

QECB – IRS Notice 2009-29

## Part III - Administrative, Procedural, and Miscellaneous

### Qualified Energy Conservation Bond Allocations for 2009

Notice 2009-29

#### **SECTION 1. PURPOSE**

This Notice sets forth the maximum face amount of qualified energy conservation bonds (“QECCBs”) that may be issued by each State and large local government under § 54D(e)(1) of the Internal Revenue Code. For this purpose, § 54A(e)(3) provides that the term “State” includes the District of Columbia and any possession of the United States. This Notice also provides certain interim guidance for QECCBs.

#### **SECTION 2. BACKGROUND**

##### **.01 INTRODUCTION**

Section 301(a) of Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Division C of Pub. L. 110-343. 122 Stat. 1365 (2008) (“Act”) added new § 54D to provide program provisions for QECCBs. The Act amended § 54A(d)(1) to provide that the term “qualified tax credit bond” means, in part, a qualified energy conservation bond that is part of an issue that meets the requirements of § 54A(d)(2), (3), (4), (5), and (6) regarding expenditures of bond proceeds, information reporting, arbitrage, maturity limitations, and prohibitions against financial conflicts of interest. The Act also amended § 54A(d)(2) to provide that,

for purposes of § 54A(d)(2)(C), the term “qualified purpose” for a QECCB means a purpose specified in § 54D(a)(1) described below.

The Act added § 54D(d) to provide a national bond limitation (“national bond volume cap”) authorization for QECCBs of \$800 million. Section 1112 of Title 1 of Division B of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (“2009 Act”) amended §54D(d) to increase the national bond volume cap authorization for QECCBs from \$800 million to \$3.2 billion.

#### .02 QUALIFIED ENERGY CONSERVATION BONDS UNDER § 54D

Section 54D(a) defines a “qualified energy conservation bond” to mean 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 this section.

Section 54D(b) provides that the annual credit determined under § 54A(b) with respect to any qualified energy conservation bond shall be 70 percent of the amount so determined without regard to § 54D(b).

Section 54D(c) provides that the maximum face amount of bonds which may be designated under § 54D(a) by any issuer shall not exceed the portion of the volume cap allocated to such issuer under § 54D(e).

Section 54D(e)(1) provides that the \$3.2 billion in total national bond volume cap shall be allocated by the Department of the Treasury among the

States in proportion to the population of the States. Section 54D(e)(2)(A) provides that in the case of any State where there is a “large local government,” as defined § 54D(e)(2)(C), each large local government shall be allocated a portion of the State’s allocation that bears the same ratio to the State’s allocation (determined without regard to this subparagraph) as the population of the large local government bears to the population of the State. Section 54D(e)(2)(B) provides that the amount allocated under this subsection to a large local government may be reallocated by the large local government to the State where the large local government is located. Section 54D(e)(2)(C) provides that for purposes of § 54D, the term “large local government” means any municipality or county that has a population of 100,000 or more.

Under § 54D(e)(3), any allocation to a State or large local government shall be allocated in turn by the State or large local government to issuers within the State in a manner that results in the use of not less than 70 percent of the allocation to such State or large local government to designate bonds that are not private activity bonds.

Section 54D(f) defines the term “qualified conservation purpose” to mean any of the following:

- (A) Capital expenditures incurred for purposes of (i) reducing energy consumption in publicly-owned buildings by at least 20 percent, (ii) implementing green community programs (including the use of loans, grants, or other repayment mechanisms to implement such programs), (iii) rural development involving the production of electricity from

renewable energy resources, or (iv) any qualified facility (as determined under section 45(d) without regard to paragraphs (8) and (10) thereof and without regard to any placed in service date).

(B) Expenditures with respect to research facilities, and research grants, to support research in (i) development of cellulosic ethanol or other nonfossil fuels, (ii) technologies for the capture and sequestration of carbon dioxide produced through the use of fossil fuels, (iii) increasing the efficiency of existing technologies for producing nonfossil fuels, (iv) automobile battery technologies and other technologies to reduce fossil fuel consumption in transportation, or (v) technologies to reduce energy use in buildings.

