

MODEL BOND OPINION REPORT

National Association of Bond Lawyers Committee on Opinions and Documents

This report, prepared by the Committee on Opinions and Documents (the “Committee”) of the National Association of Bond Lawyers (“NABL”), is the fourth edition of NABL’s model bond opinion reports, each of which was designed to reflect then-current municipal bond practice. The report and the model opinions included in it are updates of earlier model opinions included in the Model Opinion Project prepared in 1982 and 1983 by the committee chaired by M. Paul Martin and subsequently revised in 1987 and 1997 by committees chaired by the late Thomas S. Currier and Michael A. Budin, respectively. The current report reflects general developments in opinion practice and the municipal bond industry since the 1997 report, including increasing complexity in federal tax law. Future revisions may be needed over time to reflect further changes. The Board of Directors of NABL has authorized the distribution of this report.

In its consideration of current developments and practice in the municipal bond industry, the Committee recognized the importance of the bond opinion to bond purchasers, and what it means—and does not mean. In response, while reaffirming the high degree of confidence bond counsel should have before rendering an “unqualified” opinion, the report more clearly articulates the examination process involved in reaching the conclusions necessary for an “unqualified” opinion (*i.e.*, an opinion subject only to customary assumptions, limitations, and qualifications, and not “explained”). The report states that bond counsel “may render an ‘unqualified’ opinion regarding the validity and tax-exemption of bonds if it is firmly convinced (also characterized as having a ‘high degree of confidence’) that, under the law in effect on the date of the opinion, the highest court of the relevant jurisdiction, acting reasonably and properly briefed on the issues, would reach the legal conclusions stated in the opinion.” The Committee believes that this articulation more accurately reflects current practice, conforms the basis for such opinions to the recognized basis for “unqualified” opinions in other types of business transactions, and results in a more consistent and rational basis on which practitioners can determine whether a bond issue can be the subject of an “unqualified” opinion. This articulation also comports with the high standard of care historically applied by leading practitioners throughout the country. It is not intended to reduce either the level of certainty that bond counsel, in its professional judgment, should reach before delivering an “unqualified” opinion or the level of confidence to be afforded such opinions by bond purchasers.

The disclosure section of the report has been expanded to provide guidance to participants in public finance transactions with respect to opinion and tax related disclosure items, including the disclosure of post-issuance federal tax law requirements. While taking no position on the use of “exploding,” “reasoned” or “qualified” opinions in municipal bond transactions, the report does note that when used, such opinions should be accompanied by appropriate disclosure to reflect the lower level of certainty inherent in the legal conclusions expressed in “reasoned” or “qualified” opinions and the circumstances in which an “exploding” opinion may cease to apply.

As with prior updates, in addition to significant other research, the Committee has given substantial attention to the forms of opinions used in non-municipal finance transactions, and to numerous articles and publications on opinions by individuals and bar groups. Useful references include *Glazer and Fitzgibbon on Legal Opinions, Second Edition*, Aspen Law & Business (2001), which includes an extensive annotated bibliography and copies of reports of various state bar groups; *Drafting Legal Opinion Letters, Second*

Edition, John M. Sterba, Wiley Law Publications (1992, as supplemented); and *Guidelines for the Preparation of Closing Opinions* (the “*Guidelines*”), prepared by the Committee on Legal Opinions of the ABA Section of Business Law, printed in *The Business Lawyer*, Vol. 57 (February 2002), including *Legal Opinion Principles* (the “*Principles*”) appended as *Appendix A* thereto. The Committee cautions, however, that care should be taken in using such references, as substantial differences between general commercial transactions and municipal financings can require substantially different opinions. Some of these differences are discussed in the commentary accompanying this report.

Reference also should be made to *The Function and Professional Responsibilities of Bond Counsel, 1995 Second Edition* (“*Function*”), published by NABL, which provides guidance and insights regarding the responsibilities of bond counsel in rendering opinions. The discussion of the appropriate basis for delivering an “unqualified” opinion articulated in *Function* is superseded by the discussion in this report. Although some of the commentary accompanying this report refers to specific sections in *Function*, counsel rendering bond opinions should read *Function* in its entirety. Further, bond counsel should refer to *Model Engagement Letters*, published by NABL (1998) (“*Engagement Letters*”), which addresses in greater detail considerations relating to engagement letters and ethical issues encountered in rendering bond opinions. Bond counsel should also refer to *Statement Concerning Standard Applied in Rendering the Federal Income Tax Portion of Bond Opinions*, adopted by the NABL Board on November 29, 1993 (“*Tax Standard*”). As with *Function*, *Tax Standard* includes a discussion of the “unqualified” opinion that is superseded by this report.

This report was developed by the Committee, comprising the following members:

J. Foster Clark, Chair	Linda L. D’Onofrio, Vice Chair
Frederic L. Ballard, Jr.	Julianna Ebert
Michael A. Budin	Kristin H. R. Franceschi
Richard Chirls	Floyd C. Newton, III
William H. Conner	Robert Dean Pope
	Fredric A. Weber

Significant portions of this report were developed under the leadership of Kristin H. R. Franceschi while she chaired the Committee. The Committee received considerable support from members of the Board of Directors of NABL, including, in particular, W. Jackson Williams, who acted as a liaison to the Board and provided valuable guidance and constructive comments throughout the preparation of this report.

As with prior model opinion reports, the model opinions and commentaries included in this report are intended to assist bond counsel and not to create a mandatory standard for the subjects of the opinion, its wording, or the basis for rendering it. Opinions delivered in practice will vary from the model opinions as a result of factual differences, different bond counsel presentation styles, and local practices. Coverage of any matter in the model opinions is not intended to suggest that bond counsel has a duty to address that matter in an opinion. Conversely, the failure to cover any matter in the model opinions does not suggest that including such matter in an opinion is improper.

The model opinions and accompanying commentary included in this report represent the views of the Committee. Differing views are described in the commentary. The Committee welcomes comments so that future revisions may reflect appropriate considerations and correct any deficiencies.

J. Foster Clark
Chair
Committee on Opinions and Documents

February 14, 2003

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INTRODUCTION

This report is intended to assist bond counsel in preparing opinions for three basic categories of bonds: (1) general obligation bonds to which the full faith and credit of the issuer is pledged and that do not constitute private activity bonds within the meaning of the Internal Revenue Code of 1986 (the “Code”), (2) revenue bonds secured by specified revenues of the issuer and that do not constitute private activity bonds, and (3) certain private activity bonds that are conduit financing bonds. Although the model opinions have been drafted for these three basic categories of bonds, many other types of bonds exist, *e.g.*, certain general obligation bonds and revenue bonds that are private activity bonds but not conduit financing bonds. Additional considerations and opinions may be appropriate for these other types of bonds. While such variations and nuances are beyond the scope of this report, some explanatory cross references have been added to assist bond counsel in drafting an opinion that is a hybrid of the three designated forms.

This report presumes that bond counsel either is or will become knowledgeable of the relevant considerations in rendering the bond opinion in a particular transaction. In this regard, in addition to the references cited in the cover letter for this report (namely *Glazer and Fitzgibbon on Legal Opinions, Drafting Legal Opinion Letters, Guidelines, Principles, Function, and Tax Standard*), bond counsel should refer to *Disclosure Roles of Counsel in State and Local Government Securities Offerings, Second Edition (1994) (“Disclosure Roles”)*, from a project sponsored by NABL and the American Bar Association, and *Engagement Letters*. These sources provide guidance on substantive issues to be considered in rendering opinions, relevant disclosure issues, and ethical issues that bond counsel should consider.

The model opinions assume that bond counsel is engaged to render the typical bond opinion for the particular category of bond. A different engagement could require opinions in addition to, or fewer opinions than, those included in the relevant model opinion. For example, in a private activity bond transaction in which bond proceeds are loaned to a third-party conduit borrower, bond counsel might be engaged to opine on the binding and enforceable nature of agreements against the conduit borrower as well as against the issuer. Similarly, if two firms are engaged to render different portions of the bond opinion (as, for example, where special tax counsel is engaged to render the tax portion of the opinion), each firm’s opinion might address fewer areas than those indicated in the model opinion, although the combined opinions would normally cover all items in the model opinion. This division would also occur where the initial bond purchaser receives an opinion of the issuer’s general counsel regarding all matters other than tax exemption, and bond counsel is engaged solely to render the tax-exemption opinion. *See Disclosure Roles*, at pages 65 through 69, for a discussion of bond counsel’s ability to limit its opinion responsibility through a division of assignments among, or reliance on, competent counsel. *See also* the discussion of “Model Rule 1.2—Scope of Representation” in *Function*, which suggests that an engagement letter might be used to record bond counsel’s consultation with the issuer concerning the customary functions that are being omitted from the scope of representation and the issuer’s consent to this limitation.

The comments following each model opinion are intended to explain certain language in the opinion, to provide background, to identify areas where different views exist, or to highlight issues that should be considered. The comments following the model opinion for general obligation bonds apply as well to corresponding language in the model opinions for revenue bonds and private activity bonds. Similarly, the comments following the model opinion for revenue bonds apply to corresponding language in the model opinion for private activity bonds. Although some comments apply to similar opinions in other municipal finance transactions, this report, the model opinions, and the commentary are intended to address only bond opinions.

As with prior reports, this report includes a section discussing certain issues to be considered for inclusion in a disclosure document prepared and distributed by the issuer or those authorized to do so on its behalf. Although bond counsel's role does not always include preparing or reviewing the disclosure document, this report includes thoughts regarding the relationship between disclosure and the bond opinion. Cross references to relevant portions of the disclosure matters section appear in the comments.

This report includes a bibliography of the books, handbooks, articles, and cases cited.

I. GENERAL OBLIGATION BONDS (A)

MODEL OPINION

[*Note:* Letters in parentheses refer to the Commentary immediately following this opinion.]

(Letterhead of Bond Counsel)

(Date) (B)

(Addressee) (C)

(Salutation) (D)

(Caption)

We have acted as bond counsel to _____ (E) in connection with the issuance by (*Name of Issuer*) (the “Issuer”) of \$_____ (*Title of Bonds*) Bonds dated _____ (the “Bonds”). (F) In such capacity, we have examined such law and such certified proceedings, certifications, and other documents as we have deemed necessary to render this opinion. (G)

Regarding questions of fact material to our opinion, we have relied on the certified proceedings and other certifications of public officials and others furnished to us without undertaking to verify the same by independent investigation.

Based on the foregoing, we are of the opinion (H) that, under existing law:

1. The Bonds have been duly authorized and executed by the Issuer, and are valid and binding general obligations of the Issuer. (I)

2. All taxable property in the territory of the Issuer is subject to *ad valorem* taxation without limitation regarding rate or amount to pay the Bonds. (J) The Issuer is required by law to include in its annual tax levy the principal and interest coming due on the Bonds to the extent that necessary funds are not provided from other sources. (K)

3. Interest on the Bonds is excludable (L) from gross income for federal income tax purposes and is not an item of tax preference for purposes of the federal alternative minimum tax imposed on individuals and corporations; however, such interest is taken into account in determining adjusted current earnings for the purpose of computing the alternative minimum tax imposed on certain corporations. The opinion set forth in the preceding sentence is subject to the condition that the Issuer comply with all requirements of the Internal Revenue Code of 1986, as amended, (M) that must be satisfied subsequent to the issuance of the Bonds in order that the interest thereon be, and continue to be, excludable from gross income for federal income tax purposes. (N) The Issuer has covenanted to comply with all such requirements. (O) Failure to comply with certain of such requirements may cause interest on the Bonds to be included in gross income for federal income tax purposes retroactively to the date of issuance of the Bonds. (P)

4. [Opinion regarding state tax exemption, if any.] (Q)

The rights of the owners of the Bonds and the enforceability of the Bonds are limited by bankruptcy, insolvency, reorganization, moratorium, and other similar laws affecting creditors' rights generally, and by equitable principles, whether considered at law or in equity. **(R)**

We express no opinion [herein] regarding the accuracy, adequacy, or completeness of the [disclosure document] relating to the Bonds. **(S)** Further, we express no opinion regarding tax consequences arising with respect to the Bonds other than as expressly set forth herein.

[This opinion is given as of the date hereof, and we assume no obligation to revise or supplement this opinion to reflect any facts or circumstances that may hereafter come to our attention, or any changes in law that may hereafter occur.] **(B)**

Very truly yours,

COMMENTARY

(A) General Obligation Bonds

This form of opinion applies only to general obligation bonds that are not private activity bonds. Bond counsel preparing an opinion for general obligation bonds that are private activity bonds, but not conduit financing bonds, may begin with this form, modifying paragraph 3 (relating to the excludability of interest on the bonds) as indicated in Part III.

