CLIENT ALERT: MARCH 12, 2009

ORGANIZATIONS WITH TAX EXEMPT BOND FINANCING MUST ADOPT NEW PROCEDURES

Recently, the Internal Revenue Service (the "IRS") has been scrutinizing the policies and procedures put into place after the issuance of tax exempt bonds. Earlier this year, the IRS issued a questionnaire to 200 governmental entities that issue tax exempt bonds to investigate post-issuance compliance, and it issued a similar questionnaire in May of 2008 to non-profit borrowers that utilized tax exempt bond financing. The IRS has noted that many organizations lack sufficient internal policies and procedures to ensure compliance after the issuance of tax exempt bonds. In addition, the new Schedule K of the revised IRS Form 990 ("Schedule K") imposes new requirements on 501(c)(3) organizations that have used tax exempt bond financing.

As a result, 501(c)(3) organizations with tax exempt bond financing should institute written policies and procedures in some key areas, including the following:

- ***Management Practices and Procedures***: The new Schedule K requires organizations to disclose whether they have adopted management practices and procedures to ensure that tax exempt bonds remain in compliance after the issuance. The IRS has emphasized the importance of putting these policies and procedures in writing. As a result, 501(c)(3) organizations with tax exempt bond financing should adopt written procedures and practices to guide their management in ensuring that the bonds remain tax exempt.
- ***Record Retention***: The IRS has emphasized that record retention policies are an important part of the framework for ensuring post-issuance compliance. As a result, 501(c)(3) organizations with tax exempt bond financing should consider formalizing their record retention policies.
- ***Use of Bond-Financed Facilities***: Schedule K also requires disclosure of how the organization monitors the "private business use" of bond-financed facilities. Several common types of contracts, such as leases and management and other contracts with third party service providers, can result in private business use. These leases and contracts must be carefully drafted. Because private business use of a bond-financed facility may threaten the tax exempt status of the bonds, organizations should have existing arrangements reviewed by counsel, and should develop systematic policies and procedures to monitor the use of bond-financed facilities and contracts related to such facilities.
- ***Investment and Expenditure of Bond Proceeds***: Since Schedule K requires detailed disclosures about the investment and expenditure of bond proceeds, many organizations will need to develop or further refine their procedures for tracking these proceeds. The procedures should be integrated with existing accounting systems, so that issues can be addressed in a timely manner.

Many portions of Schedule K are optional for tax year 2008, but post-issuance compliance issues are likely to remain the subject of additional investigation from the IRS. Most 501(c)(3) organizations which obtained tax exempt bond financing after 2002 will need written policies and procedures to ensure that their bonds remain tax exempt, and to enable them to complete the new Schedule K in a satisfactory manner. For additional information or assistance with crafting written policies and procedures, please contact Attorney Elka Sachs.

Links:

- Schedule K and related instructions can be found at: http://www.irs.gov/charities/article/0,,id=185561,00.html