GETTING IT RIGHT: FORM FILING AND COMPLIANCE ISSUES FOR DIRECT PAY BONDS

OFFICE OF TAX EXEMPT BONDS

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TODD: Hi, I'm Todd Mitchell, and I am a group manager in the Compliance & Program Management function of the IRS office of Tax Exempt Bonds, or TEB. My co-presenter today is Carl Scott. Carl is a group manager in TEB's Field Operations function. Thank you for joining us today for our webinar, "Getting It Right: Form Filing and Compliance Issues for Direct Pay Bonds." We appreciate the opportunity to present this material.

This is TEB's first webinar and is part of a series of webinars presented by the IRS Tax Exempt and Government Entities division. 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. Other webinars in this series developed for the tax-exempt and government entities community are accessible through the IRS.gov website.

Today we will be discussing direct pay bonds and refundable credit payments under Section 6431 of the Internal Revenue Code. Carl will start with an overview of today's program.

CARL: Thank you. Today, we will cover:

- Requesting refundable credit payments by filing Form 8038-CP,
- Filing other forms for direct pay bonds,
- Properly completing these forms,
- Ongoing compliance requirements for the allowance and payment of refundable credits on direct pay bonds,
- IRS processing and review of returns filed for direct pay bonds,
- Avoiding common errors in filing the 8038-CP
- Filing amendments,
- Resolving violations through the Tax Exempt Bonds Voluntary Closing Agreement Program, and

- Finding additional information on direct pay bonds.

There are several forms related to direct pay bonds that must be filed with the IRS.

These include Forms 8038-CP, 8038-B, and 8038-TC. And, before the 8038-B was available, issuers were directed to report using Form 8038-G. Each of these forms can be found on the TEB website. Now, we'll give an overview of direct pay bonds.

TODD: The American Recovery and Reinvestment Act of 2009, or the Recovery Act as it is known, authorized state and local governments, at their option, to issue Build America Bonds as taxable governmental bonds with Federal subsidies for a portion of their borrowing costs. The subsidies take the form of tax credits provided to the holders of the bonds or refundable tax credits paid to state and local governmental issuers of the bonds. Bonds with respect to which issuers elect to receive these refundable tax credits are often referred to as direct pay bonds. The Recovery Act also created recovery zone economic development bonds, a form of direct pay Build America Bonds with a higher subsidy payment. The Hiring Incentives to Restore Employment Act of 2010, or the HIRE Act, authorized refundable credit payments under section 6431 for four other types of tax credit bonds: new clean renewable energy bonds, or New CREBs, qualified energy conservation bonds, qualified zone academy bonds, or QZABs, and qualified school construction bonds. These four types of tax credit bonds are referred to as "specified tax credit bonds."

Direct pay bonds differ from traditional tax-exempt bonds and other tax credit bonds in the way in which the benefit to the issuer is delivered. As the label implies, for direct pay bonds the benefit takes the form of a payment directly from the federal government to the issuer or, at the issuer's direction, the issuer's paying agent. For tax-exempt bonds, the benefit takes the form of the lower borrowing rate due to the bondholder's willingness to accept a lower rate in exchange for tax-exempt interest. For tax credit bonds that are not direct pay bonds, the benefit takes the form of the lower borrowing rate due to the bondholder's willingness to accept a lower rate in exchange for the tax credit allowed to the bondholder.

The Treasury has reported that over 180 billion dollars of direct pay Build America Bonds have been issued. By mid-May, 2011, information returns had been filed indicating the issuance of over 290 million dollars of direct pay New CREBs, over 415 million dollars of direct pay qualified energy conservation bonds, over 285 million dollars of direct pay QZABs, and over 8.2 billion dollars of direct pay qualified school construction bonds. Also by mid-May, 2011, the IRS had processed over 4.3 billion dollars of refundable credit claims for direct pay bonds.

The IRS processes requests for refundable credit payments from direct pay bond issuers and generally makes the refundable credit payments contemporaneously with each interest payment date on the related bonds. So, for example, an issuer with an interest payment on a fixed rate direct pay bond scheduled for July 1 can request a refundable credit payment with respect to the interest payment that will be received at about the same time.

Guidance on compliance and procedural matters for direct pay bonds and refundable credit payments can be found in a series of Notices.

IRS Notice 2009-26 provides guidance for Build America Bonds and recovery zone economic development bonds, and refundable credit payment procedures. Notice 2009-50 provides further guidance on recovery zone bonds and related volume cap allocations. Notice 2010-35 provides guidance on specified tax credit bonds and additional guidance on refundable credit payment procedures.