(C) Mass commuting facilities and related facilities that reduce consumption of energy, including expenditures to reduce pollution from vehicles used for mass commuting.

(D) Demonstration projects designed to promote the commercialization of (i) green building technology, (ii) conversion of agricultural waste for use in the production of fuel or otherwise, (iii) advanced battery manufacturing technologies, (iv) technologies to reduce peak use of electricity, or (v) technologies for the capture and sequestration of carbon dioxide emitted from combusting fossil fuels in order to produce electricity.

(E) Public education campaigns to promote energy efficiency.

Section 54D(f)(2) provides that, in the case of any private activity bond, the term “qualified conservation purposes” shall not include any expenditure that is not a capital expenditure. New § 54D(e)(4) added by the 2009 Act provides a special rule for bonds to finance green community programs, stating that bonds issued for the purpose of providing loans, grants, or other repayment mechanisms for capital expenditures to implement green community programs are not treated as private activity bonds for purposes of § 54D(e)(3).

Section 54D(g)(1) provides that the population of any State or local government shall be determined for purposes of this section as provided in § 146(j) for 2008. Section 54D(g)(2) provides, in determining the population of any county for purposes of § 54D, for the exclusion of that portion of the county population taken into account in determining the population of any municipality that is a large local government.

Under § 54D(h), an Indian tribal government shall be treated as a large local government, except that (1) an Indian tribal government shall be treated as located within a State to the extent of so much of the population of such government as resides within the State, and (2) any bond issued by an Indian tribal government shall be treated as a qualified energy conservation bond only if issued as part of an issue the available project proceeds of which are used for purposes for which such Indian tribal government could issue bonds to which § 103(a) applies.

### **SECTION 3. INTERIM GUIDANCE AND RELIANCE**

#### **.01 GENERALLY**

Pending the promulgation and effective date of future administrative or regulatory guidance, taxpayers may rely on the interim guidance provided in this Notice.

#### .02 CREDIT RATE

For QECBs issued under §§ 54A and 54D, the maximum maturity and the credit rate are determined as of the date that there is a binding, written contract for the sale or exchange of the bond. The applicable maximum maturity, the discount rate for determining the maturity, and QCEB credit rate are 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 further information regarding the methodology and procedures that the Treasury Department uses to determine these credit rates, see Notice 2009-15, 2009-6 I.R.B. 449 (February 9, 2009).

#### .03 SINKING FUND YIELD

Section 54A(d)(4)(C) provides that an issue shall not be treated as failing to meet the 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, applicable federal

rate (“AFR”), compounded semiannually, for the month in which the bond is sold. The IRS publishes the long-term adjusted AFR, compounded semiannually, each month in a revenue ruling that is 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>.

#### .04 INFORMATION REPORTING

Section 54A(d)(3) requires issuers of QECBs to submit information reporting returns to the IRS similar to those required to be submitted under § 149(e) for tax-exempt State or local governmental bonds. These information reporting returns are required to be submitted at the same time and in the same manner as those under § 149(e) on such forms as shall be prescribed by the IRS for such purpose. Pending further guidance from the IRS regarding the applicable forms to be used for such information reporting for QECBs, in the case of an issue of QECBs, the issuer must submit to the IRS an information return on Form 8038, at the same time and in the same manner as required under § 149(e), with modifications as described below. Issuers of QECBs should complete Part II of Form 8038 by checking Line 20c (Other), writing “QECBs” in the space provided for the bond description, and entering the issue price of the QECBs in the Issue Price column on Line 20c. For purposes of this Notice, the term “issue” has the meaning used for tax-exempt bond purposes in § 1.150-1(c) of the Income Tax Regulations.

