



## LEGAL ISSUES

RELATING TO COUNTY GOVERNMENT

# Counties as Conduit Revenue Bond Issuers

## Opportunity for Public-Private Partnership

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Wisconsin counties are frequently asked to participate in public-private partnerships to help advance the interests of, and benefits available to, communities within the county. One type of assistance counties may be asked to provide is to issue bonds on behalf of a private entity. While counties are typically very familiar with the process and purpose for issuing bonds for their own projects, issuing bonds on behalf of a private entity — where the county serves as a “conduit” — is a less familiar tool to many counties.

In this article, we provide an overview of conduit revenue bonds, a county’s role in issuing them, and the types of projects that qualify.

### ► What are conduit revenue bonds?

Pursuant to Wis. Stat. § 66.1103, a county may issue conduit revenue bonds for certain types of projects, which will be identified later in this article. Importantly, a conduit revenue bond is not a debt of the county. Instead, it is a debt of the conduit borrower, the entity on whose behalf the county issued the conduit revenue bonds. The county merely acts as a pass-through to give the conduit borrower access to the tax-exempt municipal bond market. This allows the borrower to finance the project at a lower interest rate, enabling projects that might not have been financially feasible at the desired scope, or at all, to be constructed, thereby providing benefits to the community.

### ► What is the county’s role with respect to the issuance and repayment of conduit revenue bonds?

To issue conduit revenue bonds, the county and the conduit borrower must generally complete the following process:<sup>1</sup>

- The borrower for an eligible project finds a local bank to directly purchase the bonds or hires a financial professional (known as an underwriter) who will market and sell the bonds to the municipal bond market.
- The borrower seeks the assistance of the county. The county board, if agreeable, must adopt an “initial resolution” expressing its intention, subject to conditions, to issue revenue bonds in an amount not to be exceeded, on behalf of a specified eligible borrower for the stated purpose of financing the eligible project. Once adopted, public notice must be given to the electors of the county. (While a referendum is not generally required, a petition by electors of the county that meets certain requirements can trigger a referendum on the bond issuance.)
- Depending on the project type, a public hearing held by the county often is also required by the Internal Revenue Code.
- The county adopts a final resolution approving the issuance of the bonds and approving the financing documents.

- The county issues the revenue bonds, which are either sold by an underwriter via a public offering to the municipal bond market or directly to a bank.

As mentioned earlier, the bonds are limited obligations (not general obligations) of the county, which are payable solely by the borrower from the project’s revenues (i.e., the borrower’s revenues). The bonds are also generally secured by the underlying project assets and real estate.

Further, the statute explicitly states that “[b]onds and interest coupons issued under this [statute] are not an indebtedness of the municipality or county, within the meaning of any state constitutional provision or statutory limitation. Bonds and interest coupons issued under this section are not a charge against the municipality’s or county’s general credit or taxing powers or a pecuniary liability of the municipality or county...” This statement is included on the face of every conduit revenue bond issued.

Finally, the statute provides that members of the county board and officers and employees of the county are not personally liable for conduit revenue bonds and are not personally liable for any act or omission related to the authorization or issuance of the conduit revenue bonds.

While counties are well protected from liability for debt service on conduit revenue bonds, there are several other aspects that counties should consider prior to issuing conduit revenue bonds.

The county could incur obligations or liabilities as a result of entering into the financial documents with the borrower. For example, if the Internal Revenue Service audits the conduit revenue bonds, it will treat the county as the “taxpayer.” This means that the county would be the initial point of contact for a potential audit. For this reason, it is highly recommended that counties seek adequate protections from the borrower, including robust indemnification provisions and agreements to pay the county’s fees, costs and expenses.

Another consideration is that the county’s name is included in the name of the bonds, even though the county is not liable for the bonds. Therefore, any nonpayment or other issues with the project or caused by the borrower could tarnish the county’s reputation.

