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## **Maine: Ranked Number One for Low Tax Burden on New Investment and Job Creation**

*As evident from the discussion that follows, Maine has made great strides in reducing the tax burden on new investment in the state.*

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**M**aine's number one ranking in a recent report on the competitiveness of state and local business taxes on new investment, prepared by Ernst & Young LLP in conjunction with the Council on State Taxation (COST), took many by surprise.<sup>1</sup> Against the backdrop of numerous negative reports about Maine's business climate and tax burden (for example Forbes Magazine ranked Maine dead last in its list of best states for business<sup>2</sup>), the Ernst & Young/COST study recognizes the successes of Maine's lawmakers in lowering the marginal tax rate for new investment and related jobs.

One of the best-kept secrets about Maine is that over the last two-plus decades, political leaders in both parties have taken serious, concrete steps to reduce the tax burden on manufacturers and other businesses that make capital investments leading to the creation of new jobs. The different result reached by the Ernst & Young/COST study, as opposed to the various negative reports about Maine's tax burden, is explained in large part by the fact that the Ernst & Young/COST study goes beyond tax rates by taking into account tax base and likely investment base by industry.

The Ernst & Young/COST study found that Maine's effective tax rate of 3% for new investment by durable and nondurable goods manufacturers, R&D facilities, headquarters facilities, and office and call centers

ranks lowest in the nation. In New England, only New Hampshire—at nearly twice the level of Maine's effective tax rate—also made the top ten in that study.

The low rate is the result of various tax provisions and incentives enacted and maintained on a nonpartisan basis by Democrats, Republicans, and Independents in multiple legislatures and administrations. The Ernst & Young/COST study notes in particular Maine's property tax incentives (the "business equipment tax reimbursement" (BETR) and "business equipment tax exemption" (BETE) programs<sup>3</sup>), favorable sales and use tax climate, and a favorable corporate tax apportionment formula for multistate businesses. Very favorable Pine Tree Economic Development Zone benefits and Property and Income Tax Increment Financing programs also contribute to a favorable tax climate for new investment.<sup>4</sup>

The newly enacted Maine New Markets Capital Investment Program and the expansion of the Maine Seed Capital Tax Credit (both occurring after publication of the Ernst & Young/COST study) further help to ensure that start-up businesses can receive equity and debt financing on favorable terms, thus allowing them to make additional capital investments in machinery, equipment, and hiring employees.

Behind these achievements have been significant efforts by business leaders, and numerous business coalitions led by the authors' firm, Pierce Atwood, who were intent on improving Maine's investment climate and job market. The following discussion reviews significant milestones in Maine's progress toward business tax competitiveness, starting with the enactment of the BETR program and ending with the changes proposed by Maine's Governor Paul LePage and enacted as a part of Maine's 2012-2013 Biennial Budget. It concludes with a discussion of goals for future improvement, including further reductions to the individual income tax rate, relief from the pre-BETR/BETE "imbedded" property tax burden on machinery and equipment at older industrial facilities, and elimination of the sales factor "throw-out" provision.

## **Property Taxes**

By the early 1990s, Maine's legislature recognized the need for business tax competitiveness and, in response, enacted several tax credits, incentive programs, and sales tax exemptions designed to spur investment in Maine and to level the playing field for Maine businesses.<sup>5</sup> Nonetheless, businesses seeking to expand or modernize their facilities in Maine continued to run into a significant impediment in the form of high personal property taxes imposed on business equipment. Business personal property

was taxed at the same tax rate as other property within a municipality; the rate varied by municipality but averaged about 1.7% of fair market value.

**BETR program.** The solution, however, was hard to come by. On the one hand, Maine's Constitution requires that state-level funds be used to reimburse municipalities at least 50% for revenues lost as a result of any "statutory property tax exemptions or credits enacted after April 1, 1978."<sup>6</sup> On the other hand, municipalities were not prepared to part with even 50% of the revenues associated with the personal property taxes assessed on business equipment. Politically, exemption from property tax for business property seemed to be a no-go. Through persistence of business leaders, a coalition of manufacturers and other capital-intensive businesses, and then-Governor Angus King, however, a program was designed and enacted that side-stepped the municipal-related political difficulties of enacting a property tax exemption. This program was ultimately known as BETR (pronounced "better").

When originally enacted in 1995, BETR provided for property owners to be reimbursed from the state general fund for municipal property taxes paid on qualifying business equipment. Qualifying equipment included most depreciable equipment that was devoted to business purposes and first placed in service in Maine beginning after 4/1/95.<sup>7</sup> The reimbursement was available for 12 years, running from the date the property was first placed in use in Maine.

But as funding demands grew with each new year of qualifying investment, the program became a big-ticket item<sup>8</sup> and, as time passed, funding of the BETR program became an annual target for legislators seeking to fund other state government programs. As a result, annual lobbying by the business community to protect funding has been required.

