MODEL LETTER OF DISCLOSURE COUNSEL

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INTRODUCTION: THE ORIGIN AND DEVELOPMENT OF DISCLOSURE COUNSEL

The development of the role of disclosure counsel to governmental issuers and conduit borrowers reflects (1) awareness of issuers of their legal responsibility for the material accuracy and completeness of the disclosure document used to offer their securities to the public and (2) recognition that good disclosure is helpful for access to the public market at attractive interest rates.

The major reason that disclosure counsel did not exist as a distinct role in transactions 50 years ago is that at such time little municipal disclosure, if any, was made. Real change began as fallout after the New York City financial crisis roiled municipal markets in 1974 and 1975. One result was the Securities Acts Amendments of 1975 (the "1975 Amendments") which, among other things, expanded the definition of "person" in the Securities Exchange Act of 1934 (the "1934 Act") to include a "government, or political subdivision, agency or instrumentality of the government." The 1975 Amendments made clear that, while municipal bonds are not subject to registration with the Securities and Exchange Commission, (1) the antifraud provisions of the federal securities law apply to the issuance and sale of municipal bonds and (2) governmental entities and their officials have potential liability under those provisions.

Thus, beginning in the late 1970s, municipal disclosure increased in both quantity and quality. While practice was never uniform, increasingly underwriters retained expert counsel in municipal bond offerings, especially negotiated offerings, with such counsel often assuming the role of principal drafter of the disclosure document.

Public finance lawyers serving as underwriter's counsel often looked for guidance from the world of registered offerings in corporate finance in meeting the requirements of Rule 10b-5 under the 1934 Act. Rule 10b-5 states that, in connection with the purchase or sale of any security, it is unlawful "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." This language is now routinely used in both closing certificates and negative assurance letters relating to the accuracy and completeness of municipal disclosure documents. This practice acknowledges that disclosure must meet the two-pronged test of (1) not having any material misstatements and (2) not suffering from any material omissions.

Some municipal issuers elected to utilize underwriter's counsel as the principal drafter of the disclosure document, but in the interests of continuity and efficiency, insisted that the underwriter's counsel be the same law firm for all of the issuer's offerings, even if the underwriter changed from bond issue to bond issue.[1] Meanwhile, the practice continued to be uneven as to what particular comfort regarding disclosure, if any, came from counsel to the issuer. Originally, issuer's counsel was responsible only for certain procedural matters and the absence of litigation and gave no advice as to the adequacy of disclosure generally. Many city and county attorneys felt uncomfortable giving "10b-5 opinions" or "negative assurance letters" with respect to disclosure, although lawyers for governmental issuers in a growing number of cases did increasingly give such assurance as underwriters required them.[2]

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[1] Under this practice a law firm with disclosure expertise was selected as permanent underwriter's counsel for all of a particular issuer's bonds.

[2] In the parallel development of disclosure for conduit bond issues, such as industrial development bonds and bonds for nonprofit colleges, hospitals and other facilities, the practice more quickly duplicated that of traditional corporate finance, with the conduit borrower, *i.e.*, the private corporate or nonprofit borrower, employing counsel willing and able to give the traditional issuer's counsel negative assurance letter as to disclosure.

A solution to these concerns evolved in the form of issuers selecting and utilizing their own disclosure counsel. This ensured that the issuer would have its disclosure prepared by lawyers whose duty was to the issuer itself. It also meant that the issuer had counsel who could competently and confidentially advise the issuer on tough disclosure questions. It also avoided the potential conflict of interest and other ethical problems arising from an issuer selecting counsel for its underwriter and permitted the issuer to impose whatever standards and practices it deemed appropriate in terms of preferences for local counsel and minority and women-owned firms.[3] Thus, disclosure counsel began to be employed with some regularity by large, frequent issuers, and such counsel usually assumed the role as principal drafter of the disclosure document.

The use of disclosure counsel also eliminated many of the difficulties raised when issuers chose to sell their securities through competitive bidding. In such cases, neither underwriters nor underwriter's counsel were present in the production of the disclosure document.