(B) Date of Opinion; Lack of Obligation To Update

The opinion is ordinarily dated as of the date of original issuance, which is the date of original delivery of and payment for the bonds. The opinion speaks only as of its date, and reflects the law and facts on such date. Unless expressly engaged to do so, bond counsel does not undertake to inform any person regarding any subsequent development that may affect the opinion. Although this concept always has been implicit in bond opinions, bond counsel may wish to state it explicitly, as is done in the final, optional paragraph of this opinion, particularly in light of the increasing complexity of the post-issuance compliance required of issuers (and conduit borrowers) to maintain the tax-exemption of interest on the bonds. *See* Comment (N), and *Disclosure Roles—Date of Bond Opinion*, at pages 150 and 151, for further discussion of this issue, including concerns arising from continued reliance on the bond opinion in the secondary market, and concerns regarding republication. *See* also “Disclosure Matters - Disclosure Issues - Tax Issues - Exploding Opinions” for a discussion of “exploding” opinions and suggested disclosure with respect to such opinions.

(C) Addressees

Practice varies regarding the addressees of the opinion. Frequently, the opinion is addressed to the issuer, the underwriters (or other original purchasers), or both. Occasionally, the opinion is addressed to an appropriate officer of the issuer or to another party (such as the paying agent). Sometimes the opinion is not addressed to anyone.

Unless otherwise stated, subsequent owners of the bonds are also intended to rely on the opinion distributed with or printed on the bond. *See Bradford Securities Processing Services, Inc. v. Plaza Bank and Trust*, 653 P.2d 188 (Okla. 1982). The opinion, however, speaks only as of its date. *See* Comment (B).

Without regard to the state of the law concerning who may bring an action against an attorney for a negligently given opinion, bond counsel should recognize that a bond opinion, by its very nature, is intended to be relied on by non-clients, such as underwriters, bondholders, and any trustee for the bondholders. *See Function—Model Rule 2.3—Evaluation for Use by a Third Person*, concerning whether bond counsel owes a duty to a third-party recipient (*e.g.*, the underwriter), even though that third-party recipient is clearly not the client, as a result of being hired to disclose information that is normally confidential. Frequently, a bond purchase contract evidences that bond counsel’s client has directed bond counsel to deliver its opinion to specified parties. To avoid any assertion that they may not rely on bond counsel’s opinion, underwriters and trustees typically require that they be addressees or be given separate reliance letters. An addressee underwriting syndicate is sometimes described by referring to the designated managing underwriters in their capacity as representatives for the underwriters. *See Function—The Bond Opinion—Limited Nature of Bond Opinion*, for a discussion of jurisprudence addressing the basis of liability of counsel to non-clients, and *Function—Professional Responsibilities of Bond Counsel—Significance of Client*

Relationship, which suggests that bond counsel should carefully consider and explain to its client the basis for and the implication of duties that may be owed to non-clients.

(D) Salutation

A salutation is unnecessary. Salutations, where used, vary from firm to firm or by local practice. If a salutation is to be used, however, a gender-neutral salutation such as “Ladies and Gentlemen” or “To the Addressees” should be used.

(E) Who Engaged Bond Counsel

Because bond counsel is advised to have an identifiable client in a bond transaction (rather than, for example, purporting to represent the transaction, or the owners of the bonds), bond counsel should identify its client in the bond opinion to dispel any belief by others that bond counsel represented them in the transaction. Some bond counsel also identify their client to other participants in the transaction by means of a memorandum of client relationship. See *Function—Disclosure Matters—Potential Conflicts of Interest, and Engagement Letters*.

In the case of general obligation bonds and non-conduit revenue bonds, the issuer usually engages bond counsel. The engagement of bond counsel by a different party, however, may result from factors such as local custom, the nature of the financing, which parties are represented by counsel, or the history or specifics of a given transaction. In the case of conduit financing bonds, practice varies from state to state and issuer to issuer, and bond counsel may be engaged typically by any of the three principal parties: (1) the issuer, (2) the conduit borrower or user, or (3) the underwriter, placement agent, or bond purchaser. In any case, the applicable basis for rendering the opinion is the same, and the fact of engagement by one party or another does not alter the requisite level of confidence for rendering the opinion.

(F) Description of Bond Issue and Transaction

A detailed description of the bonds need not be included in the opinion. The opinion is generally printed on or attached to certificated bonds (“good delivery” under Municipal Securities Rulemaking Board Rules G-12 and G-15 requires this). It is redundant to include in the opinion the maturities, interest rates, registration privileges, or terms of redemption, all of which are ordinarily set forth in any disclosure document accompanying the bonds.

Similarly, a detailed description of the transaction related to the bond issue need not appear in the bond opinion. The bond opinion is not a disclosure document, although it may be viewed as making statements in connection with the purchase and sale of securities and therefore should not mislead or misinform readers regarding the issues addressed. See *Disclosure Roles—Description of Transaction*, at page 151, and *Disclosure Roles—Security Provisions*, at pages 153 and 154, for a discussion of certain issues that bond counsel should consider in this regard, including avoidance of unintended inferences by recipients of the bond opinion (such as inferences that bond counsel has verified factual matters or makes any representation regarding the adequacy of the security or the ability of the issuer to pay).

(G) Scope of Examination

Instead of listing specifically the materials that bond counsel has examined, it is preferable to state that bond counsel has made a sufficient examination. The reference to “law” includes all sources of law, whether constitutions, statutes, regulations, rulings, court decisions, or other authoritative sources.

No specific reference is made to the examination of an executed bond, although historically examination of a bond was a common practice. Depending on the arrangements for delivery of bonds to the initial purchaser or purchasers, the delivery of an executed bond to bond counsel for examination and return may involve inconvenience and expense, and may create a security risk. Bond counsel should consider applicable local law, and exercise discretion regarding the appropriate procedure in each particular case, whether examination of an executed bond, a reproduced bond, a specimen bond, or a bond proof, or reliance on proofreading by another party.

As used in the model opinion, the term “certified proceedings” refers to the authorizing or other proceedings essential to the validity of the bonds. The term does not imply that validation or other judicial proceedings have occurred. If, however, such proceedings have been held, it may be appropriate to state that fact in the opinion.

Bond counsel generally does not rely on opinions of other counsel in rendering the opinions in paragraphs 1 and 2 of the model opinion. Exceptions to this general practice usually involve special situations. If opinions of other counsel are relied on, the bond opinion should state that fact explicitly unless, in rendering its opinion, bond counsel is rendering a concurring opinion. See Comment **(DD)** for additional discussion regarding reliance on opinions of other counsel.

(H) “Unqualified” Opinion

In this report, the word “unqualified” describes an opinion that is subject only to customary assumptions, limitations, and qualifications, and that is not otherwise “explained.” Using this definition, the model opinions are “unqualified” opinions. Consistent with this terminology, a bond opinion is not “unqualified” if it includes (1) a non-customary assumption, limitation, or qualification, (2) a phrase such as “while the matter is not free from doubt” (generally referred to as a “qualified” opinion), or (3) a legal analysis for the opinion (generally referred to as a “reasoned” or “explained” opinion). See “Other Types of Opinions” herein for a discussion of “qualified” and “reasoned” opinions. Customary assumptions, limitations, and qualifications are essential to the conclusions reached in the opinion and, thus, should be considered by the recipients of the opinion and by others who rely upon it. See, e.g., the discussion in Comment **(N)** regarding post-issuance compliance.

Bond counsel may render an “unqualified” opinion regarding the validity and tax exemption of bonds if it is firmly convinced (also characterized as having “a high degree of confidence”) that, under the law in effect on the date of the opinion, the highest court of the relevant jurisdiction, acting reasonably and properly briefed on the issues, would reach the legal conclusions stated in the opinion. See *Glazer and Fitzgibbon on Legal Opinions*, at 71-74. For issues of state law, the relevant court is the highest court of that state; for issues of federal law (e.g., matters relating to the federal income tax treatment of interest on the bonds), such court is the U.S. Supreme Court. The recitation that the court has been “properly briefed” presupposes that it has been duly briefed on the material facts and all relevant law.

In the area of federal income tax matters addressed in the opinion, certain special circumstances are recognized. Too little authoritative judicial precedent has been established in many

instances to enable bond counsel to evaluate its conclusions against the potential conclusions of a court. This lack of judicial precedent is due in part to the difficulties of placing issues before the courts in the tax-exempt bond area where the bondholder (rather than the issuer) is treated as the taxpayer entitled to challenge an adverse decision of the Internal Revenue Service. In addition, a significant and somewhat unique body of Internal Revenue Service administrative guidance exists, some of which is precedential and some of which is not formally precedential but which may nonetheless offer insight into the proper interpretation of federal income tax questions in appropriate cases. In recognition of these circumstances, bond counsel may nonetheless give an unqualified opinion with respect to federal income tax matters if it is firmly convinced that, upon due consideration of the material facts and all of the relevant sources of applicable law on federal income tax matters described below, the Supreme Court would reach the federal income tax conclusions stated in the opinion or the IRS would concur or acquiesce in the federal income tax conclusions stated in the opinion. In reaching this conclusion, bond counsel may consider authoritative and precedential sources for interpretation of relevant applicable law, including, without limitation the following: provisions of the Internal Revenue Code and other statutory provisions; Congressional intent as expressed in committee reports, joint explanatory statements of managers included in Congressional conference committee reports, and Congressional floor statements made prior to enactment by one of a bill's managers; temporary and final Treasury regulations construing the Internal Revenue Code and other relevant statutes; and IRS and Treasury administrative pronouncements which may be relied on formally as precedent, including, without limitation, revenue rulings, revenue procedures, notices, and defined "written determinations" under Treas. Reg. Sec. 1.6662-4(d)(3)(iv)(A) that address the specific tax issue for the specific matter involved in bond counsel's opinion (e.g., a private letter ruling on the particular bond issue). In addition, bond counsel also may give appropriate consideration to non-precedential IRS administrative guidance, including, without limitation, proposed Treasury regulations (when temporary or final regulations have not yet been adopted), IRS private letter rulings, IRS technical advice memoranda, IRS general counsel memoranda, IRS Actions on Decision, and other IRS administrative announcements published in the IRS Cumulative Bulletin.

In rendering an "unqualified" opinion based on the requisite degree of confidence in its conclusions on federal tax matters, bond counsel should consider all the facts and circumstances regarding the particular sources of authority for relevant applicable law relied upon, including, without limitation, the weight, relevance, persuasiveness, age, frequency, and nature of the particular authority. Bond counsel may reach the requisite degree of confidence in its conclusion on a particular federal tax issue despite the absence of certain types of authority. Thus, it is possible, depending on all the facts and circumstances, for bond counsel to reach such a conclusion supported only by a well-reasoned construction of the applicable provision of the Internal Revenue Code and relevant legislative history.

Bond counsel, however, should not base an "unqualified" opinion on federal tax matters on non-precedential IRS administrative guidance that is inconsistent with authoritative and precedential guidance. Nor should bond counsel base an "unqualified" opinion with respect to federal tax matters on a belief that the applicable bonds will not be subject to an IRS audit or otherwise challenged, that a tax issue will not be raised in an IRS audit, that the amount in controversy in an IRS audit will be too little, that the IRS or other possible challengers will have too few resources to sustain the challenge, or that the IRS and the issuer or others are likely to enter into a closing agreement to resolve any federal tax issues to preserve the federal tax exemption.

"An opinion is not a guaranty of an outcome, but rather an expression of professional judgment." See *Third-Party 'Closing' Opinions; A Report of the TriBar Opinion Committee*, 53 *Business Lawyer* 591, 596 ("TriBar 1998 Report"); and see *Glazer and Fitzgibbon on Legal Opinions*, at 72. Accordingly, even with an "unqualified" opinion, some residual risk exists that the court may disagree.

This risk is assumed by investors, but is generally considered so small as to require no special or additional disclosure in the disclosure document. See “Disclosure Matters—Disclosure Issues,” below.

Of course, even when an “unqualified” opinion is rendered, failure by the issuer to comply with the relevant post-issuance requirements of the Code may cause interest on the bonds to be included in gross income. A risk also exists that the conclusions expressed in the opinion will be challenged, with possible temporary adverse consequences to the value and liquidity of the bonds. Even if an “unqualified” opinion is delivered, counsel may consider it appropriate in certain circumstances to disclose to investors in any accompanying disclosure document the potential for such challenges, as well as other facts and circumstances that may affect the validity or tax-exempt status of the bonds, such as lawsuits, court decisions, or IRS activities or positions. See “Disclosure Matters—Disclosure Issues—Post-Issuance Tax Compliance,” “—Risk of IRS Audit,” and “—Other Disclosure,” below. Such disclosure is not inconsistent with rendering an “unqualified” opinion in accordance with the above discussion.

(I) Basic Opinion

The opinion that the bonds are valid general obligations means that (1) the issuer (unless it is the state itself) is a duly created and validly existing political subdivision or body politic and public instrumentality of the state, or has comparable authority as a *de facto* corporate entity, (2) the issuer has the power and authority to issue the bonds, (3) the issuance and sale of the bonds have been duly authorized by all requisite action of the issuer, (4) the bonds do not exceed any applicable limitation on indebtedness, (5) all required approvals or filings for the issuance and sale of the bonds to underwriters or other original purchasers have been obtained or have been made, and (6) the bonds are in proper form and have been duly executed and delivered—or that any defect in any of the foregoing would not affect the validity of the bonds, or has been overcome pursuant to applicable law, such as a statute of limitations. Bond counsel does not generally render an “unqualified” opinion on the basis that a defect in the validity of the bonds has been overcome through the purchase of the bonds by a purchaser for value without notice of the defect. See U.C.C. § 8-202. Bond counsel does not customarily set forth these conclusions explicitly, although counsel in corporate practice do set forth their equivalent. See, e.g., *TriBar 1998 Report*, at 668.

