YOUNG LAW GROUP PLLC

Summary of Post-Issuance Compliance

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Post-Issuance Compliance - Issuers of tax-exempt bonds and tax credit bonds (QSCB, QZABs, etc.) must comply with federal tax rules pertaining to expenditure of bond proceeds, rate of expenditure, investment of proceeds, use of bond financed property, and retention of records.

Over the past few years, the IRS has increased its enforcement of post-issuance compliance. In 2009, the IRS began distributing hundreds of Compliance Check Questionnaires to issuers of traditional tax-exempt bonds, including Mississippi school districts (*see USB flash drive*). In 2010 the IRS sent Compliance Check Questionnaires to all issuers of Build America Bonds (*see USB flash drive*) . IRS agents have indicated that similar questionnaires will be sent to issuers of QSCBs. Form 8038-G was recently amended to include questions regarding the issuer's post-issuance compliance procedures. The IRS also released guidance stating that issuers that have written post-issuance compliance procedures in place may receive more favorable treatment upon the occurrence of a tax law violation.

In 2007, the Advisory Committee on Tax Exempt and Government Entities issued a report entitled "After the Bonds are Issued: Then What?" (the 2007 ACT; *see USB flash drive*). The 2007 ACT stated that the particular written procedures that are appropriate may vary substantially depending on the size and complexity of the issuer, the complexity of the financing, the number of bond issues to be monitored, and the type of bond issues involved. Therefore, one size does not fit all and compliance procedures may need to be tailored to the needs of the particular school district.

In 2011, the IRS posted a web page entitled "TEB Post-Issuance Compliance: Some Basic Concepts" (*see USB flash drive*). The web page provides that issuers should adopt written procedures and that sole reliance on the bond closing documents may result in procedures insufficiently detailed or not incorporated into an issuer's operations. The web page states that written procedures should include provisions for:

- Due diligence review at regular intervals;
- Identifying the official or employee responsible for review;
- Training of the responsible official/employee;
- Retention of adequate records to substantiate compliance (e.g., records relating to expenditure of proceeds);
- Procedures reasonably expected to timely identify noncompliance; and
- Procedures ensuring that the issuer will take steps to timely correct noncompliance.

DISCLOSURE - Generally applies to debt (bonds/notes/leases) issued through an underwriter; does not apply to debt issued directly to a bank

Electronic Municipal Market Access (EMMA) - the Municipal Securities Rulemaking Board (MSRB) launched its EMMA website - http://emma.msrb.org - in 2008, which now serves as the sole repository for disclosure filings.

Types of Disclosures:

Primary Market Disclosures - Underwriters are required to post official statements and other related information to EMMA.

Continuing Disclosures - The best place to look to understand continuing disclosure requirements with respect to any particular series of bonds is the Continuing Disclosure Agreement executed in connection with that series. Continuing disclosure agreements are typically included in the closing binder distributed after closing. Sometimes the continuing disclosure covenants are part of the resolution awarding the sale of the obligations and are not set forth in a separate agreement. Continuing disclosure consists of:

Annual Financial Information - Generally, Annual Financial Information will mirror the information contained in the official statement.

Event Notices - must file within 10 days of occurrence of the event. For obligations issued on or after December 1, 2010, the events that must be reported are:

- Principal and interest payment delinquencies
- Non-payment related defaults, if material
- Unscheduled draws on debt service reserves reflecting financial difficulties
- Unscheduled draws on credit enhancements reflecting financial difficulties
- Substitution of credit or liquidity providers or their failure to perform
- Adverse tax opinions, IRS notices or material events affecting the tax status of the security
- Modifications to rights of security holders, if material
- Bond calls, if material and tender offers
- Defeasances
- Release, substitution or sale of property securing repayment of the securities, if material
- Rating changes
- Bankruptcy, insolvency, receivership or similar event
- Merger, consolidation, or acquisition of the obligated person, if material
- Appointment of a successor or additional trustee, or the change of name of a trustee, if material

In general, information is considered "material" if there is a substantial likelihood that its disclosure would have been considered important or significant by a reasonable investor.

An issuer's disclosure obligations go beyond the listed events and covers anything that could materially affect the issuer's bonds. It is up to the issuer to determine whether a notice of other material events must be filed.

Failure to comply with continuing disclosure is a breach of contract; however, the rules do not specify the consequences.

If a failure to comply with previous disclosure requirements has not been remedied as of the start of a new offering, or if the issuer has a history of persistent and material breaches, it is doubtful whether an underwriter could form a reasonable basis for relying on the accuracy of the issuer's new continuing disclosure representations.

Failure to comply with previous continuing disclosure obligations will be viewed as a red flag and may also be taken into account in determining a fair and reasonable price for a new bond issue.

Recent Changes to Continuing Disclosure:

Small Issuer Exception: for obligations issued prior to July 1, 2009, issuers with $10 million or less in outstanding obligations were exempt from filing the Annual Financial Information. However, for obligations issued on or after July 1, 2009, small issuers are now required to provide Annual Financial Information, which, at a minimum, must include financial information and operating data which is customarily prepared by the issuer and is publicly available.

Continuing disclosure documents must be submitted to the EMMA website as PDF files. All documents must also be word-searchable (except for diagrams, images and other non-textual elements).

Event notices must be filed in a timely manner but no later than 10 business days after their occurrence.