#### .05 ELIGIBLE ISSUERS

Eligible issuers of QECBs include States, political subdivisions as defined for purposes of § 103, and entities empowered to issue bonds on behalf of any such entity under rules similar to those for determining whether a bond issued on behalf of a State or political subdivision constitutes an obligation of that State or political subdivision for purposes of § 103 and § 1.103-1(b) of the regulations. Further, eligible issuers include otherwise-eligible issuers in conduit financing issues (as defined in § 1.150-1(b) of the regulations). An eligible issuer may issue QECBs based on a volume cap allocation received by the eligible issuer itself or by a conduit borrower or other ultimate beneficiary of the issue of QECBs. In all events, the eligible costs for qualified conservation purposes financed with the proceeds of an issue of QECBs under § 54D(f) must relate to qualified conservation purposes that are located within or attributable to both the jurisdiction of the issuer of the QECBs and the jurisdiction of the entity authorized to allocate volume cap to an issue of QECBs for the financing of those qualified conservation purposes. Entities authorized to allocate volume cap consist of States and large local governments that receive volume cap allocations under § 54D(e). Thus, for example, a large local government that has received a volume cap allocation under § 54D(e)(2) either may issue bonds and designate them as QECBs with respect to that volume cap itself or it may be a beneficiary of proceeds of an issue of bonds issued and designated as QECBs by another eligible issuer with respect to that volume cap, provided that, in either event, the proceeds of the issue are used to finance qualified conservation purposes located within or attributable to both the jurisdiction of the issuer of the QECBs

and the jurisdiction of the large local government authorized to allocate volume cap to the issue of QECEBs for the financing of those qualified conservation purposes.

#### **SECTION 4. NATIONAL BOND VOLUME CAP FOR QECEBs**

The national bond volume cap for QECEBs is \$3.2 billion. Each State must allocate a portion of its allocation of the national bond volume cap to each large local government in the State in an amount that bears the same ratio to the State's allocation as the population of such large local government bears to the population of such State. For this purpose, § 54D(h), described above, is applicable.

The allocations set forth below were based on the most recent available state population information released by the by the United States Census Bureau before the beginning of 2009 (which consists of state population information as of July 1, 2008), which can be found at the following web site:

<http://www.census.gov/popest/states/tables/NST-EST2008-01.xls>.

In making the required reallocations of applicable portions of State allocations to large local governments, States must use population figures for large local governments within the States based on available data from the United States Census Bureau for the period that is closest in time to that used for the State and released by the Census before 2009 which consists of information as of July 1, 2007. City and county population figures are located generally at <http://www.census.gov/popest/>.

In making the required allocations to large local governments, a State shall make the required adjustments under § 54D(g)(2), described above. Further, in making the required allocations to large local governments, in the case of a State that has local political subdivisions that are not referred to as counties or cities (e.g., townships, boroughs, or parishes), the determination of whether such political subdivisions are eligible to be treated as large local governments is based on whether, in substance, such political subdivisions are most closely analogous to counties or cities and whether they constitute uncontrolled general purpose governmental entities under §1.150-1(e)(3)(providing that an entity is not a controlled entity if the entity possesses substantial taxing, eminent domain, and police powers).

**Allocations to States of the National Bond Volume Cap for  
Qualified Energy Conservation Bonds**

<u>State or Territory</u>	<u>QECB Allocation (in dollars)</u>
Alabama	48,364,000
Alaska	7,120,000
Arizona	67,436,000
Arkansas	29,623,000
California	381,329,000
Colorado	51,244,000
Connecticut	36,323,000
Delaware	9,058,000
District of Columbia	6,140,000
Florida	190,146,000
Georgia	100,484,000
Hawaii	13,364,000
Idaho	15,809,000
Illinois	133,846,000
Indiana	66,155,000
Iowa	31,150,000
Kansas	29,070,000
Kentucky	44,291,000
Louisiana	45,759,000
Maine	13,657,000
Maryland	58,445,000
Massachusetts	67,413,000
Michigan	103,780,000
Minnesota	54,159,000
Mississippi	30,486,000
Missouri	61,329,000
Montana	10,037,000
Nebraska	18,502,000
Nevada	26,975,000
New Hampshire	13,651,000
New Jersey	90,078,000
New Mexico	20,587,000
New York	202,200,000
North Carolina	95,677,000
North Dakota	6,655,000
Ohio	119,160,000
Oklahoma	37,787,000
Oregon	39,320,000
Pennsylvania	129,144,000