Bond counsel generally does not render its opinion unless it has concluded that the original sale of the bonds to underwriters or other original purchasers is in accordance with law, including laws relating to self-dealing by officials of the issuer; however, unless expressly stated, the opinion does not address the legal capacity of the purchasers to underwrite or invest in the bonds. These self-dealing laws are sometimes broadly stated, providing, for example, that no officer or employee of the issuer shall have any direct or indirect interest in a contract with the issuer. Counsel customarily does not require each official covered by a conflict-of-interest provision to answer a questionnaire regarding the official’s relationships with bond purchasers. Cf. Securities and Exchange Commission Form T-1 relating to relationships of corporate officers and employees with indenture trustees. Key officers, however, do commonly certify (often in a “signature and no litigation” certificate) that, to the best of their knowledge and belief, none of a designated class of officials (*i.e.*, those covered by an applicable self-dealing prohibition) has any personal interest in any of the bond purchasers or in the project being financed. Even if the prohibition makes a sale “void” rather than “voidable,” a concealed violation of a self-dealing prohibition should not affect an innocent purchaser of the bonds. In this respect, comfort may be drawn from U.C.C. § 8-202, even though (as already stated) reliance is not generally placed on it regarding matters affecting validity.

The opinion uses the word “binding,” which is traditional in general obligation bond opinions, whereas the word “enforceable” is not. The word “binding” still means that remedies exist. See *generally*

TriBar 1998 Report, at 619 *et seq.* If the issuer is immune from suit on the bonds, the word “binding” may be inappropriate without qualification. An example would be the issuance of bonds by a state that has not waived sovereign immunity. If the issuer is subject to suit but a judgment cannot be paid without a legislative appropriation, use of the word “binding” may similarly be inappropriate unless the appropriation can be judicially compelled.

The word “general” means that the obligation to pay is not limited to any particular source of funds. “General” also connotes that the full faith and credit of the issuer are pledged to the payment of the bonds unless a limitation is indicated. *See* Comment (J).

(J) Property Taxes

This clause would not ordinarily apply to state bonds. For state bonds, bond counsel customarily states that the full faith and credit of the state are pledged. This clause also does not apply to all municipal general obligation bonds; in many states, for example, full faith and credit extend only to *ad valorem* taxes on real property. In some states, prior to the delivery of general obligation bonds, a tax must be levied by the governing body of the issuer for future years at a rate or in an amount sufficient to pay the principal of and interest on the bonds when due.

The significance of this clause is the elasticity of the rate that applies to the property tax base. When special categories of property (*e.g.*, motor vehicles) are exempted from the general property tax and subjected to a limited excise tax, the statement regarding the unlimited property tax remains correct.

If bonds are payable from limited property taxes, the following alternative paragraph is suggested:

“2. All taxable property in the territory of the Issuer is subject to *ad valorem* taxation, within the limit prescribed by law, to pay the Bonds. [(*Statute*) provides (with exceptions, not including debt service on the Bonds) that the annual tax levy may not exceed ___ percent of the true value of the taxable property in the territory of the Issuer.]”

This alternative paragraph should be adapted to refer to the particular limitations applicable to the bonds. Bond counsel may appropriately refer to limited tax bonds as general obligations as long as payment is not limited to any particular source of funds (other than *ad valorem* taxes on real property); the opinion, however, should refer to the tax limitation.

(K) Security

This clause obviously does not apply to all general obligation bonds; however, summarizing in the opinion the basic security for the bonds is useful if it can be done with this degree of brevity. A more detailed statement of security (and any relevant remedies) is better placed in any accompanying disclosure document, as details may be subject to change over the life of the bonds, and the opinion, although addressing current law as of the date of issue, often accompanies the bonds throughout their term.

(L) Excludable vs. Excluded

The Committee has revised the wording of this opinion to reflect recent changes in industry practice. Specifically, rather than describing interest on the bonds as “excluded from gross income” as in the prior formulation, the model opinions state that interest on the bonds is “excludable from gross income.”

Either formulation accurately indicates the result of a bond being described in Code Section 103, i.e., that the interest is excludable from gross income but is not necessarily “tax-exempt” for all purposes. For example, whereas generally the interest on the bond is excluded from gross income, other provisions of the Code may cause certain taxpayers (*e.g.*, certain property and casualty insurance companies, certain S corporations, and recipients of Social Security and Railroad Retirement benefits) to include municipal bond interest in gross income. Whether characterizing interest as “excludable” or “excluded” from gross income, bond counsel is not addressing the applicability of collateral tax consequences that may apply to particular purchasers. *See also* Comment (P), Paragraph 1, for further discussion of such collateral tax consequences.

(M) Definition of Code

The Tax Reform Act of 1986, Section 2(a), provides that the Internal Revenue Title enacted August 16, 1986, “as heretofore, hereby, or hereafter amended, may be cited as the Internal Revenue Code of 1986.” Nonetheless, the Committee has retained the wording of this opinion to refer to the “Internal Revenue Code of 1986, as amended” rather than the “Internal Revenue Code of 1986” in order to avoid any ambiguity or potential confusion that the absence of “as amended” may cause the uninitiated reader. This choice is not meant to suggest that the use of “the Internal Revenue Code of 1986”—without “as amended”—is incorrect.

(N) Conditions to Federal Tax Opinions

Federal tax opinions are conditioned on future compliance with all post-issuance requirements of the Code the compliance with which is necessary to maintain the excludability of interest on the bonds from gross income. Among the requirements that must be satisfied, depending on the particular transaction, are restrictions on investment of bond proceeds and other amounts, restrictions on use of bond proceeds, arbitrage rebate requirements, and the need to take “remedial action” after a “change in use” of the bond-financed facility (*e.g.*, to redeem all or an appropriate portion of the bonds if the property financed is subsequently no longer used for a purpose qualifying for tax exemption). If bond counsel is responsible for preparing or reviewing relevant portions of any accompanying disclosure document, bond counsel should recommend that such post-issuance requirements be described in such document. *See* “Disclosure Matters—Disclosure Issues—Tax Issues—Post-Issuance Tax Compliance,” below.

Conditioning the federal tax opinion on future compliance with such requirements is not intended to suggest that bond counsel need not consider the legality and practicability of such compliance, or that bond counsel has any obligation for post-issuance monitoring. Indeed, absent a statement to the contrary in the opinion or any accompanying disclosure document, it should be assumed that bond counsel has no such responsibility.

An alternative to the language in the text making the federal tax opinions conditioned on future compliance is the following, in which future compliance is assumed:

“For the purpose of rendering the opinions set forth in the preceding sentence, we have assumed compliance by the Issuer with all requirements of the Internal Revenue Code of 1986, as amended, that must be satisfied subsequent to the issuance of the Bonds in order

that the interest thereon be, and continue to be, excludable from gross income for federal income tax purposes.”

Practice varies in this area. Whether future compliance is assumed or is a condition of the opinion, bond counsel should consider the scope of ongoing compliance required, and the application of the general principle that counsel may make assumptions or conditions (*e.g.*, based on a certificate or documentation), unless bond counsel has knowledge that any such assumption or condition is false, or has knowledge of facts that, under the circumstances, would make it unreasonable so to assume. *See Principles*, III. Facts.

In the case of certain transitional refundings, in addition to referring to “the Internal Revenue Code of 1986, as amended,” it may be appropriate also to reference either “its statutory predecessor” or “the Internal Revenue Code of 1954, as amended.”

Some bond counsel prefer to list in the bond opinion factors that could adversely affect the excludability of interest on the bonds from gross income for federal income tax purposes. Such a listing is neither necessary nor desirable. Accordingly, the Committee makes no recommendation regarding the scope or content of any such listing. To the extent that bond counsel has responsibility for preparing or reviewing relevant portions of any disclosure document, bond counsel should suggest appropriate disclosure on this issue.

(O) Certifications and Covenants Regarding Tax Matters

The excludability of interest on the bonds from gross income for federal income tax purposes, both on the date of issuance and throughout the period during which the bonds are outstanding, will depend on (among other things) (1) the accuracy of certifications of fact made on the date of issuance and (2) continuing compliance with certain covenants by the issuer (and, in the case of conduit bonds, continuing compliance by one or more parties, including the conduit borrower, users of the facility, or guarantors). Those certifications and covenants generally are included either in the bond documents or in separate tax documents, and recite in varying levels of detail the requirements for initial and ongoing excludability of interest from gross income. The certifications and covenants not only provide a basis for bond counsel’s opinion on the excludability of interest, but also provide guidance to the financing participants regarding the post-closing conduct necessary to preserve such excludability.

Customarily, the issuer and, in the case of a conduit financing, the conduit borrower, covenant to comply with all requirements of the Code in order to preserve the tax exemption. While this covenant generally is made with respect to the Code both as it exists on the date of bond issuance and as it may be modified thereafter, in some circumstances the covenant is to comply with the Code only as it exists on the date of issuance. The language in the model opinion reflects the former approach. If the latter approach to the covenant is taken, bond counsel should consider using the following alternative language:

“The Issuer has covenanted to comply with all such requirements as in effect on the date hereof.”

If, after the date of issuance, a new Code provision is adopted that applies to outstanding bonds (*i.e.*, a provision with a retroactive effective date), an issuer that made the covenant stated in the model opinion has agreed to comply with this provision, whereas an issuer subject to the covenant stated in the alternative language above has not. This difference could result in interest on the bonds of the second issuer becoming taxable. Accordingly, in a transaction with a covenant to comply with the Code only as it exists on the date of

bond issuance, this point should be clearly disclosed in any accompanying disclosure document. *See also* Comment (N).

(P) Scope of Federal Tax Opinion

1. Basic Tax Opinion

The formulation of the opinion addressing the federal income tax treatment of interest on the bonds used in bond opinions prior to adoption of the Tax Reform Act of 1986 (the “1986 Act”), *i.e.*, “interest on the Bonds is exempt from federal income taxes,” is now narrowed to the statement contained in the first sentence of the federal tax opinion paragraph, which conforms to the language of Code Section 103(a). This language, together with the disclaimer in the last sentence of the paragraph, is intended to eliminate any claim that this sentence addresses tax matters other than the excludability of interest on the bonds from the definition of gross income contained in Code Section 61.

Because of 1986 Act changes in the computation of the alternative minimum tax imposed on individuals and corporations by Code Section 55, the market now expects the bond opinion to address the applicability of such tax to owners of bonds. The suggested language for the federal tax opinion includes a brief statement regarding the applicability of such tax.

The inclusion of the opinions regarding the applicability of the alternative minimum tax within the scope of the federal tax opinion, together with certain other changes in federal tax law effected by the 1986 Act (*e.g.*, elimination of the deductibility by financial institutions of interest expense allocable to tax-exempt interest), raises the question of whether additional tax consequences to bond owners should also be addressed in the opinion. Certain of such tax consequences (*e.g.*, the tax treatment of Social Security and Railroad Retirement benefits, and previous limitations on deductibility of interest by financial institutions) antedate the 1986 Act and have generally been regarded as beyond the scope of the bond opinion. Bond counsel may consider recommending that such additional tax consequences (other than the applicability of the alternative minimum tax) be addressed, if at all, in any accompanying disclosure document, rather than in the bond opinion. *See* “Disclosure Matters? Disclosure Issues—Tax Issues—Additional Tax Consequences,” below. The disclaimer in the final sentence of the federal tax opinion language emphasizes its limited scope.

Where appropriate, in the case of bonds determined to be “qualified tax-exempt obligations” within the meaning of Code Section 265(b)(3), the bond opinion, or a supplemental opinion of bond counsel, may also include the following statement (or only the first portion thereof):

“The Issuer has designated the Bonds as ‘qualified tax-exempt obligations’ within the meaning of Code Section 265(b)(3), and, in the case of certain financial institutions (within the meaning of Code Section 265(b)(5)), a deduction is allowed for 80% of that portion of such financial institutions’ interest expense allocable to interest on the Bonds.”

Although not phrased as an opinion, inclusion of this statement should be made only if bond counsel has satisfied itself that the factual basis exists for the bonds to be “qualified tax-exempt obligations” and that the issuer is a “qualified small issuer” within the meaning of Code Section 265(b)(3). Further, because the foregoing statement may be taken into account by purchasers in deciding whether to purchase, and the price to pay for, the bonds, bond counsel may consider recommending that some disclosure with respect to the applicability of Code Section 265(b)(3) be included in any accompanying disclosure document. Certain bond counsel do opine on the application of Code Section 265(b)(3) and modify the above-referenced language as follows:

“Subject to compliance by the Issuer with certain covenants, Bond Counsel is of the opinion that the Bonds are “qualified tax-exempt obligations” within the meaning of Code Section 265(b)(3) . . .”

