

Frequently Asked Questions on Filing Requirements for Build America Bonds, Recovery Zone Economic Development Bonds and Specified Tax Credit Bonds

New revised Form 8038-CP, *Return for Credit Payments to Issuers of Qualified Bonds*, is used to claim refundable tax credits payable to issuers of qualified build America bonds (BABs) and recovery zone economic development bonds (RZEDBs) under sections 54AA, 1400U-2 and 6431 of the Internal Revenue Code (the “Code”). Form 8038-CP is also used to claim refundable tax credits payable to issuers of specified tax credit bonds (STCBs) under sections 54A and 6431(f) of the Code. These bonds and the Federal direct payment credits were authorized by the American Recovery and Reinvestment Act of 2009 (ARRA) and by the Hiring Incentives to Restore Employment Act of 2010 (HIRE). On April 3, 2009, Notice 2009-26 was issued providing initial guidance for BABs and RZEDBs and the implementation plans for the refundable credit payment procedures for these bonds. On March 18, 2010, Notice 2010-35 was issued providing initial guidance for STCBs and the implementation plans for the refundable credit payment procedures for these bonds. This set of Questions and Answers is offered to assist issuers with questions regarding qualified bonds under section 6431, but is not formal guidance. The Questions and Answers will be updated periodically and may be changed by subsequent IRS or Treasury guidance or Congressional action.

The revised form will allow the issuer, or its designee, the option to receive payment by direct deposit. The revised Form 8038-CP will be processed on receipt for BABs and RZEDBs. The IRS will be prepared to process the revised Form 8038-CP for STCBs no later than July 12, 2010, and to make timely refundable credit payments with respect to bond interest payment dates on STCBs that are issued on or after September 1, 2010. Issuers of STCBs with interest payment dates prior to September 1, 2010 may submit a single Form 8038-CP for the full amount of the credit payment for interest paid on those dates; however, for the due date and processing of Form 8038-CP, all such interest shall be deemed to have been paid on, and the first date treated as an interest payment date for such bonds shall be, September 1, 2010.

Section 5 of Notice 2009-26 provides instructions for reporting the original issuance of BABs and RZEDBs on Form 8038-G, *Information Return for Tax-Exempt Governmental Obligations*. In February 2010, the IRS published a new Form 8038-B, *Information Return for Build America Bonds and Recovery Zone Economic Development Bonds*. Issuers should report the issuance of BABs and RZEDBs on Form 8038-B instead of Form 8038-G. Section 5 of Notice 2010-35 provides instructions for reporting the original issuance of both qualified tax credit bonds and STCBs on new Form 8038-TC.

A number of questions have arisen relating to filing Form 8038-B, Form 8038-TC and revised Form 8038-CP. These questions and answers are intended to illustrate use of the revised Form 8038-CP, Form 8038-B and new Form 8038-TC and to provide additional information for these forms. Additionally, the IRS has established an email address to which questions concerning the filing of Forms 8038-B, Form 8038-TC and Form 8038-CP may be submitted. Questions may be e-mailed to TaxExemptBondQuestions@irs.gov with "Form 8038-B Question," "Form 8038-CP Question," or "Form 8038-TC Question" in the subject line. Please include a description of your question, a return email address, the name of a person to contact, and phone number in the email.

Questions and Answers Relating to Form 8038-B and Form 8038-TC

Q-1. How is the yield calculated for BABs (Direct Pay), for RZEDBs and for STCBs?

A-1. Issuers should calculate the yield on BABs (Direct Pay), RZEDBs and STCBs for purposes of the arbitrage rules of section 148 of the Code and the regulations thereunder by reducing the amount of interest paid on the bond by the credit allowed under section 6431. (The amount of the refundable credit received may be less than the amount allowed due to Federal and other liability offsets.)

Q-2. If tax-exempt bonds and tax credit bonds or STCBs or BABs are issued to finance the same project, on what form or forms are these bonds to be reported?

A-2. The tax-exempt bonds should be reported on Form 8038-G or Form 8038-GC, as appropriate, the BABs should be reported on Form 8038-B and the qualified tax credit bonds and STCBs should be reported on Form 8038-TC.

Q-3. If both RZEDBs and BABs are issued to finance capital expenditures for a single project, what form or forms should be filed to meet section 149(e) reporting requirements?

A-3. A separate Form 8038-B must be filed for BABs (Tax Credit), BABs (Direct Pay), and RZEDBs.