Rhode Island	10,901,000
South Carolina	46,475,000
South Dakota	8,343,000
Tennessee	64,476,000
Texas	252,378,000
Utah	28,389,000
Vermont	6,445,000
Virginia	80,600,000
Washington	67,944,000
West Virginia	18,824,000
Wisconsin	58,387,000
Wyoming	5,526,000
American Samoa	673,000
Guam	1,826,000
Northern Marianas	899,000
Puerto Rico	41,021,000
US Virgin Islands	1,140,000
Total Allocation	3,200,000,000

#### **SECTION 5. EFFECTIVE DATE OF VOLUME CAP LIMITATIONS.**

The limitations for QECBs in Section 4 are effective for QECBs issued pursuant to the national bond volume cap after October 3, 2008.

#### **SECTION 6. DRAFTING INFORMATION**

The principal authors of this Notice are Timothy L. Jones and David E. White of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this Notice contact Timothy L. Jones or David E. White on (202) 622-3980 (not a toll-free call).

QECB – IRS Notice 2010-35

## 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.<sup>1</sup>

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

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<sup>1</sup> 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 45<sup>th</sup> day before the applicable interest payment date with respect to the bonds. This return, however, may not be filed earlier than the 90<sup>th</sup> 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 45<sup>th</sup> 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 OID Not Treated as Interest for Purposes of Refundable Credit Payments

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 Original Expenditures, Short-Term Interim Refinancing, and Reimbursements

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 Preissuance Accrued Interest

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).

QECB – IRS Notice 2012-44

Notice 2012-44

## Qualified Energy Conservation Bonds

### PURPOSE

This Notice provides guidance concerning qualified energy conservation bonds under § 54D of the Internal Revenue Code (Qualified Energy Conservation Bonds). This Notice addresses questions regarding qualified conservation purposes eligible for financing with these bonds, particularly (1) how to measure reductions of energy consumption in publicly-owned buildings by at least 20 percent under § 54D(f)(1)(A)(i) and (2) what constitutes a “green community program” under § 54D(f)(1)(A)(ii).

### BACKGROUND

Section 301(a) of Title III of Division B, the Energy Improvement and Extension Act of 2008, Pub. L. 110-343, 122 Stat. 1365 (2008) (the "2008 Energy Act"), added new § 54D, which contains program provisions specific to Qualified Energy Conservation Bonds effective for obligations issued after October 3, 2008.

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. Section 54D(f) defines the term “qualified conservation purpose” to include, among other purposes, capital expenditures incurred for purposes of (i) reducing energy consumption in publicly-owned buildings by at least 20 percent, or (ii) implementing green community programs (including the use of loans, grants, or other repayment mechanisms to implement such programs). Section 54D(d) originally authorized a national

bond volume cap of \$800 million for Qualified Energy Conservation Bonds, and § 54D(e) generally provides rules for how this volume cap is to be allocated among the States.

Section 1112 of Division B of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) ("ARRA"), amended § 54D in several respects. ARRA increased the national bond volume cap for Qualified Energy Conservation Bonds from \$800 million to \$3.2 billion. ARRA also amended the provision on "green community programs" to what is in the statute today to clarify that these programs may include the use of loans, grants, or other repayment mechanisms to implement such programs. In addition, ARRA added § 54D(e)(4), which provides generally that bonds issued to provide loans, grants, or other repayment mechanisms for capital expenditures to implement green community programs are not treated as private activity bonds for purposes of the restriction under § 54D(e)(3) against using more than 30 percent of the bond volume cap for private activity bonds.

In Notice 2009-29, 2009-1 C.B. 849 (April 6, 2009), the Treasury Department and the IRS allocated the national bond volume cap for Qualified Energy Conservation Bonds to States, the District of Columbia, and possessions of the United States in proportion to population. Notice 2009-29 also provided interim guidance on certain general program requirements under § 54D.

