



## **Build America Bonds, Recovery Zone Bonds and Other Tax Credit Bonds – Implementation Guidelines**

This memorandum contains a brief summary of the guidelines for implementing (1) Build America Bonds providing Federal tax credits to investors in the bonds in an amount equal to 35% of the total coupon interest on taxable governmental-purpose bonds (the “Build America Bonds (Tax Credit)”); (2) Build America Bonds providing direct Federal payments to state or local governmental issuers in an amount equal to 35% of the total coupon interest payable to investors on taxable governmental-purpose bonds (the “Build America Bonds (Direct Payment)”); and (3) Recovery Zone Economic Development Bonds providing direct Federal payments to state or local governmental issuers in an amount equal to 45% of the total coupon interest payable by the issuer on these taxable bonds (the “Recovery Zone Economic Development Bonds (Direct Payment)”). The U.S. Department of Treasury (the “Treasury”) and the Internal Revenue Service (the “IRS”) issued the guidelines on April 3, 2009 in Notice 2009-26. In addition, this memorandum provides the volume cap allocations for (1) Qualified School Construction Bonds (“QSCBs”) and (2) Qualified Zone Academy Bonds (“QZABs”) as released in IRS Notice 2009-30 and IRS Notice 2009-35.

### **Build America Bonds (Tax Credit)**

*Form 8038-G Filing Requirements.* Issuers of Build America Bonds (Tax Credit) must check Line 18, “Other”, on Form 8038-G, “Information Return for Tax-Exempt Governmental Obligations,” and insert “Build America Bonds (tax credit)” on the line provided. In addition, issuers must attach a separate schedule indicating the type of bond issue that would normally be entered on Lines 11-18.

*Irrevocable Election.* Issuers of Build America Bonds (Tax Credit) are required by Internal Revenue Code (the “Code”) § 54AA(d) to make an irrevocable election to have § 54AA apply to the bonds. An issuer should make the election to issue the bonds on its books and records on or before the issue date of the bonds.

### **Build America Bonds (Direct Payment)**

*Use of Proceeds.* Build America Bonds (Direct Payment) may only be issued to finance “New Money Capital Expenditures” (defined below) and generally may not be issued to refinance capital expenditures in refunding issues. However, Build America Bonds (Direct Payment) may be used to (1) reimburse otherwise eligible capital expenditures and (2) to refinance temporary short-term governmental obligations issued after February 17, 2009 to finance capital expenditures paid or incurred after that date. New Money Capital Expenditures means 100 percent of the excess of (1) the available project proceeds

(sale proceeds of an issue less not more than 2% of sale proceeds used to pay costs of issuance plus investment earnings on those proceeds), over (2) the amounts in a reasonably required reserve fund.

*Irrevocable Election.* Issuers of Build America Bonds (Direct Payment) are required by Code § 54AA(g) to make an irrevocable election to have Code § 54AA apply to the bonds. An issuer should make the election to issue the bonds on its books and records on or before the issue date of the bonds.

*Form 8038-CP in General.* Under the IRS guidance, *for each payment of interest* on a Build America Bond (Direct Payment), the issuer must submit a separate request for payment from the IRS. The IRS has just released a new form for this purpose, “Form 8038-CP, Return for Credit Payments to Issuers of Qualified Bonds.” The IRS will be prepared to accept Form 8038-CP beginning May 1, 2009 and will be prepared to make timely interest payments to issuers with respect to interest payments beginning on or after July 1, 2009.

(1) Original Issue Discount. Original issue discount is not treated as a payment of interest for purposes of calculating the direct payment an issuer may receive from the IRS.

(2) Original Issue Premium. A bond will not qualify as a Build America Bond if the issue price has more than a de minimis amount of premium over the stated principal amount of the bond. A de minimis amount of premium is  $\frac{1}{4}$  of 1 percent of the par amount, multiplied by the number of complete years to maturity. For example, if a bond is issued with a 20 year maturity, then it may have up to 5% of original issue premium and still qualify as a Build America Bond.

