

# Instructions for Form 8038-T



Department of the Treasury  
Internal Revenue Service

(Rev. January 2002)

## Arbitrage Rebate and Penalty in Lieu of Arbitrage Rebate

Section references are to the Internal Revenue Code of 1986 unless otherwise noted.

### General Instructions

**Note:** In general, the 1993 regulations apply to bonds sold after July 7, 1997. For the 1993 regulations, see T.D. 8476, 1993-2 C.B. 13 and T.D. 8538, 1994-1 C.B. 26. However, if the 1992 regulations apply, see T.D. 8418, 1992-1 C.B. 29.

**Note:** Use a separate Form 8038-T for each issue.

### Purpose of Form

Under section 148(f), interest on a state or local bond is not tax exempt unless the issuer of the bond rebates to the United States on Form 8038-T arbitrage profits earned from investing proceeds of the bond in higher yielding nonpurpose investments.

**Note:** For *Who Must File and When To File* see page 2.

### Qualified mortgage bonds and qualified veterans' mortgage bonds.

Section 143(g)(3) and section 103A(i)(4) of the 1954 Code provide the arbitrage rebate rules for qualified mortgage bonds and qualified veterans' mortgage bonds issued after August 15, 1986. Under these special rules, issuers may pay the rebate either to mortgagors, or if an election is made before issuance of the bond, to the United States. Use this form only if you have elected to pay the rebate to the United States.

### Industrial development bonds.

Obligations that are part of an issue of industrial development bonds issued before 1986 (other than housing obligations described in section 103(b)(4)(A) of the 1954 Code or section 11(b) of the Housing Act of 1937) are subject to the rebate requirements of section 103(c)(6)(D) of the 1954 Code. However, see the instructions for line 28 on page 4.

### Arbitrage Rebate

**Computation of arbitrage rebate.** The amount of the rebatable arbitrage is:

1. The excess of the amount earned on all nonpurpose investments over the amount which would have been earned if the nonpurpose investments were invested at a rate equal to the bond yield, plus

2. Any income attributable to the excess described in 1.

For rules on computing the arbitrage rebate for bonds subject to section 148(f), see the regulations under section 148.

The 1993 regulations, as amended, are generally effective for bonds sold after July 7, 1997. Generally, an issuer may apply these regulations to bonds that are outstanding on July 8, 1997, and to which certain prior regulations apply. Moreover, the 1997 amendments to the 1993 regulations, redesignating the temporary rules as sections 1.148-1A through 1.148-6A and 1.148-9A through 1.148-11A, together with the applicable provisions of the original 1993 regulations, continue to apply to bonds issued before July 8, 1997. The 18-month spending exception to the rebate requirement cannot be applied to any bond sold before July 1, 1993.

For rules on computing the arbitrage rebate for bonds subject to section 143(g)(3) or section 103A(i)(4) of the 1954 Code, see Temporary Regulations section 6a.103-2(i)(4). For rules on computing the arbitrage rebate for bonds subject to section 103(c)(6)(D) of the 1954 Code, see Temporary Regulations section 1.103-15AT, T.D. 8005, 1985-1 C.B. 39, if the issuer has not applied the later regulations. Also, see line 28 and its instructions as well as the 1992 and 1993 regulations.

**Exceptions.** There is no rebate requirement under section 148(f) if the exception for temporary investments under section 148(f)(4)(B) applies or the exception for governmental units issuing \$5 million or less of bonds under section 148(f)(4)(D) applies.

**Note:** The exception under section 148(f)(4)(D) is modified as follows: a governmental issuer may issue up to \$10 million in bonds after 1997 (\$15 million after 2001) per calendar year (aggregate face amount of bonds other than private activity bonds), if no more than \$5 million is used to finance expenditures other than public school capital expenditures.

Also, the rebate requirement does not apply to "available construction proceeds" of a construction issue if certain spending requirements are met; or if those spending requirements are not met, an election is made to pay a penalty in lieu of arbitrage rebate. See section 148(f)(4)(C).

The arbitrage rebate exception for a construction issue only applies to "available construction proceeds." Other proceeds of a construction issue do not qualify for this exception.