Guidance on requirements for each type of specified tax credit bond is provided in Notice 2009-29, for qualified energy conservation bonds, Notice 2009-30, for QZABs, Notice 2009-33, for New CREBs, and Notices 2009-35 and 2010-17, for qualified school construction bonds.

Our discussion today focuses on filing requirements and procedures for Form 8038-CP, including certain related topics that arise in the context of Form 8038-B and Form 8038-TC for direct pay bonds. The instructions to each of the forms provide additional information on the proper approach to complete the forms. All of the notices, forms, and instructions that we will discuss today are available on TEB's website at IRS.gov/taxexemptbond. [Graphic showing webpage at IRS.gov, then clicking on the TEB tab.]

Carl will start with a discussion of the processing of Forms 8038-CP.

CARL: All Form 8038-CP returns are filed with the IRS Service Center in Ogden, Utah, which processes millions of tax returns and other tax forms every year. As of May, 2011, 7,783 Form 8038-CPs had been processed by the IRS, relating to claims for refundable credits of over 4.3 billion dollars. The IRS has identified the 8038-CP for special handling within the Service Center to expedite processing. Each 8038-CP undergoes a compliance review conducted by employees in the Tax Exempt and Governmental Entities operating division of the IRS.

During the compliance review, TEB revenue agents review information about the issuer and, if applicable, the designated payee. We also review details of the bond transaction related to the refund claim. Information reviewed includes: filed returns, IRS account information, and information from public sources as necessary.

During the compliance reviews, TEB revenue agents have identified questions about the qualification of some bonds. In these cases, the information returns for the bonds have been referred for possible examination. These referrals go through a return selection, or "classification," process before the return is subjected to examination.

In addition, the compliance review process has allowed us to identify and correct numerous errors, reducing or correcting erroneous payments. We look for obvious errors and missing or incomplete information that would prevent normal processing. TEB revenue agents may communicate with the contact person designated on the 8038-CP to resolve any errors that could result in a delay in processing credit payments. Often these errors can quickly be corrected or missing information obtained, so that the proper credit payment can be made without undue delay. Examples of identified errors are:

- claiming credit on pre-issuance accrued interest,

- general transposition errors,
- claiming the credit for the wrong interest payment date,
- using the wrong credit percentage,
- not properly limiting the credit for specified tax credit bonds, and
- claims for credit on drawdown Build America Bonds where proceeds were drawn after December 31, 2010.

If an 8038-CP return is filed with missing or incomplete information and the information was not obtained during the compliance review, this information will be obtained via correspondence during normal return processing. The information received by the IRS in response to our correspondence must be associated with the filed return. The return then must be corrected and resubmitted for processing. This correspondence process may result in delays in receiving credit payments.

Now, Todd will discuss the purpose of Form 8038-CP, basic filing requirements, and timeframes for filing and refundable credit payments.

TODD: Thanks Carl. Form 8038-CP, Return for Credit Payments to Issuers of Qualified Bonds, is used to claim refundable credits payable to issuers of Build America Bonds, recovery zone economic development bonds, and specified tax credit bonds. [Graphic – Picture of Form 8038-CP]

Under section 6431 of the Code, these refundable credit payments are to be paid contemporaneously with each interest payment date.

The instructions to the 8038-CP explain certain timelines for when the form should be filed. The filing dates may be before or after each applicable interest payment date, depending on whether the bonds are fixed rate bonds or variable rate bonds. The IRS processes 8038-CPs that are timely filed for fixed rate bonds in sufficient time for the issuer to receive its refundable credit payment by the related interest payment date. By timely and correctly filing the 8038-CP, issuers can avoid unnecessary delays in receipt of refundable credit payments.

The refundable credit payment requested on an 8038-CP should relate to the interest payable on only a single bond issue. If a single issue has both fixed rate bonds and variable rate bonds, or both Build America Bonds and recovery zone economic development bonds, issuers should file a separate 8038-CP for each type of bond.

Generally, issuers must file a separate 8038-CP to request the refundable credit payment for each interest payment date. An exception is that issuers of variable rate bonds requesting refundable credit payments in arrears should file one 8038-CP for each calendar quarter in which interest payments are made. For fixed rate bonds, the 8038-CP must be filed at least 45 days before the related interest payment date, and may not be filed earlier than 90 days before the related interest payment date.

For variable rate bonds, issuers can claim refundable credit payments quarterly in arrears. The due date for filing Form 8038-CP for these variable rate bonds is no later than 45 days after the last interest payment date within the quarterly period for which the issuer is requesting reimbursement.

