Part III - Administrative, Procedural, and Miscellaneous

Direct Payment Subsidy Option for Certain Qualified Tax Credit Bonds and Build America Bonds

Notice 2010-35

SECTION 1. PURPOSE

This Notice addresses the new Federal refundable tax credit subsidy option (also referred to hereafter as the direct payment subsidy option) under § 6431(f) of the Internal Revenue Code (the "Code") for certain qualified tax credit bonds under § 54A. This Notice provides guidance on the refundable tax credit payment procedures for this option, required elections, information reporting, and certain other interim guidance. This Notice describes regulations that the Treasury Department and the IRS expect to issue. Pending the promulgation and effective date of future administrative or regulatory guidance, this Notice provides certain interim guidance applicable to these qualified tax credit bonds under § 54A and also to build America bonds under § 54AA(g) (Build America Bonds) on which taxpayers may rely. This Notice is intended to facilitate prompt implementation of this borrowing option and to enable issuers to begin issuing these bonds for qualified purposes.

SECTION 2. BACKGROUND

2.1. Introduction

Section 301 of the Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, 124 Stat. 71 (2010) (the “HIRE Act”) added subsection (f) to § 6431 of the Code, which authorizes issuers to elect irrevocably to receive Federal direct payments of allowances of refundable tax credits to subsidize a prescribed portion of their borrowing costs instead of the Federal tax credits that otherwise would be allowed to holders of certain qualified tax credit bonds under § 54A.

In particular, the direct payment subsidy option applies to the following specified tax credit bonds that meet the requirements to be qualified tax credit bonds under § 54A: (1) new clean renewable energy bonds (as defined in § 54C); (2) qualified energy conservation bonds (as defined in § 54D); (3) qualified zone academy bonds (as defined in § 54E); and (4) qualified school construction bonds (as defined in § 54F). The direct payment subsidy option applies to the specified tax credit bonds only if the bonds are issued after the date of enactment of the HIRE Act (March 18, 2010) and the issuer makes an irrevocable election to apply this option under § 6431(f). (The specified tax credit bonds that meet the requirements for the direct payment subsidy option under § 6431(f) are referred to in this Notice as “Direct Pay Tax Credit Bonds.”)

In general, under § 6431(f)(1)(C), Direct Pay Tax Credit Bonds provide a Federal borrowing subsidy through a refundable tax credit paid directly to issuers with respect to each interest payment due under the bonds in an amount equal to the lesser of: (i) the amount of interest payable under such bonds on such interest payment date, or (ii) the amount of interest (100 percent of the amount of such interest on qualified school construction bonds and qualified zone academy bonds and 70 percent of the amount of such interest on new clean renewable energy bonds and qualified energy conservation bonds, respectively) which would have been payable under such bonds on such interest payment date if the interest were determined at the tax credit bond rate determined under § 54A(b)(3) for qualified tax credit bonds.

2.2. Direct Pay Tax Credit Bond Requirements

Direct Pay Tax Credit Bonds have different program requirements and different levels of Federal borrowing subsidies depending on the type of qualified tax credit bond. Section 54A imposes specific program requirements for each defined type of qualified tax credit bond (e.g., qualified purposes to finance public school or energy projects). In addition, § 54A(d) imposes general program requirements on all qualified tax credit bonds, particularly requirements in § 54A(d)(2), (3), (4), (5), and (6) relating to expenditures, information reporting, arbitrage investment restrictions, maturity limitations, and prohibitions against financial conflicts of interest, respectively.

Section 54C(a) provides that the term "new clean renewable energy bond" means any bond issued as part of an issue if: (1) 100 percent of the available project proceeds of such issue are to be used for capital expenditures incurred by governmental bodies, public power providers, or cooperative electric companies for one or more qualified renewable energy facilities; (2) the bond is issued by a qualified issuer; and (3) the issuer designates such bond for purposes of § 54C. For more information on new clean renewable energy bonds, see § 54C and Notice 2009-33, 2009-17 IRB 865 (April 27, 2009).