Further, the rebate requirement generally does not apply to bond proceeds that are invested in certain

tax-exempt bonds, certain tax-exempt mutual funds, or certain demand deposit securities purchased directly from the United States Treasury.

### Failure To Pay Arbitrage Rebate on Time

Failure to pay the proper amount of arbitrage rebate on time may cause the bond to be treated as not being, and as never having been, tax exempt.

### Under the regulations effective prior to July 1, 1993.

Generally, if the failure is an innocent failure, the failure will be treated as not having occurred if the issuer pays a correction amount to the United States. Detailed rules relating to innocent failures, the correction amount, and the time to pay the correction amount are contained in Regulations section 1.148-1(c) (1992 regulations).

Even if the failure is not innocent or not so treated, the failure will be treated as not having occurred if the failure is not due to willful neglect and the issuer pays a correction amount and a penalty to the United States. Detailed rules relating to willful neglect, the correction amount, and the penalty and interest are contained in Regulations section 1.148-1(c) (1992 regulations).

### Under the regulations effective after July 7, 1997.

If the failure is not due to willful neglect, the failure will be treated as not having occurred if, in addition to payment of the proper arbitrage rebate amount, the issuer pays a penalty and interest to the United States. Detailed rules relating to the penalty and interest are contained in Regulations section 1.148-3(h).

### Penalty in Lieu of Arbitrage Rebate

In the case of a construction issue, an exception from the rebate requirement is provided under section 148(f)(4)(C) for the available construction proceeds of the issue if certain spending requirements are met. Since this exception only applies to available construction proceeds, other proceeds of a construction issue do not qualify for this exception. Thus, rebatable arbitrage may be owed for proceeds other than available construction proceeds even if this exception is satisfied for the available construction proceeds. The issuer may have elected to pay a penalty in lieu of rebating arbitrage for the available construction proceeds if the spending requirements of section 148(f)(4)(C) are not satisfied. The penalty, if any, is payable for each applicable

6-month period after the date the bonds are issued. For detailed rules concerning these provisions see Regulations section 1.148-7.

A "construction issue" is an issue of tax-exempt bonds that meets both of the following conditions:

1. At least 75% of the available construction proceeds of such issue are to be used for construction expenditures for property to be owned by a governmental unit or a 501(c)(3) organization, **and**

2. All bonds that are part of such issue are qualified 501(c)(3) bonds, bonds that are not private activity bonds, or private activity bonds issued to finance property to be owned by a governmental unit or a 501(c)(3) organization.

Generally, the "available construction proceeds" means the amount equal to the issue price of the construction issue:

1. Increased by earnings on the issue price, earnings on amounts in any reasonably required reserve or replacement fund not funded from the issue, and earnings on all of the foregoing earnings, **and**

2. Reduced by the amount of the issue price in any reasonably required reserve or replacement fund and the issuance costs financed by the issue. See section 148(f)(4)(C)(vi).

The penalty in lieu of arbitrage rebate is equal to 1½% of the amount of the available construction proceeds that do not meet certain spending requirements. See section 148(f)(4)(C) and Regulations section 1.148-7 for the rules for construction proceeds, available construction proceeds, and spending requirements needed to compute the penalty in lieu of arbitrage rebate.

### **Penalty for the Termination of Election To Pay a Penalty in Lieu of Arbitrage Rebate**

You may terminate the election to pay a penalty in lieu of arbitrage rebate by paying a 3% penalty. Generally, compute the penalty for the termination election under section 148(f)(4)(C)(viii) with reference to the end of the initial temporary period. See section 148(c) and Regulations section 1.148-2(e) for definitions of a temporary period. Compute the amount of the penalty for the termination election under section 148(f)(4)(C)(ix) with reference to the date of the election. See section 148(f)(4)(C)(viii) and (ix) for the rules for terminating an election to pay a penalty in lieu of rebate.