Q-4. If an issue of BABs or STCBs contains both variable rate bonds and fixed rate bonds, must they be filed on a separate Form 8038-B or Form 8038-TC?

A-4. No. When completing Form 8038-B, the issuer should follow the provisions of section 5.2 of Notice 2009-26 and the instructions to Form 8038-B. When completing Form 8038-TC, the issuer should follow the provisions of section 5 of Notice 2010-35 and the instructions to Form 8038-TC. Both the variable rate and fixed rate bonds must be reported together on Form 8038-B or Form 8038-TC. The issuer must attach separate, clearly labeled debt service schedules for the fixed rate bonds and the variable rate bonds.

Q-5. If drawdown BABs are issued, and the principal amount and interest payments for the interest payment dates are not known at the date of issue, but the interest rate on the bonds is fixed for two years, what information should the debt service schedule attached to Form 8038-B contain?

A-5. The debt service schedule attached to Form 8038-B should be clearly labeled as drawdown bonds and should reflect the debt service on the anticipated draw schedule. The debt service schedule should include the known debt service and enter the interest payment dates and anticipated outstanding principal amounts for the unknown periods. (If the interest payment on variable rate bonds is known in advance of an interest payment date, the issuer may file Form 8038-CP within the same timelines as fixed rate bonds.).

Q-6. What is the time frame for filing Form 8038-B or Form 8038-TC?

A-6. To meet the reporting requirements of section 149(e), Form 8038-B or Form 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 issue is issued. However, when an issuer is requesting payment of the credit on Form 8038-CP, Form 8038-B or Form 8038-TC must also be filed 30 days prior to filing Form 8038-CP.

Q-7. What are the “sale proceeds” required to be reported under “Use of Proceeds of Issue” on Form 8038-B and on Form 8038-TC?

A-7. Sale proceeds are defined on Page 1 of each of the instructions to Form 8038-B and Form 8038-TC and in section 1.148-1(b) of the Treasury Regulations. For qualified tax credit bonds and STCBs section 54A requires, among other things, that 100% of available project proceeds be spent for one or more qualified purposes. The definition of available project proceeds in section 54A means sale proceeds of such issue (less not more than 2% of such proceeds used to pay issuance costs) plus investment proceeds thereon. If a credit is stripped at issuance, sale proceeds must include sale proceeds of the principal and sale proceeds of the credit strips. For BABs (Direct Pay) section 54AA requires, among other things, that 100 percent of the excess of available project proceeds, defined in section 54A to mean sale proceeds of such issue, (less not more than 2 percent of such proceeds used to pay issuance costs) plus investment proceeds thereon, over the amounts in a reasonably required reserve are to be used for capital expenditures.

Q-8. Are the irrevocable elections required by sections 54AA(d)(1)(C), and 54AA(g)(2)(B) or 6431(f)(3)(b) of the Code required to be submitted with Form 8038-B or Form 8038-TC respectively?

A-8. No. Section 4 of Notice 2009-26 relating to the elections required by sections 54AA(d) and (g) and section 4 of Notice 2010-35 relating to the election required by section 6431(f)(3)(b) provide that the elections are to be made on the issuer's books and records on or before the issue date of the bonds. Each election may be evidenced using any reasonable method that establishes that the irrevocable election was made in a timely manner by the issuer. The format of such election is not prescribed and inclusion with any return is not required.

Questions and Answers Relating to Form 8038-CP

Q-9. If we file Form 8038-CP with our current address, even if it has changed since filing Form 8038-B or Form 8038-TC will we receive payment?

A-9. New Form 8038-CP permits credit payments to be sent either by direct deposit as authorized by the issuer or, if direct deposit is not elected by the issuer, by paper check to the addressee listed in Part I on the 8038-CP. As noted in section 3.1(a) of Notice 2009-26, the IRS originally sent payments to the requested recipient's “last known address”, as that phrase is defined and determined under section 301.6212-2 of the Treasury Regulations and Rev. Proc. 2001-18, 2001-1 C.B. 708, or any successor guidance, even if it was not the address included on Form 8038-CP.

Q-10. May Form 8038-CP be filed earlier than 30 days after filing Form 8038-B or Form 8038-TC if waiting the full 30 days would result in the issuer filing Form 8038-CP less than 45 days before the related interest payment date?

