

# State Law Issues

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# State Law Issues in Tax-Exempt Financings



Basis for Bond Counsel Opinion



Issuer Counsel Opinion



Disclosure Regarding Sources of Repayment and Enforcement of Remedies as it Relates to State Law



Other State Law Matters

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# Bond Counsel Opinion

## Components of the Bond Counsel Opinion:

- **Validity & Enforceability**
  - Duly Authorized and Executed
  - Valid and Binding Obligation
  - Source of Payment or Security for the Bonds
- **Tax Exemption**
  - Federal
  - State

## NABL Standard: “Firmly Convinced”

## Bond Counsel Opinion vs. Issuer Counsel Opinion

# Issuer Counsel Opinion

## Components of the Issuer Counsel Opinion

- Issuer's legal authority to issue debt
- Obligations are valid and binding
- Enforceability of executed documents
- Compliance with state law issues
- No default, breach or violation of existing documents, etc. because of issuance of this debt
- No litigation certification

# Validity & Enforceability

## Governing Body's Exercise of Power

### Dillon's Rule vs. Home Rule

- Home Rule: Local government's right to rule itself cannot be taken away and is limited only by reference to state and federal constitutions
- Dillon's Rule: Local government's authority comes only from the state and can be taken away by the state.

### Sources of Authority

- State Constitution
- State Legislation
- Municipal Charter and/or Code
- Prior Actions of the Governing Body

# Validity & Enforceability

Election or  
Referendum  
Requirements

Required  
Findings

Notice and State  
Filing  
Requirements

Open Meeting  
Requirements

Quorum  
Requirements

Number of  
Readings

Public Hearing  
Requirements

# Validity & Enforceability

## Financing Structure

- Type of Debt/Financing Structure
- Financed Project is an Authorized Project
- Source of Repayment or Security

# Validity & Enforceability

## Financing Term Limitations

- Principal terms of the instrument (e.g., redemption, maximum maturity, maximum interest rate)
- Debt Limit
  - ☐ Is this obligation “debt”?
  - ☐ Is this “debt” subject to a state or local limit?
- Savings Percentage on Refunding
- Competitive Sale Requirements



# Consequence If Not Valid and Enforceable?

- ***Ultra vires* borrowings void and unenforceable**
- **Washington Public Power Supply System**
  - No authority for take or pay contracts used to secure the bonds
  - Defaulted on over 2.25 billion of revenue bonds
- **Puerto Rico**
  - ERS bonds issuance challenged based on lack of statutory authority of ERS to borrow through a public bond offering

# Bond Counsel Opinion: State Tax Exemption

Has this opinion been requested by the underwriter/lender?

Does the State provide a state tax exemption?

This opinion is specific to the constitutional or statutory language granting the state tax exemption

Applicability of state tax exemption when bonds are issued by a foreign issuer (e.g. Public Financing Authority)

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# State Law Components of the Issuer's Counsel and Borrower's Counsel Opinions

## **Issuer's Counsel (in addition to the aforementioned)**

- Statement of facts regarding litigation
- No other consent, authorization or approval is necessary

## **Borrower's Counsel**

- Borrower is duly organized
- Borrower is duly authorized
- Borrower has duly authorized, executed and delivered the documents
- Borrower documents are valid and enforceable
- Real estate documents are in proper form
- Valid lien
- No other governmental approvals are necessary

# Disclosure Regarding State Law Issues

## Federal Law: Rule 10b-5: Antifraud provisions:

It shall be unlawful for any person, directly or indirectly... **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 the light of the circumstances under which they were made, not misleading...** in connection with the purchase or sale of any security.

# Rule 10b-5 Obligations

## 10b-5 Certifications:

- **Bond Counsel:**
  - Description of the bonds, security for the bonds and tax matters
- **Issuer Counsel or Disclosure Counsel**
  - Description of the Issuer, litigation and risks
- **Issuer**
  - Muni Deal: Issuer will certify as to the entire OS excluding limited sections (e.g. tax matters, underwriter, DTC)
  - Conduit Deal: Issuer will certify only as to Issuer description and litigation relating to the Issuer
- **Borrower's Counsel**
  - Description of the Borrower and its operations, plan of finance and litigation
- **Borrower**
  - Borrower will certify as to the entire OS excluding limited sections (e.g. tax matters, issuer, underwriter, DTC)

# Disclosure Regarding State Law Issues

Material Information

Facts and  
circumstances

What would a  
reasonable  
investor want to  
know?

# Additional State Law Disclosure Considerations

## Security/Source of Repayment

- What does G.O. mean in this jurisdiction?
- What recourse is available?

## Enforcement of Remedies

- Acceleration
- Bankruptcy
- Foreclosure / repossession of property

## Approval Process

## Bondholder Risks

- Property tax-exemption, zoning, construction permits, licensure, regulatory matters

# Other State Law Considerations





# Other State Law Considerations

Separation of  
Church and  
State

Validation  
Procedures

Volume Cap for  
Certain Private  
Activity Bonds

# Questions

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