### **Failure To Pay Timely the Penalty in Lieu of Arbitrage Rebate or the Termination Penalty**

Failure to pay the proper amount of penalty and interest on time (after an appropriate election either to pay penalty in lieu of arbitrage rebate or to pay a

termination penalty) may cause the bond (or any refunding bond with respect thereto) to be treated as not being, and as never having been, tax exempt. In general, the rules discussed in **Failure To Pay Arbitrage Rebate on Time**, on page 1, also apply to these penalties. See Regulations section 1.148-6(n) (1992 regulations) and 1.148-3(h) (1993 regulations).

### **Who Must File**

Issuers of tax-exempt bonds must file Form 8038-T to pay:

1. Any yield reduction payments in accordance with Regulations section 1.148-5(c).

2. The arbitrage rebate to the United States under section 143(g)(3), section 148(f), or the corresponding provisions of the 1954 Code. Payments may be made by a person acting for the issuer for bonds subject to section 103(c)(6)(D) of the 1954 Code.

3. The penalty:

- In lieu of arbitrage rebate, or
- To terminate the election to pay a penalty in lieu of arbitrage rebate.

**Note:** *Issuers must also use Form 8038-T to pay any penalties and interest on the failure to pay on time amounts due in 2 and 3 above.*

### **When To File**

#### **Yield Reduction Payments**

File Form 8038-T when paying yield reduction payments to the United States in accordance with Regulations section 1.148-5(c). In general, an amount is paid under Regulations section 1.148-5(c) if it is paid to the United States at the same time and in the same manner as rebate amounts are required to be paid.

A yield reduction overpayment may also be recovered. For details, see Regulations section 1.148-3(i) and **Recovery of Overpayment** below.

#### **Arbitrage Rebate**

File Form 8038-T when paying the arbitrage rebate to the United States. Under section 148(f), the installments are due 60 days after the end of every 5th bond year during the term of the issue. The final installment is due 60 days after the date the last bond of the issue is discharged.

Under Regulations section 1.148-1(b) (1992 regulations), each installment must be in an amount that equals at least 90 percent of the rebatable arbitrage as of the computation date (i.e., the end of the 5-year period). In addition, under Regulations section 1.148-1(b) (1992 regulations), the final installment must include all of the rebatable arbitrage as of the last computation date, plus any income attributable to the rebatable arbitrage.

Under Regulations section 1.148-3(f), each installment must be in an amount that, when added to the future value as of the computation date (i.e., the end of the 5-year period) of previous rebate payments made for the issue, equals at least 90 percent of the rebatable arbitrage as of the computation date. In addition, under Regulations section 1.148-3(f), the final installment must include an amount that, when added to the future value of previous rebate payments made for the issue, equals 100 percent of the rebate amount as of that date. See Regulations sections 1.148-3(f)(3) and 1.148-3(c) for detailed rules determining future value for these purposes.

**Special rules.** For a tax and revenue anticipation bond, you need not make the last installment of arbitrage rebate until at least 8 months after the bond issue date. See also section 143(g)(3) and section 103A(i)(4) of the 1954 Code for rules concerning qualified mortgage bonds and qualified veterans' mortgage bonds. See Temporary Regulations section 1.103-15AT(e) (1992 regulations) for rules concerning industrial development bonds.

#### **Penalties**

Under section 148(f)(4)(C), the payment of a penalty in lieu of arbitrage rebate must be made no later than 90 days after the end of each 6-month period relating to the penalty.

Payment of the 3% penalty to terminate the penalty in lieu of arbitrage rebate must be made to the United States no later than 90 days after **(a)** the end of the initial temporary period if the termination election was made under section 148(f)(4)(C)(viii), or **(b)** the date of the termination election if it was made under section 148(f)(4)(C)(ix).

See the instructions for line 25 for paying a penalty for failure to pay on time either of the penalties described above.

See the instructions for line 18 for paying a penalty for failing to pay the arbitrage rebate to the United States on time.

#### **Recovery of Overpayment**

In general, an issuer may recover an overpayment of rebate for an issue of tax-exempt bonds by establishing to the Internal Revenue Service that the overpayment occurred. To request recovery of amounts paid under rebate provisions, including yield reduction payments, see new **Form 8038-R**, Request For Recovery of Overpayments Under Arbitrage Rebate Provisions.

