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Getting It Right: Form Filing and Compliance Issues for Direct Pay Bonds

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IRS

The Forms

Form 8038-CP - *Return for Credit Payments to Issuers of Qualified Bonds*

Form 8038-B - *Information Return for Build America Bonds and Recovery Zone Economic Development Bonds*

Form 8038-TC - *Information Return for Tax Credit Bonds and Specified Tax Credit Bonds*



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ARRA and HIRE

- The American Recovery and Reinvestment Act of 2009 (Recovery Act) (Pub.L. 111-5)
- The Hiring Incentives to Restore Employment Act of 2010 (HIRE) (Pub.L. 111-147)



Direct Pay Bonds Issued

- **Build America Bonds - \$180 billion**
- **New clean renewable energy bonds - \$290 million**
- **Qualified energy conservation bonds - \$415 million**
- **Qualified zone academy bonds - \$285 million**
- **Qualified school construction bonds - \$8.2 billion**

These bonds have resulted in the processing of over \$4.3 billion of refundable credit claims as of May, 2011.



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Notices

- Notice 2009-26 (Build America Bonds and Direct Payment Subsidy Implementation)
- Notice 2009-50 (Recovery Zone Bond Volume Cap Allocations)
- Notice 2010-35 (Direct Payment Subsidy Option for Certain Qualified Tax Credit Bonds and Build America Bonds)
- Notice 2009-29 (Qualified Energy Conservation Bond Allocations for 2009)



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Notices

- Notice 2009-30 (Qualified Zone Academy Bond Allocations for 2008 and 2009)
- Notice 2009-33 (New Clean Renewable Energy Bonds Application Solicitation and Requirements)
- Notice 2009-35 (Qualified School Construction Bond Allocations for 2009)
- Notice 2010-17 (Qualified School Construction Bond Allocations for 2010)



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Identified Errors

- **Claiming credit on pre-issuance accrued interest**
- **General transposition errors**
- **Claiming the credit for the wrong interest payment date**



Identified Errors

- Using the wrong credit percentage
- Not properly limiting the credit for specified tax credit bonds
- Claims for credit on drawdown Build America Bonds where proceeds were drawn after December 31, 2010



Importance of Timely Filing

Issuers can avoid unnecessary delays in receiving refundable credit payments by timely and correctly filing their Forms 8038-CP



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File Separate Forms for:

- Each bond issue
- BABs and RZEDBs that are part of same issue
- Each type of specified tax credit bond
- Fixed rate and variable rate bonds that are part of same issue
- Each interest payment date (except quarterly reimbursement for interest paid by the issuer during the quarter on variable rate bonds)



Accuracy of Address in Part I

VERY IMPORTANT to have the correct address on lines 3 and 4 in Part I for:

- **Manual payments, if direct deposit fails**
- **Correspondence generated as a result of the 8038-CP**



Potential Correspondence

Examples:

- **Notice CP 152 - Tax Exempt Bond Acknowledgement**
- **Notice CP 153 - Notice of EFT Refund Not Allowed**
- **Notice CP 231 - Undelivered Refund Check**



Issue Price

For purposes of applying the limitation on bond premium to direct pay tax credit bonds and to build America bonds generally, the definition of “issue price” applicable to tax-exempt bonds under Treasury Regulations section 1.148-1(b) applies.