A-10. The 30 day period described in section 5.2 of Notice 2009-26 is intended to provide the IRS sufficient time to process Form 8038-B before receiving Form 8038-CP, the return for direct payment credits related to the bond transaction being reported. In those cases where the 30 day and 45 day timeframes conflict, issuers may file their first Form 8038-CP less than 30 days after filing Form 8038-B or Form 8038-TC. During processing of the Form 8038-CP, the IRS may telephone the issuer, or its authorized representative, to inquire whether the Form 8038-B or Form 8038-TC has been filed. The IRS may request that a copy of Form 8038-B or Form 8038-TC be provided directly to the reviewer to avoid potential delays in processing the credit payments. However, do not include a copy of a previously filed Form 8038-B or Form 8038-TC when submitting a Form 8038-CP.

Q-11. If RZEDBs, BABs or STCBs are issued to finance capital expenditures for a project, what form or forms should be filed to request the credit?

A-11. A separate Form 8038-CP must be filed for BABs (Direct Pay), RZEDBs and STCBs regardless of whether they may or may not constitute part of a single issue. One Form 8038-CP should be filed reflecting the 45% credit on the RZEDBs; another Form 8038-CP should be filed reflecting the 35% credit on the BABs (Direct Pay); and a separate Form 8038-CP should be filed reflecting the appropriate applicable percentage for STCBs. For qualified zone academy bonds and qualified school construction bonds, the allowed refundable credit is the lesser of the interest payable on such interest payment date or the amount that would have been payable under such bond if the interest were determined based on the applicable credit rate under section 54A(b)(3). For new clean renewable energy bonds or qualified energy conservation bonds the allowed refundable credit is the lesser of the interest payable on such interest payment date or 70% of the amount that would have been payable under such bonds if the interest were determined based on the applicable credit rate under section 54A(b)(3). Each STCB and each separate STCB maturity must be filed on a separate Form 8038-CP.

Q-12. If an issue of BABs or STCBs contains both variable rate bonds and fixed rate bonds, must they be filed on separate Forms 8038-CP?

A-12. Yes. If an issue of BABs or STCBs contains both variable rate bonds and fixed rate bonds, separate Forms 8038-CP must be filed for variable rate bonds and fixed rate bonds. (These amounts should match the amount of the respective debt service schedules attached to Form 8038-B or Form 8038-TC.)

Q-13. If a single issue consists of both fixed rate bonds and variable rate bonds as part of the same issue, when should the issuer file Form 8038-CP for the fixed rate portion?

A-13. Section 3.1(b) of Notice 2009-26 and Sections 3.2 and 3.3 of Notice 2010-35 and the instructions for Form 8038-CP provide the timeframe for filing Form 8038-CP for fixed rate bonds (as opposed to a fixed rate issue). For fixed rate bonds, Form 8038-CP must be filed no later than 45 days before the related interest payment date but no earlier than 90 days before the related interest payment date.

Q-14 If a single issue of STCBs consist of multiple maturities, must they be filed on separate Forms 8038-CP?

A.-14 Yes. If a single issue of STCBs consists of multiple maturities, a separate Form 8038-CP must be filed for each maturity. The interest and calculation for the refundable credit due must be calculated solely for the maturity that such payment is being requested on the respective Form 8038-CP. The CUSIP entered on Form 8038-CP must be the CUSIP for that bond maturity.

Q-15. When should the issuer file Form 8038-CP for the variable rate portion?

A-15. The timeframes for filing Form 8038-CP for variable rate bonds are provided in section 3.1(c) of Notice 2009-26 and Section 3.3 of Notice 2010-35 and the instructions for Form 8038-CP. However, when the issuer knows the interest payment amount of variable rate bonds prior to the interest payment date, the issuer may file Form 8038-CP within the same timelines as fixed rate bonds (45 days before the relevant interest payment date but no earlier than 90 days before the relevant interest payment date). When completing the debt service schedule attached to the Form 8038-B or Form 8038-TC for these types of bonds, the issuer should include the known debt service and enter the interest payment dates and outstanding principal amounts for the unknown years.

When the issuer does not know the interest payment amount of variable rate bonds prior to the interest payment date, the issuer must aggregate all credit payments on a quarterly basis and file Form 8038-CP for reimbursement in arrears no later than 45 days after the last interest payment date within the quarterly period for which reimbursement is being requested.