Section 54D(a) provides that the term "qualified energy conservation bond" means any bond issued as part of an issue if: (1) 100 percent of the available project proceeds of such issue are to be used for one or more qualified conservation purposes; (2) the bond is issued by a State or local government; and (3) the issuer designates such bond for purposes of § 54D. For more information on qualified energy conservation bonds, see § 54D and Notice 2009-29, 2009-16 IRB 849 (April 20, 2009).

Section 54E(a) provides that the term "qualified zone academy bond" means any bond issued as part of any issue if: (1) 100 percent of the available project proceeds of such issue are to be used for a qualified purpose with respect to a qualified zone academy established by an eligible local education agency; (2) the bond is issued by a State or local government within the jurisdiction of which such academy is located; and

(3) the issuer designates such bond for purposes of § 54E and makes certain certifications with respect to receiving written assurances for meeting the private business contribution requirement of § 54E(b) and receiving written approval of the eligible local education agency for the bond issue. For more information on qualified zone academy bonds, see § 54E, Notice 2009-30, 2009-16 IRB 852 (April 20, 2009), and Notice 2010-22, 2010-10 IRB 435 (March 8, 2010).

Section 54F(a) provides that the term "qualified school construction bond" means any bond issued as part of an issue if: (1) 100 percent of the available project proceeds of such issue are to be used for the construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which such a facility is to be constructed with part of the proceeds of such issue; (2) the bond is issued by a State or local government within the jurisdiction of which such school is located; and (3) the issuer designates such bond for purposes of § 54F. For more information on qualified school construction bonds, see § 54F, Notice 2009-35, 2009-17 IRB 876 (April 27, 2009), and Notice 2010-17, 2010-14 IRB 519 (April 5, 2010).

2.3. Amount of Refundable Credit Payment

Section 6431(f)(1)(A) provides that, in applying the refundable credit payment provisions of § 6431, a Direct Pay Tax Credit Bond is treated as a qualified bond. Section 6431(b) provides generally that with respect to each interest payment date on a qualified bond the Treasury Department shall pay to the issuer of such bond (or to any person who makes such interest payments on behalf of the issuer) an amount equal to the amount of the refundable credit allowed under § 6431(b).

Section 6431(f)(1)(C) provides that, for a Direct Pay Tax Credit Bond that is a qualified zone academy bond or a qualified school construction bond, the amount of the refundable credit payment determined under § 6431(b) with respect to any interest payment date under the bond is equal to the lesser of: (i) 100 percent of the amount of interest payable under the bond on such date; or (ii) 100 percent of the amount of interest which would have been payable under such bond on such date if such interest were determined at the applicable tax credit bond rate determined under § 54A(b)(3).

Section 6431(f)(2) provides for a reduced amount of refundable credit payment for a Direct Pay Tax Credit Bond that is a new clean renewable energy bond or a qualified energy conservation bond. For these bonds, the amount of the payment determined under § 6431(b) with respect to any interest payment date under the bond is equal to the lesser of: (i) 100 percent of the amount of interest payable under the bond on such date; or (ii) 70 percent of the amount of interest which would have been payable under such bond on such date if such interest were determined at the applicable credit rate determined under § 54A(b)(3).

2.4. Applicable Credit Rate

For purposes of determining the amount of a refundable credit payment to an issuer under § 6431(f)(1)(C)(ii), the applicable credit rate for a qualified tax credit bond, including a Direct Pay Tax Credit Bond, is determined under § 54A(b)(3). Section 54A(b)(3) provides that the applicable credit rate is the rate which the Treasury Department estimates will permit the issuance of qualified tax credit bonds with a specified maturity or redemption date without discount and without interest cost to the qualified issuer.[1]

Under § 54A(b)(3), the applicable credit rate for a qualified tax credit bond, including a Direct Pay Tax Credit Bond, is determined as of the first day on which there is a binding, written contract for the sale or exchange of the bond. The applicable credit rate for any such bond is the tax credit bond rate applicable for qualified tax credit