#### **Where To File**

File Form 8038-T with the Internal Revenue Service Center, Ogden, UT 84201.

#### **Signature**

Form 8038-T must be signed by an authorized representative of the issuer.

Also type or print the name and title of the person signing Form 8038-T.

## Specific Instructions

### Part I—Reporting Authority

**Amended Return.** If you are filing an amended Form 8038-T, check the amended return box. Complete Part I and only those parts of Form 8038-T you are amending. Use the same report number (line 4) that was used in the original report.

**Line 1.** Enter the name of the governmental entity that issued the bonds, not the name of the entity receiving the benefit of the financing.

**Line 4.** After the predesignated 7, enter two self-designated numbers. Number reports consecutively during any calendar year (e.g., 734, 735, etc.).

**Line 6.** Enter the date of issue. This is generally the first date on which there is a physical exchange of the bonds for the purchase price.

**Line 7.** Enter the name of the issue. If there is no name, please provide other identification of the issue.

**Line 8.** Enter the CUSIP (Committee on Uniform Securities Identification Procedures) number of the bond with the latest maturity. If the issue does not have a CUSIP number, enter "None."

**Line 11.** Enter the type of issue as was checked for this issue on Form 8038 or Form 8038-G. For bonds previously reported on Form 8038-GC, enter "Small Governmental Bond." Also enter the total issue price that was listed on Form 8038, 8038-G, or 8038-GC filed for this issue.

**Line 14.** Enter the date of the most recently filed (previous) Form 8038-T for this issue.

**Line 15.** In case of a rebate of arbitrage, check the box marked "Yes" only if the issue has been discharged (redeemed, called, etc.). In the case of the payment of a penalty in lieu of arbitrage rebate, check the box marked "Yes" only if the spending provisions of section 148(f)(4)(C) have been fully complied with or if a termination penalty payment is made with this form. In all other cases, check the box marked "No."

### Part II—Yield Reduction, Arbitrage Rebate, and Penalty in Lieu of Arbitrage Rebate

Under limited circumstances, you may be rebating arbitrage **and** paying a penalty in lieu of rebating arbitrage.

#### Yield Reduction

**Line 16.** To determine the yield reduction payment to which Regulations section 1.148-5(c) applies, treat any amount paid to the United States, including a rebate amount, as a payment for that investment which reduces the yield.

### Arbitrage Rebate

**Line 17.** Enter the period of time relating to this rebate payment. For any installment other than the final installment, the period of time should reflect the bond years selected.

**Line 18.** If the issuer failed to make the appropriate arbitrage rebate payment with Form 8038-T, see **Failure To Pay Arbitrage Rebate on Time** on page 1. Compute the penalty for failure to pay on time and enter the total on line 18.

In addition, whichever is applicable, attach a statement to this Form 8038-T explaining why there was (1) an innocent failure or (2) no willful neglect in the issuer's failure to pay the arbitrage rebate due. Submit the statement relating to an innocent failure according to the format and procedure of Section 4, Rev. Proc. 90-11, 1990-1 C.B. 469. Submit the statement relating to why there was no willful neglect according to the format and procedure of Section 3, Rev. Proc. 88-10, 1988-1 C.B. 635.



*Follow the procedures for each of the revenue procedures except use the mailing address under **Where To File** on page 2.*

**Line 19.** If the issuer failed to make the appropriate rebate payment with Form 8038-T, see **Failure To Pay Arbitrage Rebate on Time** on page 1. Compute the interest on the underpayment of arbitrage rebate and enter the total on line 19.

#### Penalty in Lieu of Arbitrage Rebate

If you are completing this section, you must have made a timely election under section 148(f)(4)(C)(vii). See also section 148(f)(4)(C)(xv).

**Line 20.** The expenditure requirements for available construction proceeds change at the end of each 6-month period following the date the bonds are issued. Check the appropriate box for the number of months between the date that the bonds were issued and the end of the reporting period for which this Form 8038-T is being filed. If the period is over 24 months (2 years), or is other than that given for the labeled boxes, check the box marked "Other" and give the number of months since the date of issue.