Q-16. Is the applicable percentage of the refundable credits payable on BABs, RZEDBs, and STCBs, applied against pre-issuance accrued interest?

A-16. No. Pre-issuance accrued interest is considered a return of capital and not a payment for the use of money. As such, the applicable percentage of refundable credits payable for interest on BABs, RZEDBs and STCBs are not allowed for pre-issuance accrued interest. The amount of interest reported on Lines 19a or 19b of Form 8038-CP should not include pre-issuance accrued interest. (Also, when attaching the debt service schedules to Form 8038-B or Form 8038-TC, do not include pre-issuance accrued interest in the schedules.)

Q-17. If there is a filing error on Form 8038-CP or if it is incomplete, will the credit payment be processed?

A-17. When returns are incomplete or otherwise not able to be processed, the IRS will correspond with either the issuer or the entity listed in Part I of the 8038-CP, as necessary, to process the return. In certain instances, the IRS may contact an individual listed as the designated contact person on the form. However, the credit payment may be delayed as a result of filing errors.

Q-18. If Form 8038-CP is filed late, will the issuer still receive the credit payment?

A-18. Late filed returns will be processed; however, the credits may not be paid by the interest payment date to which they relate. Returns filed after the normal statutory period of limitation for claims may be barred. Generally applicable limitations on the accrual of interest on late filed returns apply.

Q-19. Can the trustee sign Form 8038-CP?

A-19. No. Form 8038-CP is a return of the issuer, and as such, must be signed by an officer of the issuer with the authority to: (i) bind the issuer; (ii) authorize payment to be sent to the entity listed in Part I; and (iii) authorize the IRS to communicate with any person listed as a designee of the issuer.

Q-20. Can the issuer designate a conduit borrower to receive the credit payment?

A-20. No. Section 6431 of the Code states the Secretary shall pay the credit to the issuer of the bonds, or to any person who makes such interest payments on behalf of the issuer. The person who makes interest payments on behalf of the issuer is generally the bond trustee or other designated paying agent. Accordingly, the IRS is authorized to make refund payments to the actual issuer of the bonds or to a trustee or paying agent who is making such interest payments on behalf of the issuer.

Q-21. How does the trustee, as recipient of credit payments from multiple issuers, identify the issuer to whom the payment relates?

A-21. The new Form 8038-CP allows the issuer the option of direct deposit. If the issuer elects direct deposit, the corresponding ACH routing and account number will identify the issuer to the trustee. If the issuer does not elect direct deposit, trustees receiving credits may identify the issuer's credit check by the amount. When that is not possible, the issuer, or the trustee, if the trustee is authorized by the issuer on Form 8038-CP, may call TEGE Customer Service at 1-877-829-5500 to secure the issuer's report number (the three digit number on Line 10 of the Form 8038-CP beginning with an "8, 2, or 4" that is assigned by the Service Center during processing). The report number is listed on the paper check.

Q-22. If the issuer designates another person to receive the credit payments in Part I of Form 8038-CP, such as a trustee bank, will the issuer's credit payment be subject to tax and other liability offsets of that designated representative?

A-22. No. The credit is paid with respect to the issuer of the bonds and liabilities of other entities are not considered for offset purposes.

Q-23. How do we confirm that the IRS received our Form 8038-CP?

A-23. The IRS is not currently sending confirmations of Form 8038-CP returns. However, the IRS intends in the near future to issue confirmations to the issuer or to the representative of the issuer named in Part I of Form 8038-CP. Until such time, confirmations should not be requested for Form 8038-CP. The issuer may use certified mail, including the return receipt option, or use one of the many commercial delivery services available, such as FedEx, UPS, DHL, etc., where the tracking history may document receipt by the IRS.

Q-24. – What is the procedure for obtaining BAB or STCB credit refund payment information?

A-24. If you have not received your payment, and you have filed your return at least 45 days before your interest payment date, and it is less than 3 weeks before your interest payment date, please contact TEGE Customer Service at 1-877-829-5500. You will need the EINs of the Part I entity and the issuer (if applicable), the CUSIP # of the issue (if applicable), the issue price of the issue, the interest payment date, report number (if available), and the anticipated payment amount.

Q.-25 Who can file Form 8038-CP for pool bonds?

A-25. Either issuer may file Form 8038-CP for pool bonds; provided that only one issuer (either the pool issuer or the conduit borrower, but not both) files Form 8038-CP for the same bond issue within a pool.