A special rule for variable rate bonds in circumstances where the issuer knows the interest payment amount 45 days prior to the interest payment date allows issuers to file their 8038-CP using the same timeframe as that established for filings with respect to fixed rate bonds.

A late filing will not result in nonpayment of the refundable credit. However, filing after the due date in the case of fixed rate bonds may result in the payment being paid after the related interest payment date. Additionally, because refundable credit payment requests made on Form 8038-CP are processed similarly to other refund request filings, the issuer will not be entitled to late payment interest as long as the payment is processed within 45 days of the filing.

Now that we've covered that timing, Carl, could you start our review of specific parts of Form 8038-CP?

CARL: Sure. [Graphic – Picture of Part I of Form 8038-CP] Part I of Form 8038-CP asks for information on the entity that is to receive payment of the refundable credit. The 8038-CP must be signed by an official of the issuer. Issuers of direct pay bonds can choose to have the refundable credit payments made either to them or to a paying agent such as a trustee bank.

Required information in this part includes the name, employer identification number, or EIN, and address of the entity receiving the payment. Additionally, the name and telephone number of a designated contact person for the entity identified in Part I should be provided. The EIN must match the name of the entity receiving the payment, whether this is the issuer or the paying agent. It is especially important for issuers to ensure the accuracy of the address reported on lines 3 and 4 in Part I, because this address is the address to which the refundable credit payment will be sent unless a direct deposit is requested. Additionally, for issuers requesting electronic funds transfer, this is the back-up payment address, should a requested direct deposit fail for any reason, whether due to the information provided or a processing issue.

This is also the address to which any correspondence generated with respect to the return will be sent. This includes computer generated notices relating to the 8038-CP, including the notice verifying receipt of the return, the notice sent when a requested electronic funds transfer refund is not allowed, and the notice sent to notify the issuer of an undelivered refund check.

If the issuer is to receive the refundable credit payments for direct pay bonds, the issuer's name and EIN, whether reported in Part I or Part II of the 8038-CP, should match the name and EIN listed on the information return filed for the bond issue, either Form 8038-G, 8038-B, or 8038-TC. Also, in some cases where the name of the payee on the return does not match the name on the bank account designated to receive the payment, it is possible that the receiving financial institution may reject a direct deposit. Needless to say, ensuring accurate information on Part I of the 8038-CP is very important for the accurate and timely processing and receipt of credit payments.

Part II of Form 8038-CP [Graphic – Picture of Part II of Form 8038-CP] asks for information about the issuer and the direct pay bond issue. If the issuer authorized payment of the refundable credit to another entity in Part I, then Part II should be completed in full. If the issuer requested to receive payment directly and entered its information in Part I, then “SAME” should be entered on line 7, and lines 8, 9, 11, 15, and 16 should be skipped.

Information entered on lines 12, 13, and 14 of Part II on the issue date, name, and CUSIP number of the bond issue should be identical to the corresponding information for the issue on the related information return. The instructions to Form 8038-CP provide additional information for specified tax credit bonds with multiple maturities and for circumstances where no CUSIP number is assigned for the bond issue, for example, because it was not publicly offered.

Line 17b of Part II [Graphic] asks for the total issue price of the bond issue.

Generally, the issue price should match the issue price listed on the related information return. Notice 2010-35 clarified that, for purposes of applying the de minimis premium limit to direct pay Build America Bonds, the definition of “issue price” applicable to tax-exempt bonds under regulations section 1.148-1(b) applies.

That section provides that 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. Ten percent 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. For direct pay bonds that are not publicly offered, the generally applicable issue price rules in sections 1273 and 1274 apply. The Treasury Department and the IRS are reviewing the definition of issue price and are considering whether additional guidance is needed.

CARL: Part III of Form 8038-CP asks for information on the interest payment date, the interest amount payable to bondholders, and the refundable credit payment amount. [Graphic – Picture of Part III of Form 8038-CP]

The interest payable to bondholders on the interest payment date can only relate to the interest payable on a single bond issue and allocable to a single type of bond, whether that is a Build America Bond, recovery zone economic development bond, or a single type of specified tax credit bond. If an issue has more than one type of bond, issuers should file a separate 8038-CP for each type.

Issuers of New CREBs and qualified energy conservation bonds with multiple maturities should file a separate 8038-CP for each bond maturity. However, issuers of qualified school construction bonds and QZABs with multiple maturities have the option of using an alternate permitted filing method, which we will discuss later and is explained in detail on the TEB website.