Neither the federal tax opinion nor any accompanying disclosure normally addresses whether any bond owner, by reason of any understanding that it will sell or resell the bonds to another party, will be treated for tax purposes as a lender to the other party, rather than as the tax owner of the bonds. *See, e.g., American National Bank of Austin v. United States*, 421 F.2d 442 (5th Cir. 1970); *American National Bank of Austin v. United States*, 573 F.2d 1201 (Ct. Cl. 1978). The opinion does imply, however, that no tax ownership problem arises from the initial offering, sale, and delivery of the bonds.

2. Original Issue Discount

In the case of bonds sold at a discount upon original issuance, most bond counsel prefer to refer in the opinion only briefly, if at all, to the treatment of original issue discount as tax-exempt interest and, where bond counsel’s role includes preparation or review of relevant portions of an accompanying disclosure document, to recommend inclusion of a more complete discussion in such disclosure document. For background, *see* Code Sections 1271-1275, 1286, and 1288, and Treasury Regulations Sections 1.1271-1 through 1.1275-5. The effect of treating original issue discount as interest, coupled with a corresponding basis adjustment, is to exclude from gross income for federal income tax purposes an amount that would otherwise constitute capital gain on the sale, exchange, redemption, or maturity of the bonds.

In a publicly underwritten issue, original issue discount for any particular bond is any excess of its stated redemption price at maturity over its initial offering price to the public excluding underwriters and other intermediaries at which price a substantial amount of the bonds of such maturity was sold. Code Sections 1273(a) and (b)(1). In a private placement, the original issue discount on a bond is the excess of its stated redemption price at maturity over the price paid by the first buyer. Code Sections 1273(a) and (b)(2).

When original issue discount is present, the following opinion language may be used in place of the first clause of paragraph 3 of the model opinion:

“Interest on the Bonds (including any original issue discount properly allocable to an owner thereof) is excludable from gross income for federal income tax purposes.”

For an illustrative statement regarding original issue discount that bond counsel could recommend be included in any accompanying disclosure document, *see* “Disclosure Matters—Disclosure Issues—Tax Issues—Original Issue Discount,” below.

3. Arbitrage Bonds

The federal tax opinion implicitly concludes that the bonds are not arbitrage bonds within the meaning of Code Section 148(a). Whether bonds are arbitrage bonds depends in part on the issuer’s reasonable expectations as of the date of issue. To establish its expectations, a nonarbitrage certification (which may be variously titled) of the issuer is required pursuant to Treasury Regulations Section 1.148-2(b)(2), unless no unspent gross proceeds will remain after the date of issue or the issue price is \$1,000,000 or less. Under Treasury Regulations Section 1.148-2(b)(2)(i), a nonarbitrage certification is evidence of the issuer’s expectations in establishing eligibility for, among other things, (1) the temporary

periods permitted under Code Section 148(c) and (2) reasonably required reserve or replacement funds under Code Section 148(d). Such certification, however, does not establish conclusions of law or any presumptions regarding the issuer's actual expectations or their reasonableness. Ordinarily, bond counsel does not render a tax opinion unless (except as noted above) an appropriate nonarbitrage certification has been obtained. Notwithstanding the issuer's reasonable expectations, bonds can become "arbitrage bonds" under Code Section 148(a) if, for example, any required rebate is not paid, the issuer or conduit borrower intentionally uses bond proceeds or amounts characterized as "replacement proceeds" under the Treasury Regulations to acquire higher-yielding investments, or the bonds are found to have used an "abusive arbitrage device."

4. Taxable Bonds.

If interest on the bonds is not intended to be excludable from gross income for federal income tax purposes, the opinion of bond counsel will sometimes include a specific opinion to that effect. A typical opinion is as follows:

"Interest on the Bonds is not excludable from gross income for federal income tax purposes under Section 103 of the Internal Revenue Code of 1986."

If an opinion is required regarding state income tax, it would similarly address whether interest on the bonds is taxable for state tax purposes.

Other collateral tax consequences result from taxable interest, including the treatment of original issue discount, market discount, premium, sale or redemption, back-up withholding, treatment of foreign bondholders, and state and local taxes. These considerations should be addressed by specific language in any disclosure document accompanying the bonds. The scope and extent of such discussion varies. Alternatively or additionally, bond counsel may include a statement in the bond opinion advising prospective purchasers to consult their own tax advisors. For example, the following language could be added to the opinion:

"Except as expressly stated above, we express no opinion regarding any other federal or state income tax consequences of acquiring, carrying, owning, or disposing of the Bonds. Owners of the Bonds should consult their tax advisors regarding the applicability of any collateral tax consequences of owning the Bonds, which may include [original issue discount,] original issue premium, purchase at a market discount or at a premium, taxation upon sale, redemption or other disposition, and various withholding requirements."

5. "Exploding" Opinions

Opinions that cease to be applicable under certain circumstances are often referred to as "exploding" opinions. In a sense, all bond opinions are exploding opinions, as the inaccuracy of various facts represented to bond counsel, or the failure of the issuer or another party to comply with the myriad tax-related covenants, could adversely affect the validity and/or tax exemption of the bonds, with possible retroactive effect. This aspect of opinions is generally well understood, and bond counsel need not make or recommend any special mention of it in opinions or disclosure documents beyond statements indicating reliance on representations of facts and the conditioning of the opinion on continuing compliance with covenants. *See, e.g.,* Comment (N). References in this report to "exploding" opinions refer not to the foregoing opinions but to opinions that, by their express terms, cease to be applicable under certain

circumstances. See “Disclosure Matters - Disclosure Issues - Tax Issues - Exploding Opinions” for further discussion of “exploding” opinions and suggested disclosure relating thereto.

(Q) State Tax Exemptions

Generally, an opinion addresses the excludability of interest on the bonds from taxation in the state of issuance. In some states, however, reference to such treatment is made only upon express request by the underwriter or issuer. Because of the disparate nature of state legislation addressing the issue, virtually no uniformity of language exists with respect to the tax treatment of bonds for state tax purposes. Many counsel prefer to use opinion language that follows closely the applicable legislation; others use a more generic formulation.

It should be noted that, in some states, tax treatment of interest is tied to its treatment under federal tax law.

If the bonds are exempt from intangible property taxes in the state of issuance, a statement to that effect is often included in the opinion.

With respect to state income taxes, even if the applicable statute broadly states that interest is exempt from taxation within the state, the state may include it in the “measure” of corporate excise or franchise taxes. See *Connecticut Bank & Trust Co. v. Tax Commissioner*, 178 Conn. 250, 423 A.2d 883 (Conn. 1979). Indeed, if interest on U.S. Treasury obligations is included in the measure of those taxes, the state is required by federal law to include interest on state and local obligations as well. See 31 U.S.C. § 3124 (1983); *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983). If bond interest is or may be includable in the measure of corporate excise or franchise taxes, corporate purchasers may misinterpret a statement that interest is excludable from state income taxes. In such a case, a qualification should be included.

If an opinion is given regarding state tax treatment of interest on the bonds, bond counsel may wish to include a disclaimer similar to the last sentence of the federal tax opinion in item 3 of this opinion. Some bond counsel prefer to put such tax disclaimers in a paragraph following the numbered paragraphs.

(R) Bankruptcy and Equitable Principles

The reference to bankruptcy and similar laws is limited to laws affecting creditors’ rights generally. If a law would affect only one particular type of creditor, that law should be discussed or disclosed in either the disclosure document or in another place in the opinion.

An example of the possible adverse exercise of equitable principles would be judicial permission to pay essential operating expenses ahead of debt service. See *Borough of Fort Lee v. United States*, 104 F.2d 275, 284 (3rd Cir. 1939).

Many formulations of this qualification are used in bond opinions. Another form for consideration is set forth below. The bracketed language would be appropriate for an issue of conduit financing bonds in which the private party agrees to indemnify the issuer against certain liabilities.

“The Bonds are subject to bankruptcy, insolvency, moratorium, reorganization, and other similar state and federal laws affecting the enforcement of creditors' rights generally,

and to general principles of equity[, and enforceability of the indemnification provisions of the Agreement may be limited by applicable public policy.]”

For further discussion of this paragraph, *see* Comment (Z).

(S) Opinion Regarding Disclosure Document

This statement is consistent with the general approach taken by bond counsel not to express an opinion on or to render any other advice regarding any disclosure document accompanying the bonds. The statement does not necessarily mean that bond counsel has not been engaged to review the accuracy or completeness of specific portions of any disclosure document or to render an opinion in addition to the bond opinion with respect thereto. Indeed, bond counsel’s engagement now often includes (1) the preparation of summaries and descriptions of the bonds and relevant documents for inclusion in a disclosure document and (2) the rendering of an opinion, in addition to the bond opinion, to one or more specified parties, with respect to such summaries and descriptions, as well as the portions of the disclosure document describing tax and legal matters. Such an opinion usually is rendered to the underwriters, and is not included in the bond opinion. In that case, the word “herein” should be added to the disclaimer, as shown in the model opinions, to make the disclaimer accurate. Unless specifically engaged to do so, bond counsel usually does not render an opinion regarding other portions of the disclosure document, or assume any responsibility for reviewing such portions of the disclosure document. *See Disclosure Roles—Other Opinions of Bond Counsel*, at pages 159 and 160, for a discussion of the scope and content of an opinion regarding material in a disclosure document, including examples of opinion language and the need to avoid language “that implies that the document summaries include every provision of the bond documents that might be material to an investor under every circumstance.”

In situations where bond counsel is not engaged to review the accuracy, completeness, or sufficiency of all or part of any accompanying disclosure document and will not be rendering any opinion or other advice with respect thereto, bond counsel may wish to include a statement to that effect in the bond opinion. While such a statement will inform investors of the limited role of bond counsel, such statement may not be an effective shield against any statutory or common law liability. *See “Disclosure Matters,”* below.

Some bond counsel also include in their bond opinions a disclaimer of responsibility regarding the creditworthiness of the instrument or the issuer’s ability to pay. Such disclaimers are unnecessary because bond opinions cannot reasonably be construed to reach such matters. *See Disclosure Roles—Security Provisions*, at pages 153 and 154. Factual matters bearing on credit or ability to pay properly should be addressed in any accompanying disclosure document and not in the bond opinion. The bond opinion is not intended to serve as a “prospectus” and should not be used as a disclosure document. *See “Disclosure Matters,”* below.

(T) Miscellaneous

1. Contingent Fees

No reference is made in the model opinion to the financial terms on which bond counsel is retained. The same standard of care should apply in rendering the opinion, regardless of the basis for compensation. Accordingly, so long as bond counsel is applying the same standard, the basis for compensation is not material to the bond opinion and need not be disclosed therein. *See “Disclosure Matters—Disclosure Issues—Other Disclosure—Potential Conflicts of Interest,”* below.

2. No-Litigation Certificate

The delivery of an “unqualified” opinion regarding validity has traditionally meant that counsel for the issuer (or a responsible officer or officers) has certified that no litigation is pending or, to such person’s knowledge, threatened, affecting the validity of the bonds or, if applicable, the power of the issuer to levy and collect taxes or to provide any other security for the payment of the bonds. *Cf. Disclosure Guidelines for State and Local Government Securities (“GFOA Guidelines”)*, published by the Government Finance Officers Association (1991), at Section XI, ¶E. The requirement of an unqualified no-litigation certificate has at times impeded financings where, notwithstanding pending or threatened litigation, no substantial basis existed for questioning the validity of or security for the bonds. As a result, a more reasonable standard has emerged, and it is considered appropriate for bond counsel to render an “unqualified” opinion regarding the validity of the bonds, notwithstanding pending or threatened litigation challenging the validity of or adversely affecting the security for the bonds, if bond counsel is satisfied that a material adverse outcome is remote and if terms of the sale permit delivery of the bonds in these circumstances. *Cf. American Bar Association, Statement of Policy Regarding Lawyers’ Responses to Auditors’ Request for Information*, 31 Bus. Law. 1709, 1713, 1723 (1976) (definition of “remoteness” in litigation situation). In reaching this conclusion, bond counsel may rely upon a “no merit” opinion of other counsel familiar with the litigation if bond counsel is satisfied regarding the competence of such other counsel through its reputation or otherwise. *See TriBar 1998 Report* at 636 *et seq.* The Committee believes that it is still advisable to recommend that the litigation be described in any accompanying disclosure document, together with an indication that a no merit opinion, if sought, was rendered and relied upon. *See GFOA Guidelines*, at Section XI, ¶A. Some bond counsel may choose to include a description of the litigation in the opinion itself.

Litigation affecting the valid existence of the issuer or the title to office of the officers acting for the issuer is not considered relevant to the opinion if the validity of and security for the bonds would not be affected by an adverse decision in such litigation. As an example, the validity of and security for bonds may be unaffected because, under applicable law, the issuer would be recognized as a *de facto* entity or the officers would be recognized as *de facto* officers. Here again, however, depending on the materiality of the litigation in other respects, describing the litigation in any accompanying disclosure document may be appropriate.