SEC enforcement actions have promoted and encouraged the use of disclosure counsel. Starting with its actions against Orange County, California in 1996, the SEC has stressed the responsibility of issuers for their own disclosure. And, in a number of settled enforcement cases, the SEC has required the issuer to retain an independent third party to review disclosure procedures, including "the hiring of internal personnel and external experts for disclosure functions."[4] More recently, the SEC has sought to impose the use of disclosure counsel on an issuer alleged to have systematically produced bad financial disclosure over many years. In the final judgment entered in its enforcement action against the town of Ramapo, New York and others,[5] the SEC obtained an injunction enjoining any offer or sale of municipal securities by the town or a related issuer for three years unless the town and related issuer have, "prior to each such offering, retained an Independent Disclosure Counsel not unacceptable to the SEC staff, and which are also unaffiliated with the bond counsel retained for such offering."[6]

So how did this development affect the traditional role of underwriter's counsel? In some cases, underwriters decided that the presence of disclosure counsel obviated the need to employ underwriter's counsel. This position has generally not prevailed in negotiated sales because underwriter's counsel performs important duties in its representation of the underwriter in addition to drafting disclosure, such as (1) advising the underwriter on disclosure matters, state law matters and MSRB rules; (2) assisting the underwriter in establishing a due diligence defense; (3) drafting and/or negotiating the bond purchase agreement and continuing disclosure undertaking and (4) delivering the standard underwriter's counsel letter of negative assurance.[7] The shift of drafting responsibilities to disclosure counsel usually reduces the time requirements in serving as underwriter's counsel.

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[3] See MSRB Notice, *"Issuer Selection of Underwriter's Counsel"* (Sept. 3, 1998), at http://www.msrb.org/msrb1/reports/0299v191/ucounsel.htm and Government Finance Officers Ass'n, "*Issuer's Role in Selection of Underwriter's Counsel"* (October, 2009), at http://www.gfoa.org/issuers-role--selection-underwriters-counsel (noting that the limited issuer role in the engagement of underwriter's counsel should be to ensure that underwriter's counsel is competent, has no conflicts of interest and charges reasonable fees).

[4] See for example SEC Release Nos. 33-8751; 34-54745 (November 14, 2006) (City of San Diego); SEC Release Nos. 33-9135; 34-14009 (August 18, 2010) (State of New Jersey); SEC Release No. 33-9389 (March 11, 2013) (State of Illinois); SEC Release No. 33-9629 (August 11, 2014) (State of Kansas).

[5] SEC Litigation Release No. 23997 (November 29, 2017).

[6] Similarly in its Municipalities Continuing Disclosure Cooperation Initiative ("MCDC"), the SEC has required as a condition of settlement that the issuer "establish appropriate written policies and procedures and periodic training regarding continuing disclosure obligations." While this does not directly require the employment of disclosure counsel, the effect has been to encourage this practice.

[7] The standard underwriter's counsel letter is not technically an "opinion," since it does not purport to express any opinion but simply states that nothing has come to counsel's attention that cause it to believe that the disclosure

The above developments promoted the continued expansion and evolution of the role of disclosure counsel. Two tasks remain central to their responsibilities: (1) helping the issuer identify matters requiring disclosure and (2) drafting the offering document using clear, effective disclosure language that permits the investor to understand the relevance of the information to the securities being sold.

The following Model Letter is provided to assist NABL members in their representation of issuers (or conduit borrowers) as disclosure counsel in connection with the issuance of municipal securities. The Model Letter contains references, indicated by capital letters, to Comments that follow the Model Letter and that expand upon issues relevant to the particular section of the Model Letter. Readers are encouraged to conduct their own independent research of original authority.

This Model Letter is intended as a guide. It includes alternative language, indicated by brackets. In addition, the Comments to this Model Letter provide, in some instances, alternatives to the language in the Model Letter. Other language may be customary in some jurisdictions and the language used in any particular disclosure counsel letter should be reviewed in light of, and conform to, the situation of the specific transaction, as well as internal firm and local opinion practice.