Lines 19b and 19c only apply to specified tax credit bonds. [Graphic] These lines ask for the applicable credit rate and interest payable to bondholders, calculated using the applicable credit rate. The applicable credit rate is the daily tax credit bond rate set by the Secretary of the Treasury pursuant to Code section 54A(b)(3). The credit rate is set for each day. The credit rate applicable to a bond will be the rate set for the first day on which there is a binding written contract for the sale or exchange of the bond.

Issuers should enter the requested credit payment amount on the appropriate line of lines 20a through 20f, corresponding to the type of bond for which the 8038-CP is being filed. You may not have more than one entry on lines 20a through 20f. The instructions for Form 8038-CP explain how to calculate the credit payment amount for each type of direct pay bonds. If the credit payment amount entered is different from the amount shown on the debt service schedule that was attached to the information return filed for the bonds, the issuer must attach an explanation. For variable rate bonds, no explanation is required.

TODD: Lines 21a and 21b should be completed only if corrections are to be made to credit payment amounts requested on prior filings of the 8038-CP for the bond issue. In such cases, the issuer must attach an explanation describing how the mistake happened and what steps have been taken to prevent similar mistakes from recurring. Credit payments may be delayed if this explanation is not attached. Remember, the 8038-CP may not be filed between interest payment dates to adjust requested credit payment amounts. Such adjustments may be made only on an 8038-CP subsequently filed within the timeframes specified for a subsequent interest payment. But if the issuer has submitted its final 8038-CP, then the adjustment should be filed as an amendment.

If the 8038-CP relates to the final interest payment date for the bond issue, the box for “yes” on line 23 should be checked. If a box is not checked “yes” or “no” on line 23, credit payments could be delayed.

[Graphic– Picture of Line 25 of Form 8038-CP]

Line 25 is critical for issuers requesting that a refundable credit payment be made by direct deposit. When the issuer elects to receive, or to have their paying agent receive, a refundable credit payment by direct deposit, the routing and account numbers must be compatible with the Automated Clearing House, or ACH, electronic funds transfer system. Fed wire routing and account numbers are NOT accepted by the system and will be rejected. If a Fed wire routing number is used, it may result in a delay in payment of the refundable credit. Such delay could result in the refundable credit payment being received after the related interest payment date. [Graphic“Fedwire” with overlay of circle and slash (international “NO” symbol)] As we mentioned earlier, if a requested direct deposit is rejected or fails for any other reason, the payment will be made by paper check and mailed to the entity at the address provided in Part I.

[Graphic- Picture of “Signature and Consent” portion of Form 8038-CP]

Form 8038-CP must be signed by an officer of the issuer with the authority to bind the issuer, the authority to authorize payment to be sent to the entity identified in Part I, and the authority to authorize the IRS to communicate with any designated contact person listed in Parts I and II of the form.

Before we move on to Form 8038-TC, Carl is going to take a moment to talk about an alternate filing method for direct pay qualified school construction bonds and QZABs.

TEB recently announced on our website that the IRS would allow issuers of qualified school construction bonds and QZABs with multiple maturities to file a single Form 8038-CP for each interest payment date of the bonds. The alternate method is intended to reduce the burden of filing and processing 8038–CPs for issues of these types of bonds with multiple maturities.

The alternate method changes the instructions for lines 19a, 19c, 20e and 20f of the form. Notification of the alternate method is being mailed to identified eligible issuers. The form of the notification letter can be found on the TEB website.

At this time, the alternate method is NOT available to request refundable credit payments on issues of New CREBs or qualified energy conservation bonds

The IRS will continue to process separate 8038-CPs filed in accordance with the Instructions for each maturity of an issue of qualified school construction bonds or QZABs for those issuers who do not elect to use the alternate method. (Turn to Camera 1)

That concludes our look at the provisions of the 8038-CP. Additional information on completing Form 8038-CP is available on TEB's website.

Remember, incomplete, late, or improperly completed Forms 8038-CP may lead to delays in payment of the refundable credits.

Before we begin our look at Form 8038-TC, the information return for specified tax credit bonds, we are going to talk a little about the history of specified tax credit bonds.

TODD: In 2008, section 54A was added to the Code. Section 54A provided rules for the allowance of tax credits to the holders of several types of qualified tax credit bonds, including New CREBs, qualified energy conservation bonds, QZABs, and others. (Turn to Camera 2)

In 2009, the Recovery Act added qualified school construction bonds to the coverage of section 54A. Under section 54A, taxpayers that hold qualified tax credit bonds are allowed a tax credit on one or more quarterly credit allowance dates. The HIRE Act authorized issuers to make an irrevocable election to apply Code section 6431(f) to certain types of qualified tax credit bonds, and thereby receive a refundable credit payment in lieu of the tax credit that otherwise would be allowed to holders of those bonds.