[1] The Conference Report to the American Recovery and Reinvestment Act of 2009 ("ARRA") states the following regarding credit rate determinations under § 54A: "Given the differences in credit quality and other characteristics of individual issuers, the Secretary cannot set credit rates in a manner that will allow each issuer to issue tax credit bonds at par." H.R. Conf. Rep. No, 111-16 ("ARRA Conf. Rep.") at 592, n. 145 (Feb. 12, 2009). The ARRA Conf. Rep. further states: "The Secretary determines credit rates for tax credit bonds based on general assumptions about credit quality of the class of potential eligible issuers and such other factors as the Secretary deems appropriate. The Secretary may determine credit rates based on general credit market yield indexes and credit ratings." Id. at 592.

bonds under § 54A that is published for that date by the Bureau of Public Debt on its Internet site for State and Local Government Series securities at: https://www.treasurydirect.gov. For more information on applicable tax credit bond rate determinations by the Treasury Department, see Notice 2009-15, 2009-6 I.R.B. 449 (February 9, 2009).

2.5. Maximum Maturity

The maximum term of a qualified tax credit bond, including a Direct Pay Tax Credit Bond, is the maximum term determined by the Treasury Department under § 54A(d)(5) for purposes of qualified tax credit bonds generally. Section 54A(d)(5)(B) provides that during each calendar month, the Treasury Department shall determine the maximum term permitted under § 54A(d)(5) for bonds issued during the following calendar month. The maximum term is the term which the Treasury Department estimates will result in the present value of the obligation to repay the principal on the bond being equal to 50 percent of the face amount of the bond. The maximum term is determined under § 54A(d)(5) by using a discount rate equal to 110 percent of the long-term adjusted AFR, compounded semi-annually, for the month in which the bond is sold. For this purpose, a bond is "sold" on the first day on which there is a binding, written contract for the sale or exchange of the bond. The maximum term for a qualified tax credit bond, including a Direct Pay Tax Credit Bond, is published daily by the Bureau of Public Debt on its Internet site for State and Local Government Series securities at: https://www.treasurydirect.gov.

2.6 Sinking Fund Yield

Section 54A(d)(4)(C) provides that an issue of qualified tax credit bonds, including bonds that meet the additional requirements for Direct Pay Tax Credit Bonds, shall not be treated as failing to meet the arbitrage requirements of § 148 by reason of any fund which is expected to be used to repay the issue if: (i) the fund is funded at a rate not more rapid than equal annual installments; (ii) the fund is funded in a manner reasonably expected to result in an amount not greater than an amount necessary to repay the issue; and (iii) the yield on such fund is not greater than the discount rate determined under § 54A(d)(5)(B) (the "permitted sinking fund yield").

The permitted sinking fund yield is determined under § 54A(d)(5)(B) by using a rate equal to 110 percent of the long-term adjusted AFR, compounded semi-annually, for the month in which the bond is sold. The IRS publishes the long-term adjusted AFR, compounded semi-annually, each month in a revenue ruling published in the Internal Revenue Bulletin. The Bureau of Public Debt publishes the permitted sinking fund yield for each month on its Internet site for State and Local Government Series securities at: https://www.treasurydirect.gov.

2.7. Certain Other Applicable Rules for Refundable Credit Payments

Section 6431(c) provides that, in applying the arbitrage investment restrictions under § 148 to a Direct Pay Tax Credit Bond, the yield on the bond is reduced by the amount of the refundable credit allowed under § 6431(a). Section 6431(f)(1)(D) provides that, in the case of a Direct Pay Tax Credit Bond, interest on any such bond shall be includible in gross income. Section 6431(f)(1)(E) provides that, in the case of a Direct Pay Tax Credit Bond, no credit shall be allowed under § 54A with respect to the bond. Section 6431(f)(1)(F) provides that, in the case of a Direct Pay Tax Credit Bond, any payment made under § 6431(b) shall not be includible as income for purposes of the Code. Section § 6431(f)(1)(G) provides that the deduction otherwise allowed under the Code to the issuer of a Direct Pay Tax Credit Bond with respect to interest paid under the bond shall be reduced by the amount of the payment made under § 6431 with respect to that interest. For further information regarding the tax character and procedural framework for refundable credit payments under § 6431, see Section 3.2 of Notice 2009-26, 2009-16 IRB 833 (April 20, 2009), regarding build America bonds.