This Model Letter is derived, in part, from the Model Letter of Underwriter's Counsel, Second Edition, but it is not identical. NABL members are encouraged to examine the Comments concerning the negative assurance on preliminary and final official statements for a discussion of some of the issues involved.

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document contains material misstatements or suffers from material omissions. See NABL's *Model Letter of Underwriter's Counsel* (2017 Edition).

MODEL LETTER OF DISCLOSURE COUNSEL

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

[Letterhead of Disclosure Counsel]

(Date) (A)

(Issuer Name and Address) (B)

Re: (Name of Bonds) (C)

We have acted as disclosure counsel to you, and not any other person, (D) in connection with the issuance of the above-referenced bonds (the "Bonds").

(E) In providing the statement of belief set forth in the second succeeding paragraph, reference is made to [the Preliminary Official Statement dated _________________ (the "Preliminary Official Statement") and] (F) the Official Statement dated _________________ (the "Official Statement"). As disclosure counsel, we have reviewed [the Preliminary Official Statement and] the Official Statement and certain other documents and have participated in conferences in which the contents of [the Preliminary Official Statement and] the Official Statement and other matters were discussed. The purpose of our professional engagement was not to establish or to confirm factual matters set forth in [the Preliminary Official Statement or] the Official Statement, and we have not undertaken to verify independently any of such factual matters.

(G) In requesting and accepting this letter, you recognize and acknowledge that: (i) the scope of the activities performed by us described above were inherently limited and do not encompass all activities that you may be responsible for undertaking in preparing [the Preliminary Official Statement and] the Official Statement; (ii) such activities relied substantially on representations, warranties, certifications and opinions made by your representatives and others, and are otherwise subject to the matters set forth in this letter; and (iii) while statements of negative assurance are customarily given to underwriters of municipal securities to assist them in discharging their responsibilities under the federal securities laws, the responsibilities of the issuer of such securities under those laws may differ from those of underwriters in material respects, and this letter may not serve the same purpose or provide the same utility to you as it would to an underwriter of the Bonds.

(H) Subject to the foregoing and on the basis of the information we gained in the course of performing the services referred to above, we confirm to you that no facts have come to the attention of the attorneys in our firm rendering legal services in connection with this matter that cause them to believe that [the Preliminary Official Statement as of its date or (I)] the Official Statement as of its date or as of the date hereof, contained or contains any untrue statement of a material fact or omitted 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; (J) provided, however, we do not assume responsibility for the accuracy, completeness or fairness of the statements contained in [the Preliminary Official Statement or] the Official Statement, nor do we express any belief with respect to any financial and statistical data and forecasts, projections, 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 report of _______ contained in Appendix __thereto] [, and information concerning The Depository Trust Company and the book-entry system for the Bonds] contained or incorporated by reference in the [the Preliminary Official Statement or] Official Statement and its Appendices, which we expressly exclude from the scope of this paragraph. (K)

This letter is furnished by us solely for your benefit and may not be relied upon by any other person or entity. (L) 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. (A) (M)

Very truly yours,

COMMENTARY

(A) Date of the Letter

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

(B) Addressees; Clients; Conflicts

The client of disclosure counsel is the issuer (or, in the case of a conduit issue, the conduit borrower),[8] who relies on the letter as a part of its disclosure policies and procedures for ensuring the accuracy of the preliminary official statement and the official statement and protecting itself from liability under Rule 10b-5 (discussed further in Comment (H), Antifraud Liability). Therefore, the letter should be addressed to the issuer. The issuer's reliance on the letter does not diminish the issuer's overall legal responsibility for the accuracy and completeness of disclosure in the offering document. See Comment (D), Scope of Representation, and Comment (L), Reliance by Other Parties, for discussions related to the scope of representation of disclosure counsel and reliance letters.

(C) Name of Bonds

Although this Model Letter uses the term "Bonds," the securities to which this letter can apply include bonds, notes, certificates of participation, leases and other forms of municipal securities.

