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IRS Confirms Importance of Written Post-Issuance Compliance Procedures

In both its written materials and oral presentations outlining changes to its tax-exempt bond compliance program, the Tax-Exempt Bonds ("TEB") group of the Internal Revenue Service ("IRS") recently reconfirmed the importance of municipal issuers having *written* post-issuance compliance procedures with respect to their tax-exempt bond issues. A detailed description of the requirements for tax-exempt bond post-issuance compliance and the parameters of the Voluntary Closing Agreement Program ("VCAP") may be found at www.irs.gov/bonds under "TEB Post-Issuance Compliance" and "TEB Voluntary Compliance," which also contain extensive cross-links to relevant sections of the Internal Revenue Manual, IRS Notices and Rulings, articles, and other educational materials. This Alert provides an overview of key concepts presented in these materials. **Emphasis on Voluntary Compliance and Dispute Resolution** The continued tax-exempt status of bonds or receipt of subsidy payments for direct-pay tax-credit bonds (such as Build America Bonds) requires issuers to maintain ongoing compliance with tax covenants contained in the bond documents. The IRS expects issuers to monitor compliance and prefers that they take "self-correction" remedial actions when noncompliance is uncovered. If a remedial action is not available, the IRS prefers that issuers use the VCAP program. The IRS has stated that an issuer *will receive more favorable treatment of its matter under the VCAP program than it would under an audit examination of the same noncompliance matter.* **Heightened Emphasis on Written Post-Issuance Compliance Procedures** Recent modifications to the standards for dispute resolution contained in the Internal Revenue Manual also provide incentives for issuers to adopt and use *written* procedures to monitor post-issuance compliance as part of their ongoing operations. The IRS has stated that issuers that timely identify violations pursuant to their *written* post-issuance compliance procedures and that timely submit a VCAP request will be subject to *a reduced settlement amount*. The IRS has identified that *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.

Additional Action We also call to your attention that the IRS has recently amended certain versions of Form 8038 to include a question asking whether the issuer has adopted *written* post-issuance compliance procedures. While we cannot predict with certainty, it is our expectation that the IRS will move toward including such a question in all versions of Form 8038. We note that the IRS uses 8038 forms to identify bond issues to be audited. The Day Pitney municipal finance attorneys listed to the right of this Alert are available to assist you in understanding the impact of these new guidelines, and in drafting and implementing such written procedures. Please feel free to call on us. We also encourage you to visit the above-listed website.