Section 179D also provides tax benefits for reductions in energy consumption in government-owned buildings. Because of the difference in the rules and standards for determining the deduction for energy-efficient commercial buildings under § 179D as compared to the rules and standards for determining whether bonds are Qualified Energy Conservation Bonds under § 54D, this Notice, including the rules for measuring the reduction of energy consumption in publicly-owned buildings, does not apply for purposes of § 179D. For guidance on § 179D, see Notice 2006-52, 2006-1 C.B. 1175, Notice 2008-40, 2008-1 C.B. 725, and Notice 2012-26, 2012-17 I.R.B. 847.

## LEGISLATIVE HISTORY

The legislative history of the 2008 Energy Act includes the House of Representatives version of the 2008 Energy Act in a bill entitled the “Renewable Energy and Job Creation Act of 2008,” H.R. 6049, 110<sup>th</sup> Cong. (2008) (H.R. 6049). The text of the House Bill is identical, in pertinent part, to the text of the statute that was enacted. House of Representatives Report No. 110-658 accompanied H.R. 6049 and indicates that the House intended the Qualified Energy Conservation Bond rules to be interpreted broadly to give State and local governments wide discretion on methods to conserve energy that may be financed with Qualified Energy Conservation Bonds. The House Report states the following reasons for enacting the Qualified Energy Conservation Bond provision:

### **Reasons for Change**

The Committee believes that it is important to encourage energy conservation. The Committee believes that State and local governments often are in the best position to assess community needs and recognizes there are a number of approaches to energy conservation that State and local governments may wish to encourage. For example, the Committee recognizes that State and local governments may wish to encourage the development of combined heat and power systems, facilities that use thermal energy produced from renewable resources, smart electrical grids, the use of solar panels, mass transit, bicycle paths, or residential property that reduces peak-use of energy. In addition to these approaches, the Committee believes that State and local governments will develop numerous other approaches to energy conservation. Furthermore, the Committee recognizes that there is great potential for energy conservation in urban areas and the Committee believes that local officials should have the flexibility to develop their own approaches to energy conservation. Therefore, the Committee believes that it is appropriate to empower State and local governments by providing them with access to subsidized financing to help promote energy-efficient policies tailored to the needs of local communities.

H. R. Rep. No. 110-658, at 94 (2008).

The legislative history of ARRA gives further indication of the broad discretion Congress intended to give State and local governments issuing Qualified Energy Conservation Bonds. The Conference Report, H. R. Rep. No. 111-16 (2009), provides:

### **Conference Agreement**

#### *In general*

The provision expands the present-law qualified energy conservation bond program. . . . Also, the provision clarifies that capital expenditures to implement green community programs includes grants, loans and other repayment mechanisms to implement such programs. For example, this expansion will enable States to issue these tax credit bonds to finance retrofits of existing private buildings through loans and/or grants to individual homeowners or businesses, or through other repayment mechanisms. Other repayment mechanisms can include periodic fees assessed on a government bill or utility bill that approximates the energy savings of energy efficiency or conservation retrofits. Retrofits can include heating, cooling, lighting, water-saving, storm water-reducing, or other efficiency measures.

H. R. Rep. No. 111-16, at 627 (2009).

### **QUESTIONS AND ANSWERS**

Numerous questions have arisen relating to Qualified Energy Conservation Bonds, particularly how to measure whether there have been reductions of energy consumption in publicly-owned buildings by at least 20 percent under § 54D(f)(1)(A)(i) and what constitutes a “green community program” under § 54D(f)(1)(A)(ii). Set forth below are questions and answers regarding certain of these interpretative issues. Issuers may rely upon these answers until further guidance, if any, is provided.