**BETE program.** In 2006, a business coalition was again formed to seek enactment of a "business equipment tax exemption" (BETE, pronounced "Betty").<sup>9</sup> This effort succeeded, in part because the impact of the exemption was effectively phased in over time by applying it to only new investment, and businesses made some related concessions. As with BETR, BETE applies to "qualifying property" with similar limitations, the major difference being that BETR rather than BETE continues to apply to most retail sales facilities (certain large retail sales facilities were excluded from both BETR and BETE). BETE applies to equipment first subject to assessment after March 2008. Under BETE, municipalities were reimbursed for 100% of the revenue loss resulting for the exemption for the year beginning 4/1/08, then generally on a basis that declines ten percentage points each year until property tax year 4/1/13, after which the reimbursement percentage remains at 50%, the minimum required by the Maine Constitution.

The legislation enacting BETE placed some limitations on reimbursement under BETR for property covered by a municipal tax financing credit enhancement agreement pursuant to which the business received financing payments funded from property taxes that, when combined with the BETR reimbursement, exceeded 100% of the tax paid.<sup>10</sup> (Doubling up of BETR and tax increment financing benefits was unpopular with some legislators, who saw this as an inappropriate "double dip.") In exchange, however, BETR reimbursement, which continues to have importance for property first placed in service before April 2008, and for certain retail sales facilities, was extended at a reduced rate beyond its original 12 years. The rate declines to 75% for the 13th year for which reimbursement is claimed, and declines by five percentage points each year through the 18th year; thereafter the reimbursement remains at 50% of the taxes paid.<sup>11</sup>

## **Income Taxes**

The Ernst & Young/COST study notes that Maine has adopted a favorable income apportionment formula for multistate businesses that, under the parameters of the study, more than offsets the impact of Maine's relatively high corporate income tax rate (8.93%) for new investment in the state. In 1991, Maine revised its three-factor formula to double-weight sales, and in 2007, for tax years beginning after 2006, it replaced that formula with a single sales-factor formula.<sup>12</sup> Both changes were made with the intent of favoring Maine investment: under a three-factor formula, additional investment in Maine would be reflected in a proportional increase in the income tax base, whereas under a single sales-factor formula, additional facilities and employees can be added in Maine without any impact on the business's tax base (unless Maine sales also increase). By apportioning income on the basis of sales shipped or delivered to customers within the state, a single sales-factor formula can significantly reduce income tax for a multistate business located in a state with a relatively low population such as Maine.<sup>13</sup>

Not reflected in the Ernst & Young/COST study is the impact of Maine's unitary combined reporting tax scheme. As noted in that study, combined reporting can have a positive or negative impact on liability relative to separate-entity reporting, depending on various factors. Concerns or uncertainty with regard to the effect of including the income of the entire unitary business in the tax base can discourage companies from expanding into the state, regardless of the favorable formula.

**More apportionment formula changes.** Two recent changes in the apportionment formula also may detract from the benefit of the single sales factor, depending on circumstances of the business. First, in 2009 Maine substituted a statutory "throw-out" rule for its "throw-

back" rule for sales made into jurisdictions where the business is not taxable.<sup>14</sup> Under the revised statute, sales made by a Maine taxpayer that, under a sales-destination test, would be assigned to a state that has no jurisdiction to tax the seller are removed from the numerator and denominator of the apportionment formula.<sup>15</sup> In effect, additional income is apportioned to states where the taxpayer has established nexus, including Maine. This provision may be subject to challenge on constitutional grounds, similar to the challenges made to New Jersey's (now repealed) throw-out rule.<sup>16</sup>

Second, in 2010 the Maine Legislature effectively reversed a 1996 Maine Supreme Court ruling that had adopted the so-called "Joyce" approach to apportionment of unitary business income.<sup>17</sup> Under that approach, each member of a combined group is treated as a taxpayer and the Maine apportionment formula numerator includes sales of only the members with Maine tax nexus. Now, however, the statute requires the so-called "Finnigan" approach, whereby if any member of the unitary group has nexus with Maine, a sale into the state by any other member of the group is included in the sales factor numerator, even if the selling entity does not have nexus with Maine.<sup>18</sup>

Both of these changes create at least some disincentive for a business to establish or maintain nexus in Maine and, as a result, undermine the business development benefits of adopting a single sales factor.

**Development zones, tax increment financing.** Also not discussed in the Ernst & Young/COST study are Maine's impressive and broadly available Pine Tree Development Zones (PTDZ) and the Property Tax Increment Financing program. The PTDZ program was created in 2003 under Governor John Baldacci to encourage economic development in targeted areas of the state where unemployment was relatively high and/or wages were relatively low.<sup>19</sup> In 2009, as a response to the economic downturn, the legislature extended the PTDZ program to *all areas* of the state, not just economically distressed areas.<sup>20</sup> To qualify, a business must be in the manufacturing, financial services, or targeted technology sectors and must make investments that result in the creation of new jobs.

