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NON-PROFIT

Tax-Exempt Issuers and Borrowers Need Written Post-Issuance Compliance Policies

ARE YOU A NON-PROFIT OR GOVERNMENTAL ENTITY WITH OUTSTANDING TAX-EXEMPT BONDS? ARE YOU CONSIDERING FINANCING A PROJECT USING TAX-EXEMPT BONDS? IF SO, YOU SHOULD HAVE A WRITTEN "POST-ISSUANCE COMPLIANCE POLICY" IN PLACE.

(Note: If you are new to tax-exempt financing, you might wish to first read: "Tax-Exempt Borrowing Basics - A Quick Reference Guide to Tax-Exempt Bonds.")

The status of an issuer or borrower as a governmental or 501(c)(3) entity, while often a prerequisite, is not itself sufficient to achieve the benefits of tax-exempt financing. Rather, there are many requirements for bonds to qualify as tax-exempt. Much effort is put into the initial structuring and documentation of an issuance of tax-exempt bonds to ensure that the bonds comply with the rules governing tax-exempt debt. Such rules include restrictions on how the borrowed funds can be used and invested, deadlines for spending the borrowed funds, and certain recordkeeping and reporting requirements.

The numerous and complex rules that are analyzed in preparation for the issuance of the bonds continue to apply throughout the life of the bonds, as well as the life of any bonds issued to refinance the original bonds. Issuers and borrowers are responsible for the continued compliance with those rules in their day-to-day operations. Although the issuer and borrower typically have counsel guiding them through these rules during the issuance of the bonds, subsequent legal support is not always available or called upon. However, counsel can help issuers and borrowers establish a customized post-issuance compliance policy ("PICP"), which will serve as a guide to actions that must be taken or avoided after the bonds have been issued.

What are the goals of a written PICP?

- to ensure bonds remain tax-exempt the entire time they are outstanding
- to comply with Internal Revenue Service ("IRS") guidance
- to integrate compliance with tax-exempt bond rules into an issuer's/borrower's day-to-day operations and existing procedures
- to provide guidance to issuer/borrower employees responsible for compliance
- to make tax-exempt bond compliance more efficient for the issuer/borrower
- to help the issuer/borrower identify and resolve compliance-related issues as they arise

Why is a written PICP important?

Given the complexity of the tax-exempt bond rules, it is extremely difficult for a borrower, without help, to keep such rules in mind as it carries out its day-to-day operations. Additionally, a borrower's employees change, and new employees as well as existing employees may inadvertently violate the tax-exempt bond rules. Appropriate PICPs help by prompting consideration of such rules using processes that are a good fit for each particular issuer or borrower.

In addition, the IRS has recently placed a major focus on whether issuers have PICPs, and such procedures are becoming more and more commonplace among tax-exempt borrowers. For example, various IRS reporting forms now ask whether written PICPs are in place, the IRS may look for written PICPs on audit, and the IRS has indicated that, when a violation does occur, those entering its voluntary compliance program with existing, written PICPs in place will receive more favorable treatment than those who do not have policies in place. The IRS has a particular idea of what PICPs are and what they should contain. An IRS survey revealed that many issuers and borrowers thought they had policies constituting PICPs in place, but the IRS disagreed.

What should my PICP look like?

First and foremost, PICPs should be written. They should reflect detailed IRS guidance and meet the IRS description of PICPs. However, PICPs are not a one-size-fits-all product. Rather, they are more effective, more efficient, and more likely to withstand scrutiny when they are customized to the issuer and borrower. PICPs should vary based on factors such as whether they are written for an issuer or a borrower, the nature of the issuer/borrower, the preferences of the issuer/borrower, and existing policies and procedures of the issuer/borrower. PICPs need not be complex documents; they can be written in plain English and, in most cases, set forth the critical guidelines in only a few pages.

For additional information regarding PICPs, other tax-exempt bond issues, or non-profit entity issues, please feel free to contact Katie Ahern at kahern@hinckleyallen.com.

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