

# STATE OF NEW YORK MUNICIPAL BOND BANK AGENCY

## Recovery Act Bond Program Written Procedures for Tax Compliance and Internal Monitoring, adopted September 12, 2013

### PROGRAM OVERVIEW

The State of New York Municipal Bond Bank Agency (“MBBA”) instituted its Recovery Act Bond Program (the “Program”) in 2009 in order to facilitate access to the capital markets for New York State municipalities seeking to take advantage of certain provisions of the American Recovery and Reinvestment Act of 2009 (“ARRA”). Under the Program, MBBA purchased full faith and credit general obligation bonds issued by New York State municipalities for ARRA purposes. MBBA, in turn, sold its Recovery Act Bonds to raise funds to finance these purchases.

Build America Bonds (“BABs”) and Recovery Zone Economic Development Bonds (“RZEDBs”) were created by ARRA as an alternative to tax-exempt governmental bonds. The BABs referred to herein are tax-advantaged bonds issued as described in Section 54AA(g) of the Internal Revenue Code of 1986, as amended (the “Code”). Issuers of BABs may receive a refundable credit payment equal to 35% of the interest payable on such bonds on each interest payment date. The tax-advantaged status of BABs remains throughout the life of the BABs if all applicable federal tax laws are satisfied while the BABs are outstanding.

In addition to BABs, ARRA created another alternative to tax-exempt governmental bonds known as Recovery Zone Economic Development Bonds (“RZEDBs”). RZEDBs are similar to BABs with two important exceptions. First, issuers of RZEDBs receive a credit equal to 45% of the interest payment on such bonds. Second, the authority to issue RZEDBs was limited to specific allocations made by the federal government to every County in the United States and to every other municipal government with a population of 100,000 or more.

BABs and RZEDBs (hereafter collectively referred to as “BABs”) also have special requirements that must be followed, in addition to other requirements under the Code and the Treasury Regulations (the “Regulations”) which apply generally to tax-exempt governmental bonds, including specifically:

- De Minimis Premium Rule The issue price of BABs must not have more than a de minimis amount (determined under rules similar to the rules of Section 1273(a)(3)) of premium over the stated principal amount of the bond.
- 2% Costs of Issuance Limitation Costs of issuance financed by the issue must not exceed 2% of the proceeds of sale.
- Correct Calculation of “Available Project Proceeds” The term “Available Project Proceeds” means sale proceeds, less not more than two percent of such proceeds used to pay bond issuance costs, plus investment proceeds thereon.
- Capital Expenditure Requirement All proceeds of BABs, other than proceeds deposited in a reasonably required reserve fund, if any, or used to pay costs of issuance, must be spent on capital expenditures.

- Irrevocable Election The issuer of BABs is required to make an irrevocable election to have section 54AA(g) of the Code apply.
- Correct and Timely 8038-CP Filing The Issuer must timely file a correctly completed Form 8038-CP in order to receive payment of the credit.

To comply with all applicable federal tax requirements, issuers of BABs must ensure that the rules are met at the time the BABs are issued and throughout the term of the BABs. Generally this includes continued maintenance of records sufficient to establish compliance with all applicable federal tax requirements, including records related to periods before the BABs are issued (e.g., in the case of reimbursement of prior expenditures) until three years after the final maturity date of the BABs.

MBBA is the issuer of the BABs and RZEDBs on behalf of the participating local governments and as such is obligated to comply with relevant federal, State and local laws as well as its internal procedures. In order to ensure compliance and timely receipt of relevant subsidy payments, MBBA has established the following procedures.

## **PURPOSE**

These Internal Management Policies are designed to set forth procedures to ensure that MBBA (a) applies for each interest subsidy payment with respect to BABs in an accurate and timely manner, (b) utilizes the proceeds of the BABs in accordance with all applicable federal tax guidelines, and (c) complies with all other applicable federal guidelines with respect to the BABs.