This direct payment option applies to the following specified tax credit bonds:

- New CREBs,
- Qualified energy conservation bonds,
- QZABs, and
- Qualified school construction bonds.

Issuance of specified tax credit bonds, and qualified tax credit bonds of the same type, is generally limited by national volume cap limitations to specific amounts under sections 54C, 54D, 54E, and 54F of the Code. Issuance of New CREBs and qualified energy conservation bonds within the volume limitations do not have a time limit. Volume limitations were established for years 2009 and 2010 for QZABs and qualified school construction bonds. Also, unused volume limitations of various specified tax credit bonds may be carried forward, so new issuances of those bonds may still occur.

The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 provided an additional national bond limitation authorization of 400 million dollars for QZABs for calendar year 2011. However, any QZAB issued pursuant to the 2011 volume cap may not be issued as a direct pay bond. The 2011 volume limitations for QZABs are included in Revenue Procedure 2011-19.

Now, let's spend a few minutes going over the filing of the Form 8038-TC, the information return which must be filed to report the issuance of qualified tax credit bonds, including specified tax credit bonds.

[Graphic – Picture of Form 8038-TC] Form 8038-TC, Information Return for Tax Credit Bonds and Specified Tax Credit Bonds, is the information return that issuers of qualified tax credit and specified tax credit bonds are required to file by Code section 54A(d)(3), which incorporates the information reporting requirements of section 149(e). Our focus today in examining the 8038-TC is in reference to specified tax credit bonds that receive refundable credit payments under Code section 6431. Of course, the 8038-TC is also filed to report issuance of qualified tax credit bonds that are not eligible to receive refundable credit payments.

Two deadlines are important to keep in mind when it comes to filing the 8038-TC for direct pay bonds. First, the 8038-TC must be filed on or before the 15th day of the second calendar month after the close of the calendar quarter in which the bond issue was issued. Second, the 8038-TC must be filed at least 30 days before the first 8038-CP is filed for the bond issue. Note that the 8038-TC may not be filed before the issue date because, as with other series 8038 information returns, the 8038-TC must be completed based on the facts as of the issue date. Failure to complete the 8038-TC correctly, or to include the attached schedules, may result in a delay in processing requests for payment of refundable credits.

CARL: As with many tax forms, the Form 8038-TC is broken into parts. [Graphic – Picture of Part I of Form 8038-TC] The 8038-TC consists of the main form, which has eight parts, and four schedules. For any particular bond issue, only one schedule will be filled out, depending on which type of tax credit bond is being reported.

Part I of Form 8038-TC asks for information pertaining to the issuer. On line 1, be sure to enter the name of the actual issuer of the bonds, and not the name of any different entity receiving the benefit of the financing, such as a conduit borrower. Line 3 permits the issuer to name a person other than an officer of the issuer with whom the IRS may speak with respect to the Form 8038-TC. This may include a paid preparer or legal representative of the issuer. By completing this line, the issuer authorizes the IRS to communicate directly with the named individual and to disclose the issuer's return information as necessary to process the return. [ADD GRAPHIC FOR EMPHASIS] On line 9, the issuer is to enter the CUSIP number for the bond in the issue with the latest maturity. The issuer should also attached a schedule with a complete list of CUSIP numbers for each bond in the issue. If the issue does not have a CUSIP number, or if it was privately placed, the issuer must attach a schedule with the name, EIN, and address of each bond purchaser.

[Graphic – Picture of Part II of Form 8038-TC]

Part II of Form 8038-TC asks for information identifying the type of tax credit bond issue that is being reported. This includes entering a three digit code that has been assigned for each type of qualified tax credit bond, which can be found in the instructions. Issuers of specified tax credit bonds must attach a debt service schedule to the 8038-TC. The schedule should contain a list of each interest payment date, the total principal amount of bonds expected to be outstanding on each interest payment date, the total interest payable on each date, the amount of refundable credit payment expected to be received for each date, and the earliest date on which the bonds may be called. For variable rate bonds, the amount of interest payable and expected refundable credit is not required, but the schedule should describe how the interest will be computed.

As noted, the required schedules for fixed rate bonds and variable rate bonds differ. If an issue of specified tax credit bonds contains both fixed rate bonds and variable rate bonds, the schedules for both the fixed rate and variable rate bonds should be filed with one Form 8038-TC.