2.8 General Application of Provisions of § 54A

Except as expressly modified by § 6431(f) in disallowing the credit under § 54A and in providing the payment terms of refundable credit payments, the requirements for qualified tax credit bonds under § 54A apply to Direct Pay Tax Credit Bonds, including, without limitation, provisions relating to expenditures under § 54A(d)(2), information reporting under § 54A(d)(3), arbitrage investment restrictions under § 54A(d)(4), maturity limitations under § 54A(d)(5), prohibition against financial conflicts of interest under § 54A(d)(6), and definitions under § 54A(e)(2)-(4).

SECTION 3. REFUNDABLE CREDIT PAYMENT PROCEDURES FOR DIRECT PAY TAX CREDIT BONDS

3.1. In General

The IRS and the Treasury Department plan to implement the refundable credit payment procedures for Direct Pay Tax Credit Bonds in order to be able to process requests for refundable credit payments with respect to interest payments due on or after September 1, 2010, to enable issuers to begin issuing these bonds for qualified purposes. The IRS and the Treasury Department expect that Form 8038-CP, *Return for Credit Payments to Issuers of Qualified Bonds*, revised to take into account payment of the refundable credit payments with respect to Direct Pay Tax Credit Bonds, will be available on the IRS web site at http://www.irs.gov/app/picklist/list/formsInstructions.html on or before June 25, 2010. Effective on its release, issuers of build America bonds, recovery zone economic development bonds, and Direct Pay Tax Credit Bonds are required to submit to the IRS the revised Form 8038-CP to request payment of a refundable credit. Revised Form 8038-CP will be processed on receipt for build America bonds and recovery zone economic development bonds. The IRS will be prepared to process the revised Form 8038-CP for Direct Pay Tax Credit Bonds no later than July 12, 2010, and to make timely refundable credit payments with respect to bond interest payment dates on Direct Pay Tax Credit Bonds that are on or after September 1, 2010. Issuers of Direct Pay Tax Credit Bonds with interest payment dates prior to

September 1, 2010, may submit a single Form 8038-CP for the full amount of the refundable credit payment with respect to interest paid on those dates subject to the following: for purposes of the due date and the 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. A Form 8038-CP must be filed with respect to each issue of Direct Pay Tax Credit Bonds. 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 § 6431(a). For more information on refundable credit payment procedures, see the revised Instructions for Form 8038-CP.

3.2 Fixed Rate Bonds

In general, for fixed rate bonds, upon receipt of a timely filed Form 8038-CP requesting payment of the credit, such amount will be paid contemporaneously with the applicable interest payment date. For fixed rate bonds, 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. This return, however, may not be filed earlier than the 90th day before the relevant interest payment date.

3.3 Variable Rate Bonds.

In general, for variable rate bonds, upon receipt of a timely filed Form 8038-CP requesting payment of the credit, such amount will be paid quarterly on a reimbursement basis for interest paid by the issuer during the quarter that includes the interest payment date with respect to which the return requesting payment relates. For variable rate bonds, the due date for an issuer to file Form 8038-CP is the 45th day after the last interest payment date within the quarterly period for which reimbursement is requested. If, however, the issuer knows the interest payment amount at least 45 days prior to the interest payment date, Form 8038-CP may be filed within the same timeframe as that for fixed rate bonds (*i.e.*, no later than 45 days before the interest payment date and no earlier than 90 days before the interest payment date). If an issuer of variable rate bonds files the Form 8038-CP under the timeframe for fixed rate bonds, the form will be processed, and the refundable credit payment will be made, in the same manner as for fixed rate bonds.

SECTION 4. ELECTIONS TO ISSUE DIRECT PAY TAX CREDIT BONDS

Subject to updated IRS procedures, an issuer of Direct Pay Tax Credit Bonds must make the irrevocable election required by § 6431(f)(3)(B) to issue the bonds on its books and records on or before the issue date of the bonds.