**Note:** *File a separate Form 8038-T for each different time period associated with a checked box.*

**Line 21.** Indicate the available construction proceeds and the unspent available construction proceeds as of the end of the 6-month period for which this Form 8038-T is filed.

**Line 22. Check Box A if:**

1. The election to terminate the 1½% penalty in lieu of arbitrage rebate was made not later than 90 days after the earlier of the end of the initial temporary period or the date the construction is substantially completed,

2. The issuer pays with this Form 8038-T an amount equal to 3% of the available construction proceeds of the issue that have not been spent for the governmental purpose of the issue as of the close of the initial temporary period multiplied by the number of years (including fractions) in the initial temporary period,

3. The amount of the available construction proceeds of the issue that is not spent for the governmental purposes of the issue as of the close of the initial temporary period is invested at a yield not exceeding the yield on the issue or which is invested in any tax-exempt bond which is not investment property, **and**

4. The amount of the available construction proceeds of the issue that is not spent for the governmental purposes of the issue as of the earliest date on which bonds may be redeemed is used to redeem bonds on that date.

#### Check Box B if:

1. The election to terminate the 1½% penalty in lieu of arbitrage rebate was made before the end of the initial temporary period, and not later than 90 days after the date the construction was substantially completed,

2. The construction financed by the construction issue has been substantially completed before the end of the initial temporary period,

3. The issuer has identified on its records an amount of available construction proceeds that will not be spent for the governmental purposes of the issue, **and**

4. The issuer pays with this Form 8038-T an amount equal to 3% of the available construction proceeds of the issue that have not been spent for the governmental purpose of the issue as of the close of the temporary period (shortened as if the temporary period ended as of the date the election was made), multiplied by the number of years (including fractions) in the initial temporary period.

**Line 25.** If the issuer failed to make the appropriate penalty payment with Form 8038-T, see **Failure To Pay Timely the Penalty in Lieu of Arbitrage Rebate or the Termination Penalty** on page 2. Compute the penalty for failure to pay on time and enter the total on line 25. See the instructions for line 18 for the applicable statement to attach to Form 8038-T.

**Line 26.** If the issuer failed to make the appropriate penalty payment with Form 8038-T, see **Failure To Pay Timely the Penalty in Lieu of Arbitrage Rebate or the Termination Penalty** on page 2. Compute the interest on the underpayment of the penalty in lieu of arbitrage rebate, or penalty upon termination, and enter the total on line 26.

**Line 27.** Combine all payment amounts on lines 16, 17, 18, 19, 23, 24, 25, and

26. Enclose a check or money order for this total amount made payable to the "United States Treasury." Include the issuer's name, address, EIN, "Form 8038-T," and the date on the payment.

### Part III—Elections by the Issuer

This part applies only if the bonds are subject to the requirements of the regulations under section 148.

For rules relating to elections, see Regulations section 1.148-8(h) (1992 regulations) and 1.148-1(d). See the instructions for lines 39 and 40 on applying the 1993 regulations retroactively.

#### A. Elections made under the 1992 regulations

**Line 28.** This election applies to a bond subject to section 103(c)(6)(D) of the 1954 Code. You may elect to apply the rules under the regulations for section 148 to determine if the bond complies with section 103(c)(6)(D) of the 1954 Code.

**Line 29.** You may elect to treat the last day of any bond year on a variable yield issue as a computation date. If you make this election, the yield on the issue may be computed for periods shorter than 5 years. This election is revocable under certain conditions. See Regulations section 1.148-3(b)(2)(ii)(B).

**Line 30.** You may elect to treat any variable yield issue sold on or before May 15, 1989, and issued on or before June 14, 1989, as a fixed yield issue. If you make this election, the yield on the issue is computed over the term of the issue rather than period-by-period. See Regulations section 1.148-3(b)(1)(ii).

**Line 31.** If you make this election, a variable yield bond that is not a tender bond is treated as a fixed yield bond after the close of business on the first day the bond would be a fixed yield bond if issued immediately after the close of business on that day. See Regulations section 1.148-3(b)(3)(i).