[Graphic – Picture of Part III of Form 8038-TC]

Part III of Form 8038-TC requires information pertaining to the bonds, including issue price, applicable credit rate, maximum term, permitted sinking fund yield, and interest rate.

TODD: [Graphic – Picture of Part IV of Form 8038-TC]

Part IV of Form 8038-TC asks for information about the proceeds of the issue, including sale proceeds, estimated investment proceeds, proceeds used for costs of issuance, projected available project proceeds, and total proceeds.

Sale proceeds are, “any amount 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.” Sale proceeds also include but are not limited to, amounts derived from the sale of a right associated with a bond. Amounts received upon the termination of certain hedges may also be deemed sale proceeds.

To determine the amount of available project proceeds, investment earnings are added to sale proceeds, and proceeds used to pay costs of issuance (up to and not more than 2%) are subtracted from sale proceeds. For specified tax credit bonds, section 54A of the Code requires that 100% of available project proceeds be spent for one or more qualified purposes. [ADD GRAPHIC (100%) FOR EMPHASIS]

[Graphic – Picture of Part V of Form 8038-TC]

Part V of Form 8038-TC asks for information about the qualified purpose expenditures that will be made with the total proceeds. These expenditures will vary for each type of specified tax credit bond.

[Graphic – Picture of Part VI of Form 8038-TC]

As mentioned previously, qualified tax credit bonds, including specified tax credit bonds, are subject to volume cap limitations on the amount that may be issued, and issuance must be authorized through an allocation of volume cap to the issuer. Part VI asks for information about the allocation of volume cap. A copy of the volume cap allocation certification must be attached to the 8038-TC.

CARL: [Graphic – Picture of Part VII of Form 8038-TC]

Two statements in Part VII relating to post-issuance compliance procedures should be noted by issuers. The first statement is: “If the issuer established written procedures to monitor the requirements of section 148 with respect to these bonds, check box.” The second statement is: “If the issuer established written procedures to ensure that all nonqualified bonds at the end of the applicable period are redeemed within 90 days, check box.” Issuers should consider establishing routine post-issuance monitoring of ongoing compliance for tax credit bonds.

Part VIII of Form 8038-TC does not apply to direct pay bonds.

A signature of an authorized representative of the issuer is required in the “Signature and Consent” part of Form 8038-TC. The representative signing the form declares under penalties of perjury that he or she has examined the return and any accompanying schedules and statements and to the best of his or her knowledge and belief, they are true, correct, and complete. The representative must have authority to consent to the IRS’ disclosure of the issuer’s return information to the persons that have been designated, as necessary to process the form.

[Graphic (or SLIDE ?) – Composite picture of captions for each Schedule to Form 8038-TC]

There are four schedules which are part of Form 8038-TC, each one pertaining to a different type of tax credit bond. Issuers must fill out only the schedule that relates to the type of bond they are reporting. Please note that the issuer's name and EIN is to be filled in at the top of each schedule.

TODD: Amendments to Form 8038-G or Form 8038-B filed for Build America Bonds, and amendments to Form 8038-TC or Form 8038-CP should be filed when an issuer needs to correct errors, make changes to, or add to the information reported on a previously filed return for the same bond issue. The issuer must check the "Amended Return" box located in the upper right hand corner on the 1st page of the return. Issuers must include new or corrected information on the amended return in addition to all the correct information reported on the original return. In addition, an amended return must include an explanation identifying the information changed or added, and the reason for filing the amended return. The explanation must be labeled across the top of the page as "Amended Return Explanation"

Amendments to an 8038-CP should only be filed when an issuer needs to correct or add information in Parts I and II, or the signatory boxes, of a previously filed return for the same interest payment date. Do not file an amended return for corrections to prior filings of Form 8038-CP involving the credit amount claimed or other information in Part III of Form 8038-CP. Such adjustments may be made only on an 8038-CP subsequently filed within the timeframes specified for a subsequent interest payment, using lines 21a or 21b. As we mentioned earlier, when making corrections using lines 21a or 21b, an explanation of the adjustment must be attached to the return. The issuer should NOT check the "Amended Return" box in the upper right hand corner on the first page of the return. The one exception to this method of correcting previously claimed credit amounts is in the case of a previously filed FINAL 8038-CP. In that case, subsequent corrections of the credit amount need to be made to lines 21a or 21b only and the "Amended Return" box must be checked.