(D) Scope of Representation

The phrase "we have acted as disclosure counsel to" can have a wide array of interpretations unless care has been taken to define the scope of disclosure counsel's responsibilities at the outset of the transaction. By specifying the terms of the representation in an engagement letter, disclosure counsel can clearly delineate the duties it is undertaking. Although NABL's *Model Engagement Letters* (1998 Edition) ("*Model Engagement Letters*") deals specifically with bond counsel, many aspects of the publication are helpful to attorneys serving as disclosure 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 disclosure counsel. Consideration also should be given to modifying this Model Letter to refer expressly to the engagement letter and any limitations it places on disclosure counsel's responsibilities. For example, the first clause of this sentence could alternatively be expressed as "We have acted as disclosure counsel to you, pursuant to the Engagement Letter dated __________, …"

Another purpose of the phrase "we have acted as disclosure counsel to you, and not any other person," is to make clear that other transaction parties are not clients, since an attorney's responsibilities for an opinion to non-clients is different from the responsibilities to a client.

See Comment (L), Reliance by Other Parties, for considerations in providing a reliance letter to other parties. If a reliance letter is provided, a description in the letter of disclosure counsel's client relationship (*e.g.*, "acted as disclosure counsel to") should be made so that the recipient of a reliance letter does not assume a nonexistent attorney-client relationship.

[8] Throughout the commentary, references to the issuer should be presumed to refer to the issuer or, if applicable, the conduit borrower.

In most cases, underwriter's counsel will provide the underwriters with an expression of negative assurance similar to that provided to the issuer by disclosure counsel, and, albeit less frequently, provide a reliance letter to the issuer. The issuer should nevertheless, as discussed below, follow its disclosure policies, and disclosure counsel will usually assist or advise the issuer in implementing such policies and deliver a letter like the Model Letter.

(E) Disclosure Counsel's Review and Investigation Related to Negative Assurances

The language in the second paragraph of the Model Letter sets forth the basis for disclosure counsel's expression of negative assurance and circumscribes it within the limited nature of disclosure counsel's engagement, consistent with the limited scope of the "negative assurance" discussed in Comment (J), Negative Assurance. The language also confirms that the purpose of disclosure counsel's engagement was not to establish or independently verify factual matters set forth in the Preliminary Official Statement or the Official Statement.

Disclosure counsel often assists or advises the issuer in complying with its disclosure policies and procedures concerning the disclosure document (e.g. assists the issuer in demonstrating its reasonable care concerning the disclosure document). However, as the language in the letter makes clear, this assistance does not relieve the issuer of its responsibilities with respect to the Preliminary Official Statement and the Official Statement. As stated in Comment (D), Scope of Representation, consideration should be given to detailing in the engagement letter or in another communication to the issuer the scope of the activities to be undertaken by disclosure counsel so as to make clear the areas where the issuer is getting assistance from disclosure counsel. Additionally, disclosure counsel should address with the issuer how the issuer's activities undertaken in compliance with its disclosure policies and procedures should be documented. The disclosure counsel's negative assurance letter would not typically disclose that documentation.

However, to the extent the limited nature of disclosure counsel's assistance to the issuer in complying with its disclosure policies and procedures is not otherwise documented, consideration should be given to making that clear in the letter. For example, the second sentence of this second paragraph could be revised as follows:

> "As disclosure counsel, we have reviewed [the Preliminary Official Statement and] the Official Statement and only those documents described in Annex 1 hereto and have participated in only those conferences described in Annex 1 hereto in which the contents of [the Preliminary Official Statement and] the Official Statement were discussed."

To the extent disclosure counsel consulted other counsel with regard to particular matters, disclosure counsel may wish to indicate that, to the extent its negative assurance covers those matters, its belief is based on the advice of the other counsel. For example, the second sentence of this paragraph could be revised as follows:

> "As disclosure counsel, we reviewed [the Preliminary Official Statement and] the Official Statement and certain documents and have participated in conferences in which the contents of [the Preliminary Official Statement and] the Official Statement were discussed; further, our statement of belief set forth in the second succeeding paragraph is based on the opinion of _______________ with respect to the statements and information contained in [the Preliminary Official Statement and] the Official Statement under the heading '___________________'."

