



# National Association *of* Bond Lawyers

## **NABL Teleconference on Build America Bonds (BABs)**

### **Answers to participant-submitted questions**

Tuesday, May 25, 2010

#### IRS Relevant Questions

1. If a major issuer such as a State Treasurer receives the Form 14127 Questionnaire after it has issued several series of Direct-Pay BAB's in two or more distinct programs (i.e., general obligation bonding program and a special revenue bond program), should it fill out a separate form for each program or one form for all its Direct-Pay BAB's (and explain the differences in the programs as appropriate in the single form)?

**Answered by IRS:** Each issuer of Build America Bonds will be sent a Form 14127 Questionnaire to be completed with respect to all of their issuances. The IRS is asking issuers to complete the questionnaire with respect to their general practices and procedures as they relate to all of their issuances. If an issuer has different procedures or practices relating to distinct programs, then the issuer should explain those differences on a single questionnaire.

2. What is the penalty for late filing of the Form 8038-CP? Late receipt of the subsidy amount applied for or something more serious?

**Answered by IRS:** There is no penalty per se for the late filing of a Form 8038-CP. However, a failure to timely file will delay the time by which the IRS will be able to transmit the payment provided that such filing is within statutory timeframes for filing a tax refund.

3. Are all issuers actually receiving the compliance check questionnaire, as I had understood? We have at least one client that issued BAB and RZEDB obligations late last year but has not received a compliance check.

**Answered by IRS:** Each issuer of Build America Bonds will be sent a Form 14127 Questionnaire. These questionnaires are being sent on a continuous basis approximately 6 to 9 months post-issuance.

4. Please confirm that 100% of the BAB issuers will receive a new BAB Compliance Check Questionnaire, even for prior BAB issues last year? AND, that 50% can expect a formal audit.

**Answered by IRS:** All issuers of Build America Bonds will receive a Form 14127 Questionnaire. TEB is still in its examination planning stage with respect future examinations of BABs. This process includes a review of information provided on information returns, the questionnaires, and other research being performed by TEB staff. The actual number of examinations will not be determined until such planning process is complete.



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5. Steve indicated that 75% of the compliance check questionnaires that were due had been returned. I just wanted to clarify: Are 25% delinquent? Are some of the 25% sent out but not yet due? Are some of the 25% representing issuers who have requested additional time to respond?

**Answered by IRS:** Approximately 23% of the issuers sent Form 14127 Questionnaires are considered late in their response. For this purpose, late means a response was not received by either the original due date or an agreed upon extension date. TEB has historically worked with issuers to receive the requested information on questionnaires. At this time, we are following up with non-responders to determine the cause of the non-response and when we can expect to receive the requested information.

6. If the Compliance Checklist responses reveals that the majority of issuers do not have written procedures in place, is it a safe bet that the IRS will eventually make such written procedures a requirement? Is it legally necessary to have a written policy to ensure post-issuance compliance with direct pay tax credit subsidy bonds or only advisable?

**Answered by IRS:** The implementation of written procedures to monitor post-issuance compliance is not an express requirement under sections 103, 54A or 54AA of the Code (including the regulations thereunder). As such, the IRS will not be requiring such written procedures as a requirement for preferential tax treatment. However, such written procedures can be a useful tool for issuers to monitor compliance with on-going Federal tax requirements. The IRS encourages issuers to take effective steps in ensuring the continued compliance of their bond issues for so long as such bonds remain outstanding.

7. Can you confirm that we can rely on the de minimis rule for premium on QSCB sales?

**Answered by IRS:** Section 6.2 of Notice 2010-35 provides that for purposes of determining refundable credit payments under section 6431(f) on a specified tax credit bond (including qualified school construction bonds whereby the issuer elects to receive a direct payment from the US Government in lieu of the holder of the bonds receiving a Federal tax credit), a rule similar to the de minimis premium limitation described under section 54AA(d)(2)(C) applies to specified tax credit bonds including qualified school construction bonds.

8. Did we understand the IRS representative correctly that when the 8038TC comes out all prior BABS issuers will have to file the 8038TC even though they filed the 8038 when the Bonds were issued?

**Answered by IRS:** All specified tax credit bonds will have to be reported on a Form 8038-TC even if already reported on a Form 8038 filed with the IRS. The IRS will not be able to process a Form 8038-CP requesting a direct credit payment with respect to a specified tax credit bond issue unless the issuer has filed a Form 8038-TC with respect to that bond issue. A specified tax credit bond is any qualified zone academy bond, qualified school construction bond, new clean renewable energy bond, or qualified energy conservation bond whereby the issuer elects to



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receive a direct credit payment from the US Government in lieu of the holder of the bond receiving a Federal tax credit. Build America Bonds are reported on Form 8038-B, and are not specified tax credit bonds.