Do not file an amended return to correct direct deposit routing or account numbers. If these numbers are invalid, a paper check payment will be mailed to the entity and address in Part I of the return. Correct the routing and account numbers on subsequently filed 8038-CPs.

That concludes our discussion of the forms to be filed in connection with direct pay bonds. We want to spend the rest of the time in this presentation discussing compliance matters associated with direct pay bonds.

CARL: One thing of particular note for issuers filing the Form 8038-CP is that filing is a certification that the issue is eligible for the amount of the refundable credit claimed on the form as of the date it is filed. The first page of the instructions describes important criteria in connection with the filing. The instructions contain a cautionary instruction, noted with a large exclamation point and the word "caution." [Graphic – picture of warning and wording from instructions] This warning states that "This return is to be filed only if, as of the date the form is filed, the issuer of the outstanding obligation(s) with respect to which this return is submitted has reasonably concluded that the obligation(s) meet all applicable requirements for the payment of the requested credit." Let's break that down, to see what the issuer is certifying when the 8038-CP is submitted.

First, the warning speaks "as of the date the form is filed." Therefore, the issuer must be able to make the reasonable conclusion taking into account actions, inactions, or other matters that have occurred after the direct pay bonds were issued.

Second, the warning requires that the issuer has made a REASONABLE conclusion in connection with filing the 8038-CP. The issuer should have a reasonable basis, such as gathering and monitoring information relating to the bonds, to submit the 8038-CP.

Third, the warning states that the bonds are to meet ALL applicable requirements for payment of the refundable credit. This statement was made in Notice 2010-35, as well. That Notice provides that, "Form 8038-CP may be filed only if the Direct Pay Tax Credit Bonds with respect to which the form is filed meet all the requirements for the allowance of the refundable credit under section 6431(a)."

When executing the 8038-CP, officials should keep this certification in mind, and they also should note that the 8038-CP is signed under penalties of perjury. An issuer's procedures for monitoring ongoing compliance with the tax requirements will assist the signer in making a proper certification.

The requirements for the allowance of the refundable credit vary with different types of direct pay bonds. The statutes authorizing each type of direct pay bond include different, and complex, requirements concerning how the available project proceeds of that type of bond may be spent: Issuers must monitor the items on which direct pay bond proceeds are spent in order to ensure compliance with these statutory requirements.

Under Code section 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. [Graphic naming Notice 2010-35] For more information, you should refer to Notice 2010-35. In section 6 of that Notice, additional guidance is provided on this important topic. If an issuer becomes aware that an issue was not in compliance with this rule, the issuer should consider contacting the IRS to resolve any violation through the TEB Voluntary Closing Agreement Program, which we will discuss further.

CARL: Issuers of direct pay bonds are allowed refundable credits only with respect to actual interest payments under the bonds. Events that affect the amount of interest payable on the bonds, such as prepayments, extinguishment, adjustments to interest rates, or other modifications may affect the amount of credit allowable. Issuers should avoid filing an 8038-CP requesting payment of a refundable credit where interest for federal tax purposes is not payable under the bonds. When the terms of a bond have changed, resulting in a different credit payment amount, a statement should be attached to the 8038-CP explaining why the amount requested differs from the projected refundable credit schedule submitted with the information return.

An issuer's acquisition of its outstanding bonds typically results in an extinguishment of that debt obligation for Federal tax purposes, because the interest of the issuer and the holder merges.

If the bonds become extinguished, and therefore are no longer considered as outstanding, there is no obligation eligible for a refundable credit.

Modifications to bonds could affect eligibility for the refundable credit if the modifications result in a reissuance. Generally, a reissuance occurs under federal tax law when there are significant modifications to the terms of a bond so that the bond ceases to be the same bond for tax purposes. A reissuance is a deemed exchange of the modified bond for the original bond. After a reissuance, a reissued obligation might not qualify for the refundable credit. More information on reissuance of bonds and certain circumstances in which it might unexpectedly occur can be found on TEB's website, where a new article on reissuance and answers to frequently asked questions about reissuance have recently been posted. [Graphic with picture of IRS.gov/taxexemptbond showing link to article]

TODD: An important complement to issuers' efforts to ensure compliance at issuance is the establishment of post-issuance compliance monitoring procedures to track compliance on their direct pay bond issues. Such procedures might include checking to make sure that all the available project proceeds of direct pay Build America Bonds remaining after funding of an allowable reserve fund are spent on capital cost items. Or that all the available project proceeds of specified tax credit bonds are spent on the proper type of permissible costs. These procedures benefit issuers by enabling them to identify and address any compliance issues in a timely manner. Compliance procedures also help to ensure that the request for a credit payment on Form 8038-CP is not being made when not allowed by the law.

