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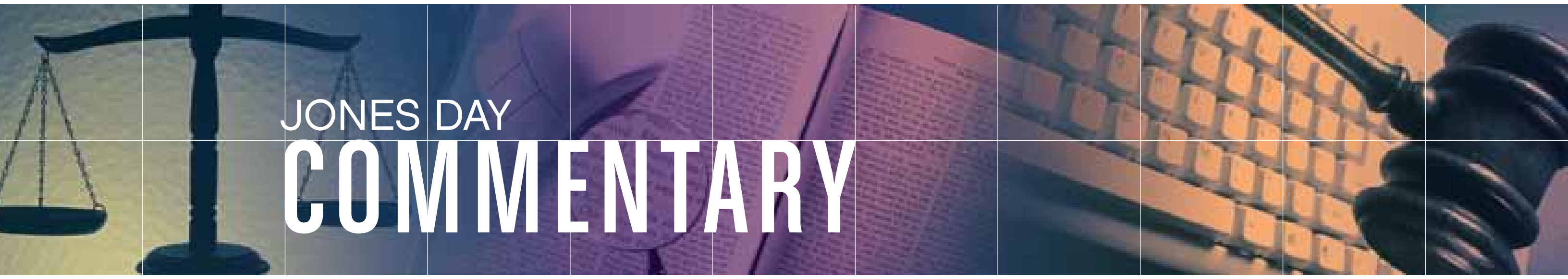

IRS PROVIDES GUIDANCE REGARDING WRITTEN POST-ISSUANCE COMPLIANCE PROCEDURES FOR TAX-EXEMPT BONDS

On August 5, 2011, in a *Jones Day Commentary* entitled "IRS TEB Publishes Final Report on Post-Issuance Compliance Survey," we described the results of a post-issuance compliance check program performed by the Tax Exempt Bonds ("TEB") function of the IRS Tax Exempt and Government Entities Division. The intent of the program was to evaluate the post-issuance compliance and record retention practices within the tax-exempt bond industry. In its final report regarding the compliance check program (the "Survey Report"), TEB focused on the fact that only 15 percent of the conduit borrowers that participated in the compliance check program had implemented formal, written procedures and policies governing post-issuance compliance.[1] Based on that fact, TEB concluded that "there still appear to be significant misconceptions and inadequacies concerning the responsibilities of governmental issuers and conduit borrowers in post-issuance compliance."[2] TEB further concluded that, "the responses to the questionnaire indicated that there is a high recognition of the importance of post-issuance compliance and recordkeeping; however, the overall effectiveness of the implementation of such programs is questionable."[3] In the Survey Report, however, TEB did not provide any guidance as to what the contents of such formal, written procedures should look like.

1 Tax Exempt Bonds Questionnaire Project: Final Report on Governmental and Charitable Financings.

2 *Id.*

3 *Id.*

UPDATED TEB VCAP ADMINISTRATIVE PROCEDURES

On August 11, 2011, the IRS released updated administrative procedures for the TEB Voluntary Closing Agreement Program ("VCAP")[4] under Section 7.2.3 of the Internal Revenue Manual. The VCAP administrative procedures have been supplemented to include a new Section 7.2.3.4.4. This section permits a reduced settlement amount when an issuer or conduit borrower timely submits a VCAP request following the identification of a violation pursuant to due diligence monitoring processes established in the issuer's or conduit borrower's written post-issuance compliance procedures.[5] Paragraph (2) of Section 7.2.3.4.4 describes what constitutes "written procedures" for VCAP purposes: "Such procedures must, at a minimum, specify the official(s) with responsibility for monitoring compliance, a description of the training provided to such responsible official(s) with regard to monitoring compliance, the frequency of compliance checks (must be at least annually), the nature of the compliance activities required to be undertaken, the procedures used to timely identify and elevate the resolution of a violation when it occurs or is expected to occur, procedures for the retention of all records material to substantiate compliance with the applicable federal tax requirements, and an awareness of the availability of TEB VCAP and other remedial actions to resolve violations. Generally, a reference to reliance on the bond documents, without more, will ***not*** (emphasis added) qualify as written procedures that satisfy this paragraph."[6]

CONCLUSION

The availability of reduced sanctions when *written* post-issuance compliance procedures are in place, coupled with the IRS's commentary in the Survey Report, seem to indicate that it is prudent for every Section 501(c)(3) organization to adopt written compliance policies and procedures governing post-issuance compliance as soon as possible. Further, those organizations that have already adopted written procedures should review them and revise them, as necessary, to include the provisions detailed in the Internal Revenue Manual as described above.

LAWYER CONTACTS

For further information or for assistance in drafting written post-issuance compliance procedures, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

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4 According to the TEB Voluntary Closing Agreement Program section of the IRS web site, TEB administers the VCAP, in part, to assist governmental issuers in voluntarily resolving violations of the federal tax laws applicable to their tax-exempt bonds through closing agreements with the IRS. "The primary objective of TEB VCAP is to encourage issuers and other parties to bond transactions to exercise due diligence in complying with applicable federal tax laws and to provide a vehicle to correct tax violations as expeditiously as possible."

5 Internal Revenue Manual, Section 7.2.3.4.4.

6 *Id.*