*Form 8038-CP and Form 8038-G Filing Procedures.* Issuers must report the issuance of Build America Bonds (Direct Payment) on Form 8038-G, and the form must be filed with the IRS at least 30 days before the first Form 8038-CP is filed (issuers should not attach a Form 8038-CP to a Form 8038-G). For Build America Bonds (Direct Payment) issued before July 1, 2009, Form 8038-G may be filed less than 30 days before the filing of the first Form 8038-CP if the Form 8038-G is filed separately from, and prior to, the filing of Form 8038-CP. The filing dates for Form 8038-CP vary depending on whether the bonds bear interest at fixed rates or variable rates:

(1) Fixed Rate Bonds. An issuer of Build America Bonds (Direct Payment) paying interest at fixed rates must file a Form 8038-CP no earlier than 90 days, and no later than 45 days, before the applicable interest payment date. Issuers should expect to receive requested payments within 45 days of the date that a processible Form 8038-CP is filed with the IRS. If Form 8038-CP is timely filed, the IRS will make payment of the credit due the issuer on a contemporaneous basis by the applicable interest date.

(2) Variable Rate Bonds. For an issuer of Build America Bonds (Direct Payment) paying interest at variable rates, the due date for filing a Form 8038-CP is the 45<sup>th</sup> day after the last interest payment date within the quarterly period for which reimbursement is requested. Upon receipt of a timely filed Form 8038-CP, the IRS will make payment of the credit due the issuer quarterly on a reimbursement basis for interest paid by the issuer during the quarter. Issuers should expect to receive requested payments within 45 days of the date that a processible Form 8038-CP is filed with the IRS.

*Form 8038-G Filing Requirements.* Issuers of Build America Bonds (Direct Payment) must check Line 18, “Other”, on Form 8038-G and insert “Build America Bond (payment option)” on the line provided. Also, issuers must attach a separate schedule to Form 8038-G indicating the type of bond issue

that would normally be entered on Lines 11-18. In addition, issuers must attach a schedule to Form 8038-G which contains the information described below for the bonds:

(1) **Fixed Rate Bonds.** A complete debt service schedule titled “Fixed Rate Bond – Debt Service Schedule,” that provides a list of each interest payment date, total interest payable on that date, the total principal amount of bonds expected to be outstanding on each interest payment date, the credit payment expected to be requested from the IRS on each interest payment date, and the earliest date that bonds can be called.

(2) **Variable Rate Bonds.** A debt service schedule titled “Variable Rate Bond – Debt Service Schedule,” that provides a list of each interest payment date, the total principal amount of bonds expected to be outstanding on each interest payment date, and a description of how interest on the bonds is computed.

*Late Filings and Missed Payments.* The Treasury and IRS provided no express guidance regarding (1) the impact of an untimely filing of Form 8038-CP or (2) the procedures for when a requested payment is late or missed.

*Direct Federal Payments Treated as Overpayments.* The “refundable credits” (Federal payments) for Build America Bonds (Direct Payment) are treated as overpayments of tax. Accordingly, all rules relating to overpayments of tax apply. This means (1) the IRS may use the credits to offset other Federal income tax liabilities of the issuer under Code § 6402, (2) an issuer will be allowed to recover interest on any overpayment under Code § 6611; and (3) any claim for a credit or refund of an overpayment of tax will be limited under Code § 6511.

*Receipt of Direct Payment.* When the payments are made, the IRS will send the payments to the requested recipient’s last known address. The requested recipient’s last known address may not be the address on the Form 8038-CP. An issuer may verify and update its address of record with the IRS by calling 1-877-829-5500 and by Filing Form 8822, Change of Address.

### **Recovery Zone Economic Development Bonds (Direct Payment)**

*Use of Proceeds.* Recovery Zone Economic Development Bonds (Direct Payment) may only be issued to finance “Qualified Economic Development Purposes” (defined below). This means 100 percent of the excess of (1) the available project proceeds (sale proceeds of an issue less not more than 2% of sale proceeds used to pay costs of issuance plus investment earnings on those proceeds), over (2) the amounts in a reasonably required reserve fund must be used to finance Qualified Economic Development Purposes. Qualified Economic Development Purposes means expenditures for purposes of promoting development or other economic activity in a recovery zone, including (1) capital expenditures paid or incurred with respect to property located in a recovery zone, (2) expenditures for public infrastructure and construction of public facilities and (3) expenditures for job training and educational programs.

