NATIONAL ASSOCIATION OF BOND LAWYERS

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THE ROLE OF ISSUER'S COUNSEL

Panelists:

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1. **The Prime Directive.** The main purpose of issuer's counsel: PROTECT THE ISSUER. Given increased tax, securities and other regulations and increased regulatory initiatives and activity in the past 20 years affecting issuers, the role of issuer's counsel has become ever more important and complex.

2. **Considerations for Issuers.** The following are some of the matters to be considered by the issuer in a financing and, thus, matters that may be important to issuer's counsel:

    - Meeting procedural requirements: sunshine laws, debt limits, voter approval requirements, compliance with statutory requirements, compliance with additional bond tests (ABT), bylaws, TEFRA, volume cap.

    - Availability of payment source: confirming that the source of funding to be used to repay the bonds is expected to be adequate in the future and will not pose undue risk to funding necessary for issuer operations. For conduit issuers, consider whether it is necessary or appropriate to develop policies and procedures that provide for minimum credit ratings and/or sales restrictions for lower-rated transactions.

    - Entering into a complex structure: variable rate debt, auction rate bonds, forward delivery, swaps, non-standard investments.

    - Tax status, analysis and risks: qualified use of proceeds and continued qualified use in the future, reasonable expectations as to expenditure of proceeds and useful lives of financed assets, arbitrage and yield restriction matters, among others.

- Disclosure risks: full and accurate disclosure, litigation, environmental issues, investigations, financial conditions.

- Post-issuance: financial audit presentation of transaction, tax and securities law compliance.

Issuer's counsel should be mindful of these issues and confirm they are being addressed by the issuer, bond counsel, or other appropriate parties to the financing.

3. **Know the parties and where their interests lie.** Understanding the roles of, and interacting with, the parties to a financing.

    - Is the Issuer a governmental issuer or a conduit issuer? Difference in approach between the two.

    - Which parties owe a fiduciary duty to the issuer: issuer's counsel, bond counsel (usually but not necessarily in conduit transactions), disclosure counsel (if any), municipal/financial advisor.

    - Which parties (and counsel) are (potentially) adverse to the issuer: underwriter[1], trustee/paying agent, swap counterparty, credit enhancer, conduit borrower.

    - Make sure the issuer understands the nature of its relationship with each of these parties. Make sure each of the parties is accommodating what is best for the issuer and not just what is best for themselves.

    - Consider, in light of the complexity of the offering and/or the issuer's finances and operations, whether to recommend that the issuer engage disclosure counsel to advise on primary market and post-issuance disclosures.

    - Be wary of any conflicts of interest on the part of any parties which could adversely affect the interest of the issuer in securing the best possible financing.

4. **The issuer's team.** Coordinating the issuer's approach to the financing.

    - Identify the staff person who is in charge of the issuer's approach to the financing. And identify the other staff people to be involved and what their

[1] Although the underwriter does not owe a fiduciary duty to the issuer, the underwriter does owe a "duty of fair dealing" to the issuer. See the MSRB discussion of this duty to the issuer in MSRB Notice No. 2021-03: http://cecouncil.org/media/266802/msrb-regulatory-reminder-2021-03.pdf.

roles are. Understand how your role as issuer's counsel fits in with the overall approach of the issuer to the financing.

- Consider what information other parties will need to document the transaction – issuer staff and issuer's counsel typically coordinate development of the official statement disclosure and gather the information needed by tax counsel, including information on how and when bond proceeds will be spent for new money bonds, or information about the use of the refunded bonds' proceeds for refunding bonds.

- Consider how the issuer will show compliance with additional borrowing tests or other documentary or statutory requirements.

- Consider the role of the issuer's board in the financing. Keep them informed of the progress of the financing. Coordinate the resolution or other official action to be taken by the board in approving the financing, and consider what process is appropriate for coordinating the review of the official statement by the appropriate issuer officials. And coordinate the process for the officers' execution of sale and closing documents.