A business located in a PTDZ receives various tax benefits and other incentives. Among these is a five-year income tax holiday, by way of a credit for all corporate income taxes related to the PTDZ business.<sup>21</sup> In most areas of the state, a 50% income tax credit is available to such businesses for an additional five years. PTDZ incentives also include enhanced employment tax increment financing (E-TIF) benefits.<sup>22</sup> With limited exceptions, the benefit of E-TIF is the reimbursement to the employer of 80% of all new employees' Maine income tax withholdings for up to ten years (the employees get full credit for the withholdings, of course).<sup>23</sup> To qualify for the E-TIF, a business must create a minimum of five new full-

time Maine jobs within a two-year period. Furthermore, the employees' compensation must be above the county's average per capita wage, and they must have access to group health insurance and a qualified retirement program.

In addition, as discussed further below, substantial sales tax benefits also are available to qualifying PTDZ business.

## **Seed Capital Investment Tax Credit**

The Seed Capital Investment Tax Credit, first created in 1987, was recently expanded.<sup>24</sup> The Seed Capital Credit is designed to encourage equity capital investments in Maine businesses, and especially in Maine start-ups. Eligible investors who apply to the Finance Authority of Maine (FAME) may receive a tax credit over four years equal to 40% of their investment; the credit is increased to 60% for a business located in "a high-unemployment area." To qualify, the business must either (1) be a manufacturer, (2) produce a product or service that will be sold predominantly outside Maine, (3) be engaged in the development or application of advanced technologies, (4) be engaged in television or film production, or (5) otherwise bring capital into the state.<sup>25</sup>

Because an eligible business's gross sales may not exceed \$3 million, and because the principal owner of the business must be engaged in the enterprise on a full-time basis, small businesses and start-ups are the prime recipients of eligible seed capital. There are also limits on the amount of an individual's qualifying investment, the total qualifying investments received by a business, and the total credits authorized. The authorized credits have been expanded significantly to \$30 million, corresponding to as much as \$75 million of seed capital equity investments.

## **New Income Tax Incentives for Business**

Governor LePage, who took office in January 2011, ran on a platform that included a promise to lower Maine's "excessive" tax burden and to bring jobs to the state. The first budget during the governor's tenure included several new efforts to spur investment throughout Maine, including the Maine New Markets Capital Investment Program, the Maine Capital Investment Credit, and conformity to the federal thresholds under the Section 179 "election to expense certain depreciable business assets."

**New Markets Capital Investment Program.** Like the Seed Capital Investment Credit, Maine's New Markets Capital Investment Program offers a tax credit for those

investing in certain businesses, and it is administered by FAME.<sup>26</sup> For the most part, the similarities end there. The New Markets Program is based on the federal New Markets Tax Credit (NMTC) program, which was created in 2000 and has been reauthorized by Congress several times with strong bipartisan support.<sup>27</sup>

The federal NMTC was created to spur investment in low-income communities, which suffered from a lack of investment capital due to a perceived greater risk associated with those communities. The Maine New Markets Program has a similar goal: to encourage "investment in qualified businesses and developments located in economically distressed areas of the State and the creation and preservation of jobs..."<sup>28</sup> Several states have created similar programs over the past few years. Maine, however (the smallest state by population to have a new markets program), has the distinction of creating the largest single state new markets tax credit allocation, allowing up to \$250 million of qualified equity investments (discussed below), giving rise to \$97.5 million of tax credits.

The Maine program piggybacks on the substantial rulemaking and procedures created under the federal NMTC. Like the federal credit, the Maine New Markets Credit is available for "qualified equity investments" in "community development entities" that have received an allocation of tax credits (from the Community Development Financial Institutions Fund on the federal level; from FAME in Maine) and use substantially all the proceeds of the equity investment to make qualified low-income investments in qualified active low-income community businesses. The Maine Credit is 39% of the investment, claimed over seven years beginning with 7% in year three, and 8% in each of the years four through seven (the 39% federal credit is claimed in increments of 5% for each of the years one through three, and 6% for years four through seven).

A community development entity (CDE) is the hub for all new markets tax credit transactions. Each CDE must apply for the authority to issue tax credits to investors who will acquire long-term debt or equity (just equity, for federal purposes) in the CDE (or its subsidiary CDE) in exchange for the tax credits. The proceeds of those investments are, in turn, invested (through debt or equity) in qualified active low-income community businesses.

Unlike the Seed Capital Credit, almost any type of business, including a nonprofit, can qualify to receive the investment. The only exceptions to qualification are passive businesses (such as an intangible property holding company) and certain so-called "sin" businesses like liquor stores, casinos, and massage parlors.<sup>29</sup>

To be eligible, a business must be located in a low-income community or primarily serve, employ, or be owned by low-income individuals. In general terms, a low-income community is a census tract that has a poverty rate in excess of 20%, or a median family income that is not more than 80% of the statewide average.

If a business is able to qualify, the benefit to the business is often in the form of substantially below-market interest rates and/or cancellation of a portion of a loan from the CDE to the business after the expiration of the seven-year credit period. Alternatively, if the CDE's investment in the business is in the form of equity rather than debt, the business may be able to issue the equity on favorable terms because the investor receives part of its desired return in the form of tax credits.

Significantly, the Maine New Markets credit is fully refundable; an investor does not need to owe Maine tax to receive the credit. The legislature made the credit refundable to help bring out-of-state capital into Maine.