9. Might the IRS consider drafting suggested guidelines for monitoring BAB compliance that issuers can adopt?

**Answered by IRS:** The IRS is gathering information about practices and procedures implemented by issuers to monitor post-issuance compliance. However, while the IRS does not intend to recommend any best practices at this time, other municipal bond market stakeholder associations have provided such recommendations for bonds in general.

### MSRB Relevant Questions

10. With respect to the printout of California bonds, on page one, under the caption "trade type", do the references to "Customer bought" mean that (i) the purchaser was a public purchaser (i.e., excluding bond houses, brokers, etc.) or (ii) the purchaser could have been a public purchaser or a bond house or broker? (If "Customer bought" includes a bond house or broker, how could the information be used to determine whether 10% of the maturity was purchased by public purchasers?)

**Answered by MSRB:** A "customer" is defined in MSRB definitional Rule D-8 as "any person other than a broker, dealer, or municipal securities dealer acting in its capacity as such or an issuer in transactions involving the sale by the issuer of a new issue of its securities."

11. With respect to the power point presentation, rule 15c2-12 requires that the final official statement be available in time to accompany any confirmation that requests payment from a customer. When does this occur within the timeline in the presentation?

**Answered by MSRB:** MSRB Rule G-32 requires the underwriter to submit the Official Statement to the MSRB within one business day after receipt from the issuer or the issuer's designee but no later than closing for the new issue. On the timeline in the presentation the Official Statement typically would be made available after the Time of Formal Award but prior to Closing.

12. Do "customers" as listed on EMMA include affiliates of the underwriter?

**Answered by MSRB:** A "customer" is defined in MSRB definitional Rule D-8 as "any person other than a broker, dealer, or municipal securities dealer acting in its capacity as such or an issuer in transactions involving the sale by the issuer of a new issue of its securities." The MSRB is aware that some underwriters have affiliates or marketing arrangements with other dealers, which provide a significant source of distribution of new issue securities. When a customer of such affiliate/other dealer places an order with such affiliate/other dealer during a primary offering (sometimes referred to as a "going away" order) for which the affiliate/other



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dealer is not an underwriter or selling group member, the affiliate/other dealer places an interdealer order with an underwriter of the issue, which then reports that interdealer trade to the MSRB. After its interdealer order has been accepted by the underwriter, the affiliate/other dealer reports the customer trade to the MSRB.

13. I do not think EMMA shows how much of a security is sold. That is because EMMA does not show which trades are secondary market trades. Thus, there are often more trades in gross dollar amount than there are bonds, but there still could be some bonds that never were sold. Please have Justin clarify.

**Answered by MSRB:** EMMA displays all transactions disseminated from the MSRB's transaction reporting program. Therefore, the par amount of a security that is traded could exceed the par amount of the security. For example, if an underwriter sells a position in a security to another dealer and that dealer sells the same position in the security to a retail investor, then two transactions would be displayed on EMMA: an inter-dealer transaction and a sale to a customer.

14. So is Justin saying that, it is the MSRB's view that the initial issue price on EMMA represents the issue price? That perhaps market participants can use this as an issue price under IRS rules?

**Answered by MSRB:** No. EMMA displays the "initial offering price" for the new issue. This information is supplied to the MSRB by the underwriter for the new issue and it generally also is found on the cover of the Official Statement. The "initial offering price" may or may not be the same as the "issue price" for Federal tax purposes.

15. On the chart of California trades, why does line 20 sold to customer show an "L" but line 21 at the same price for an inter-dealer trade not show an "L"?

**Answered by MSRB:** The "L" displayed on EMMA in conjunction with certain trade data signifies that the transaction was either a sale transaction: (i) by a sole underwriter, syndicate manager, syndicate member or selling group member at the published list offering price for the security to a customer; or (ii) by a sole underwriter or syndicate manager to a syndicate or selling group member at a discount from the published list offering price for the security to another dealer. The "L" indicator is reported to the MSRB by the dealer reporting the trade. Customer transactions with the "L" indicator are reflective of "primary market" transactions, since they are indicative of sales from the underwriter, syndicate manager, syndicate member or selling group member to a customer on the first day of trading, but may not reflect all such primary market transactions. The transaction on line 20 appears to be a primary market sale transaction by the underwriter, syndicate manager, syndicate member or selling group member to a customer. Line 21 shows an inter-dealer transaction that, while at the same price as the transaction on line 20, does not appear to be a sale transaction by a sole underwriter or syndicate manager to a syndicate or selling group member.