MBBA's Chief Financial Officer or Chief Executive Officer will identify the officer or other employee(s) who will be responsible for each of the procedures listed below, notify the current holder of that office of the responsibilities, and provide that person a copy of these procedures. Upon employee or officer transitions, MBBA's Chief Financial Officer will advise the new personnel of their responsibilities under these procedures and ensure they understand the importance of these procedures. If employee or officer positions are restructured or eliminated, MBBA's Chief Financial Officer will reassign responsibilities as necessary to ensure that all procedures hereunder have been appropriately assigned.

## **Procedures**

**Maintenance of Records.** Program participants must maintain detailed records regarding the expenditure of the BABs proceeds, and make them available upon request or on the occasion of risk of noncompliance to MBBA.

100% of Proceeds Must Be For Capital Expenditures Federal law provides that all proceeds of BABs, other than proceeds deposited in a reasonably required reserve fund (if any, as defined in the Tax Certificate), or used to pay costs of issuance are to be spent on capital expenditures. Such amount includes earnings on the original proceeds of the BABs. Capital expenditures are defined in the Tax Certificate but generally means:

*...a cost of a type properly chargeable to the capital account of a project under general federal income tax principles. Generally, Capital Expenditures are costs to acquire, construct, or*

*improve property, or to adapt the property to a new or different use. The property must have a useful life longer than one year. Capital Expenditures include design and planning costs related to the Project, and include architectural, engineering, surveying, soil testing, environmental, and other similar costs incurred in the process of acquiring, constructing, improving or adapting the property. Capital Expenditures do not include operating expenses of the projects or incidental or routine repair or maintenance of the Project, even if the repair or maintenance will have a useful life longer than one year. This definition of Capital Expenditures may differ from state law definitions of capital costs or capital expenditures.*

MBBA will require project participants who make use of the proceeds generated by MBBA bonds to send a letter to MBBA, at least annually, to certify that proceeds from BABs, including investment earnings generated from such proceeds, are used solely for capital expenditures.

**Investment Restrictions; Arbitrage Yield Calculation; Rebate (to be monitored by Treasury Department)**

Investment Restrictions Investment restrictions generally are set forth in the Tax Certificate. MBBA shall require that project participants who make use of the proceeds generated by MBBA bonds maintain detailed records regarding the investment of proceeds. These records shall be made available upon request or upon risk of noncompliance to the finance personnel at MBBA, who will monitor the investment of any BAB proceeds.

Arbitrage Yield Calculation The yield on the BABs must be calculated net of the expected subsidy.

Rebate MBBA shall make use of an arbitrage rebate consultant to perform rebate calculations that may be required to be made from time to time with respect to MBBA's bonds. MBBA shall provide the arbitrage rebate consultant with requested documents and information upon request on a prompt basis, shall review applicable rebate reports and other calculations and shall generally interact with the arbitrage rebate consultant to ensure the timely preparation of rebate reports and payment of any rebate.

Arbitrage rebate services shall be monitored to assure compliance with required rebate payments, if any, which need to be paid no later than the fifth year after issuance and each 5-year period thereafter through the term of the BABs. A final rebate payment must be made within 60 days of the final maturity or redemption date of the issue.

The arbitrage rebate consultant shall be consulted to determine whether MBBA is meeting any spending exception. Available spending exceptions are in periods of 6 months, 18 months and two years (for construction only), with the 18-month and 2-year exception subject to six-month internal benchmarks. See the Tax Certificate or consult the rebate consultant for more details regarding the spending exceptions.

Copies of all arbitrage reports, related return filings with the IRS, copies of cancelled checks with respect to any rebate payments and information statements shall be retained as described below.

In general, MBBA MBBA staff will follow the procedures set forth in the Tax Certificate entered into with respect to any BABs that relate to the compliance with the rebate requirements.

## **Federal Subsidy**

Primary Responsibility MBBA's Chief Financial Officer will be the primary person responsible for applying for the federal subsidy reimbursement. To ensure timely submission of application for subsidy reimbursement, the Agency has appointed The Bank of New York Mellon as Calculation Agent. MBBA recognizes that the IRS does not guarantee that the subsidy will be received prior to the debt service payment dates on any BABs.