3. Securities Laws

a. Federal

In opinions rendered on general obligation bonds, common practice has been not to refer to the exemptions from registration and qualification under federal securities laws. If an opinion is required from bond counsel regarding exemption from registration under the Securities Act of 1933, and exemption of a trust indenture or equivalent document from qualification under the Trust Indenture Act of 1939, such opinion is generally given in a supplemental opinion rather than in the bond opinion and may be given by counsel to the underwriter. Such an opinion had been included in the model opinions for revenue bonds and private activity bonds in the predecessor to this report. In keeping with general current practice, however, the Committee has deleted such opinion in this report. The following language could be used for such an opinion:

“The Bonds are exempt from registration under the Securities Act of 1933, as amended, and the [insert term given to trust document pursuant to which Bonds are issued] is exempt from qualification under the Trust Indenture Act of 1939, as amended.”

b. State

Before rendering an opinion, bond counsel generally satisfies itself that state securities law requirements have been met regarding the original sale of the bonds by the issuer to the underwriter (or private placement purchaser). But, unless specifically engaged to do so, bond counsel does not assume responsibility for compliance with “blue sky” requirements for resale of the bonds by underwriters and dealers, or eligibility for investment by institutional investors. In states that have adopted the Uniform Securities Act, general obligation bonds are generally exempt from securities registration, although the filing of offering literature may be required. Unif. Sec. Act (1985 with 1988 Amendments) § 401(b)(1), 7B U.L.A. (1994 Cum.) 105; *see, e.g.*, Mass. Gen. Laws Ann. ch. 110A, § 403 (West 1982). Under the Uniform Securities Act, brokers or dealers executing transactions in municipal bonds are not exempt from broker-dealer registration, but the issuer is not treated as a broker-dealer. Unif. Sec. Act (1985 with 1988 Amendments) § 101(2)(ii), 7B U.L.A. (1994 Cum.) 75.

For more information on state securities laws, including consideration of various types of issues (*e.g.*, hospital bonds and single family housing bonds), reference should be made to *Blue Sky Regulation of Municipal Securities*, published by NABL (1995), and, for the subsequent impact of the National Securities Markets Improvement Act of 1996 on blue sky regulation of other states’ securities, discussion drafts of *Model Blue Sky Memoranda for Municipal Securities* (2001) and *The Effects of NSMIA on Blue Sky Requirements Applicable to Municipal Securities* (October 14, 2002). The discussion drafts may be found on NABL’s website.

4. Credit Enhancement

If bond insurance, a letter of credit, or other credit enhancement secures the bonds, reference thereto is sometimes made in the bond opinion. This practice is particularly true in the case of a direct-pay letter of credit. To address tax concerns resulting from a possible “reissuance” of the bonds if a change occurs in the credit enhancement, bond counsel often takes an exception in the opinion with respect to the excludability of interest on the bonds after such a change. The purpose of such an exception is generally to alert purchasers to the need to retest for the continued tax-exemption of interest on the bonds after such a change in credit enhancement. *See also* discussion in Comment (P), Paragraph 5, and “Disclosure Matters” with respect to “exploding” opinions.

II. REVENUE BONDS (U)

MODEL OPINION

[Note: Letters in parentheses refer to Commentary immediately following this opinion. *See* the Commentary following the General Obligation Bonds Opinion for additional notes as appropriate.]

(Letterhead of Bond Counsel)

(Date)

(Addressee)

(Salutation)

(Caption)

We have acted as bond counsel to _____ in connection with the issuance by *(Name of Issuer)* (the “Issuer”) of \$_____ *(Title of Bonds)* Bonds dated _____ (the “Bonds”). In such capacity, we have examined such law and such certified proceedings, certifications, and other documents as we have deemed necessary to render this opinion.

The Bonds are issued pursuant to *(Enabling Act)* and a Revenue Bond Resolution (the “Resolution”) of the Issuer adopted _____. **(V)** Under the Resolution, the Issuer has pledged certain revenues (the “Revenues”) for the payment of principal of, premium (if any) and interest on the Bonds when due.

Regarding questions of fact material to our opinion, we have relied on the representations of the Issuer contained in the Resolution, and in the certified proceedings and other certifications of public officials and others furnished to us, without undertaking to verify the same by independent investigation.

Based on the foregoing, we are of the opinion that, under existing law:

1. The Issuer is validly existing as a body corporate and politic and public instrumentality of *(State)* with the power to adopt the Resolution, perform the agreements on its part contained therein, and issue the Bonds. **(W)**

2. The Resolution has been duly adopted by the Issuer, **(W)** and constitutes a valid and binding obligation of the Issuer enforceable against the Issuer. **(X)**

3. The Resolution creates a valid lien on the Revenues and other funds pledged by the Resolution for the security of the Bonds on a parity with other bonds (if any) issued or to be issued under the Resolution. **(Y)**

4. The Bonds have been duly authorized and executed by the Issuer, **(W)** and are valid and binding limited obligations of the Issuer, payable solely from the Revenues and other funds provided therefor in the Resolution.

5. Interest on the Bonds is excludable from gross income for federal income tax purposes and is not an item of tax preference for purposes of the federal alternative minimum tax imposed on individuals and corporations; however, such interest is taken into account in determining adjusted current earnings for the purpose of computing the alternative minimum tax imposed on certain corporations. The opinion set forth in the preceding sentence is subject to the condition that the Issuer complies with all requirements of the Internal Revenue Code of 1986, as amended, that must be satisfied subsequent to the issuance of the Bonds in order that the interest thereon be, and continue to be, excludable from gross income for federal income tax purposes. The Issuer has covenanted to comply with all such requirements. Failure to comply with certain of such requirements may cause interest on the Bonds to be included in gross income for federal income tax purposes retroactively to the date of issuance of the Bonds.

6. [Opinion regarding state tax exemption, if any.]

The rights of the owners of the Bonds and the enforceability of the Bonds and the Resolution are limited by bankruptcy, insolvency, reorganization, moratorium, and other similar laws affecting creditors' rights generally, and by equitable principles, whether considered at law or in equity. **(Z)**

We express no opinion [herein] regarding the accuracy, adequacy, or completeness of the [disclosure document] relating to the Bonds, or regarding the perfection or priority of the lien on Revenues or other funds created by the Resolution. **(Y)**. We note that, unless perfected, the lien on Revenues may not be effective. Further, we express no opinion regarding tax consequences arising with respect to the Bonds other than as expressly set forth herein.

[This opinion is given as of the date hereof, and we assume no obligation to revise or supplement this opinion to reflect any facts or circumstances that may hereafter come to our attention, or any changes in law that may hereafter occur.]

Very truly yours,

COMMENTARY

(U) Revenue Bonds

In its current form, this opinion is applicable only to revenue bonds that are not private activity bonds; however, bond counsel preparing an opinion for revenue bonds that are private activity bonds, but not conduit financing bonds, may wish to start with this form, modifying paragraphs 5 and 6 (relating to the excludability of interest on the bonds) as indicated in Part III.

(V) Resolution or Trust Agreement

If the bonds are secured by a trust agreement, a trust indenture, or other document, rather than by a resolution or ordinance, the references in the opinion should be modified appropriately.

(W) Subsidiary Conclusions

Most corporate opinions state that the transaction (including performance of obligations undertaken by the issuer) does not violate “any agreement, instrument, order, writ, judgment, or decree known to us to which the Corporation is a party or is subject.” An alternative formulation of the opinion indicates that the transaction does not breach or result in a default under any agreement or instrument specifically identified on an attached schedule. *See TriBar 1998 Report*, at 670, ¶2(a). If this opinion is to be given by counsel in a municipal revenue bond transaction, it may be preferable to have it given by local or general counsel most familiar with the affairs of the issuer rather than by bond counsel. If this opinion is to be rendered by bond counsel, it may be preferable to include it in a supplemental opinion addressed to the underwriters.

(X) Enforceability

In a revenue bond transaction, the issuer ordinarily undertakes a number of obligations beyond the basic promise to pay, such as obligations to operate and maintain the revenue-producing facility or system in a sound and economical manner, to charge and collect sufficient rates to operate and maintain the facility or system, and to pay the bonds. These obligations are set forth in the resolution, a bond indenture, or a similar document. With respect to these obligations, “enforceable” probably has the same meaning as “enforceable in accordance with its terms.” *See TriBar 1998 Report*, at 619-620. Some opinion recipients prefer to have the words “in accordance with its terms” added to make this explicit. *See also* the discussion of “binding” in Comment (I).

In some situations, bond counsel may not be satisfied that all significant terms of the resolution are enforceable. In such a case, the opinion may be appropriately qualified, or each potentially unenforceable provision may itself be qualified, such as by providing that it shall be applicable “to the extent permitted by law.” Alternatively, the opinion concerning the enforceability of the resolution could be deleted from the bond opinion and included in a supplemental opinion, where additional qualifications to enforceability are more commonly accepted.

(Y) Uniform Commercial Code

The Uniform Commercial Code (the “U.C.C.”) was revised in 1998 to provide that, effective July 1, 2001 (or 2002 under a transition rule) and contrary to the 1972 revision, the creation, perfection, priority, and enforcement of security interests granted by governmental units (including their bond issuing instrumentalities) are governed by Article 9 of the U.C.C., except to the extent that another statute of the

governmental unit's state expressly governs such matters. *See* U.C.C. §§ 9-109(c)(2) and (3). Although all states have enacted the 1998 revisions, more than half the states enacted non-conforming amendments that continue to exclude from the scope of U.C.C. Article 9 security interests granted by governmental units.

Revenue bonds have traditionally been issued under laws that expressly authorize a lien on future revenues. This lien is frequently called a “pledge” even though at common law a pledge is made only by a transfer of possession of the collateral to the pledgee. *Black’s Law Dictionary*, at page 1153 (6th Ed. 1990). To avoid any argument that the pledge of future revenues is subject to the filing of a financing statement under U.C.C. Article 9, the enabling laws often expressly provide that the pledge is effective or enforceable without any such filing. If the enabling or other statute states that the pledge is effective or enforceable, it effectively pre-empts U.C.C. Article 9 regarding this issue.

If U.C.C. Article 9 applies and the bond enabling or other statute does not expressly state that the pledge is enforceable, bond counsel will need to satisfy itself that the pledge will be enforceable under Article 9. To do so, bond counsel generally must conclude that the resolution describes the pledged property and that the issuer then has rights to the pledged property. For a description of special issues raised by “net revenue” pledges, *see* Report of the National Association of Bond Lawyers Opinions and Documents Committee Re: Revised Article 9 of the Uniform Commercial Code, dated July 17, 2000. That report can be viewed on NABL’s website. If the issuer does not have rights to the pledged property (*e.g.*, in the case of future revenues the rights to which have not yet been earned by the delivery of goods or services), the lien enforceability opinion may be qualified by adding a phrase such as “as and to the extent that the issuer obtains rights to the Revenues and funds.”

It is not uncommon for the title of bonds to imply the priority position of the pledge of revenues made to secure the bonds (*e.g.*, “Senior” or “Prior” Lien Revenue Bonds). Unless the perfection and priority of the pledge are governed by the bond enabling or other state statute, the perfection and priority of the pledge will be governed by U.C.C. Article 9, to the extent applicable. Under the U.C.C., depending on the form, possession, and location of the revenues, perfection and priority could be governed by the law of other states and could depend not only on the filing of a conforming financing statement but also on the existence of possession or control of the revenues by bondholders or their representatives (in the case of revenues in the form of money or a deposit account balance). *See* U.C.C. §§ 9-301-307, 312(b). In view of the possible complexity of perfection and, especially, priority opinions, the model opinion addresses only the creation of the bond pledge. To avoid an implied perfection and priority opinion by reference to the bond title, an express disclaimer is recommended. If perfection opinions are given, it is suggested that they be rendered by the issuer’s other counsel or be included in a supplemental opinion of bond counsel addressed to the underwriter. The Committee considers it inappropriate to request a priority opinion in most circumstances, since priority is usually addressed by bond resolutions, and such opinions are complex and add little to a reading of U.C.C. Article 9. To avoid any unwarranted inference that the lien opinion is intended to address perfection or priority, the model opinion expressly disclaims any opinion on such issues.

(Z) Bankruptcy and Related Matters

In general, by virtue of Section 552 of the federal Bankruptcy Code, a security interest is ineffective regarding revenues received after the filing of a bankruptcy case unless: (i) the revenues are proceeds, rents, or products of property acquired before the filing of the case, (ii) a perfected pre-petition security interest in such property and proceeds, rents, or products thereof, as applicable, was granted, and (iii) the security interest or the transfer of revenues under the security interest cannot otherwise be avoided by the trustee in bankruptcy. *See* Comment (Y). *See also In re County of Orange*, 179 B.R. 185, 193 (Bkrcty.

