For the Business Manager:
Post-Issuance Compliance: How to Live with a Bond Issue

By Donna L. Kreiser

November 15, 2010

Donna L. Kreiser is a member of the Financial Services practice group of McNees Wallace & Nurick LLC. On Wednesday, September 15, 2010, she joined a panel assembled by the Pennsylvania Association of School Business Officials ("PASBO") to address the topic of Post-Issuance Compliance. More than 70 member school districts attended the presentation.

Post-issuance compliance is a process that provides a school district with a record retention and reporting system that enables the school district to identify actions that could potentially impact the school district's compliance with its existing finance documents, and could render the interest on the bonds it issues taxable.School districts issuing tax-exempt bonds often spend weeks, or even months, working toward the successful closing of a tax-exempt bond financing. The finance process includes, among other things, detailed analysis by bond counsel to ensure that the bonds will be in compliance with federal tax law requirements. Certain closing documents executed by school districts at the time of issuance of tax-exempt bonds include covenants by issuers that tax law requirements will be complied with throughout the life of the bonds. The opinion of bond counsel rendered in connection with a tax-exempt bond issuance (opining that interest on the bonds is excluded from the gross income of bond holders) is based upon, and qualified by, the reasonable expectation of the school district that tax law requirements will be complied with throughout the time the bonds remain outstanding. In addition, school districts may be required to comply with certain disclosure requirements, or other reporting requirements as described in the bond finance documents, throughout the life of the bonds.

Because most tax-exempt bonds may remain outstanding for many years, and school districts must comply with federal tax laws, securities laws and other document requirements during the life of the bonds, it is important to have procedures in place to ensure continued compliance with the terms and provisions of such bond finance documents, even as responsible officials change. An effective post-issuance compliance program should help the school district identify matters – whether tax or otherwise – which may require further analysis.

Post-issuance compliance programs may vary, depending on such factors as the number of bond issues to be monitored, the complexity of any financing and the type of bond financing. Resources are available to assist school districts in the development of a post-issuance compliance program. For instance, the National Association of Bond Lawyers and the Government Finance Officers Association have jointly developed a checklist to assist in identifying post-issuance compliance matters. (The checklist is available at www.gfoa.org/downloads/Post Issuance Compliance.pdf.) School districts may also seek guidance in preparing a post-issuance compliance program from bond counsel or their accounting firm.

School districts should consider a board-approved post-issuance compliance policy. School districts that have effective post-issuance compliance programs in place will more likely be able to respond to an IRS inquiry on a successful and cost-effective basis. On the other hand, failure to undertake a post-issuance compliance program may place the school district at risk of violating tax rules, which could result in the loss of the tax-exempt status of the bonds, impose liability to the IRS or bond holders and cause reputational damage. Violation of securities laws or existing document requirements could also expose any school district to unnecessary liability or potential bond document defaults.

The attorneys of McNees Wallace & Nurick LLC are available to work with school districts as they consider adopting and implementing a post-issuance compliance program.