SECTION 5. INFORMATION REPORTING FOR DIRECT PAY TAX CREDIT BONDS

Section 54A(d)(3) provides that an issue shall be treated as meeting the requirements of § 54A(d)(3) if the issuer of Direct Pay Tax Credit Bonds submits reports similar to the reports required under § 149(e). The IRS and the Treasury Department expect that an IRS form for reporting tax credit bonds and Direct Pay Tax Credit Bonds, new IRS "Form 8038-TC, *Information Return for Tax Credit Bonds and Specified Tax Credit Bonds,*" will be available on the IRS web site at http://www.irs.gov/app/picklist/list/formsInstructions.html on or before June 25, 2010**.** Subject to updated IRS procedures, the IRS expects that, as of the date of public release of IRS Form 8038-TC and its Instructions, issuers of tax credit bonds, including Direct Pay Tax Credit Bonds, will be required to report the issuance of those bonds on Form 8038-TC in the time and manner contemplated by this Notice, § 149(e), and Form 8038-TC. The IRS will be prepared to accept Form 8038-TC for processing immediately upon its public release.

Generally, Form 8038-TC with respect to an issue of Direct Pay Tax Credit Bonds must be filed with the IRS at least 30 days before the first Form 8038-CP is filed to request the refundable credit payment for an interest payment date for that issue. For Direct Pay Tax Credit Bonds with interest payment dates prior to September 1, 2010, Form 8038-TC may be filed less than 30 days before filing the first Form 8038-CP provided Form 8038-TC is filed separately from and prior to the filing of Form 8038-CP. Issuers should not attach Form 8038-TC to Form 8038-CP.

Issuers of Direct Pay Tax Credit Bonds must attach a schedule to Form 8038-TC which contains the information described below with respect to the bond issue:

(1) For fixed-rate bonds, attach a complete debt service schedule entitled "Fixed Rate Bond--Debt Service Schedule," that provides a list of each interest payment date, the total interest payable on each such date, the total principal amount of bonds expected to be outstanding on each such date, the refundable credit payment expected to be requested from the IRS as allowed under section 2.3 of this Notice with respect to each such date, and the earliest the bonds can be called.

(2) For variable rate bonds, attach a debt service schedule entitled "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 such date, and a description of how interest on the bond is computed. If, however, the issuer knows the interest payment amount for a certain period, the issuer should include the refundable credit payment expected to be requested from the IRS, as allowed under section 2.3 of this Notice, with respect to such period.

SECTION 6. OTHER INTERIM GUIDANCE AND RELIANCE

6.1 In General

Pending the promulgation and effective date of future administrative or regulatory guidance, this Notice provides certain interim guidance applicable to Direct Pay Tax Credit Bonds and to Build America Bonds on which issuers may rely.

6.2 Limitation on Bond Premium

For purposes of determining refundable credit payments under § 6431(f) on a Direct Pay Tax Credit Bond, a rule similar to the prohibition in § 54AA(d)(2)(C) against the issuance of a Build America Bond with more than a *de minimis* amount (determined under rules similar to the rules of § 1273(a)(3)) of premium in the issue price of the bond over the stated principal amount of the bond shall apply to Direct Pay Tax Credit Bonds. For purposes of applying this limitation on bond premium to Direct Pay Tax Credit Bonds and to Build America Bonds generally under § 54AA(d)(2)(C), the following rules apply. The definition of "issue price" applicable to tax-exempt bonds under § 1.148-1(b) applies. Section 1273(a)(3) and § 1.1273-1(d) provide rules for determining a *de minimis* amount for a bond, which generally means .25 percent of the stated redemption price at maturity of the bond multiplied by the number of complete years from the bond's issue date to its maturity date. For purposes of applying section 1273(a)(3) and § 1.1273-1(d) to a bond, the rules in § 1.163-13(e)(3) (relating to an issuer's determination of bond issuance premium in certain circumstances) will apply to determine a bond's payment schedule and maturity date. Under § 1.163-13(e)(3)(i), in the case of a bond subject to certain contingencies, the rules in § 1.1272-1(c) (other than § 1.1272-1(c)(3) (relating to mandatory sinking funds)) will apply to determine the bond's payment schedule and maturity date. For example, under § 1.1272-1(c)(5), an issuer is presumed to exercise a call option or combination of call options if the exercise would minimize the yield on the bond. Under § 1.163-13(e)(3)(ii), the issuer must determine the payment schedule by assuming that a pro rata portion of the bond will be called under a sinking fund provision. In addition, the rules in § 1.1275-2(h) (relating to remote and incidental contingencies) will apply to determine a bond's payment schedule and maturity date.

