



Public Finance Alert

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Internal Revenue Service provides Build America Bond guidance

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Summary. On April 3, 2009, the Internal Revenue Service (the “IRS”) issued Notice 2009-26, which provides guidance on the new Build America Bond program created by the American Recovery and Reinvestment Act of 2009 (the “Act”). Notice 2009-26 (the “Notice”) provides guidance on the initial implementation of the direct federal subsidy payment procedures, elections for using this program, and information-reporting for this program, but only limited guidance on other aspects of the program.

On April 3, 2009, the IRS also issued other guidance related to qualified zone academy bonds and qualified school construction bonds. On April 6, 2009, the IRS issued guidance related to qualified energy conservation bonds and new clean renewable energy bonds.

Build America Bonds. As described in our February 12, 2009, *Alert*, the Act authorizes state and local governments to issue Build America Bonds as taxable bonds in 2009 and 2010 in lieu of issuing tax-exempt governmental bonds. There are two types of Build America Bonds: (1) Build America Bonds (Tax Credit), which pay investors both taxable interest and a federal tax credit equal to 35 percent of that taxable interest, and (2) Build America Bonds (Direct Payment), which provide state and local governments with a direct federal subsidy payment equal to 35 percent of the interest paid to investors on such bonds.

Notice 2009-26. The Notice provides some guidance on the eligible types of financings for both types of Build America Bonds.

- **Build America Bonds (Tax Credit).** The Notice provides that Build America Bonds (Tax Credit) may be issued to finance any governmental purpose for which tax-exempt governmental bonds may be issued, other than private activity bonds. Accordingly, Build America Bonds (Tax Credit) may be issued to finance capital expenditures and working capital expenditures and may involve new money financings, current refundings, and advance refundings.
- **Build America Bonds (Direct Payment).** The Notice provides that Build America Bonds (Direct Payment) may be issued only to finance capital expenditures (plus issuance costs and reserve funds) that may be financed with tax-exempt governmental bonds. Build America Bonds (Direct Payment) *may not* be issued to finance working capital expenditures or to

refund other bonds, other than interim financings issued after the effective date of the Act.

Build America Bond Election. The Notice provides that an issuer should make the election to issue Build America Bonds on its books and records on or before the issue date of such bonds. In addition, an issuer of Build America Bonds (either Direct Payment or Tax Credit) must report the issuance of such bonds on IRS Form 8038-G, *Information Return for Tax-Exempt Governmental Obligations*, and provide additional information with the form.

Direct Payment Procedures. The IRS also released IRS Form 8038-CP, *Return for Credit Payments to Issuers of Qualified Bonds*, which is to be used by issuers to request the federal payment under the Build America Bonds (Direct Payment) option.

The Notice states that the IRS and Treasury Department will be prepared to make timely payments with respect to interest payment dates beginning on or after July 1, 2009.

- **Fixed-rate bonds.** For fixed-rate Build America Bonds (Direct Payment), the federal payment will be paid on a *contemporaneous* basis by the applicable interest payment date. The due date for an issuer to file a Form 8038-CP is the 45th day before the applicable interest payment date with respect to the bonds. The return may not be filed earlier than the 90th day before the relevant interest payment date.
- **Variable-rate bonds.** For variable-rate Build America Bonds (Direct Payment), the federal payment will be paid quarterly on a *reimbursement* basis for interest paid by the issuer during the quarter. Form 8038-CP for reimbursement must be filed within 45 days after the last interest payment date within the quarterly period for which reimbursement is requested.

The IRS and Treasury have solicited public comment on the payment procedures for Build America Bonds, including comments regarding efficient methods to make such direct payments, such as electronically.

Additional guidance under the Act. Also on April 3, 2009, the IRS issued Notices 2009-30 and 2009-35, related to qualified zone academy bonds and qualified school construction bonds, respectively. Notice 2009-30 sets forth the maximum amount of qualified zone academy bonds authorized under the Act that may be issued for each state for each of the calendar years 2008 and 2009. In addition, Notice 2009-35 sets forth the maximum amount of qualified school construction bonds authorized by the Act that are allocated to each state and large local educational agency for 2009.

On April 6, 2009, the IRS issued Notices 2009-29 and 2009-33, related to qualified energy conservation bonds and new clean renewable energy bonds, respectively. Notice 2009-29 sets forth the maximum amount of qualified energy conservation bonds authorized under the Act that may be issued for each state. Notice 2009-33 solicits applications for allocations of the national volume of new clean renewable energy bonds that was increased by the Act to \$2.4 billion.

Links to the IRS notices can be found at:

http://www.nixonpeabody.com/linked_media/publications/n-09-35.pdf

http://www.nixonpeabody.com/linked_media/publications/n-09-33.pdf

http://www.nixonpeabody.com/linked_media/publications/n-09-30.pdf

http://www.nixonpeabody.com/linked_media/publications/n-09-29.pdf

http://www.nixonpeabody.com/linked_media/publications/n-09-26.pdf

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