The Maine New Markets Program was the brainchild of several CDEs operating within Maine and those with a track-record of success with other states' new markets programs. Although the program creates a one-time tax credit allocation, the goal of those who helped to create the program is to show its success in creating and saving jobs, so that future legislatures will create new allocations of tax credit authority, just as Congress has, over the years, reauthorized (and expanded) the federal program. (The sidebar, "Maine's New Markets Capital Investment Program: Allocation of Tax Credit Authority," accompanying this article, describes the application process. Exhibit 1 illustrates the most common form of NMTC transaction.)

Maine's program can be coupled with federal NMTCs, such that an investor may receive tax credits equal to 78% (39% federal and 39% Maine) of its investment. The extent to which an investor can qualify for both the Maine Seed Capital Credit and the state's New Markets Credit is not entirely clear, but it seems unlikely that the same investment would qualify for both credits because the investor's equity investment for new markets purposes is actually in a CDE, and not in the qualifying business.

**Capital Investment Credit.** Over the last several years, Congress has periodically allowed businesses to claim so-called bonus depreciation with respect to new purchases of equipment and other property used in the business.<sup>30</sup> For most of 2010, bonus depreciation was 50% of the basis of the property. In 2011, it is 100%, and in 2012 it reverts back to 50%.<sup>31</sup> Much to the chagrin of many Maine

businesses, the state did not follow suit. As of 1/1/11, however, Maine businesses may take advantage of the Maine Capital Investment Credit, which is meant to simulate bonus depreciation for certain types of property.

If a Maine taxpayer claims on its federal tax return bonus depreciation for property placed in service in Maine, the taxpayer will receive a Capital Investment Credit against its Maine income tax.<sup>32</sup> The credit is 10% of the bonus depreciation claimed on the taxpayer's federal return, and the basis of the property for Maine purposes is reduced as if the bonus depreciation deductions had actually been taken.

Because Maine's corporate income tax rate is 8.93%, the credit is more valuable than a deduction. For example, if instead of enacting this credit, the legislature had conformed to federal bonus depreciation, a Maine corporate taxpayer that claimed 100% bonus depreciation on \$100 of property would reduce its tax liability by \$8.93. In contrast, the Capital Investment Credit on that same property would be \$10.

The Capital Investment Credit is recaptured if the property is not used within Maine for the entire 12-month period following the date it is placed in service in the state.

**IRC Section 179 expensing.** For many years Congress has allowed small businesses to currently expense otherwise depreciable property.<sup>33</sup> The cost of the property that may be expensed for federal purposes is limited: \$250,000 per year for 2007 through 2010, and \$500,000 for 2011. Prior to 2011, Maine did not conform to the federal expensing limitations,<sup>34</sup> and in 2010 a small business in Maine was allowed to expense only \$25,000 of property. Because Maine now conforms to the federal dollar limitations, in 2011 a small business will be allowed to expense, for Maine tax purposes, up to \$500,000 of IRC Section 179 property.<sup>35</sup>

## **Sales and Use Tax**

Maine not only employs a relatively low state sales tax rate (5%), as noted by the Ernst & Young/COST study it has no local sales taxes. Moreover, Maine's sales and use tax exemptions are very favorable to businesses. Exemptions exist for: air and water pollution control facilities; machinery and equipment used in research and development; instrumentalities of interstate commerce; packaging materials; and products used in agriculture or fishing. Also, qualified Pine Tree Development Zone businesses may (for the first five or ten years, depending on specific location) (1) make exempt purchases of tangible personal property for use directly and primarily in a qualified business activity, and (2) claim reimbursements for

sales and use taxes paid on tangible personal property that is physically incorporated in and becomes a permanent part of real property that is owned by or sold to the business and that is used directly and primarily by that business in one or more qualified business activities.<sup>36</sup>

Manufacturers can qualify for exemptions for purchases of machinery and equipment used directly and primarily in production, and property that becomes an ingredient or component part or is consumed in production, as well as an exemption on 95% of the cost of fuel and electricity used at a manufacturing facility.<sup>37</sup> In addition to actively working for legislative changes, a coalition of manufacturers has also worked together to obtain very clear, comprehensive guidance on the application of the manufacturing exemptions, which has all but eliminated significant litigation in this area.<sup>38</sup>

Furthermore, the recently enacted exemption for aircraft is helpful to businesses that fly executives to operations within Maine.<sup>39</sup>

## Individual Income Tax

Maine has had a relatively high individual income tax, a concern for businesses organized as pass-through entities. Recent legislation enacted as a part of the biennial budget begins to address this concern by lowering the top rate from 8.5% to 7.95%, effective for tax years beginning after 2012.<sup>40</sup> The budget bill also conforms to federal standard deductions and personal exemptions as of 1/1/12, which will reduce or eliminate the tax liability for many low-income Mainers.<sup>41</sup>

## Case Study

A start-up manufacturing company is considering whether to locate its business in Maine. The company applies to the state's Department of Economic and Community Development for Pine Tree Development Zone benefits. Seeking capital to fund its operations, the company looks to the Seed Capital Credit and the Maine New Markets Capital Investment Program. It may receive:

- Equity investments of \$5 million that qualifies for the Seed Capital Credit. Because the investors will qualify for tax credits equal to \$3 million, the equity investment is on very favorable terms. (Indirect benefit of up to \$3 million.)
- Debt financing of \$10 million from a community development entity. Because the investors who financed the CDE will qualify for tax credits of \$3.9 million, the debt is at substantially below-market rates, and a portion of the debt may even be forgiven at the end of seven years. (Indirect benefit of

up to \$3.9 million.) If the investors also receive federal new markets tax credits, the business may see an increased benefit.