Thus, for example, if a 17-year bond issued at a premium is callable by the issuer at par after 10 years, the issuer will be treated as if it called the bond on the first call date if calling the bond on the first call date would produce the lowest yield on the bond. If so, then for purposes of section 6431, the issuer would determine if the premium is de minimis based on a 10-year maturity date rather than a 17-year maturity date. By comparison, for example, if a bond is callable by an issuer only under a “make whole” call option which requires the issuer to pay a call premium in an amount that preserves the bond’s original yield to maturity, the issuer’s exercise of that call option generally will not produce a lower yield and the call option will be disregarded in determining whether the bond premium is *de minimis*.

The Treasury Department and the IRS are reviewing the definition of issue price in this area and also are considering whether further limitations or special rules may be necessary or appropriate with respect to the allowability and treatment of bond issuance premium on Direct Pay Tax Credit Bonds and Build America Bonds in various circumstances in light of the particular purposes of the limitations on bond issuance premium in this area. The Treasury Department and the IRS expect to address any such further limitations or special rules in future prospective administrative or regulatory guidance.

6.3 <u>OID Not Treated as Interest for Purposes of Refundable Credit Payments</u>

For purposes of determining refundable credit payments under § 6431(b), as modified by § 6431(f), on a Direct Pay Tax Credit Bond or a Build America Bond, original issue discount (OID) (whether paid upon accrual, bond redemption, at maturity, or otherwise) is not treated as a payment of interest. OID is the excess of a bond’s stated redemption price at maturity over the bond’s issue price. See ARRA Conf. Rep. at 593, n. 146.

6.4 <u>Original Expenditures, Short-Term Interim Refinancing, and Reimbursements</u>

Section 54A(d)(2) generally provides in part that an issue of qualified tax credit bonds meets the expenditure requirements if, as of the issue date, the issuer reasonably expects (i) to spend 100 percent of the available project proceeds (as defined in § 54A(e)(4)), on qualified purposes (as defined in § 54A(d)(2)(C)) within 3 years, and (ii) a binding commitment with a third party to spend at least 10 percent of such available project proceeds will be incurred within the 6-month period beginning on such date of issuance. Proceeds of Direct Pay Tax Credit Bonds generally may not be used to refinance eligible expenditures for qualified purposes in "refunding issues" (as defined in § 1.150-1). For this purpose, however, Direct Pay Tax Credit Bonds issued to reimburse otherwise eligible expenditures for qualified purposes under § 1.150-2 that were paid or incurred after the date of enactment of the HIRE Act and that were financed originally with temporary short-term financing issued after the date of enactment of the HIRE Act will not be treated as a refunding issue under §§ 1.150-1(d) or 1.150-2(g).

In addition, under § 54A(d)(2)(D), issuers may use proceeds of Direct Pay Tax Credit Bonds to reimburse otherwise eligible expenditures for qualified purposes, regardless of whether such expenses were paid or incurred before or after the date of enactment of the HIRE Act. In applying § 54A(d)(2)(D) relating to reimbursement of eligible expenditures for qualified purposes, rules under § 1.150-2 generally shall apply.

6.5 <u>Preissuance Accrued Interest</u>

For purposes of determining refundable credit payments under § 6431(b), as modified by § 6431(f), on a Direct Pay Tax Credit Bond or a Build America Bond, preissuance accrued interest is not taken into account. For this purpose, the term "preissuance accrued interest" means the portion of the stated interest on the bond paid by the issuer that is allocable to interest accrued prior to the issue date of the bond (as defined in § 1.150-1(b)).

SECTION 7. EFFECTIVE DATE

The effective date of this Notice is April 26, 2010. This Notice applies to bonds issued after March 18, 2010.

SECTION 8. DRAFTING INFORMATION

The principal author of this Notice is Zoran Stojanovic of the Office of Associate Chief Counsel (Financial Institutions and Products). For further information regarding this Notice, contact Zoran Stojanovic at (202) 622-3980 (not a toll-free call).