### **CAPITAL EXPENDITURES FOR CERTAIN QUALIFIED CONSERVATION PURPOSES**

Q.-1. What are “capital expenditures” for purposes of § 54D(f)(1)(A), which provides in relevant part that qualified energy conservation purposes include, among other purposes, capital expenditures incurred for purposes of (i) reducing energy consumption in

publicly-owned buildings by at least 20 percent, or (ii) implementing green community programs (including the use of loans, grants, or other repayment mechanisms to implement such programs)?

A-1. For purposes of the capital expenditures requirement in § 54D(f)(1)(A), the definition of a “capital expenditure” applicable to State and local governments for tax-exempt bond purposes in § 1.150-1(b) of the Income Tax Regulations applies. This definition provides that a “capital expenditure” means any cost of a type that is properly chargeable to capital account (or would be so chargeable with a proper election or with the application of the definition of placed in service under § 1.150-2(c)) under general Federal income tax principles. The determination of whether a particular expenditure is a capital expenditure is made when the expenditure is paid or incurred and future changes in law do not affect this determination.

#### 20% REDUCTION IN ENERGY CONSUMPTION IN PUBLICLY-OWNED BUILDINGS

Q-2. What does the term “publicly-owned buildings” mean under § 54D(f)(1)(A)(i)?

A-2. The term “publicly-owned buildings” under § 54D(f)(1)(A)(i) means a building or buildings that are owned by a State or local government (as defined in § 1.103-1) or any instrumentality thereof for Federal tax purposes. If the “measurement unit” (as defined in Q&A 4 below) used to measure reductions in energy consumption is a unit other than a building or buildings, such as a building system component, the building or buildings encompassing the measurement unit must be a publicly-owned building or buildings.

Q-3. What standard applies to determine that available project proceeds are to be used to finance capital expenditures for the purpose of reducing energy consumption in publicly-owned buildings by at least 20 percent under § 54D(f)(1)(A)(i) (the “20 percent test”)?

A-3. In general, a reasonable expectations standard (as defined for tax-exempt bond purposes under § 1.148-1(b)) applies for purposes of determining reductions in energy consumption under the 20 percent test. In particular, an issuer may determine that its available project proceeds are to be used in a manner that meets the 20 percent test if, as of the issue date of the issue of Qualified Energy Conservation Bonds, the issuer has reasonable expectations (as defined in § 1.148-1(b)) that the capital expenditures to be financed with the bond proceeds will result in a 20 percent or greater reduction in energy consumption for the selected building, buildings, or building system component(s) comprising the measurement unit for the selected measurement time period, and using a common energy unit. See Q & A 4 (regarding measurement units), Q & A 5 (regarding measurement methods), Q & A 6 (regarding measurement time periods), Q & A 7 (regarding reliance on certifications of independent experts), Q & A 8 (regarding certain available tools for measuring energy reductions), and Q & A 9 (regarding common energy units) below.

Q-4. What is the unit for which the issuer measures reductions in energy consumption for purposes of satisfying the 20 percent test?

A-4. For purposes of the 20 percent test, the issuer may measure the reduction in energy consumption using one of the following measurement units: (i) a single publicly-owned building, (ii) multiple publicly-owned buildings; (iii) one or more building system components of one or more publicly-owned buildings, or (iv) a combination of (i) or (ii) and (iii) above (the “measurement unit”), provided that measurement unit includes the publicly-owned building or buildings, or building system component or components, with respect to which the capital expenditures financed with Qualified Energy Conservation Bond proceeds are incurred. For this purpose, a building system includes a system that serves one of the following functions: heating, ventilation, and air conditioning (“HVAC”); hot water

system; lighting; building envelope (e.g., windows, roof, walls, insulation); or electricity “plug load” (e.g., items plugged into electric outlets, such as computers and refrigerators).

Q-5. What methods may be used to measure energy savings attributable to capital expenditures with respect to a measurement unit for purposes of the 20 percent test?

A-5. A reasonable and consistently applied method must be used to measure energy savings attributable to capital expenditures with respect to a measurement unit for purposes of the 20 percent test.

Q-6. What time periods may an issuer use to measure reductions in energy consumption to meet the 20 percent test?

