the Proposed Legislation, it appears that the loan cannot accrue interest.
7.	Coordination with Other IDAs	In municipalities where there are overlapping IDAs, there will be need for coordination among the IDAs.
8.	Loan Documents	There will be need for careful drafting to ensure compliance with the grace period and maturity date provisions contained in the Proposed Legislation.
9.	Claw-back Provisions	The Proposed Legislation does not restrict the ability of IDAs to impose additional requirements on the making of loans and grants, including the imposition of claw-back agreements.
10.	Existing Loans	Any grant or loan made by an IDA under the Proposed Legislation is subject to existing loans and covenants of the project applicants.
11.	Fees and Expenses	The Proposed Legislation does not prohibit IDAs from charging fees and expenses, including attorneys’ fees. If such fees are to be paid out of the proceeds of the loan or grant, then the amount of the loan or grant must be reduced to reflect the loan and grant limit contained in the Proposed Legislation.
12.	Recordkeeping	Given the amount of regulatory oversight IDAs are subject to, it is very important that IDAs maintain careful and complete records of its grants and loans.

If you have any comments or questions on the Proposed Legislation, please do not hesitate to contact the following attorneys:

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