Having decided to locate in Maine, the business now has \$15 million of capital that it received on extremely favorable terms. It purchases \$10 million of manufacturing equipment and materials to improve its factory.

- The company pays no sales or use tax on the property as part of the PTDZ Program (\$500,000 benefit).
- The company claims bonus depreciation on its federal income tax return, and thus receives a Maine Capital Investment Credit. Although the full credit may not be claimed in year one (as a start-up, the company likely will have minimal income or even a loss), any excess credit can be carried forward for 20 years to offset future tax liabilities (\$1 million benefit).
- Under BETE, the business will pay no property taxes on the new equipment that qualifies for this benefit. (Approximate benefit of \$170,000 in year one, declining over time with property value.)
- The company receives a Maine income tax credit of 100% of its corporate income tax on PTDZ-related income for the first five years, and a 50% credit for the second five years. (Benefit depends on the success of the business, but it could be substantial.)

The business uses the remaining \$5 million of capital to purchase real property, and receives tax increment financing from the local municipality.

- The company enters into an agreement to have 50% of the property taxes (at a rate of 1.7%) related to real property returned to the taxpayer for 20 years (\$42,500 benefit per year).

Because the business has created more than five new full-time jobs, it also receives Employment Tax Increment Financing.

- The company receives a reimbursement of 80% of its new employees' Maine income tax withholdings for the first ten years of operations (approximate benefit of \$3,000 to \$5,000 per employee).

## **Consider Further Improvements; Conclusion**

As evident from the Ernst & Young/COST study and the substantial new incentives discussed above, Maine has made great strides in reducing the tax burden on new investment in the state. Additional work remains, however.

The "throw-out" rule deviates from and undermines the benefits of using a single sales factor apportionment formula, as discussed above, and also creates a perception of unfairness where two businesses with exactly the same activities in Maine are taxed at different rates depending wholly on whether the business's products are delivered outside Maine to states where the taxpayer lacks nexus. Elimination of this rule would improve the business climate.

Further reductions in the top personal income tax rate would help attract corporate headquarters operations to the state and would reduce taxes for businesses organized as pass-through entities. Elimination of the imbedded pre-BETR and pre-BETE property tax on older industrial equipment would also help to put Maine businesses on a level playing field with other states that have eliminated personal property tax on business property. Most of the states in the northeast already have eliminated personal property taxes on manufacturing equipment. Meanwhile, and perhaps most important, Maine businesses continue to engage in organized and vigilant efforts to maintain BETR funding and other incentives in the face of repeated challenges by legislators looking to reduce tax expenditures. [ ]

## **Sidebar**

### **Practice Note: Maine's New Markets Capital Investment Program: Allocation of Tax Credit**

#### **Authority**

Based on the federal New Markets Tax Credit program (IRC Section 45D), Maine's New Markets Capital Investment Program is, as discussed in the accompanying article, intended to encourage "investment in qualified businesses and developments located in economically distressed areas of the State and the creation and preservation of jobs" (10 Me. Rev. Stat. Ann. §1100-Z.1). For the Maine program, the application process for an entity seeking allocation of tax credit authority is described in 10 Me. Rev. Stat. Ann. §1100-Z.3.B, as follows:

"A qualified community development entity that seeks an allocation of tax credit authority shall apply to the [Finance Authority of Maine]. The qualified community development entity shall submit an application on a form that the authority provides. The application must include:"

"(1) The name, address and tax identification number of the entity and evidence of the certification of the entity as a qualified community development entity;"

"(2) A copy of an allocation agreement executed by the qualified community development entity, its controlling entity or other entity controlled by the same controlling entity and the Community Development Financial Institutions Fund of the United States Department of the Treasury, which includes the State in its service area;"

"(3) A certificate executed by an executive officer of the qualified community development entity attesting that the allocation agreement remains in effect and has not been revoked or canceled by the Community Development Financial Institutions Fund;"

"(4) Information regarding the amount of tax credit authority requested and the proposed use of proceeds from the issuance of the qualified equity investment or long-term debt security; and"

"(5) Responses to the following 5 questions, which must be answered affirmatively or negatively without explanation or elaboration, to determine qualification for participating in the program:"

"(a) Whether the Community Development Financial Institutions Fund has awarded multiple rounds of federal New Markets Tax Credit allocation to the qualified community development entity, its controlling entity or other entity controlled by the same controlling entity;"