A-6. For purposes of the 20 percent test, the issuer may consider actual and expected energy consumption in the measurement unit during any reasonable and consistent time periods of not less than one year (the measurement time periods), with one such period ending immediately before, and one such period beginning immediately after, all capital expenditures to be financed by the Qualified Energy Conservation Bond proceeds in the measurement unit are to be incurred, using a consistent method of measuring energy use. For example, if the issuer selects measurement time periods of two years, the issuer must determine its energy consumption in the measurement unit during the two years immediately before the capital expenditures are to be incurred and compare it to the energy consumption in the measurement unit during the two years immediately after the capital expenditures are to be incurred (energy consumption during the construction period is not considered), using the same method for measuring energy consumption, to determine if it meets the 20 percent test.

Q-7. May an issuer rely on a certification of an independent expert to establish its reasonable expectations to meet the 20 percent test?

A-7. An issuer may rely on an independent expert to establish that it reasonably expects to meet the 20 percent test, if, no earlier than 60 days before the issue date of the

issue, an independent, licensed professional engineer or other independent expert certifies under penalty of perjury that the capital expenditures to be incurred with respect to the measurement unit are reasonably expected to result in the reduction of energy consumption by 20 percent or greater in the measurement unit during the measurement time period. An issuer may rely on this certification only if the actual capital expenditures from the bond proceeds are substantially the same as the expected capital expenditures of such proceeds on which the certification was based.

An example of an engineer's certification for this purpose is attached as Appendix A to this Notice.

Q-8. What tools are available to estimate the energy savings attributable to capital expenditures for purposes of establishing that the issuer had reasonable expectations as of the issue date of the issue that the capital expenditures will result in reduction of energy consumption in publicly-owned buildings by at least 20 percent?

A-8. An issuer or an independent expert on whom an issuer relies may obtain energy savings estimates through an ASHRAE level 3 audit or through building energy use simulation techniques and estimating software, including the DOE (Department of Energy) 2 based Quick Energy Simulation Tool (eQUEST) or other qualified computer software for calculating commercial building energy and power cost savings that meet federal tax incentive requirements as listed by Department of Energy's Building Technology Program at: [http://apps1.eere.energy.gov/buildings/tools\\_directory/](http://apps1.eere.energy.gov/buildings/tools_directory/). Further, an issuer or independent expert may rely on other tools to estimate energy savings, using reasonable and consistently applied methods.

An issuer is not required to subsequently measure the energy savings, but is encouraged to employ energy management and monitoring practices, such as use of the ENERGY STAR Portfolio Manager software to establish energy baselines and track whole

building energy performance. See

[http://www.energystar.gov/index.cfm?c=evaluate\\_performance.bus\\_portfoliomanager](http://www.energystar.gov/index.cfm?c=evaluate_performance.bus_portfoliomanager).

Q-9. How does the issuer determine the reduction of energy consumed in the chosen measurement unit if more than one energy source affects the measurement unit and the energy reduction is computed with respect to different types of energy sources, such as electricity and natural gas?

A-9. If more than one energy source affects the measurement unit and thus is taken into account in computing the reduction in energy consumption, the amount of the consumed energy from each source before and after incurring the capital expenditures must be converted into a common energy unit such as, for example, a MMBtu (one million British thermal Units). In this circumstance, for purposes of the 20 percent test, the percentage reduction in energy consumption is based on the percentage reduction for the aggregate of the energy sources, using the common energy unit.

## GREEN COMMUNITY PROGRAM

Q-10. What is a “green community program” under § 54D(f)(1)(A)(ii) for which capital expenditures may be incurred as one of the qualified conservation purposes eligible for financing with Qualified Energy Conservation Bonds?