**Line 32.** If you make this election, a variable yield issue that has been converted to a fixed yield issue will continue to be treated as a variable yield issue. See Regulations section 1.148-3(b)(3)(ii).

**Line 33.** You may elect to recompute the yield on certain fixed yield issues sold on or before May 15, 1989, and issued on or before June 14, 1989. Otherwise, you must use the yield computed as of the issue date for such purposes. See Regulations section 1.148-3(c)(5).

#### B. Elections made under the 1993 regulations

**Line 34.** Regulations section 1.148-4(h)(2)(viii) permits an issuer of tax-exempt bonds to identify a hedge for

the hedge to be included in yield calculations that are necessary to compute arbitrage profits. Under Regulations section 1.148-4(h)(5), hedges can be entered into prior to the issuance of the tax-exempt bonds.

**Line 35.** Regulations section 1.148-7(f)(2) permits an issuer to use an "actual facts" analysis for a construction issue under Regulations sections 1.148-7(e) through (m) rather than an analysis based on reasonable expectations. This election does not apply for purposes of determining whether an issue is a construction issue under Regulations section 1.148-7(f)(1) if the election for the 1½% penalty in lieu of arbitrage rebate is made under Regulations section 1.148-7.

**Line 36.** Regulations section 1.148-7(i)(2) permits an issuer to elect to exclude earnings on a reasonably required reserve or replacement fund from the definition of available construction proceeds. Earnings on any reasonably required reserve or replacement fund are available construction proceeds only to the extent that those earnings accrue before the earlier of the date construction is substantially completed or the date that is 2 years after the issue date. If the election is made, the rebate requirement applies to the excluded amounts from the issue date.

**Line 37.** Regulations section 1.148-7(j) permits an issuer to elect to treat the different purposes of a multipurpose issue as two, and only two, separate issues for purposes of the 2-year exception if certain conditions are present. See Regulations section 1.148-7(j)(1).

**Line 38.** Regulations section 1.148-7(b)(6) permits an issuer of a pooled financing issue to apply the spending exceptions separately to each conduit loan. Detailed rules relating to this election are contained in Regulations section 1.148-7(b)(6)(ii).

**Line 39.** Regulations section 1.148-11(b) permits issuers to apply certain provisions of the regulation before the effective date. Regulations section 1.148-11 permits an issuer to retroactively apply the 1993 regulations in whole—but not in part—to issues that were outstanding before July 8, 1997, and that are subject to section 148(f) or sections 103(c)(6) or 103A(i) of the Internal Revenue Code of 1954. Also, the issuer has the option to apply individual provisions of Regulations sections 1.148-1 through 1.148-11 to bonds issued before July 1, 1993. The 18-month spending exception to the rebate requirement cannot be retroactively applied before July 1, 1993. Regulations section 1.148-11 also contains several specific application transition rules.

If a bond was issued after July 7, 1997, check the "No" box. If a bond was issued before July 8, 1997, and the issuer has electively applied the finalized 1993 regulations, check the "Yes" box. All other filers should check the "No" box.

**Line 40.** Regulations section 1.148-11 permits issuers to apply certain amendments to Regulations sections 1.148-1 through 1.148-11 and Regulations sections 1.148-1A through 1.148-6A and 1.148-9A through 1.148-11A before the effective date of the 1993 regulations.

Check the "No" box unless:

1. A bond was issued before June 6, 1994, and before July 8, 1997, the issuer electively applied the above regulations (for example, on a previously filed Form 8038-T), and
2. The issuer intends to continue with that elective application while filing this Form 8038-T.

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**Paperwork Reduction Act Notice.** We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to collect the right amount of arbitrage rebate, yield reduction payments, and penalties.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is:

<b>Recordkeeping</b> . . . . .	11 hr., 57 min.
<b>Learning about the law or the form</b> . . . . .	8 hr., 44 min.
<b>Preparing, copying, assembling, and sending the form to the IRS</b> . . . . .	9 hr., 19 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Tax Forms Committee, Western Area Distribution Center, Rancho Cordova, CA 95743-0001. **Do not** send the form to this address. Instead, see **Where To File** on page 2.

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