(F) Preliminary Official Statement

SEC Rule 159 under the 1933 Act codifies the SEC's position that disclosure for securities law liability is measured by the disclosure available to the investor at the time the investor made the commitment to purchase the security. The disclosure document available to the investor when it commits to purchase the bonds in a primary offering is generally the Preliminary Official Statement, with the final Official Statement prepared subsequent to the sale and sent with the confirmations. The *Report of the Subcommittee on Securities Law Opinions, committee on Federal Regulation of Securities, ABA Section of Business Law*, Negative Assurance in Securities Offerings (2008 Revision) (the "*ABA Report*") summarized the SEC's position as follows:

> [N]ew rules codified the SEC's view that the potential liability of a seller of securities for deficiencies in disclosure is based on the information about the issuer and the offering conveyed to prospective investors at or before the time when the contract of sale is entered into rather than the information in the prospectus sent with the confirmation of sale.

Because Rule 159 expressly applies to determinations of liability under Section 17(a)(2) of the 1933 Act, it would apply to SEC actions in the municipal context. As such, disclosure counsel may be asked by the issuer to address the Preliminary Official Statement as part of its disclosure procedures. If disclosure counsel addresses the Preliminary Official Statement, certifications obtained from the issuer (and, if applicable, and to the extent feasible, from other parties) should also speak to the Preliminary Official Statement, as well as the final Official Statement. Whether the Preliminary Official Statement is to be addressed in the letter should be discussed at the outset of the representation.

Additionally, if reference to the Preliminary Official Statement is included in the negative assurance letter, disclosure counsel should be mindful of any differences between the Preliminary Official Statement and the Official Statement (other than with respect to "permitted omissions" under Rule 15c2-12). Any differences between the two documents should be analyzed to determine if a supplement to the Preliminary Official Statement is necessary in order to provide the requested negative assurance. If there are changes to the disclosure and no supplement to the Preliminary Official Statement was prepared, by including the Preliminary Official Statement in the negative assurance letter, disclosure counsel may be viewed as stating its belief that such changes were not material and no supplement was necessary.

For a discussion of other issues regarding Preliminary Official Statements, see Comment (I), Date of Assurance Regarding Preliminary Official Statement.

(G) Acknowledgement of Limitations of Scope and Utility

The third paragraph of the Model Letter asks the client to acknowledge the limited scope of the "negative assurance" discussed in Comment (E), Disclosure Counsel's Review and Investigation Related to Negative Assurances, and Comment (J), Negative Assurance. The language also asks the client to acknowledge that the utility of a statement of negative assurance to an issuer will differ from its utility to an underwriter as discussed in Comment (H), Antifraud Liability.

(H) Antifraud Liability

Issuers of municipal securities transactions are subject to the antifraud provisions of Section 17(a) of the 1933 Act, Section 10(b) of the 1934 Act and Rule 10b-5 promulgated under Section 10(b).

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 that were made or omitted with scienter. Scienter is an "intent to deceive, manipulate or defraud" and may include recklessness. SEC enforcement actions have included fraud charges based on issuer negligence. One way to establish the absence of intent, or lack of recklessness or negligence, is to demonstrate reasonable care in ensuring the accuracy and completeness of the disclosure document. By requiring disclosure counsel to include this paragraph in its letter (and obtaining similar statements or opinions from other counsel participating in the transaction), the issuer provides evidence of such reasonable care.

However, the receipt of a negative assurance letter from disclosure counsel should be only one part of an issuer's disclosure policies and procedures. The application of such policies and procedures to the municipal securities of an issuer will depend upon the circumstances surrounding the particular securities to be issued and take into account such matters as materiality, reasonableness and practicability. For examples of such procedures, see *National Ass'n of Bond Lawyers, Crafting Disclosure Policies (1st ed. 2015)* ("*Crafting Disclosure Policies*"). The language of the third paragraph of the Model Letter, as noted in Comment (G), Acknowledgement of Limitations of Scope and Utility, informs the issuer that the letter may not serve the same purpose or provide the same utility to issuers as it would to an underwriter because the issuer does not possess an affirmative defense against a private cause of action under Rule 10b-5 .Further, a negative assurance letter from disclosure counsel, on its own, will not be sufficient, in and of itself, to safeguard against an allegation of negligence or recklessness.