"(b) Whether the qualified community development entity, its controlling entity or other entity controlled by the same controlling entity has participated as a qualified community development entity in a state New Markets Tax Credit program or has made an investment in this State that qualifies for federal New Markets Tax Credits;"

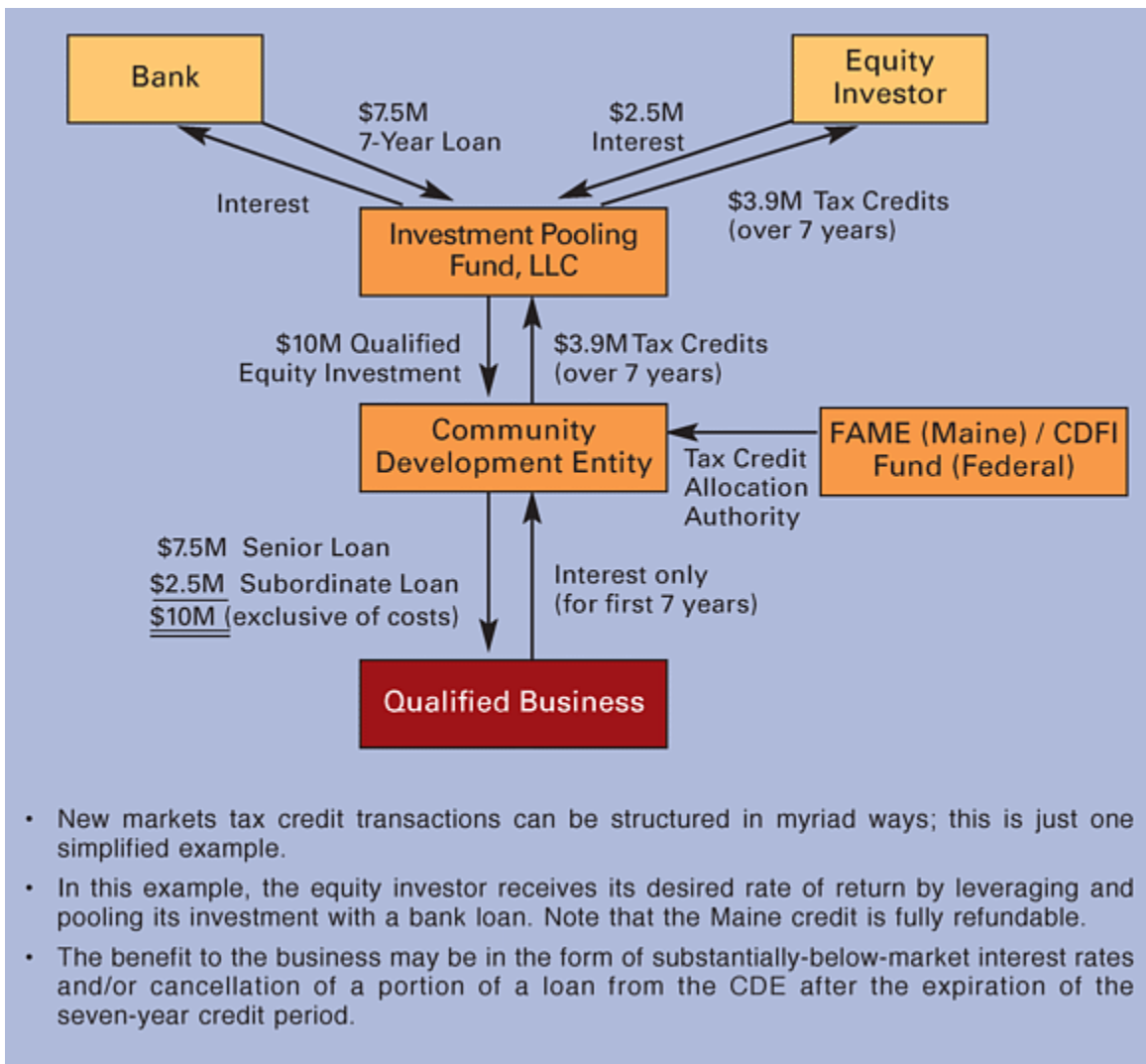
"(c) Whether the qualified community development entity, its controlling entity or other entity controlled by the same controlling entity has made an investment qualified for tax credits in a business located in a nonmetropolitan census tract;"

"(d) Whether the qualified community development entity, its controlling entity or other entity controlled by the same controlling entity has made an investment qualified for tax credits in a state where it did not previously have substantial operations; and"

"(e) Whether the qualified community development entity, its controlling entity or other entity controlled by the same controlling entity has explored potential investment opportunities in this State that would qualify under this subchapter."

"Applicants answering affirmatively to 4 or more of the 5 questions must be determined to be qualified."

### Exhibit 1. Typical Example of Leveraged New Markets Tax Credit Transaction



## ENDNOTES

1

Cline, Philips, and Neubig, "Competitiveness of State and Local Business Taxes on New Investment: Ranking States by Tax Burden on New Investment" (Ernst & Young LLP and Council on State Taxation, April 2011), available online via the EY website at [www.ey.com](http://www.ey.com) or the COST website at [www.cost.org](http://www.cost.org) (click on "State Tax Library" and "COST Studies, Articles, and Reports").