*Irrevocable Election.* Issuers of Recovery Zone Economic Development Bonds (Direct Payment) are required by Code § 54AA(g) to make an irrevocable election to have Code § 54AA apply to the bonds. An issuer should make the election to issue the bonds on its books and records on or before the issue date of the bonds.

*Form 8038-CP in General.* Under the IRS guidance, like the Build America Bonds (Direct Payment), for each payment of interest on a Recovery Zone Economic Development Bond (Direct Payment), the issuer must submit a separate request for payment from the IRS, using Form 8038-CP. The

IRS will be prepared to accept Form 8038-CP beginning May 1, 2009 and will be prepared to make timely interest payments to issuers with respect to interest payments beginning on or after July 1, 2009.

(1) Original Issue Discount. Original issue discount is not treated as a payment of interest for purposes of calculating the direct payment an issuer may receive from the IRS.

(2) Original Issue Premium. A bond will not qualify as a Recovery Zone Economic Development Bond if the issue price has more than a de minimis amount of premium over the stated principal amount of the bond. A de minimis amount of premium is  $\frac{1}{4}$  of 1 percent of the par amount, multiplied by the number of complete years to maturity. For example, if a bond is issued with a 20 year maturity, then it may have up to 5% of original issue premium and still qualify as a Recovery Zone Economic Development Bond.

*Form 8038-CP and Form 8038-G Filing Procedures.* Issuers must report the issuance of Recovery Zone Economic Development Bonds (Direct Payment) on Form 8038-G, and the form must be filed with the IRS at least 30 days before the first Form 8038-CP is filed (issuers should not attach a Form 8038-CP to a Form 8038-G). For Recovery Zone Economic Development Bonds (Direct Payment) issued before July 1, 2009, Form 8038-G may be filed less than 30 days before the filing of the first Form 8038-CP if the Form 8038-G is filed separately from, and prior to, the filing of Form 8038-CP. The filing dates for Form 8038-CP vary depending on whether the bonds bear interest at fixed rates or variable rates:

(1) Fixed Rate Bonds. An issuer of Recovery Zone Economic Development Bonds (Direct Payment) paying interest at fixed rates must file a Form 8038-CP no earlier than 90 days, and no later than 45 days, before the applicable interest payment date. Issuers should expect to receive requested payments within 45 days of the date that a processible Form 8038-CP is filed with the IRS. If Form 8038-CP is timely filed, the IRS will make payment of the credit due the issuer on a contemporaneous basis by the applicable interest date.

(2) Variable Rate Bonds. For an issuer of Recovery Zone Economic Development Bonds (Direct Pay) paying interest at variable rates, the due date for filing a Form 8038-CP is the 45<sup>th</sup> day after the last interest payment date within the quarterly period for which reimbursement is requested. Upon receipt of a timely filed Form 8038-CP, the IRS will make payment of the credit due the issuer quarterly on a reimbursement basis for interest paid by the issuer during the quarter. Issuers should expect to receive requested payments within 45 days of the date that a processible Form 8038-CP is filed with the IRS.

*Form 8038-G Filing Requirements.* Issuers of Recovery Zone Economic Development Bonds (Direct Payment) must check Line 18, "Other", on Form 8038-G and insert "Recovery Zone Economic Development Bond (payment option)" on the line provided. Also, issuers must attach a separate schedule to Form 8038-G indicating the type of bond issue that would normally be entered on Lines 11-18. In addition, issuers must attach a schedule to Form 8038-G which contains the information described below for the bonds:

(1) Fixed Rate Bonds. A complete debt service schedule titled "Fixed Rate Bond – Debt Service Schedule," that provides a list of each interest payment date, total interest payable on that date, the total principal amount of bonds expected to be outstanding on each interest payment date, the credit payment expected to be requested from the IRS on each interest payment date, and the earliest date that bonds can be called.

(2) Variable Rate Bonds. A debt service schedule titled "Variable Rate Bond – Debt Service Schedule," that provides a list of each interest payment date, the total principal amount of

bonds expected to be outstanding on each interest payment date, and a description of how interest on the bonds is computed.

*Late Filings and Missed Payments.* The Treasury and IRS provided no express guidance regarding (1) the impact of an untimely filing of Form 8038-CP or (2) the procedures for when a requested payment is late or missed.