## ► What are qualifying projects?

Although the title of the statute is “Industrial development revenue bonding,” it applies to far more than just industrial development projects. The statute uses the term “project” and “industrial project” interchangeably, and includes the following:

1. Assembling, fabricating, manufacturing, mixing or processing facilities for any products of agriculture, forestry, mining or manufacture, even though the products may require further treatment before delivery to the ultimate consumer
2. Generating, manufacturing, transmission or distributing facilities for electric energy, gas or water
3. Telecommunications and telegraph facilities
4. Pollution control facilities, including any connected environmental studies and monitoring systems
5. Sewage and solid and liquid waste disposal facilities
6. Printing facilities
7. Hospital, clinic or nursing home facilities
8. Animal hospitals and veterinary clinics
9. Industrial park facilities
10. Dock, wharf, airport, railroad or mass transit facilities
11. National or regional headquarters facilities
12. Recreational facilities, convention centers and trade centers, as well as related hotels, motels or marinas

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13. Facilities to provide service activities, including but not limited to warehousing, storage, distribution, research and data processing, which are directly related to and used in conjunction with a project enumerated in this paragraph having the same principal user
14. Facilities required for compliance with a lawful order of the U.S. Occupational Safety and Health Administration (OSHA) or any similar governmental agency
15. In addition to No. 13 in this list, facilities used primarily for the storage or distribution of products described under No. 1, materials, components or equipment, but not including facilities regularly used for the sale of goods or services to ultimate consumers for personal, family or household purposes
16. Facilities for compliance with a lawful order of any state or federal governmental agency controlling the use of land with respect to any of the industries, activities or facilities enumerated in this paragraph
17. Repair or new construction of dry dock facilities, storage facilities or other harbor improvements
18. Nonresidential facilities, including, but not limited to, one or more shopping centers, office buildings, convention or trade centers, hotels, motels or other nonresidential buildings, with respect to which an urban development action grant has been made under 42 USC 5318 as in effect on April 30, 1980
19. Facilities for research and development activities relating to the production of products described under No. 1 regardless of whether the user of the facilities is also engaged in the production of one or more of those products
20. A shopping center, or an office building, convention or trade center, hotel, motel or other nonresidential facility, which is located in or adjacent to a blighted area or in accordance with a redevelopment plan or urban renewal plan as defined by certain Wisconsin Statutes
21. Cable television facilities that provide services only in a municipality having a population of 2,500 or less
22. Facilities with respect to which a recovery zone facility bond or a qualified Midwestern disaster area bond is issued, in each case under certain federal laws.

This is a robust list, but it is important to review it carefully when considering whether a project is eligible, because the list is exhaustive rather than illustrative, unlike some statutes. In other words, if a project does not fit into one of these boxes, it can't be financed with conduit revenue bonds issued by a county.

In addition to the requirement that the revenue bonds must finance a qualifying project, they may only be issued for the benefit of an "eligible participant." An "eligible participant" includes any person (other than the state or any other governmental unit) who enters into an agreement with a county with respect to a qualifying project. It is also permissible to have more than one eligible participant. Moreover, an eligible participant is not required to be a direct or indirect user of the project (meaning the eligible participant could lease the project to another user subject to certain conditions).

### ► Conclusion

Conduit revenue bonds represent a potentially attractive tool for Wisconsin counties to facilitate economic development and community investment without incurring direct financial liability. By serving as a conduit issuer, a county can participate in public-private partnership opportunities by providing access to lower-cost, tax-exempt financing for eligible projects that deliver public benefits. Even though county liability is limited, careful diligence and appropriate legal protections are essential for managing potential administrative and other liability and reputational risks to the county.

If you have any questions surrounding this topic, please do not hesitate to contact the association or any member of the public finance team at Attolles Law, s.c. ■

*Attolles Law, s.c. works on behalf of Wisconsin counties, school districts and other public entities across the state of Wisconsin. Its president & CEO, Andy Phillips, has served as outside general counsel for the Wisconsin Counties Association for more than 20 years.*

1. Note that there are a number of other processes, filings, and notices that must be followed or made, but a discussion of such issues is beyond the scope of this article.