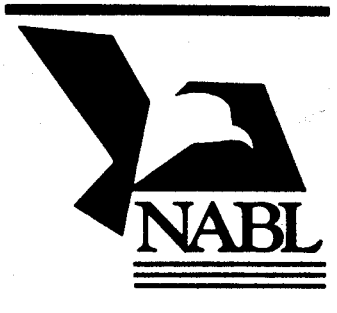
Model Letter of

Underwriters' Counsel

1999
Edition



NATIONAL ASSOCIATION OF BOND LAWYERS

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MODEL LETTER OF UNDERWRITERS' COUNSEL

[NOTE: Parenthetical letter references are to the Commentary immediately following this letter.]

[Letterhead of Underwriters' Counsel]

(DATE) **(A)**

(Name and Address) **(B)**

Re: (Name of Bonds)

Ladies and Gentlemen:

We have acted as your counsel **(C)** in connection with your purchase of the referenced bonds (the "Bonds") pursuant to a Bond Purchase Agreement dated _____ (the "Agreement") between _____ (the "Issuer") and you. Capitalized terms not otherwise defined herein shall have the meanings assigned to them in the Agreement.

We are of the opinion under existing law that the Bonds are exempt from registration under the Securities Act of 1933, as amended, **(D)** and that the Trust Indenture is exempt from qualification under the Trust Indenture Act of 1939, as amended. **(E)**

(F) We are not passing upon and do not assume any responsibility for the accuracy, completeness or fairness of any of the statements in the Official Statement and make no representation that we have independently verified the accuracy, completeness or fairness of any such statements. However, to assist you in your investigation concerning the Official Statement, we have reviewed certain documents [and have participated in conferences in which the contents of the Official Statement and related matters were discussed]. During the course of our work on this matter, no facts have come to our attention that cause us to believe that the Official Statement (except for any financial and statistical data and forecasts, numbers, estimates, assumptions and expressions of opinion [, and information concerning the Letter of Credit and the Bank] [, and information concerning the Investment Agreement and the provider thereof] [, and information concerning the Bond Insurance Policy and the Bond Insurer] [, and information concerning The Depository Trust Company and the book-entry system for the Bonds] [, and information concerning [describe particular litigation]]contained or incorporated by reference in the Official Statement and its Appendices, which we expressly exclude from the scope of this sentence) **(G)** contains as of the date hereof any untrue statement of a material fact or omits to state any material

fact necessary to make the statements made therein, in the light of the circumstances under which they were made, not misleading. **(H)**

This letter is furnished by us solely for your benefit and may not be relied upon by any other person or entity. **(I)** We disclaim any obligation to supplement this letter to reflect any facts or circumstances that may hereafter come to our attention or any changes in the law that may hereafter occur.

(J)

Very truly yours,

Commentary

(A) Date of the Letter

The letter is ordinarily dated and delivered the date of the closing and speaks only as of its date.

(B) Addressees; Clients; Conflicts

The letter should be addressed to the client of underwriters' counsel, whether counsel considers the client to be the senior managing underwriter or the underwriters named in the Agreement. Establishing the identity of the client by engagement letter is advisable. Selling group members (and others) whose interest is limited to a normal concession or allowance are not usually considered underwriters, and therefore are not clients of underwriters' counsel. Because all clients of underwriters' counsel may not be identified at the beginning of a transaction, underwriters' counsel may need to analyze and deal with conflicts of interest well into the transaction. Both NABL's *The Function and Professional Responsibilities of Bond Counsel* (Second Edition, 1995) and NABL's *Model Engagement Letters* (1998 Edition) include discussion of the American Bar Association's Model Rules of Professional Conduct (the "Model Rules") as they relate to conflicts of interest and provide guidance for dealing with situations involving conflicts of interest.

(C) Scope of Representation

The phrase "we have acted as your counsel" can have a wide array of interpretations unless counsel has taken care to define the scope of its responsibilities at the outset of the transaction. Specifying the terms of the representation in an engagement letter makes it possible to delineate clearly the duties to be undertaken and assists in clarifying the role of underwriters' counsel for both lawyer and client. Although NABL's *Model Engagement Letters* deals specifically with bond counsel, many aspects of the publication are helpful to bond attorneys undertaking the role of underwriters' counsel. *Model Engagement Letters* addresses the scope of an engagement as well as the application of several of the Model Rules. Model Rule 1.2 (which

provides that a lawyer may limit the objectives of the representation if the client consents after consultation) has particular significance for underwriters' counsel. The third paragraph of the Model Letter may need to be modified based on the duties agreed to be assumed by underwriters' counsel. Consideration should also be given to modifying the Model Letter to refer expressly to the engagement letter.

