

## A Reshuffling of the 8038 Deck

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The IRS recently released a new Form 8038-G, which is the information return for issues of tax-exempt governmental bonds, and a new Form 8038, which is the information return for tax-exempt private activity bonds. In addition, the IRS has released draft instructions for each form. The revised forms are in part a response to changes made to the Internal Revenue Code by the Tax Cuts and Jobs Act (P.L. 115-97), which was signed into law on December 22, 2017 (“TCJA”). Keep reading for more information on the new forms, the fate of some old forms, and some gratuitous commentary.

The TCJA repealed the ability to advance refund tax-exempt bonds with tax-exempt bonds. (Please click [here](#) and [here](#) for prior blog posts on this subject). Thus, both Form 8038-G and Form 8038 have been updated to delete information requests regarding the advance refunding of a prior tax-exempt bond issue. However, each form now requests information regarding the use of tax-exempt bond proceeds to refund taxable bonds.

The 8038 has also been updated to reflect that certain types of tax-exempt bonds can no longer be issued. For example, the line referring to the District of Columbia enterprise zone facility bonds has been replaced with “Other,” and the line referring to qualified New York liberty zone bonds has been replaced with a reference to local district heating or cooling facilities. In addition, for unknown reasons (maybe a demotion), the reference to qualified green building and sustainable design projects, which still exist as a category of exempt facility bonds, was replaced with a reference to mass commuting facilities on the Form 8038.

Interestingly, it must be pretty expensive and/or cumbersome to delete a line from an IRS form because the old Form 8038-G and new Form 8038-G and the old Form 8038 and new Form 8038 have the exact same number of lines. On the new Form 8038, the desire to keep the form at a length of 52 lines has left us with six (6) different lines that are described as “Other” in Part II (where the category of private activity bond being issued is described). Imagine how many trees could have been saved by shortening Part II, moving everything up, and potentially eliminating the third page of the Form 8038.

In addition, likely in an effort to keep the 8038 at 52 lines, a reference to New York liberty zone advance refunding bonds has been replaced with a requirement to identify whether the Form 8038 is being filed because the bonds are treated as reissued for federal income tax purposes. The draft instructions request information as to whether the bonds are being treated as reissued as a result of a remedial action or as a result of a significant modification. Note that although governmental bonds

are subject to many of the same rules and considerations regarding whether they have been reissued for federal income tax purposes, Form 8038-G does not request this information (which would have required the IRS to move beyond 45 lines or to find another sacrificial line).

It is interesting to note that the IRS did not choose to incorporate “interactive” features in the new forms. The IRS currently uses interactive features in Form 8038-CP, which performs calculations based on data entered into the form, and provides feedback to the user if, for example, the internal math in the form is not adding up. (Please click [here](#) and [here](#) for prior blog posts on this subject).

Finally, since the TCJA repealed the ability to issue tax-credit bonds and direct-pay bonds, Form 8038-B and Form 8038-TC have been retired.

We have attached marked versions of the new 8038 forms, highlighting the sections with new language. ([Click here for the new 8038](#), and [click here for the 8038-G](#).) The boring, unhighlighted forms can be downloaded from the IRS website here ([8038 is here](#), and [8038-G is here](#)).

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