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2

Badenhausen, "The Best States for Business and Careers," *Forbes Magazine*, 10/13/10, available online via the Forbes website at [www.forbes.com/2010/10/13/best-states-for-business-business-beltway-best-states.html](http://www.forbes.com/2010/10/13/best-states-for-business-business-beltway-best-states.html).

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3

For more on the BETR program and some other Maine incentives, see generally Good and Liddell, "Maine Adds Economic Development Zones to Its Incentives Tool Kit," 14 *J. Multistate Tax'n* 30 (June 2004).

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4

See Creamer, "Maine: Legislation Seeks to Boost the State's Economy on Two Fronts," 19 *J. Multistate Tax'n* 41 (Nov/Dec 2009); see also Good and Liddell, *supra* note 3.

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5

For example, the Jobs and Investment Tax Credit, 36 Me. Rev. Stat. Ann. §5215 (a rough corollary to the federal investment tax credit); the Seed Capital Investment Tax Credit, 36 Me. Rev. Stat. Ann. §5216-B (a credit for equity investments in certain businesses, discussed in detail below); sales tax exemptions for manufacturing, energy, and repair and replacement parts, 36 Me. Rev. Stat. Ann. §1760; Employment Tax Increment Financing, 36 Me. Rev. Stat. Ann. ch. 917 (§§6751 to 6761); and municipal tax increment financing, 30-A Me. Rev. Stat. Ann. ch. 206.

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6

Me. Const., art. IV, §23.

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7

1995 Me. Laws, P.L. 368, §FFF-2, codified at 36 Me. Rev. Stat. Ann. ch. 915, §§6651 to 6665.

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8

For example, the state estimates costs of funding BETR for 2010 and 2011 to be \$65.7 million and \$60 million, respectively.

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2005 Me. Laws, P.L. 623, §1, codified at 36 Me. Rev. Stat. Ann. ch. 105, §691 *et seq.*

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10

2005 Me. Laws, P.L. 623, §3, codified at 36 Me. Rev. Stat. Ann. §6652(1).

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11

36 Me. Rev. Stat. Ann. §6652(4).

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12

2007 Me. Laws, P.L. 240, §V-2, amending 36 Me. Rev. Stat. Ann. §5211(98). Also in 2007, and applicable to tax years beginning after 2006, the statute was changed to source receipts from sales of services and intangibles to the market state (i.e., location of the customer). See 2007 Me. Laws, P.L. 240, §V-9, enacting 36 Me. Rev. Stat. Ann. §5211(16-A). Previously, under now-repealed §5211(16), sales "other than sales of tangible personal property" were sourced based on cost of performance. Again, this change favors in-state investment in facilities and employees. For more on market-based sourcing generally, see Sutton, Yesnowitz, Jones, and Conley, "The Nuances of Market-Based Sourcing of Service Revenue: Not All Markets Look the Same," 21 J. Multistate Tax'n 6 (May 2011).

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13

For more on this subject generally, see, e.g., "Wisconsin: State Enacts Single-Factor (Sales) Income Tax Apportionment," 13 J. Multistate Tax'n 43 (Nov/Dec 2003); Goodman, Marcus, Wethekam, Hughes, and Browdy, "Single-Factor Sales Apportionment: A Tax Incentive for the Future," 7 J. Multistate Tax'n 196 (Nov/Dec 1997).

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14

2009 Me. Laws, P.L. 213, §§NN-1 and NN-2, amending 36 Me. Rev. Stat. Ann. §§5211(14) and 5211(15)(B).

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15

36 Me. Rev. Stat. Ann. §5211(14).

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16

See, e.g., Whirlpool Properties, Inc. v. Director, Division of Taxation, 25 NJ Tax 519, 2010 WL 2795154 (Super. Ct. App. Div., 2010), *aff'd as modified* 208 N.J. 141, 26 A3d 446 (2011). The superior court decision was analyzed in Sollie and Gutowski, "New Jersey: Appellate Court Upholds Throwout Rule; Supreme Court Will Hear Appeal," 20 J. Multistate Tax'n 37 (February 2011). The New Jersey Supreme Court opinion will be the subject of an article in an upcoming issue of The Journal [see Meleney and Santoro, "A Constitutional Challenge to New Jersey's Throw-Out Rule--Impacting New Jersey and Beyond" 21 J. Multistate Tax'n 6 (January 2012)].

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17

See Great Northern Nekoosa Corp. v. State Tax Assessor, 675 A2d 963 (Me., 1996). This case was discussed in "Maine: State Supreme Court Decides 'Throwback' Apportionment Issue," 6 J. Multistate Tax'n 173 (Sep/Oct 1996).