C.D. Cal. 1995) (remanded 189 B.R. 499 (C.D. Cal. July 13, 1995)). Under Section 928 of the Bankruptcy Code, enacted in 1988, a lien on post-petition revenues is nevertheless effective if the lien is on net “special revenues,” other than betterment assessments, of the project or system from which the revenues are derived. “Special revenues” are defined by Section 902(2) of the Bankruptcy Code as follows:

“(A) receipts derived from the ownership, operation, or disposition of projects or systems of the debtor that are primarily used or intended to be used primarily to provide transportation, utility, or other services, including the proceeds of borrowings to finance the projects or systems; (B) special excise taxes imposed on particular activities or transactions; (C) incremental tax receipts from the benefited area in the case of tax-increment financing; (D) other revenues or receipts derived from particular functions of the debtor, whether or not the debtor has other functions; or (E) taxes specifically levied to finance one or more projects or systems, excluding receipts from general property, sales, or income taxes (other than tax-increment financing) levied to finance the general purposes of the debtor.”

If the pledged revenues are neither “special revenues” nor proceeds of property that is the subject of a perfected pre-petition security interest that cannot be avoided by a trustee in bankruptcy, the pledge will be ineffective if a bankruptcy petition is filed.

The Committee does not consider it necessary to include in this paragraph of the opinion a reference to the state or federal “police” power. Municipalities are inherently subject to these police powers. Where the exercise of the police power takes the form of a moratorium or similar act, it is covered by this paragraph of the opinion as written. An exercise of the police power may also take the form of a regulation of land use, utility rates, or the like. Regulatory laws of this character are not likely to affect the legal validity or enforceability of general obligation bonds (although they may affect the ability to pay); in the case of revenue bonds, such regulatory laws may affect validity or enforceability. *See* Comment (X).

III. PRIVATE ACTIVITY BONDS (AA)

MODEL OPINION

[Note: Letters in parentheses refer to the Commentary immediately following this opinion. See the Commentaries following the General Obligation Bonds Opinion and the Revenue Bonds Opinion for additional notes as appropriate. In this regard, note that Comments (E) and (P) include material specifically relevant to conduit private activity bonds.]

(Letterhead of Bond Counsel)

(Date)

(Addressee)

(Salutation)

(Caption)

We have acted as bond counsel to _____ in connection with the issuance by *(Name of Issuer)* (the “Issuer”) of \$_____ *(Title of Bonds)* Bonds dated _____ (the “Bonds”). In such capacity, we have examined such law and such certified proceedings and other documents as we have deemed necessary to render this opinion.

The Bonds are issued pursuant to *(Enabling Act)*, a Trust Indenture (the “Indenture”) between the Issuer and _____, as Trustee (the “Trustee”), and a resolution (the “Resolution”) of the Issuer authorizing the issuance and sale of the Bonds. The Issuer and *(Name of Company)* (the “Company”) have entered into a loan agreement (the “Loan Agreement”) pursuant to which the Issuer is lending the proceeds of the Bonds to the Company. **(BB)** Under the Loan Agreement, the Company has covenanted to make payments to the Issuer to be used to pay when due the principal of, premium (if any) and interest on the Bonds, as well as other payments and revenues (collectively, the “Revenues”). Under the Indenture, the Issuer has pledged and assigned its rights in and to the Loan Agreement and the Revenues (except certain rights to indemnification, reimbursements, and administrative fees) as security for the Bonds. The Bonds are payable solely from the Revenues. **(CC)**

We note that various issues concerning [specify legal issues] are addressed in the opinion of [identify counsel and their relationship] provided to [identify addressee], and we express no opinion with respect to those issues. **(DD)**

Regarding questions of fact material to our opinion, we have relied on representations of the Issuer and the Company contained in the Indenture and the Loan Agreement, and the certified proceedings and other certifications of public officials and others furnished to us, including certifications furnished to us by or on behalf of the Company, without undertaking to verify the same by independent investigation.

Based on the foregoing, we are of opinion that, under existing law:

1. The Issuer is validly existing as a body corporate and politic and public instrumentality of (*State*) with the power to enter into and perform its obligations under the Indenture and the Loan Agreement and to issue the Bonds.

2. The Indenture has been duly authorized, executed, and delivered by the Issuer, and is a valid and binding obligation of the Issuer enforceable against the Issuer. **(EE)** The Indenture creates a valid lien on the Revenues, the other funds pledged by the Indenture as security for the Bonds, and the rights of the Issuer under the Loan Agreement (except certain rights to indemnification, reimbursements, and administrative fees) on a parity with other bonds (if any) issued or to be issued under the Indenture. **(FF)**

3. The Bonds have been duly authorized and executed by the Issuer, and are valid and binding limited obligations of the Issuer, payable solely from the Revenues.

[The following paragraph should be used if the bonds are “qualified small issue bonds” within the meaning of Code Section 144(a), “exempt facility bonds” within the meaning of Code Section 142, “mortgage revenue bonds” that are exempt under Code Section 143, “qualified student loan bonds” within the meaning of Code Section 144(b), or “qualified redevelopment bonds” within the meaning of Code Section 144(c):]

4. Interest on the Bonds is excludable from gross income for federal income tax purposes, except for interest on any Bond for any period during which such Bond is held by a “substantial user” of the facilities financed by the Bonds, or a “related person” within the meaning of Section 147(a) of the Internal Revenue Code of 1986, as amended (the “Code”); **(GG)** **(HH)** however, interest on the Bonds is an item of tax preference for purposes of the federal alternative minimum tax imposed on individuals and corporations. The opinion set forth in this paragraph is subject to the condition that the [Issuer and the Company] comply with all requirements of the Internal Revenue Code of 1986, as amended, that must be satisfied subsequent to the issuance of the Bonds in order that interest thereon be, and continue to be, excludable from gross income for federal income tax purposes. The [Issuer and the Company] have covenanted to comply with all such requirements. Failure to comply with certain of such requirements may cause interest on the Bonds to be included in gross income for federal income tax purposes retroactively to the date of issuance of the Bonds.

[The following paragraph should be used if the bonds are qualified 501(c)(3) bonds within the meaning of Code Section 145:]

4. Interest on the Bonds is excludable from gross income for federal income tax purposes **(II)** and is not an item of tax preference for purposes of the federal alternative minimum tax imposed on individuals and corporations; however, for the purpose of computing the alternative minimum tax imposed on certain corporations, such interest is taken into account in determining adjusted current earnings. The opinion set forth in this paragraph is subject to the condition that the [Issuer and the Company] comply with all requirements of the Internal Revenue Code of 1986, as amended, that must be satisfied subsequent to the issuance of the Bonds in order that interest thereon be, and continue to be, excludable from gross income for federal income tax purposes. The [Issuer and the Company] have covenanted to comply with all such requirements. Failure to comply with certain of such requirements may cause interest on the Bonds to be included in gross income for federal income tax purposes retroactively to the date of issuance of the Bonds.

5. [Opinion regarding state tax exemption, if any.]

The rights of the owners of the Bonds and the enforceability of the Bonds and the Indenture are limited by bankruptcy, insolvency, reorganization, moratorium, and other similar laws affecting creditors' rights generally, and by equitable principles, whether considered at law or in equity.

We express no opinion [herein] regarding the accuracy, adequacy, or completeness of the [disclosure document] relating to the Bonds, or regarding the perfection or priority of the lien on Revenues or other funds created by the Indenture. Further, we express no opinion regarding tax consequences arising with respect to the Bonds other than as expressly set forth herein.

[This opinion is given as of the date hereof, and we assume no obligation to revise or supplement this opinion to reflect any facts or circumstances that may hereafter come to our attention, or any changes in law that may hereafter occur.]

Very truly yours,

COMMENTARY

(AA) Private Activity Bonds

This opinion is applicable to private activity bonds issued in a conduit financing where the issuer loans the bond proceeds to a third-party conduit borrower. With appropriate revisions, it should also suffice for conduit financings in which the issuer leases or sells the bond-financed facilities to the third-party conduit beneficiary. Non-conduit bonds may also be private activity bonds because of private business use of bond proceeds and either private security or payment supporting the bonds, as provided in Code Section 141. For such general obligation bonds or revenue bonds that are private activity bonds, the General Obligation Bonds Opinion or Revenue Bonds Opinion should be used, but with paragraph 4 of this opinion substituted for the respective paragraph addressing the federal income tax treatment of interest on the bonds.

(BB) Documentation

Documentary formats used in private activity bond financing vary considerably, and include: (1) a trust agreement between the issuer and the trustee, a loan agreement, lease or installment sale agreement between the issuer and the conduit borrower, and a separate security agreement or mortgage between the issuer and the conduit borrower, (2) a trust agreement between the issuer and the trustee, and a loan and security agreement between the issuer and the conduit borrower, and (3) a single trust, loan, and security agreement among the issuer, the trustee, and the conduit borrower. This opinion assumes format (2). If a different format is used, appropriate changes should be made. Representative language for an opinion in a transaction utilizing a multi-document format is as follows:

The Bonds are issued pursuant to (*Enabling Act*) and a Trust Agreement (the “Agreement”) among the Issuer, (*Name of Company*) (the “Company”), and _____, as Trustee (the “Trustee”). Under the Agreement, the Company has agreed to make payments to be used to pay when due the principal of, premium (if any) and interest on the Bonds, and such payments and other revenues under the Agreement (collectively, the “Revenues”), and the rights of the Issuer under the Agreement (except certain rights to indemnification, reimbursements, and administrative fees) are pledged and assigned by the Issuer as security for the Bonds. The Bonds are payable solely from the Revenues.

Additional paragraphs are added to the opinion addressing the authenticity and enforceability of the additional documents. Also, where other documents secure the conduit borrower’s obligations or the bonds (*e.g.*, a guaranty or letter of credit), reference should be made to those documents.

(CC) Right To Receive Revenues

Where bond counsel concludes that the power to pledge revenues includes the power to assign the rights under the trust agreement (or other financing document) to receive the revenues, it may be useful to include an assignment. An assignment should overcome the problem created by Sections 547 and 552 of the Bankruptcy Code in the event of bankruptcy of the issuer. *See* Comment (Z). Even without an assignment, however, this problem is probably not significant in a conduit financing. Legislative history to the Bankruptcy Code indicates that, in a conduit financing, the issuer’s rights and obligations would not be treated in bankruptcy as property and obligations of the issuer subject to its bankruptcy proceeding. *See* S. Rep. No. 989, 95th Cong., 2d Sess., 5859-86, reprinted in 1978 *U.S. Code Cong. & Ad. News*, 5859-86.

(DD) Opinions of Other Counsel

These references to opinions of other counsel are included both for information and to make clear that bond counsel is not rendering certain opinions. Such references do not express reliance on or concurrence in the opinions of other counsel, and are not intended to have the meanings attributed to an opinion that expresses reliance on the opinion of another. *Cf. TriBar 1998 Report*, at 636 *et seq.* (concerning reliance on the opinion of other counsel). Regarding the title to mortgaged property (if any), reference may be made to a title policy in place of or in addition to a title opinion. In a conduit financing such as that contemplated by the Private Activity Bonds Opinion, counsel for the conduit borrower usually renders an opinion regarding (1) the due authorization, execution, and delivery of documents by the conduit borrower, (2) the legal, valid, and binding nature of documents to which the conduit borrower is a party, and (3) where “qualified 501(c)(3) bonds” are involved, that the conduit borrower is an organization described in Code Section 501(c)(3). Bond counsel is generally an addressee of such opinion. Increasingly, bond counsel expresses in the bond opinion reliance on such Section 501(c)(3) opinion of other counsel.

In general opinion practice, a primary opinion giver’s responsibility for the conclusions in an opinion of other counsel depends on how the reliance is stated. The TriBar 1998 Report states that an opinion reciting that counsel is relying on another opinion (*e.g.*, a bond opinion reciting that bond counsel is relying on a Section 501(c)(3) opinion provided by the conduit borrower’s counsel) means that such other opinion addresses the legal issues on which counsel is purporting to rely, and that, in the professional judgment of the counsel rendering the opinion, reliance on that other opinion is reasonable. *See TriBar 1998 Report*, at 636-639. By contrast, an opinion reciting that the other opinion is “satisfactory in form and substance” or “reasonable in form and substance” may be construed as implying concurrence with the opinion being reviewed. *See Disclosure Roles*, at 164 and 165. The use of assumptions in lieu of reliance is developing in general opinion practice. Notwithstanding the above general guidelines, little guidance exists regarding how a court or a jury would interpret these different alternatives. Accordingly, bond counsel relying on an opinion of another counsel should develop the language used in its opinion with great care, and should perform its diligence functions accordingly. In rendering the bond opinion, if bond counsel relies on or assumes, but does not itself adopt, the conclusions expressed by other counsel, that fact should be disclosed clearly to prospective bond purchasers. For a more complete discussion of the issues related to reliance on the opinions of other counsel, *see Glazer and Fitzgibbon on Legal Opinions*, at 129-145.

(EE) Assumptions Regarding Other Parties

An opinion that an agreement is binding on one party implicitly assumes that it is binding on the other parties to the extent necessary to satisfy requirements of mutuality. *See TriBar 1998 Report*, at 615.