(I) Date of Assurance Regarding Preliminary Official Statement

Although the model language provides the option for assurance regarding the Preliminary Official Statement only as of its date, the issuer may request that the Preliminary Official Statement be addressed both as of its date and as of the date of pricing or, if the bonds are sold via negotiated sale, the date of the bond purchase agreement. If counsel is inclined to provide assurance as of a date in addition to the dated date, consideration should be given to the fact that, in many transactions, pricing may occur over multiple days. Therefore, caution should be taken in addressing the Preliminary Official Statement as of the date of pricing in light of the uncertainty as to exactly when pricing occurs and the continuing attention that is required through the pricing period. Because of the certainty of the date, addressing the Preliminary Official Statement as of the date of the bond purchase agreement, when applicable, is preferable to addressing the Preliminary Official Statement as of the date of pricing. Addressing the Preliminary Official Statement as of the closing date is not appropriate since the Preliminary Official Statement is superseded by the final Official Statement.

When negative assurance refers to the Preliminary Official Statement as of any date other than its date, counsel should consider excluding from its coverage of the Preliminary Official Statement the items that Rule 15c2-12(b)(1) says do not have to be in the deemed final (i.e., Preliminary) Official Statement: "The offering price(s), interest rate(s), selling compensation, aggregate principal amount, principal amount per maturity, delivery dates, any other terms or provisions required by an issuer of such securities to be specified in a competitive bid, ratings, other terms of the securities depending on such matters, and the identity of the underwriter(s)."

For a discussion of other issues regarding Preliminary Official Statements, see Comment (F), Preliminary Official Statement.

(J) Negative Assurance

The latter part of this sentence tracks the language of Rule 10b-5. The sentence is framed as "negative assurance" that, in general terms, in the course of disclosure counsel's representation, it did not

learn of material, untrue statements in the disclosure document or the omission of any material information. Alternative formulations of the negative assurance sentence are also common, such as "led us to conclude" in place of "caused us to believe," and "no information" in place of "no facts." The *ABA Report* suggests that these differences in formulation do not change the subjective nature of the negative assurance being given. The sentence implies that if disclosure counsel discovered material facts in the course of its representation, those facts have been disclosed in the Official Statement. However, as stated in the second paragraph of this letter and as discussed in Comment (E), Disclosure Counsel's Review and Investigation Related to Negative Assurances, the sentence does not imply that disclosure counsel has made an investigation of every statement in the Official Statement or undertaken to identify relevant facts not stated in the Official Statement. It only confirms that the work that disclosure counsel did perform in connection with preparing and reviewing the Official Statement and other diligence documents did not cause counsel to believe that the Official Statement contained a misstatement or omission of material fact. See the *ABA Report*.

The sentence also limits the negative assurance to the lawyers in disclosure counsel's firm "rendering legal services in connection" with the bond issue. The *ABA Report* advises as follows:

> A statement of negative assurance by a law firm necessarily expresses only the actual subjective belief (*i.e.*, conscious awareness) of those lawyers in the firm who have actively participated in the process of preparing the offering document . . . .
>
> When a law firm acts as counsel to the underwriters, the lawyers who work on the offering are likely to be the only lawyers in the firm who are knowledgeable about the issuer. . . .
>
> While some underwriters object to the inclusion in a negative assurance letter of 'ring fencing' language to this effect, most lawyers believe that, based on custom and practice, the negative assurance statement should be understood by the recipient to be based solely on the knowledge of this limited group of lawyers.

Limiting the negative assurance in the manner suggested in the Model Letter makes explicit what the *ABA Report* advises should be the understanding of the recipients.