Application Process; Accurate Completion MBBA, in coordination with the Calculation Agent, will apply for the semi-annual federal subsidy by filing the Form 8038-CP (Return for Credit Payments to Issuers of Qualified Bonds) in accordance with the applicable IRS guidelines (see attached Instructions for Form 8038-CP). In completing the Form 8038-CP, including the determination of the amount of the requested subsidy payment, reference should be made to the Form 8038-B that was filed for the BABs. MBBA will verify with the bond trustee the proper determination of the amount of interest payable on each interest payment date and the proper amount of refundable credit reported on the Form 8038-CP to ensure the accurate completion thereof.

MBBA will elect in each Form 8038-CP that the payment of the federal subsidy be deposited directly into the BABs interest subsidy subaccount.. Those subsidy funds shall then be distributed to local governments.

Timely Filing The Form 8038-CP must be submitted no later than 45 days prior to the interest payment dates on the BABs

MBBA will establish a system to remind their staff of these filing dates.

Record Retention MBBA will maintain copies of each Form 8038-CP that is submitted. The forms will be maintained for at least six years past the retirement of the applicable issue of BABs.

In addition, copies of all relevant documents and records sufficient to support that the requirements relating to the status of the BABs have been satisfied will be maintained by MBBA for the term of the BABs plus three years, including the following documents and records:

- Bond closing transcript and other relevant documentation, available to the Agency (in some cases, documentation will only be obtainable from Program participants; (Provided by Debt Issuance)
- All records of investments, investment agreements, arbitrage reports, return filings with the IRS and underlying documents; (Treasury)

Records will be kept in a combination of paper and electronic form.

Treatment of Subsidy In its annual budget, MBBA will treat the subsidy payment as an offset to debt service. MBBA will ask for and receive letters from the project participants who make use of the proceeds generated by MBBA bonds as to their expenditures.

## **POST ISSUANCE COMPLIANCE**

### **In General**

MBBA will conduct annual reviews of compliance with these procedures and with the terms of the Tax Certificate to determine whether any violations have occurred so that such violations can be remedied through the "remedial action" regulations (Treas. Reg. 1.141-12) or the Voluntary Closing Agreement Program described in IRS Notice 2008-31 (or successor guidance).

If any changes to the terms of a given BABs issue are contemplated, MBBA will consult its Bond Counsel. MBBA maintains an ongoing relationship with Bond Counsel to serve as a resource for advice regarding BAB compliance.

### **Private Business Use (Treasury)**

BAB-financed assets are limited in the amount of private business use such assets may have.

Until such time as the proceeds are fully spent, MBBA will require project participants who make use of the proceeds generated by MBBA bonds to send a letter to MBBA, at least annually, to certify that there is no more than the permitted amount of private business use described in the Tax Certificate or otherwise conveyed to MBBA in connection with BAB-financed assets. In general, the permissible amount of private business use is no more than the lesser of (i) 10% or (ii) \$15 million of the sale proceeds of an issue of BABs used in any trade or business carried on by any natural person or any activity carried on by anyone other than a natural person or a state or local governmental unit. For purposes of the above, the 10% limit shall be reduced to 5% for any non-governmental use which is either unrelated or disproportionate to the governmental use financed by the issue of BABs.

In the event the use of proceeds or the financed assets are different from the covenants and representations in the Tax Certificate, MBBA will contact Bond Counsel to ensure that there is no adverse effect on the status of the BABs and, where appropriate, will work with Bond Counsel to remedy any violations through the "remedial action" regulations (Treas. Reg. 1.141-12) or the Voluntary Closing Agreement Program described in IRS Notice 2008-31 (or successor guidance).

## **EFFECTIVE APPLICATION OF PROCEDURES; MODIFICATION**

The procedures set forth herein, as they may be amended from time to time, will be effective so long as the U.S. Treasury continues to provide subsidy payments on BABs. MBBA will work with its Bond Counsel and Financial Advisor to monitor changes from the IRS relating to the subsidy reimbursement process and any other guidelines applicable to BABs. If and when the IRS revises the process for receiving the subsidy, MBBA will modify these procedures, as appropriate and responsive, to ensure continued compliance with the federal tax requirements applicable to BABs.