(FF) Revenue Pledge

This opinion assumes that only the issuer has granted a security interest under the agreement. *See Comment (Y)*. If the conduit borrower pledges property as security for the bonds, its counsel more commonly addresses the enforceability and priority of that pledge.

(GG) Substantial User and Related Person Exception

The “substantial user” and “related person” exception set forth in Code Section 147(a) is inapplicable to mortgage revenue bonds under Code Section 143, and to qualified student loan bonds under Code Section 144(b), and should be omitted from the opinion with respect to such bonds.

(HH) \$10,000,000 and \$40,000,000 Limitations

Some bond counsel also prefer to specify exceptions for the \$10,000,000 and \$40,000,000 limitations of Code Section 144(a), in which case the following language may be added:

“, and except that the Company or another person, by taking action after the date hereof that causes the \$10,000,000 limitation set forth in Code Section 144(a)(4) or the \$40,000,000 limit set forth in Code Section 144(a)(10) to be exceeded, may cause interest on the Bonds to be included in gross income (retroactively to the date hereof, in the case of the \$40,000,000 limitation) for federal income tax purposes.”

(II) \$150,000,000 Limitation

Although Code Section 145(b)(7) has made the \$150,000,000 limitation inapplicable to most qualified 501(c)(3) new money issues, the \$150,000,000 limitation continues to apply to many qualified 501(c)(3) bond issues, or portions thereof. For such financings, some bond counsel prefer to specify an exception for the \$150,000,000 limitation, in which case the following language may be added:

“, except that the Company or another person, by taking action after the date hereof that causes the \$150,000,000 limitation set forth in Code Section 145(b) to be exceeded, may cause interest on the Bonds to be included in gross income retroactively to the date hereof. Moreover, such interest is not an item of tax preference”

IV. DISCLOSURE MATTERS

A. General

Municipal bonds are customarily sold in public offerings with a disclosure document typically referred to as an “Official Statement”—a bond prospectus—the purpose of which is to provide information about both the bonds being offered and the credit behind the payment of such bonds. A similar document, sometimes more limited in scope, often is used in private placements or other limited offerings.

The disclosure document is customarily a document of the issuer, although practice varies widely regarding which party drafts it. It is the “selling document” under both federal and state securities laws. As such, its purposes include making appropriate disclosure to investors. The discussion below is intended to assist counsel in identifying issues to consider in preparing or reviewing any portions of the disclosure document relevant to either the role or the opinion of bond counsel. A general discussion of the applicability of federal and state securities laws to bond offerings is beyond the scope of this report. The discussion below is not intended to identify or create standards for disclosure. In particular, the illustrative language is not intended to imply that the particular issue discussed always requires disclosure, or that the language suggested is always appropriate. Disclosure, as is constantly acknowledged, should reflect the particular facts and circumstances of the bond financing.

B. Role of Bond Counsel

Bond counsel does not customarily assume responsibility for the preparation of the disclosure document or the delivery of any opinion regarding its accuracy and completeness, although bond counsel may be retained to play a larger role. Bond counsel's engagement should reflect the limits on its responsibility for information in the disclosure document. Material in *Engagement Letters*, and in *Disclosure Roles—Practical Considerations—Disclaimers and Limitation in Engagement Letters*, provides useful insights and suggestions regarding the ability of bond counsel to limit its responsibility for information in the disclosure document. Familiarity with such material should sensitize bond counsel to appropriate actions needed to clarify its role and to limit liability for matters for which it does not assume responsibility.

Bond counsel does, however, customarily either prepare or review specific portions of the disclosure document. These portions may include the description of the bonds and their security, descriptions of certain aspects of the bond opinion and the tax-exempt status of the bonds, and summaries of the basic financing documents. Bond counsel in many cases delivers a separate or supplemental opinion to the underwriter regarding these sections. While its language varies significantly, the supplemental opinion usually addresses the accuracy of such sections. In most instances, the proposed form of the bond opinion (but not the supplemental opinion) is attached as an exhibit to the disclosure document.

When authorized to be shared with investors or to be printed on the bonds, the bond opinion itself may be viewed as a statement made in connection with the purchase or sale of securities, so that any material misstatement or materially misleading statement in the opinion could be actionable as a primary violation of Rule 10b-5. Even when bond counsel is not the drafter of language used to describe the opinion in the disclosure document, bond counsel appropriately may insist that any description of its opinion and role be accurate and complete.

C. Disclosure Issues

The following are areas where disclosure of opinion-related issues in the disclosure documents may be appropriate. This list is not intended to be comprehensive, and the appropriateness or extent of disclosure of any issue will depend on the facts and circumstances of a particular transaction. Disclosure in offering documents need not be limited to those items required under a Rule 10b-5 standard. In addition, if an “unqualified” opinion is to be delivered by bond counsel regarding the validity and tax-exempt status of the bonds, no special or additional disclosure is generally necessary with respect to the matters addressed in the opinion. *But see* “Tax Issues—Post-Issuance Tax Compliance,” below.

1. Description of Opinion and Role of Bond Counsel.

The bond opinion is customarily referenced in a section variously titled “Legal Matters,” “Legal Opinions,” or “Bond Counsel Opinion.” As discussed below, matters relating to the opinion regarding tax exemption are frequently addressed in a separate section, such as “Tax Matters” or “Tax Exemption.”

To ensure that bond counsel’s limited disclosure role is made clear, this section often contains language indicating the limited role of bond counsel and reflecting the specific language of the bond opinion, as suggested in the model opinions, disclaiming responsibility for the general accuracy and adequacy of the disclosure document. The scope of this language may depend on whether the form of the bond opinion is attached to the disclosure document. The following is illustrative of language used:

“The opinion of bond counsel will be limited to matters relating to the authorization and validity of the Bonds and the tax-exempt status of interest thereon, as described in the section “Tax Matters,” and will make no statement regarding the accuracy and completeness of this [disclosure document].”

As discussed more fully below, and particularly where such ideas are expressed in the bond opinion, disclosure may include the fact that the bond opinion speaks only as of its date, and that bond counsel is not retained to monitor compliance by the parties after issuance. In addition, the limited assurance of a legal opinion (in contrast to a guaranty) is sometimes disclosed in language substantially similar to the following:

“Bond Counsel’s opinions are based on existing law, which is subject to change. Such opinions are further based on factual representations made to Bond Counsel as of the date thereof. Bond Counsel assumes no duty to update or supplement its opinions to reflect any facts or circumstances that may thereafter come to Bond Counsel’s attention, or to reflect any changes in law that may thereafter occur or become effective. Moreover, Bond Counsel’s opinions are not a guarantee of a particular result, and are not binding on the IRS or the courts; rather, such opinions represent Bond Counsel’s professional judgment based on its review of existing law, and in reliance on the representations and covenants that it deems relevant to such opinions.”

An alternative to the final sentence above is as follows:

“The legal opinions to be delivered concurrently with the delivery of the Bonds express the professional judgment of the attorneys rendering the opinions regarding the legal issues expressly addressed therein. By rendering a legal opinion, the opinion giver does not become an insurer or guarantor of the result indicated by that expression of professional judgment, of the transaction on which the opinion is rendered, or of the future performance of parties to the transaction. Nor does the rendering of an opinion guarantee the outcome of any legal dispute that may arise out of the transaction.”

If this clarification is not included in the section that describes the tax opinion, a cross-reference to it may be included in that section.

2. Tax Issues

a. Post-Issuance Tax Compliance

As discussed above in Comment (N), “Conditions to Federal Tax Opinion,” bond counsel's federal tax opinion is limited to existing law, and is conditioned on the assumption of future compliance with all post-issuance requirements of the Code applicable to the bonds. Federal tax law in the last two decades, especially provisions of the 1986 Act, has vastly complicated the qualifications for tax-exempt status, and multiplied the circumstances in which tax exemption can be lost subsequent to issuance. This loss of tax exemption may be applied retroactively to the date of issuance. The disclosure document customarily includes disclosure regarding the existence of the post-closing risk of loss of tax exemption.

Where, as with the model opinion, the bond opinion does not specify the post-issuance compliance by which the opinion is qualified, the disclosure document typically does so in the “Tax Matters” section, or by cross-references to summaries of the tax compliance covenants. This section may refer to post-issuance concerns involving proper use of bond proceeds, rebate and capital expenditure violations, change in use of the bond-financed facility, *etc.*, but may also include more specific requirements depending on the type of bonds offered (*e.g.*, multi-family or single-family housing, 501(c)(3) financings). Such disclosure may be tailored to the specific post-issuance compliance requirements applicable to the type of bond issue being sold. In addition, particularly where such ideas are expressed in the bond opinion, the disclosure appropriately may point out that the bond opinion speaks only as of its date, and that, in most cases, bond counsel is not retained to monitor compliance by the parties after issuance. The following is one example of disclosure for a 501(c)(3) bond issue:

“The Internal Revenue Code and the regulations promulgated thereunder contain a number of requirements that must be satisfied subsequent to the issuance of the Bonds in order for interest on the Bonds to be and remain excludable from gross income for purposes of federal income taxation. Examples include: the requirement that the Borrower maintain its status as an organization exempt from federal income taxation by reason of being described in Code Section 501(c)(3); the requirement that the Issuer rebate certain excess earnings on proceeds and amounts treated as proceeds of the Bonds to the United States Treasury; restrictions on investment of such proceeds and other amounts; and restrictions on the ownership and use of the facilities financed with proceeds of the Bonds. The foregoing is not intended to be an exhaustive listing of the post-issuance tax compliance requirements of the Internal Revenue Code, but is illustrative of the requirements that must be satisfied by the Issuer and the Borrower subsequent to issuance of the Bonds to maintain the exclusion of interest on the Bonds from income for federal income taxation purposes. Failure to comply with such requirements may cause interest on the Bonds to be included in gross income retroactively to the date of issuance of the Bonds. The Issuer and the Borrower have covenanted in the Indenture and the Loan Agreement to comply with these requirements. The opinion of Bond Counsel delivered on the date of issuance of the Bonds is conditioned on compliance by the Issuer and the Borrower with such requirements, and Bond Counsel has not been retained to monitor compliance with requirements such as described above subsequent to the issuance of the Bonds.”

In appropriate circumstances and when consistent with the financing documents, the following language may be inserted into this paragraph:

“The Indenture, however, does not require the Issuer to redeem the Bonds or to pay any additional interest or penalty in the event that interest on the Bonds becomes taxable.”

If the disclosure document contains a “Bondholder Risks” section, the following language may be used:

“For information with respect to events occurring subsequent to issuance of the Bonds that may require that interest on the Bonds be included in gross income of the holders of the Bonds for purposes of federal income taxation, *see* "TAX MATTERS" herein.”

While all bonds are subject to loss of tax exemption for, as an example, failure to pay rebate, certain types of bonds involve specific requirements. This disclosure is usually accomplished by repeating the language from the bond opinion regarding post-issuance compliance and the possible consequences of failure to comply.

If the covenants of the issuer or other party to meet the requirements necessary to maintain tax exemption are limited to the requirements under existing law, consideration should be given to disclosing this fact.

b. Reliance

In the case where one firm delivers the validity opinion and another the federal tax opinion, disclosure may indicate that the firm’s federal tax opinion relies on the validity opinion of the other firm, as federal tax exemption is dependent on the bonds or other obligations having been validly issued. Any additional reliance may also merit disclosure. One example is the reliance by bond counsel, in rendering its tax opinion, on the opinion of other counsel regarding the status of a conduit borrower as an “exempt organization” under Code Section 501(c)(3). Indeed, disclosure may be appropriate in any case where bond counsel is relying on any other counsel for any matter essential to the conclusion of tax exemption. This issue frequently arises in connection with certificates of participation (“COPs”) in government leases where special tax counsel sometimes relies on the opinion of a local government attorney. If the opinion being relied on includes material qualifications or other limitations different from those included in the bond opinion, such other qualifications or limitations should be disclosed.

c. “Exploding” Opinions

As noted in Comment (P), paragraph 5, opinions that cease to be applicable under certain circumstances are often referred to as “exploding” opinions. Legal practice in the area of “exploding” opinions is still evolving. Two examples of language for “exploding” opinions currently used by some bond counsel are presented below. The Committee takes no position regarding the appropriateness or validity of either of these examples.

Example 1:

“... *except* that we express no opinion concerning any effect on such excludability of subsequent action that under the terms of the [Resolution/Indenture or Loan Agreement] may be taken only upon receipt of an opinion of counsel of nationally recognized standing in the field of municipal bond law that such action will not adversely affect such excludability....”

Example 2:

“We express no opinion regarding the excludability from gross income of interest on the Bonds for federal income tax purposes on or after the effective date on which any change contemplated by the [Resolution/Indenture or Loan Agreement] occurs or action is taken upon the approval of counsel other than ourselves.”

The first example does not as much provide for an “explosion” of the opinion as simply point out that the original bond counsel does not, in the original opinion, address the consequences of any subsequent changes to the documents that can be made only with a bond opinion. In this formulation, the full original bond opinion remains in effect, and only the effect of the post-issuance action is excluded. In such a situation, only a “no adverse effect” opinion need be rendered to permit a change, and investors may rely on the “no adverse effect” opinion for the issues that it addresses, and may continue to rely on the original opinion for all other issues. *But see* Comment (B).