Notwithstanding the middle excerpt from the *ABA Report* restated above, a law firm acting as disclosure counsel may also represent the issuer on other matters, including as bond counsel, so that other lawyers at the firm may be knowledgeable about the issuer. Consideration should be given to identifying in an engagement letter or in the letter of disclosure counsel the lawyers rendering disclosure counsel services in connection with the bond issue to establish clearly the scope of the negative assurance. Further, consideration should be given to firm procedures to align with that scope.

As discussed in American Bar Ass'n, *Disclosure Roles of Counsel in State and Local Government Securities Offerings* (3rd ed. 2009) ("*Disclosure Roles*"), bond counsel in a transaction may be requested to give a supplemental opinion, addressed to the underwriter, regarding (among other things) the accuracy and adequacy of the disclosure in the Official Statement regarding the terms of the bonds, the summaries of the financing documents and the "Tax Matters" section. If bond counsel is also disclosure counsel, the negative assurance may be included in the supplemental opinion or in a separate letter of disclosure counsel. In either event, counsel should ensure that the areas of the Official Statement addressed by the "accuracy" opinion in its supplemental opinion do not conflict with any exclusions in its negative assurance, as discussed in Comment (K), Exclusions from Negative Assurance. For a discussion of alternative formulations of the "accuracy" opinion, see *Disclosure Roles* (page 120).

As discussed in Comment (E), Disclosure Counsel's Review and Investigation Related to Negative Assurances, disclosure counsel often assists the issuer in demonstrating its reasonable care concerning the disclosure document. As stated in Comment (D), Scope of Representation, consideration should be given to detailing in an engagement letter or in the letter of disclosure counsel the scope of the activities to be undertaken by disclosure counsel in order to establish clearly those areas where the issuer is getting assistance from its counsel.

Recipients often request, and the Model Letter provides, that negative assurance letters address the Official Statement both as of its date and as of the closing date. Although most lawyers are willing to give negative assurance as of the closing date, recipients' liability is unlikely to be determined by reference to that date (as noted above, under the SEC's rules applicable to municipal securities, the time of sale is the key reference point). Lawyers who give negative assurance as of the closing date often perform additional procedures to update their work to the closing date.

(K) Exclusions from 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 disclosure counsel can reasonably be expected to address. This list is subject to adjustment (by either adding or deleting items, such as information concerning particular litigation). The exceptions reflect the fact that other participants in the transaction *(e.g.,* underwriters, accountants, consultants or issuer's or borrower's counsel) are either in a better position to address such matters or that counsel does not bring any special expertise to bear on the topics involved.

Issuers may object to exclusions of matters that are not being covered by other participants in the offering process, such as accountants, actuaries or other experts. They reason that the letter is not only providing them negative assurance but giving them the benefit of counsel's reading of the entire disclosure document. While in practice disclosure counsel may suggest corrections throughout the document, many disclosure counsel insist exclusions are appropriate since otherwise disclosure counsel might be perceived as providing negative assurance on specialized information for which other offering participants or other experts are more qualified to express a view.

For a discussion of other issues regarding Preliminary Official Statements, see Comment (F), Preliminary Official Statement, and Comment (I), Date of Assurance Regarding Preliminary Official Statement.

(L) Reliance by Other Parties

This Model Letter is intended only for the benefit of its addressees. See Comment (B), Addressees; Clients; Conflicts. Typically other parties, such as the underwriters, in lieu of being added as an addressee request a "reliance letter" allowing those parties to rely on the letter of disclosure counsel as if it had been addressed to those parties. Disclosure counsel should use its own judgment in deciding whether to allow others to rely on its negative assurance, recognizing that (a) disclosure counsel's attorney-client relationship is with the issuer and not with any of the other parties to the transaction, and (b) providing a reliance letter will expand the number of parties to whom disclosure counsel may be liable. Also, the "negative assurance" paragraph of disclosure counsel's letter is limited by the terms of the engagement between the issuer and disclosure counsel, based on a mutually agreed upon allocation of responsibility. Because those limitations may not apply to third parties, disclosure counsel should consider including appropriate limitations in any reliance letter.

