

November 22, 2011

## 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.



#### Related practice areas:

[Municipal Finance](#)

For more information, please contact any of the individuals listed below:

**Judith A. Blank** <sup>CT, NY</sup>  
[jablank@daypitney.com](mailto:jablank@daypitney.com)  
(860) 275 0112

**Sam S.F. Caligiuri** <sup>CT</sup>  
[sscaligiuri@daypitney.com](mailto:sscaligiuri@daypitney.com)  
(860) 275 0396

**Linda L. D'Onofrio** <sup>NY</sup>  
[ldonofrio@daypitney.com](mailto:ldonofrio@daypitney.com)  
(212) 297 2419

**Douglas W. Gillette** <sup>CT</sup>  
[dwgillette@daypitney.com](mailto:dwgillette@daypitney.com)  
(860) 275 0186

**Adam M. Kasowitz** <sup>CT, NY</sup>  
[akasowitz@daypitney.com](mailto:akasowitz@daypitney.com)  
(860) 275 0477

**Namita Tripathi Shah** <sup>CT</sup>  
[ntshah@daypitney.com](mailto:ntshah@daypitney.com)  
(860) 275 0132

**James J. Tancredi** <sup>CT</sup>  
[jjtancredi@daypitney.com](mailto:jjtancredi@daypitney.com)  
(860) 275 0331

**Richard J. Wasserman** <sup>CT</sup>  
[rjwasserman@daypitney.com](mailto:rjwasserman@daypitney.com)  
(860) 275 0142

**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](http://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.

**Bar Admissions:** Connecticut<sup>CT</sup> New York<sup>NY</sup>

---

This communication is provided for educational and informational purposes only and is not intended and should not be construed as legal advice. This communication may be deemed advertising under applicable state laws. Prior results do not guarantee a similar outcome.

If you have any questions regarding this communication, please contact Day Pitney LLP at 7 Times Square, New York, NY 10036, (212) 297 5800.