In the second example, if counsel other than original bond counsel opines on changes to the bond documents, the original bond opinion expressly no longer addresses tax exemption after the changes. Bond counsel who follow the second example may be unwilling to extend the benefit of their tax opinion to bondholders after a change because of a concern that the “no adverse effect” opinion may be inconsistent with the basis on which their original opinion was rendered. If the second example is used, counsel rendering an opinion with respect to the change may be requested or required to opine not only on the consequences of the post-issuance event but also on the tax treatment of interest on the bonds (*i.e.*, effectively replacing *in toto* the original tax opinion that has “exploded”). Even when the tax opinion “explodes,” bondholders should retain the benefit of the original opinion to the extent that it has not “exploded” (*i.e.*, relating to the validity of the bonds and tax treatment of interest on the bonds as of the date of bond issuance, determined without regard to the consequences of the change on which the new counsel opined).

If bond counsel uses an express form of “exploding” opinion limitation, any accompanying disclosure document should clearly disclose that limitation and its consequences to promote understanding by both initial recipients and subsequent purchasers of the limitations of the opinion and the circumstances and manner in which it ceases to be applicable. If an opinion “explodes” after the issuance of the bonds, bondholders may have difficulty learning that the opinion may no longer be relied on with respect to some or all of the issues originally covered by the opinion. Additionally, bond purchasers after the date that the opinion “exploded” might be unaware that it is no longer in effect. *See Disclosure Roles*, at 148 and 149, for a discussion of standard delivery practices. For that reason, consideration should be given to disclosing whether a new opinion must be received as a condition to the action that terminates or limits the original bond

opinion (and, if so, the requirements, if any, for the new opinion) and whether (and, if so, how and when) bondholders will be notified of the action.

d. “Qualified” and “Unqualified” Opinions

Because the vast majority of bond opinions currently are “unqualified” opinions as described in Comment (H), disclosure should be made if the bond opinion is “reasoned” or “qualified” or otherwise is not “unqualified” as discussed in this report. See “Other Types of Opinions” herein. In this instance, the form of opinion should be included as an exhibit to the offering document.

e. Alternative Minimum Tax

The model opinions include language addressing the federal tax treatment of interest on the bonds under the alternative minimum tax. Disclosure with respect to the alternative minimum tax treatment of interest on the bonds should be included in the disclosure document.

f. “Bank Qualified Bonds”

If the issuer has designated the bonds as “qualified tax-exempt obligations” within the meaning of Code Section 265(b)(3), appropriate disclosure of such fact and its consequences should be included in the disclosure document.

g. Risk of IRS Audit

In recent years, the IRS has instituted a vigorous program of both random and targeted audits. Any audit of particular bonds can affect their market value. From time to time the IRS has announced that it will audit bonds of a particular type, or bonds implicating the interpretation of a particular section of the Code. Practice varies, but many bond lawyers believe that disclosure of the general risk of audit is not necessary in most circumstances. The following is one example of general disclosure that may be used if disclosure of the general risk of audit is determined to be appropriate:

“The Internal Revenue Service (the “IRS”) has established an ongoing program to audit tax-exempt obligations to determine whether interest on such obligations is includible in gross income for federal income tax purposes. Bond Counsel cannot predict whether the IRS will commence an audit of the Bonds. Owners of the Bonds are advised that, if the IRS does audit the Bonds, under current IRS procedures, at least during the early stages of an audit, the IRS will treat the [name of issuer] as the taxpayer, and the owners of the Bonds may have limited rights to participate in such procedure. The commencement of an audit could adversely affect the market value and liquidity of the Bonds until the audit is concluded, regardless of the ultimate outcome.”

Other issues to be considered for disclosure include whether the bonds are of a type more likely to be selected by the IRS for investigation, and whether ongoing audits are being conducted either of issues of the same type or of the same issuer.

h. Collateral Tax Consequences to Holders

If disclosure of tax consequences in addition to those covered by the bond opinion is deemed appropriate for the disclosure document, the following statement, or an expanded form thereof, may serve as appropriate disclosure:

“Prospective purchasers of the Bonds should be aware that ownership of the Bonds may result in collateral federal income tax consequences to certain taxpayers, including, without limitation, financial institutions, property and casualty insurance companies, individual recipients of Social Security or Railroad Retirement benefits, certain S corporations with “excess net passive income,” foreign corporations subject to the branch profits tax, life insurance companies and taxpayers who may be deemed to have incurred or continued indebtedness to purchase or carry or have paid or incurred certain expenses allocable to the Bonds. Bond Counsel does not express any opinion regarding such collateral tax consequences. Prospective purchasers of the Bonds should consult their tax advisors regarding collateral federal income tax consequences.”

i. Original Issue Discount

When bonds are sold with original issue discount, counsel should consider disclosure of this fact. The following language is one example of appropriate disclosure:

“In the opinion of Bond Counsel, under existing law, the original issue discount in the selling price of each Bond maturing on _____, to the extent properly allocable to each owner of such Bond, is excludable from gross income for federal income tax purposes with respect to such owner. The original issue discount is the excess of the stated redemption price at maturity of such Bond over its initial offering price to the public, excluding underwriters and other intermediaries, at which price a substantial amount of the Bonds of such maturity were sold.

“Under Section 1288 of the Internal Revenue Code of 1986, as amended, original issue discount on tax-exempt bonds accrues on a compound basis. The amount of original issue discount that accrues to an owner of a Bond during any accrual period generally equals (i) the issue price of such Bond plus the amount of original issue discount accrued in all prior accrual periods, multiplied by (ii) the yield to maturity of such Bond (determined on the basis of compounding at the close of each accrual period and properly adjusted for the length of the accrual period), minus (iii) any interest payable on such Bond during such accrual period. The amount of original issue discount so accrued in a particular accrual period will be considered to be received ratably on each day of the accrual period, will be excludable from gross income for federal income tax purposes, and will increase the owner’s tax basis in such Bond. Purchasers of any Bond at an original issue discount should consult their tax advisors regarding the determination and treatment of original issue discount for federal income tax purposes, and with respect to state and local tax consequences of owning such Bonds.”

The suggested language assumes that all interest payments made on the bond are “qualified stated interest payments” as defined in Treasury Regulations Sections 1.1273-1(c)(1)(i) or 1.1275-5(e), as applicable. If interest payments are not “qualified stated interest payments,” then such payments

must be included in the stated redemption price at maturity, for the purpose of calculating original issue discount, and will be accrued as part of the original issue discount.

Other special circumstances might merit additional disclosure. For example, original issue discount bonds subject to mandatory sinking fund redemption may require additional disclosure. Neither the opinion nor the disclosure document typically addresses circumstances where disposition of a bond may result in capital gain or loss or the consequences of secondary market discount. Counsel may consider whether disclosures relating to such topics should be included in certain circumstances.

j. Premium

Counsel should consider disclosure of the consequences to the initial purchasers when bonds are sold at a premium in the initial offering. Although neither the bond opinion nor the disclosure document typically addresses premium in the secondary market, counsel should also consider whether such disclosure should be included in certain circumstances. The following language is one example of disclosure in either event:

“An amount equal to the excess of the purchase price of a Bond over its stated redemption price at maturity constitutes premium on such Bond. A purchaser of a Bond must amortize any premium over such Bond’s term using constant yield principles, based on the Bond’s yield to maturity. As premium is amortized, the purchaser’s basis in such Bond and the amount of tax-exempt interest received will be reduced by the amount of amortizable premium properly allocable to such purchaser. This will result in an increase in the gain (or decrease in the loss) to be recognized for federal income tax purposes on sale or disposition of such Bond prior to its maturity. Even though the purchaser’s basis is reduced, no federal income tax deduction is allowed. Purchasers of any Bond at a premium, whether at the time of initial issuance or subsequent thereto, should consult their tax advisors with respect to the determination and treatment of premium for federal income tax purposes, and with respect to state and local tax consequences of owning such Bonds.”

3. Other Disclosure

a. Prospective Legislation

Disclosure on legislation currently before a state legislature or the U.S. Congress that may affect validity, tax exemption, or market value of bonds appropriately may be included in the disclosure document. In past years, legislation has been introduced in Congress that, if enacted, would retroactively deny tax exemption to interest on bonds even though, upon issuance, all then-existing qualifications for tax exemption were met. Some bond counsel insist on disclosure of this generic risk; others disclose only when specific legislation is pending. Facts and circumstances will affect disclosure decisions on specific legislation. These facts and circumstances include the identities and status of the sponsors of the bill and its status in the legislative process.

b. Litigation

As discussed above in Comment (T) under “No-Litigation Certificate,” in some circumstances bond counsel may deliver an “unqualified” opinion even if litigation is pending that challenges

the validity of the bonds or some critical covenant or security pledge with respect to the bonds. Such litigation may involve the bonds being issued, or may challenge other obligations being issued under the same statutory provisions or in reliance on legal conclusions required for bond counsel's opinion. Even if bond counsel delivers an "unqualified" opinion, disclosure of the existence of such litigation and its status may be appropriate. Bond counsel may reference such litigation in the bond counsel opinion, and a description of the litigation in the section of the disclosure document discussing the bond opinion may also be appropriate. Disclosure also would be appropriate if bond counsel is relying on the opinion of other counsel regarding the outcome of such litigation, as such other opinion is an essential link in the chain of conclusions sustaining the validity of the bonds.

This discussion does not address the issues relating to disclosure of litigation that may affect the creditworthiness of the issuer or conduit borrower.

c. Potential Conflicts of Interest

The Securities and Exchange Commission has asserted that "information concerning financial and business relationships and arrangements among the parties involved in the issuance of municipal securities may be critical to any evaluation of any offering." This assertion suggests that, in the view of the Securities and Exchange Commission, in certain cases the relationship of bond counsel to other parties, or assumption by bond counsel of other roles, may be material and therefore require disclosure. *See 1994 Interpretive Release—Primary Offering Disclosure—Areas Where Improvement is Needed—Conflicts of Interest and Other Relationships or Practices. See also GFOA Guidelines, Section XII.*

V. OTHER TYPES OF OPINIONS

Opinions other than “unqualified” opinions were considered to be beyond the purview of prior model bond opinion reports. While preparing this report, the Committee learned that, although opinions other than “unqualified” opinions are only used very rarely, there are instances in which “qualified” or “reasoned” opinions are being rendered by bond counsel, particularly in the context of certain privately-placed or secondary-market financings. Inclusion of the following discussion of “qualified” or “reasoned” opinions, however, is not intended as a recommendation that bond counsel provide such opinions in lieu of “unqualified” opinions in any particular circumstance.

As with “unqualified” opinions, “qualified” or “reasoned” opinions express bond counsel’s professional judgment regarding the legal matters being considered, but indicate a lesser degree of confidence that a court would agree with those legal conclusions. The form of qualification or degree of reasoning in a “qualified” or “reasoned” opinion will depend on the particular legal issue, the facts of the transaction, and relevant legal precedents and authority. The opinion should provide sufficient information for potential purchasers to determine whether an opinion is an “unqualified” opinion or a “qualified” or “reasoned” opinion. A potential purchaser should conclude that an opinion is “qualified” or “reasoned” if the opinion contains any discussion of conflicting cases or rulings, an analysis of legal authorities and precedents, or a phrase such as “while the matter is not free from doubt.” Additionally, “reasoned” opinions frequently provide that the conclusion “should” or “would” be as set out in the opinion (rather than “will” or “is”). *See Glazer and Fitzgibbon on Legal Opinions*, at 74-79 for a general discussion of “qualified” and “reasoned” opinions. In general opinion practice, “should” and “would” opinions are viewed generally as conveying an equal degree of professional judgment regarding the judicial resolution of issues in the opinion. *See TriBar 1998 Report*, at 607.

To the extent possible, “qualified” or “reasoned” opinions should indicate counsel’s level of confidence so that holders and prospective purchasers, in making an investment decision and in pricing the obligations, can evaluate the likelihood that the court will disagree with the conclusions stated by the opinion. A common phrase used in transactional tax opinions is “more likely than not.” Such an opinion indicates that, in the opinion giver’s professional judgment, more than a 50% likelihood exists that a court would concur with the conclusions in the opinion. *See Drafting Legal Opinion Letters, Second Edition*, by John Sterba (1992), §7.7, and Proposed Circular 230 Regulations released January 11, 2001, §10.35.

“Qualified” and “reasoned” opinions reflect a lower level of certainty in the conclusions expressed than in the case of an “unqualified” opinion. Accordingly, in addition to attaching the form of opinion to any disclosure document prepared for the issue, the opinion’s limitations should be disclosed in the disclosure document. So long as “qualified” and “reasoned” opinions remain infrequent in the municipal securities marketplace, this disclosure should be conspicuous. *See* “Disclosure Matters—Disclosure Issues—Tax Issues—‘Qualified’ and ‘Unqualified’ Opinions” herein.

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