THE BOND BUYER
Thursday, September 8, 2016 | as of 6:27 PM ET

Taxation

GFOA, NABL Publish Guidance on Post-Issuance Tax Compliance

By Evan Fallor
September 8, 2016

WASHINGTON – The National Association of Bond Lawyers and the Government Finance Officers Association on Thursday each issued guidance to issuers and counsel on how to comply with tax-exempt bond rules after the issuance of tax-advantaged bonds.

The guidance came after three years of research, according to Matthias Edrich, an attorney with Kutak Rock in Denver and chair of NABL's tax law committee.

Edrich, who authored NABL's 14-page publication, said the groups issued the guidance because of the Internal Revenue Service's focus on the need for issuers to have good policies and procedures in recent years.

"The IRS is telling them today we hope you have effective policies in place, but what means effective is up to you," Edrich said. "We recommend policies that contain certain elements, but they are not penalized if they don't have these elements."

NABL cited several suggestions that the IRS had for issuers in March, including that they: identify those responsible for coordinating post-issuance tax compliance; provide for due diligence reviews at regular intervals; address the timely identification of noncompliance; and promote the retention of adequate records.

"Procedures assist the entity in complying with tax and document covenants, in the transfer of knowledge and to streamline the entity's financing operations, all for the purpose of maintaining the tax benefits associated with the bonds," NABL officials wrote.

The IRS oversees and enforces the post-issuance compliance of tax-advantaged bonds, and NABL said the agency has increased its efforts to encourage issuers and conduit borrowers to adopt effective procedures.

Though it provides oversight, the agency does not dictate to an issuer what elements need to be in a policy, Edrich said. The guidance was written as tips for what an issuer could consider without proposing best practices, he said.

"It's written fairly broad and supposed to be a guide for issuer boards to be able to think about what are best practices," Edrich said. "It's a paper that I hope will be useful for years to come."

Procedures suggest courses of action an entity can take to maximize the likelihood that rules applicable to tax-advantaged bonds are followed after the bonds are issued and remain outstanding.

A bond is considered tax-advantaged if it is tax-exempt and interest on the bond is excluded from gross income to the bondholder, if it is a taxable tax credit bond and the holder receives federal tax credits, or if it is a direct-pay, taxable bond and the issuer receives federal subsidies from the Treasury Department. The four principal categories that tax compliance rules address, according to NABL, are the expenditure of bond proceeds, the use of bond-financed assets, the investment of bond proceeds, and the gathering and maintenance of records relating to the bonds.

The two groups added that issuers should consult with bond counsel and other professionals on post-issuance tax compliance as tax laws, rules and practices continue to change.

Emily Brock, director of GFOA's federal liaison center, said the guidance stems from enforcement actions and settlements, including those reached under the IRS Office of Tax-Exempt Bonds' Voluntary Closing Agreement Program (VCAP) as well as other IRS settlements. The IRS has said if such procedures are in place, then it will consider them when issuing orders, she added.

"It's so important that issuers know and understand all of these compliance procedures so that they can prevent and correct any tax violations while tax-exempt bonds are outstanding," Brock said. "We just really wanted to make sure the issuer and counsel are informed of the procedures."

GFOA and NABL issued separate publications, though they were produced as complementary guidance to their respective members.

The guidance was published separately because GFOA wanted to glean those things most important to issuers, while issuers can share the "significantly comprehensive" NABL publication with counsel, Brock said.

"The project taken together is a way for NABL and GFOA to reach an even broader community," she said.

As of Thursday afternoon, Edrich said he had not received any feedback from NABL members or IRS officials.

NABL officials also said that Congress may develop new types of tax-advantaged bonds in the future that will be subject to additional special tax rules. This could need to be addressed in revisions to the entity's post-issuance tax compliance procedures, they said.