A-10. In general, the term “green community program” means a program that meets the following two requirements:

(1) Program Purpose. The purpose of a green community program is to promote one or more of the purposes of energy conservation, energy efficiency, or environmental conservation initiatives relating to energy consumption, broadly construed. Eligible program purposes include, among others, promotion of energy savings through retrofitting initiatives for heating, cooling, lighting, water-saving, storm-water reducing, or other efficiency measures; distributed generation initiatives; or transportation initiatives that

conserve energy and/or support alternative fuel infrastructure (which may include, for example, improvements to public bicycle paths or mass transit systems).

(2) General Public Use or Broad Public Availability. A green community program must: (i) involve property that is available for general public use (using standards similar to standards for distinguishing general public use from private business use under § 1.141-3(c)); or (ii) involve a loan (or other repayment mechanism) or grant program that is broadly available to members of the general public, including individuals or businesses. A green community program need not affect the entire geographical area or all the residents and businesses within the jurisdiction of the State or local governmental unit that implements the program, provided that the program broadly benefits the general public, residents, or businesses in the affected area of the State or local governmental unit. Examples of programs that are available for general public use include programs to make improvements to public infrastructure that enhances proximity and connectivity between community assets and public transit in order to reduce motor vehicle use and promote energy conservation. An example of a loan or grant program that is broadly available to the general public would be a program for residential housing or private building energy efficiency initiatives that provides grants or loans that are broadly available for homeowners or businesses.

Q-11. What is an example of a green community program?

A-11. The following example illustrates the implementation of a green community program with proceeds of Qualified Energy Conservation Bonds. City, a large local government, plans a program to finance capital expenditures to replace existing public street lights located throughout the City with more energy-efficient lights within a 3-year period. City recognizes the program as a green community program and designates the bonds to finance the program as Qualified Energy Conservation Bonds under § 54D(a)(3). Specifically, City plans to use the bond proceeds to replace existing high-pressure

luminaries with light emitting diode luminaries that consume substantially less electricity. City's independent experts estimate that the new streetlights will have a useful life of approximately 15 years. As of the issue date of the bonds, City expects that the program will result in substantial energy savings. City's program qualifies as a green community program that meets § 54D(f)(1)(A)(ii) for the following reasons:

1. The program furthers a qualified conservation purpose because it promotes energy conservation. The program calls for the replacement of existing street lights with more efficient street lights.
2. The program involves public streetlights that are available for general public use.
3. The proceeds of the bond will be used for capital expenditures within the meaning of § 1.150-1(b) to replace the street lights.

#### FURTHER INFORMATION

For further information regarding this notice, contact Zoran Stojanovic at (202) 622-3980 (not a toll-free call).

## APPENDIX A

### Qualified Energy Conservation Bonds Statement of Expected Savings and Signatures

**Qualified Professional Engineer certifying reasonable expectation of 20% or greater savings using based on an ASHRAE Level 3 audit or through use of DOE-approved software tool.**

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

I certify that the expected percentage of energy savings from the capital expenditures financed with Qualified Energy Conservation Bonds for the measurement unit and measurement time specified by the issuer is at least 20 percent.

Address of the building(s) (and description of component(s), if applicable) to which the certification applies:

\_\_\_\_\_  
\_\_\_\_\_

**Qualified Professional Engineer must initial and complete one or more of the following statements:**

\_\_\_\_ (1) I conducted an ASHRAE level 3 energy audit to estimate the expected savings from planned improvements that will be financed through the qualified energy conservation bond.

\_\_\_\_ (2) I used a qualified computer software for calculating commercial building energy and power cost savings that meet federal tax incentive requirements as listed by Department of Energy's Building Technology Program to estimate the expected savings from planned improvements that will be financed through the qualified energy conservation bond. The name and version of the software is: \_\_\_\_\_

**Penalty of perjury statement to be signed by the Qualified Professional Engineer that performs field inspections and generates certification form using qualified computer software.**

Under penalties of perjury, I declare that I have examined this certification, including supporting documents, and to the best of my knowledge and belief, the facts presented in support of this certification are true, correct, and complete.

Professional Engineer License # and State: \_\_\_\_\_

Signature of Professional Engineer: \_\_\_\_\_

Date Signed: \_\_\_\_\_