Because of heightened awareness by issuers of the importance of disclosure and the disclosure process, it has become common in some jurisdictions for issuers to retain special counsel whose role is to represent the issuer with respect to disclosure matters. In such transactions, the underwriters should nevertheless, as discussed below, conduct their own investigation, and underwriters' counsel will usually assist in that investigation and deliver a letter like the Model Letter.

(D) Securities Act Registration Exemption

Section 3(a)(2) of the Securities Act of 1933 (the "1933 Act") exempts "[a]ny security issued or guaranteed by the United States or any territory thereof or any State of the United States, or by any political subdivision of a State or territory, or by any public instrumentality of one or more States or territories . . ." from the requirement of the 1933 Act that certain publicly sold securities be registered with the Securities and Exchange Commission. Thus, most obligations of states, political subdivisions and public instrumentalities are exempt from registration under the 1933 Act.

When appropriate, underwriters' counsel should secure from other counsel no-registration opinions addressed to the underwriters with respect to other possible securities involved in the transaction, such as guarantees, letters of credit, and bond insurance. In a conduit transaction in which bond proceeds are loaned by the issuer to a third party, that loan obligation (whether or not evidenced by a note) frequently is a security that must be registered unless an exemption applies. Section 3(a) of the 1933 Act and SEC Rule 131 usually provide exemptions for such separate securities.

(E) Trust Indenture Act Exemption

The Trust Indenture Act of 1939 (the "1939 Act") requires that the SEC "qualify" indentures by a determination that certain required provisions are included and that the trustee is eligible. Section 304(a)(4) of the 1939 Act exempts from those requirements indentures providing for the issuance of "[a]ny security exempted from the provisions of the Securities Act of 1933 by paragraph (2)... of subsection 3(a) thereof." Since, as discussed in Comment (D) above, most obligations of states, political subdivisions and political instrumentalities are exempt from the registration requirements of the 1933 Act by Section 3(a)(2), trust indentures related to such obligations are also generally exempt from the qualification requirements of the 1939 Act.

(F) Underwriters' Antifraud Liability

Underwriters in municipal securities transactions are subject to the antifraud provisions of Section 17(a) of the 1933 Act, Section 10(b) of the Securities Exchange Act of 1934 (the "1934

Act"), and Rule 10b-5 promulgated under Section 10(b). Underwriters are also subject to the antifraud provisions contained in Section 15(c) of the 1934 Act.

An element of a private cause of action under Rule 10b-5 is the existence of materially misleading misstatements or omissions in the offering document (plus, for omissions, a duty to disclose to the plaintiff) which were made or omitted with scienter. Scienter is an "intent to deceive, manipulate or defraud" and may include recklessness. Underwriters should conduct a reasonable investigation concerning the accuracy and completeness of the disclosure document to avoid being found to have been reckless (and consequently to avoid having the requisite scienter under Rule 10b-5).

In proposing Rule 15c2-12, the SEC stated its view that underwriters, in order to satisfy their obligations under the antifraud provisions, must have a "reasonable basis for belief in the truthfulness and completeness of the key representations made in any disclosure documents used in offerings" and should "review the issuer's disclosure documents in a professional manner for possible inaccuracies and omissions." See SEC Release No. 34-26100, Sept. 22, 1988.

The accuracy of a disclosure document is the responsibility of the issuer of the bonds. See "*Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others,*" Securities Act Release No. 7049 (March 9, 1994) 59 FR 12748 (the "Statement"). Neither underwriters nor their counsel are primarily responsible for preparation of disclosure documents, but the underwriters should investigate the accuracy and adequacy of the disclosure. Underwriters' counsel often assists in this activity, but has no duty under the securities laws to do so. The scope and nature of the investigation will depend upon the particular circumstances surrounding an issue and must be determined in the context of materiality, reasonableness and practicability. This investigation by underwriters is sometimes referred to as "due diligence," but should not be confused with the "due diligence defense" available to defendants under Sections 11 and 12 of the 1933 Act, neither of which sections is applicable to municipal securities. See John M. McNally, "*Due Diligence in the Context of Municipal Securities Underwritings,*" *The Quarterly Newsletter of the National Association of Bond Lawyers*, Vol. 18, No. 1, March 1, 1997, 42, for a discussion of the legal justification for investigatory activity by underwriters in municipal offerings. See also the "*Report Regarding Recent SEC Enforcement Activities Involving Municipal Securities Transactions,*" Enforcement Subcommittee of the National Association of Bond Lawyers, July 1, 1997, for an overview of SEC enforcement activities involving municipal securities and the legal theories advanced by the SEC in these actions. According to the Statement, each member of the underwriting syndicate should either review the disclosure document and raise questions (and have them settled to its satisfaction) if it sees any "red flags," or determine that the senior manager is performing an adequate investigation on its behalf.