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18

The "Joyce" approach is named after a California case, Appeal of Joyce, Inc., Cal. SBE, No. 66-SBE-070, 11/23/66, in which the State Board of Equalization (SBE) required the sourcing of a group member's sales to the destination state only if the selling member was taxable in that state, regardless of whether any other member was taxable there. The "Finnigan" rule derives from Appeal of Finnigan Corp., Cal. SBE, No. 88-SBE-022-A, 1/24/90, which rejected the Joyce rule and required inclusion of California destination sales for *all* members of a unitary group if *any* member of the group was subject to California tax, even if the selling entity was not itself taxable in California. Subsequently, in Appeal of Huffy Corp., Cal. SBE, No. 99-SBE-005, 4/22/99, *amended on denial of reh'g* Cal. SBE, No. 99-SBE-005-A, 9/1/99, the SBE rejected the Finnigan rule in favor of its old taxing rule established in Joyce, but Huffy was applied prospectively only. Now, however, for tax years beginning after 2010, California has gone back to

Finnigan, codifying the rule in Cal. Rev. & Tax. Code §25135(b). For more on this subject generally, see Houghton, Dennen, and Borucki, "Apportionment Opportunities and Problems Involving the Sales Factor," 12 J. Multistate Tax'n 10 (May 2002).

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19

2003 Me. Laws, P.L. 451, Part NNN (Pine Tree Development Zones), generally codified at 30-A Me. Rev. Stat. Ann. §5245 *et seq.* and 36 Me. Rev. Stat. Ann. §§1760(86) and (87), 2529, 5219-W, and 6754(1)(D). See Good and Liddell, *supra* note 3.

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20

2009 Me. Laws, P.L. 461. See Creamer, *supra* note 4.

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21

36 Me. Rev. Stat. Ann. §5219-W.

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22

36 Me. Rev. Stat. Ann. §6754(1)(D).

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23

Businesses that do not qualify for the enhanced E-TIF benefits associated with the PTDZ Program because, for example, they are not in the manufacturing, financial services, or technology sectors, can nevertheless qualify for an E-TIF. The benefit is reduced, however, depending on the business's location, to either: 30% (if the local labor market area unemployment rate is at or below the state rate); 50% (if the local labor market area unemployment rate is greater than the state rate); or 75% (if the local labor market area unemployment rate is greater than 150% of the state rate). Me. Rev. Stat. Ann. §§6754(1)(A), (B), and (C).

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24

36 Me. Rev. Stat. Ann. §5216-B. For some background on this program, and an earlier expansion, see "Maine: State Expands Seed Capital Tax Credit Program," 12 J. Multistate Tax'n 42 (June 2002).

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25

Investors in certain venture capital funds that, in turn, invest in eligible businesses also may receive the Seed Capital Credit.

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26

H. 778, 6/20/11, 2011 Me. Laws, P.L. 380, Part Q, enacting 10 Me. Rev. Stat. Ann. §1100-Z and 36 Me. Rev. Stat. Ann. §5219-GG. (The legislation codified both the Maine Capital Investment Credit and the New Markets Capital Investment Credit as §5219-GG. Presumably, this will be corrected and one of these credit statutes will be renumbered.)

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27

The federal NMTC program is codified at IRC §45D. For a recent discussion of the program, see Propst, "New Markets Tax Credits—Creative Financing for Economic Development," 21 J. Multistate Tax'n 26 (June 2011) .

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28

10 Me. Rev. Stat. Ann. §1100-Z.1.

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29

Treas. Regs. §1.45D-1(d)(5)(iii).

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30

See IRC §168(k).

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31

The federal "Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010" (H.R. 4853, 12/17/10; P.L. 111-312), increased bonus depreciation to 100% for property placed in service after 9/8/10 and before 2012.

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32

H. 778, 6/20/11, 2011 Me. Laws, P.L. 380, §O-17, enacting 36 Me. Rev. Stat. Ann. §5219-GG. (See note 26, *supra*, regarding this codification.)

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33

See IRC §179.

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34

See 36 Me. Rev. Stat. Ann. §§5122(1)(N)(3) and 5200-A(1)(N)(3), applicable to tax years beginning before 2010.

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35

H. 778, 6/20/11, 2011 Me. Laws, P.L. 380, §§O-1 and O-9, amending, respectively, 36 Me. Rev. Stat. Ann. §§5122(1)(N) and 5200-A(1)(N), effective for tax years beginning after 2010.

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36

36 Me. Rev. Stat. Ann. §§1760(87) and 2016.

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37

36 Me. Rev. Stat. Ann. §§1760(31) (machinery and equipment used in production); 1760(74) (property that becomes an ingredient or component part or is consumed in production); 1760(9-D) (fuel and electricity used in manufacturing).

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38

"Maine Instructional Bulletin No. 22: Manufacturers" (Me. Revenue Services, 10/15/00).

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39

For more on this new legislation, and Maine's approach to taxing aircraft, see Speciale and Golden, "A Tale of Two Planes: State High Court Examines Use Tax on Aircraft, Legislature Acts," 21 J. Multistate Tax'n 20 (September 2011).

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H. 778, 6/20/11, 2011 Me. Laws, P.L. 380, Part N, amending 36 Me. Rev. Stat. Ann. §5111.

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*Id.*, §§N-7 and N-11, amending, respectively, 36 Me. Rev. Stat. Ann. §§5124-A and 5126.

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