See Notice 2010-35



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Issue Price - Regulations § 1.148-1(b)

- Except as otherwise provided, issue price as defined in §§ 1273 and 1274
- Generally, the issue price of bonds that are publicly offered is the first price at which a substantial amount of the bonds is sold to the public
- 10% is a substantial amount
- The public does not include bond houses, brokers, or similar persons or organizations acting in the capacity of underwriters or wholesalers



Corrections to Credit Payments - Lines 21a and b

- Use to correct credit payment amounts requested on prior filings of 8038-CP
- Must attach an explanation:
 - How the mistake occurred
 - Steps taken to prevent similar mistakes in future
- Use amended 8038-CP to correct mistake on the last 8038-CP filed for an issue



Direct Deposit – Line 25

- Line 25 is critical for issuers requesting payments by direct deposit
- Routing and account numbers **MUST** be compatible with ACH electronic funds transfer system:
<http://www.fms.treas.gov/ach/index.html>
- Fedwire routing and account numbers will be rejected



Alternate Permitted Method for Filing Form 8038-CP

- For qualified school construction bonds and qualified zone academy bonds
- Intended to reduce the burden of filing and processing 8038-CPs for issues of these bonds with multiple maturities



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Alternate Permitted Method for Filing Form 8038-CP

- Changes instructions for Lines 19a, 19c, 20e and 20f
- More details at www.irs.gov/taxexemptbond/



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Prevent Payment Delays

- Incomplete, late, or improperly completed Forms 8038-CP may delay payment -
 - Are the EIN and address correct?
 - Does interest payment match schedule filed on Forms 8038-G, -B or -TC?
 - Is the credit rate correct?
 - Is the filing timely?
 - Is the entity to be paid identified correctly?
 - Is direct deposit information correct?
- Additional information for filing is available at www.irs.gov/taxexemptbond/



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Specified Tax Credit Bonds

Under §6431(f), the direct payment option applies to the following specified tax credit bonds:

- New clean renewable energy bonds
- Qualified energy conservation bonds
- Qualified zone academy bonds
- Qualified school construction bonds

Note: However, any qualified zone academy bond issued pursuant to 2011 volume cap may not be issued as a direct pay bond.



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Sale Proceeds

- Any amounts actually or constructively received from the sale of the issue, including amounts used to pay underwriters' discount or compensation and accrued interest other than pre-issuance accrued interest
- Also include, but are not limited to, amounts derived from the sale of a right that is associated with a bond and that is described in § 1.148-4(b)(4)
- May include amounts received upon the termination of certain hedges



Available Project Proceeds

Available project proceeds means –

- The excess of –
 - The proceeds from the sale of an issue, over
 - The issuance costs financed by the issue (to the extent that such costs do not exceed 2% of such proceeds), and
- The proceeds from any investment of the excess described above



Amendments to Forms

- To correct errors, make changes to, or add to the information on a previously filed return
- Include new or corrected information on the amended return in addition to all the correct information reported on the original return
- Must include an attached explanation identifying the information changed or added and the reason for filing the amended return
- Explanation must be labeled as “Amended Return Explanation”



Certain Form 8038-CP Amendments

- Only be filed when an issuer needs to correct or add information in Parts I and II or the signatory boxes
- Do not file an amended return for corrections to the credit amount claimed in Part III. Use lines 21a or 21b on a subsequently filed Form 8038-CP to make these adjustments.
- Exception is correcting previously claimed credit amounts in the case of a previously filed FINAL CP return.



Criteria for Filing Form 8038-CP

Form 8038-CP is to be filed only if:

- as of the date the form is filed
- the issuer has reasonably concluded
- that the obligations meet all applicable requirements for the payment of the requested credit.



De Minimis Premium Rule

- Under § 54AA, a bond shall not be treated as a Build America Bond, and a refundable credit will not be allowed, if the issue price has more than a de minimis amount of premium over the stated principal amount of the bond.
- See Notice 2010-35 for additional guidance.



TEB VCAP

- Available for direct pay bonds
- Notice 2008-31
- IRM section 7.2.3.1; IRM being revised to address direct pay bonds
- Not available if problem can be addressed by remedial action



For More Information

- www.irs.gov/taxexemptbond/
- Specific questions about any of the forms discussed today can be submitted via e-mail to TaxExemptBondQuestions@irs.gov
- Inquiries regarding specific refundable credit payments on direct pay bonds should be made to the IRS Customer Service line at 1-877-829-5500



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