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IRS Adds Questions to Form 8038-G Regarding Post-Issuance Compliance for Tax-Exempt Bonds

As we indicated in our recent prior Alert, the Internal Revenue Service ("IRS") has reconfirmed the importance of municipal issuers having written post-issuance compliance procedures with respect to their tax-exempt bond issues. We noted that the IRS had amended certain versions of Form 8038 to include questions regarding the issuer's post-issuance compliance procedures, and predicted that these questions might soon be added to the Form 8038-G, applicable to governmental issues. The IRS has recently issued a new Form 8038-G, which includes these new questions, discussed below. **New Questions on Post-issuance Compliance New Question 43**, which addresses written procedures for remediating bonds to preserve tax exemption in the event that the private use limitations are violated, states: *If the issuer has established written procedures to ensure that all nonqualified bonds of this issue are remediated according to the requirements under the Code and Regulations (see instructions), check box.* The instructions for this question read as follows: *If the issuer takes a "deliberate action" after the issue date that causes the conditions of the private business tests or the private loan financing test to be met, then such issue is also an issue of private activity bonds. Regulations section 1.141-2(d)(3) defines a deliberate action as any action taken by the issuer that is within its control regardless of whether there is intent to violate such tests. Regulations section 1.141-12 explains the conditions to taking remedial action that prevent an action that causes an issue to meet the private business tests or private loan financing test from being treated as a deliberate action. Check the box if the issuer has established written procedures to ensure timely remedial action for all nonqualified bonds according to Regulations section 1.141-12 or other remedial actions authorized by the Commissioner under Regulations section 1.141-12(h).* We note that the rules regarding remediation are complex and that the issuer may want the assistance of bond counsel familiar with these rules to help frame written procedures to ensure compliance. **New Question 44**, which addresses written procedures for post-issuance compliance with the arbitrage requirements under Code section 148, states: *If the issuer has established written procedures to monitor the requirements of section 148, check box.* The instructions for this question read as follows: *Check the box if the issuer has established written procedures to monitor compliance with the arbitrage, yield restriction, and rebate requirements of section 148.* We note that the IRS has stated publicly that the tax compliance document accompanying an issuance of bonds does not in and of itself establish written post-issuance compliance procedures and that "something more" is needed. A detailed description of the requirements for tax-exempt bond post-issuance compliance may be found at www.irs.gov/bonds under "TEB Post-Issuance Compliance," which also contains extensive cross-links to relevant sections of the Internal Revenue Manual, IRS Notices and Rulings, articles, and other educational materials. As a brief overview, the IRS has stated that such written procedures should include the following:

- Performance of a due diligence review of compliance with covenants at regular intervals;
- Identification of the official or employee responsible for the review;
- Training of the responsible reviewer;
- Retention of adequate records to substantiate compliance; and
- Procedures to outline the taking of timely action to resolve identified noncompliance.

Last, the IRS has publicly stated that an Issuer should *not* check the boxes for Questions 43 and 44 if it does not have such written procedures. **Additional Action** As we indicated in our prior Alert, the IRS uses 8038 forms to identify bond issues to be audited. We *strongly* encourage issuers to implement written post-issuance compliance procedures. The Day Pitney municipal finance attorneys listed to the right of this Alert are available to assist you in further understanding the impact of

these new questions and guidelines, as well as in drafting and implementing such written procedures. Please feel free to call on us. We also encourage you to visit the IRS website referenced above.