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Practice Group(s):
Public Finance

You Don't Have to Pay for a Post Issuance Compliance Policy...But Have You Adopted One Yet?

By Cynthia Weed, Laura McAloon, Scott McJannet, and David Thompson

A number of municipal entities have been receiving a solicitation to purchase a post-issuance debt policy and procedure manual. The advertisement suggests that having such a policy is required by the Internal Revenue Service (the "IRS"). However:

- **Post Issuance Compliance Policies are available for free from K&L Gates** – you do not need to pay third parties for material your bond counsel has already prepared for you.
- **Adopting a policy is not required by the IRS (but is certainly advisable – as discussed below).**

As you know, Federal tax law requires the filing of an IRS form (8038-G) by a governmental issuer in connection with its tax-exempt Bonds. Form 8038-G is an informational form. The Form 8038-G was recently amended by the IRS to include questions inquiring whether the issuer has adopted written procedures to ensure compliance with federal tax law following the issuance of the bonds and during the life of the bond issue.

The new check box does not create or reflect any legal requirement that an issuer adopt these written procedures. *However, we do recommend that governmental issuers adopt written procedures.* By doing so, you will be able to affirmatively "check the box" on the IRS Form 8038-G (Lines 43 and 44).

While there is no penalty for not having written procedures, recent written pronouncements in the Internal Revenue Manual suggest that when dealing with the IRS in the future in the event of unanticipated changes in use of tax-exempt financed facilities or other matters that might adversely affect the tax-exempt status of the bonds, the IRS may be more favorably disposed on the outcome (maintenance of tax-exempt status) if the issuer has written policies that monitor post issuance compliance.

[Click here for a model Post Issuance Compliance Policy for governmental bonds.](#)

[Click here for a model Post Issuance Compliance Policy for private activity bonds.](#)

Please contact us if you would like assistance in tailoring the model policy to your specific needs.

K&L Gates has been serving as bond counsel to municipalities for over 100 years. We welcome the opportunity to continue to serve you. For more information, contact Cynthia Weed at 206-370-7801, Laura McAloon at 509-241-1532, Scott McJannet at 206-370-8190, or David Thompson at 206-370-8395.

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Authors:

Cynthia Weed

cynthia.weed@klgates.com
+1. 206.370.7801

Laura McAloon

laura.mcaloon@klgates.com
+1. 509.241.1532

Scott McJannet

scott.mcjannet@klgates.com
+1. 206.370.8190

David Thompson

david.thompson@klgates.com
+1. 206.370.8395

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