This paragraph of the Model Letter (and similar statements or opinions from other counsel participating in the transaction) provides evidence of appropriate investigation by the underwriters and the absence of recklessness.

(G) Exclusions from Rule 10b-5 Negative Assurance

It is customary to exclude from the scope of the statement made in this paragraph (and therefore from any implication of responsibility for) certain information provided by other parties or otherwise outside the scope of what underwriters' counsel should reasonably be providing advice about. This list is subject to adjustment (by either adding or deleting items) based on the particulars of a transaction and on expectations of the underwriters and willingness of underwriters' counsel (perhaps as stated in an engagement letter). The exceptions reflect the fact that other parties in the transaction (*e.g.*, underwriters, accountants, or issuer's or borrower's counsel) are in a better position to analyze such matters.

(H) Rule 10b-5 Negative Assurance

The latter part of this sentence tracks the language of Rule 10b-5. The sentence is framed as "negative assurance" that in the course of counsel's representation of the underwriters, it did not learn of material untrue information in the disclosure document or the omission of any material information. It implies that if counsel discovered material facts in the course of its representation of the underwriters, those facts have been disclosed. As discussed in Comment (F), underwriters' counsel often assists the underwriters in performing a reasonable investigation concerning the disclosure document. As stated in Comment (C), consideration should be given to detailing in an engagement letter the scope of the activities to be undertaken by underwriters' counsel in order to establish clearly those areas where the underwriters are getting assistance from their counsel.

(I) Reliance by Other Parties

The Model Letter is intended to create legal rights only in its addressees. Occasionally other parties, such as the issuer or the conduit borrower, request a "reliance letter" allowing those parties to rely on the letter of underwriters' counsel as if it had been addressed to those parties. Underwriters' counsel should use its own judgment in deciding whether to provide such a letter, recognizing that (a) the primary purpose of the letter of underwriters' counsel is to assist the underwriters in fulfilling their duty to have a reasonable basis for belief in the truthfulness and completeness of key representations contained in the disclosure document, and (b) providing a reliance letter will expand the number of parties to whom underwriters' counsel may be liable. Also, the "negative assurance" paragraph of underwriters' counsel's letter is limited by the terms of the engagement between the underwriters and their counsel, based upon mutually agreed upon allocation of responsibility. Because those limitations may not apply to third parties, underwriters' counsel should consider including appropriate limitations in any reliance letter.

Model Rule 2.3 indicates certain prerequisites for undertaking an evaluation of a matter, whether in the form of an opinion or otherwise, for a third party who is not a client. It should also be recognized that rendering opinions to non-clients can, under certain circumstances and under the laws of some states, negatively impact the attorney-client privilege and certain client defenses and claims.

(J) It should be recognized that particular circumstances may suggest (or particular underwriters may require) that matters be addressed by underwriters' counsel in addition to the matters addressed in this Model Letter. For example, underwriters' counsel may be asked to opine or give comfort to their clients concerning compliance with certain requirements of Rule 15c2-12 of the Securities and Exchange Commission.

Additional NABL Resources

Guidance on the role of underwriters' counsel in municipal transactions may be found in *Disclosure Roles of Counsel in State and Local Government Securities Offerings* (Second Edition, 1994) ("Disclosure Roles"). Disclosure Roles, a joint project between NABL and the ABA, provides a detailed discussion of the roles and opinions of various counsel in bond transactions, including underwriters' counsel. Disclosure Roles discusses the various formulations of letters or opinions of underwriters' counsel, as well as the legal framework therefor, the responsibilities of counsel in investigating and rendering the opinion or advice, and the potential liabilities of counsel. Also, many of the substantive legal areas discussed in the above Comments are covered in greater depth in the "Securities Laws" section of NABL's *Fundamentals of Municipal Bond Law* (1998). Other NABL publications may less directly assist underwriters' counsel in interpreting their role. For example, the *Model Bond Opinion Report* (1997 Edition) provides helpful references to publications dealing with the drafting of legal opinions in general.

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