*Direct Federal Payments Treated as Overpayments.* The “refundable credits” (Federal payments) for Recovery Zone Economic Development Bonds (Direct Payment) are treated as overpayments of tax if the amount of refundable credits due the issuer exceeds the Federal tax imposed upon the issuer. Accordingly, all rules relating to overpayments of tax apply. This means (1) the IRS may use the credits to offset other Federal income tax liabilities of the issuer under Code § 6402, (2) an issuer will be allowed to recover interest on any overpayment under Code § 6611; and (3) any claim for a credit or refund of an overpayment of tax will be limited under Code § 6511.

*Receipt of Direct Payment.* When the payments are made, the IRS will send the payments to the requested recipient’s last known address. The requested recipient’s last known address may not be the address on the Form 8038-CP. An issuer may verify and update its address of record with the IRS by calling 1-877-829-5500 and by Filing Form 8822, Change of Address.

*Volume Cap.* The Treasury and the IRS expect to issue separate guidance on the \$10 billion national volume cap allocation for Recovery Zone Economic Development Bonds (Direct Payment) but have not set an estimated date for release of this information.

**Qualified School Construction Bonds**

*Allocation of National Bond Volume Cap for QSCBs.*

<b>Issuer</b>	<b>2009 Volume Cap Allocation</b>
State of Illinois	\$244,435,000
State of Iowa	\$64,252,000
State of Kansas	\$79,589,000
State of Missouri	\$141,441,000
State of Nebraska	\$32,343,000
Kansas City School District	\$17,880,000
Omaha Public Schools	\$17,378,000
St. Louis City	\$28,163,000

*Form 8038.* Issuers of QSCBs must submit a Form 8038. When completing Form 8038, issuers must check Line 20C “Other” and insert “QSCBs” in the space provided for the bond description.

*Eligible Expenditures for Equipment.* All available proceeds of QSCBs must be spent on construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which a public school facility is to be constructed with bond proceeds. For this purpose, eligible expenditures include, among other things, expenditures for the cost of acquisition of equipment to be used in the portion(s) of the public school facility that is being constructed, rehabilitated, or repaired with proceeds of QSCBs.

*Eligible Issuers.* Eligible issuers include States, political subdivisions, large local educational agencies that are State or local governmental entities, and entities empowered to issue bonds on behalf of any such entity. Further, eligible issuers include otherwise eligible issuers in conduit financing issues. In all events, the eligible costs of public school facilities financed with proceeds of a QSCB must relate to public school facilities that are located within both the jurisdiction of the issuer of the QSCBs and the jurisdiction of the authorized entity that allocated volume cap to the issue of QSCBs. Thus, the Omaha, Kansas City and St. Louis City School Districts have received a volume cap allocation and may issue QSCBs themselves or may be the beneficiary of proceeds of an issue issued by another eligible issuer with respect to their volume cap, provided that the public school facilities to be financed with the bond proceeds are located within both the jurisdiction of the issuer of the QSCBs and the jurisdiction of the Omaha, Kansas City or St. Louis City School District.

*Maximum Maturity and Credit Rate.* The maximum maturity and credit rate are determined as of the date that there is a binding, written contract for the sale or exchange of the bonds. The applicable maximum maturity and QCSB credit rate are published daily by the Bureau of Public Debt at: <http://www.treasurydirect.gov>.

**Qualified Zone Academy Bonds**

*Volume Cap Allocation.*

<b>Issuer</b>	<b>2008 Volume Cap Allocation</b>	<b>2009 Volume Cap Allocation</b>
State of Illinois	\$14,972,000	\$52,401,000
State of Iowa	\$3,182,000	\$11,139,000
State of Kansas	\$3,002,000	\$10,508,000
State of Missouri	\$7,426,000	\$25,990,000
State of Nebraska	\$1,931,000	\$6,760,000

*Maximum Maturity and Credit Rate.* The maximum maturity and credit rate are determined as of the date that there is a binding, written contract for the sale or exchange of the bonds. The applicable maximum maturity and QZAB credit rate are published daily by the Bureau of Public Debt at: <http://www.treasurydirect.gov>.

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