Model Rule 2.3 indicates certain prerequisites for undertaking an evaluation of a matter for a client, whether in the form of an opinion or otherwise, for a third party who is not a client. As Note [3] to Model Rule 2.3 advises, the attorney giving the evaluation must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken on behalf of the client.

The question of delivering the disclosure counsel letter to the underwriters is a particular matter for concern. As stated in "*Disclosure Roles*" (page 93):

> The delivery of such a reliance letter or opinion [the product of disclosure counsel] addressed to the underwriter raises important concerns given that the duties of … disclosure counsel run directly to the issuer, not the underwriter; and the issuer's interest may differ from the underwriter's interest in the disclosure process. There is also a question about the value of reliance by an underwriter on such comfort given by … disclosure counsel, since … disclosure counsel has not been engaged to assist in any "due diligence" on behalf of the underwriter and any such reliance letter or opinion may properly disclaim any such responsibility. Furthermore, the advice that underwriters usually obtain Rule 10b-5 letters "from their counsel" [reference to SEC Release No. 34-26100 (Sept. 22, 1988)] may not be satisfied if the underwriter obtains such a letter only from … disclosure counsel [to the issuer] and not also from their own counsel. Nevertheless, if an underwriter is advised that it is entitled to rely on the … disclosure counsel opinion, this may constitute an important element of an underwriter's defense to a charge of scienter, recklessness, or negligence.

If the decision is made to allow for underwriter reliance on the letter, it is recommended that a separate reliance letter be used for this purpose and it include language noting disclosure counsel (a) represented the issuer and (b) was not engaged to make an evaluation for use by the underwriter or otherwise assist in its "due diligence" or other legal responsibilities.

Additionally, as the *ABA Report* states, ultimate purchasers of securities do not have liability under the federal securities laws; thus, requests from ultimate purchasers for negative assurance are inappropriate. In municipal securities transactions, a similar issue can arise with municipal bond insurers and other credit enhancers. Although bond insurers and other credit enhancers potentially have liability for information they provide for inclusion in the offering document, generally they do not have liability for other information in the offering document; thus, requests from bond insurers and other credit enhancers for negative assurance are not appropriate.

(M) Other Related Matters.

Rule 15c2-12 requires underwriters to reasonably determine that an issuer (or other obligated person) has made a contractual commitment (an "Undertaking") to provide continuing disclosure of the type and in the manner specified in the Rule, unless the offering is exempt from the Rule's continuing disclosure requirements.

The sections of the Preliminary Official Statement and Official Statement describing the issuer's (or other obligated person's) obligations under Rule 15c2-12, the terms of the continuing disclosure undertaking, and any instances of violations of the issuer's (or other obligated person's) failures to comply with its prior continuing disclosure undertakings within the past five years are also within the scope of disclosure counsel's negative assurance discussed in Comment (J), Negative Assurance. The degree to which disclosure counsel should assist the issuer (or other obligated person) in implementing its disclosure

policies, conducting its own independent investigation, to discover any such violations, is a function of the nature of disclosure counsel's engagement, as discussed above in Comment (D), Scope of Representation.

Additional NABL Resources

Guidance on the role of disclosure counsel in municipal transactions may be found in *Disclosure Roles*, a joint project between NABL and the ABA Section of State and Local Government Law and Business Law Section, which provides a detailed discussion of the roles and opinions of various counsel in bond transactions, including disclosure counsel. *Disclosure Roles* discusses the various formulations of letters or opinions of disclosure counsel, as well as the legal framework for those letters, the responsibilities of counsel in investigating and giving 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*. Other NABL publications may also be of some assistance to disclosure counsel in performing their role. For example, the *Model Letter of Underwriter's Counsel* (2017) discusses many of the issues addressed here from the viewpoint of underwriter's counsel, the *Model Bond Opinion Report* (2003 Edition) provides helpful references to publications dealing with the drafting of legal opinions in general, *Professional Responsibilities of Bond Counsel* provides a survey of the Model Rules that pertain generally to municipal finance practice, and *Crafting Disclosure Policies* provides tools to advise issuers in developing written disclosure policies and procedures.

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