

Changes to Form 990, Schedule K Would Require 501(c)(3) Borrowers to Report to IRS Whether They Have Written Bond Compliance Procedures

Last week, the Internal Revenue Service released a revised version, still in draft form, of **Schedule K** to the Form 990, effective for the 2011 reporting year (which is generally filed by borrowers in 2012 or 2013). Schedule K is the form that addresses tax-exempt bond compliance for 501(c)(3) bonds. Probably the most important change is the addition of three questions that ask, in different ways, whether the 501(c)(3) borrower maintains **written** procedures addressing post-issuance tax-exempt bond compliance. More specifically, the questions ask whether the borrower has adopted written procedures that cover the monitoring of arbitrage compliance, the remediation of excessive private business use, and the correction of violations through the IRS's voluntary closing agreement program (or "VCAP").

These questions would replace a question on prior versions of Schedule K that asked whether the borrower had adopted management practices and procedures to ensure post-issuance compliance, but did not specifically ask about written procedures. The new questions are the latest in a series of IRS efforts over a number of years to encourage borrowers to adopt written post-issuance compliance procedures. While there is no legal requirement that borrowers have such procedures, the IRS apparently believes that the adoption of written procedures by a borrower increases the likelihood that the borrower will do what is required to maintain the tax-exempt status of its bonds.

Any borrowers that have not yet adopted written procedures for their 501(c)(3) bonds should consider doing so, in order to be able to answer "yes" to these questions if, as seems likely, the questions are included in the final version of Schedule K for the 2011 reporting year. The written procedures should cover private business use and arbitrage compliance, and should make reference to correcting potential violations through the remedial action provisions of the regulations (with respect to private business use) or through the IRS's voluntary closing agreement program (with respect to private business use or arbitrage). These written procedures may also be helpful on audit to demonstrate to the IRS the borrower's good faith in attempting to meet its compliance responsibilities.

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