Direct pay bonds present novel interpretative issues and factual scenarios for issuers. Our compliance programs with respect to direct pay bonds reflect both TEB's responsibility to promote compliance and its recognition of the importance of reasonable efforts to achieve compliance in light of such issues and scenarios.

TEB announced on our website that issuers of direct pay bonds can access the Tax Exempt Bonds Voluntary Closing Agreement Program to resolve identified compliance failures relating to their bonds. Through this program, issuers can work with the IRS to resolve compliance issues on a voluntary basis. TEB VCAP was originally created for tax-exempt bonds. Notice 2008-31 and Internal Revenue Manual Section 7.2.3 describe the process by which an issuer can seek relief under TEB VCAP. The purpose of the program is to encourage issuers to remain in compliance with the Internal Revenue Code. The important takeaway is that TEB VCAP is available to issuers of direct pay bonds to correct violations of the Internal Revenue Code as expeditiously as possible and to solve issues at the transaction level.

Issuers may submit a TEB VCAP request on an anonymous basis. The anonymous request option is intended to assist issuers in evaluating complex or unique violations as part of their post issuance compliance due diligence. It is not intended to encourage issuers to delay the submission of a fully disclosed request relating to relatively simple and straightforward violations. Certain novel interpretative issues and factual scenarios may be appropriate for anonymous requests. TEB VCAP's response to an anonymous request will be a general description of how TEB will analyze the issue, factors that will be considered, and which settlement terms may be appropriate for the type of violation described. Anonymous requests must present only a conceptual question and include only such hypothetical facts as are necessary to describe the violation. CPM will not respond to any anonymous requests which relate to an identifiable bond issue. For final relief with a closing agreement, the issuer must provide all information required under IRM 7.2.3, including identification of the bond issue and all relevant facts necessary to determine appropriate settlement terms. (Turn to Camera 1)

At this time, our office is working on a revision of the TEB VCAP IRM that includes updates that are specific to direct pay bonds. These updates are expected to include some additional resolution standards analogous to those in existence for certain noncompliance situations for tax-exempt bonds.

We look forward to these enhancements, but emphasize again that TEB VCAP is available today for issuers of direct pay bonds, and an issuer that detects a problem has a means of resolving any potential violations through TEB VCAP.

Now Carl will give a quick recap of some of the points we've covered today.

CARL: It is the goal of the IRS to process refundable credit payment requests so that the payments may be made contemporaneously with the associated interest payment date. The most effective way for the IRS to accomplish this is for issuers to timely and correctly file the Form 8038-CP. (Turn to Camera 3)

We have mentioned a number of common errors during our presentation today that can lead to delays.

- It is important to note that all correspondence relating to an 8038-CP return will be sent to the entity reported in Part I. This includes paper refunds if required.

- If the credit amount requested does not agree with the schedule previously provided, don't forget to attach a statement explaining the difference.

- Failure to provide valid ACH routing and account numbers is perhaps one of the most common problems causing delayed refunds.

- Finally, only an official of the Issuer may sign the 8038-CP.

The issuer must ensure and attest that the information presented in its return is, to the best of its knowledge and belief, true, correct, and complete. Failure to report accurate and complete information may result in a delay in the payment of the refundable credit. Said another way, attention to detail is critical. (Turn to Camera 1)

For a timely filed accurate return the refund claimed on the 8038-CP should be received before the interest payment date for fixed rate bonds. For late filed returns, and returns for reimbursement of interest on variable rate bonds, the refund claimed should be received within 45 days after we receive the return.

TODD: We have certainly covered a lot of information today. We appreciate you taking the time to participate in our webinar and hope that the material we've presented is helpful to you in requesting refundable tax credits on Form 8038-CP and in ensuring compliance with federal tax laws.

Additional information on the topics discussed today and other issues related to direct pay bonds and tax-exempt bonds generally, is available on the TEB website at www.irs.gov/taxexemptbond. In addition to the specific Notices we already mentioned, there are answers to frequently asked questions about direct pay bonds, tax credit bonds, and related filing requirements. [Graphic showing picture of page at http://www.irs.gov/taxexemptbond/content/0,,id=229169,00.html]

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 made to the IRS Customer Service line at 1-877-829-5500.

We appreciate the opportunity to present this webinar today and look forward to processing many more refundable credit payments on direct pay bonds. On behalf of Carl, TEB, and the IRS Tax Exempt and Government Entities division, thank you, and have a great day.