5. **Disclosure document.** In traditional governmental offerings (*i.e.*, non-conduit deals), the Official Statement (the "OS") is primarily the issuer's disclosure document, even if it is initially drafted by another party such as bond counsel, disclosure counsel, the financial advisor, the underwriter or underwriter's counsel. Carefully review the OS, particularly the information describing the issuer and its operations and finances, and make sure you or issuer personnel are consulting the relevant subject-matter experts to confirm accurate and complete disclosure is being presented. The issuer's counsel knows the issuer better than any other professional working on the financing, and it is important that the issuer and its counsel carefully review the OS. Expect this to be a time-intensive process, especially if the issuer has not presented primary market disclosure in two or more years.

   In a conduit financing, issuer's counsel should confirm that the party most knowledgeable (usually the conduit borrower) provides certifications as to the applicable sections of the disclosure document. The issuer might consider a policy requiring that it be addressed on "negative assurance" letters provided by outside counsel and/or borrower's counsel relating to the disclosure document. Indemnity from the borrower to the issuer, usually provided through a side letter to the bond purchase contract, should also be considered.

6. **Kick the tires.** The issuer's counsel may not be an expert in public finance, but the issuer's counsel should be the official tire kicker for the issuer. As the transaction moves forward, ask questions if you do not understand something – there are no

"stupid" questions whether one dollar or millions of dollars of public funds are involved. The odds are, if you do not understand something, your issuer probably does not understand it either. Do not accept "that's just the way it's done" as an answer. You and the issuer deserve clear answers to your questions. Here are a few examples of good general questions:

- Ask bond counsel if there are any significant tax challenges or issues they are analyzing in connection with the financing and how they are getting comfortable with the issues. For conduit issues, work with bond and disclosure counsel to confirm that key risks to the issuer – whether during or after the transaction – are mitigated through its contractual arrangement with the conduit borrower to the extent appropriate. These might include closing representations being made solely by the borrower, post-issuance monitoring and reporting required of the borrower, insurance requirements, or indemnity provisions.

- Ask the municipal advisor and/or the underwriter if there are any financial risks involved in particular bond structures being considered. Do the structures rely on the issuance of future bonds or assume future market access will be available? Will credit support last for the life of the bonds, or will periodic renewals be required? Do the structures assume the ongoing health of a novel trading market? Could the structures result in an unexpected termination payment?

- Make sure your client and the larger financing team are thinking through all material matters that should be considered in developing the disclosure for the OS. Make sure individuals with both subject-matter knowledge and high-level strategic roles are reviewing the disclosure and providing their insights. Confirm the approach to disclosure approvals from the governing board with your client and bond and/or disclosure counsel.

7. **Issuer's Counsel opinion.** Early in the transaction, the issuer's counsel should inquire as to what opinion, if any, it will be required to deliver at closing. This is particularly true if the issuer is not a frequent issuer. For frequent issuers, there is likely a form of opinion that has been accepted in prior transactions. If the parties to the issuer's financial transactions vary from deal to deal (*e.g.*, bond, disclosure, underwriter's counsel), try to develop a standard opinion to use for all similar transactions. Consistency in opinion practice is important, particularly with respect to the scope of matters covered in the opinion as well as the knowledge standard employed. Also, the issuer's counsel opinion may be much more limited for a conduit issuer than it is for a governmental issuer.

In some cases, the bond counsel will prepare a draft of the issuer's counsel opinion; in that case, ask bond counsel to give you a draft of the opinion very early on in the course of the transaction for your review and comment. Review it carefully and make sure you are comfortable with the opinions you are required to render. Pay particular attention to opinions regarding outstanding or potential litigation. If there are any complicated litigation or investigatory matters, be sure to discuss them with the other parties before the Preliminary OS is distributed.

The issuer's counsel opinion is a key closing requirement for most public finance transactions, especially non-conduit issuances. While past practice and consistency are important, you can thoughtfully negotiate for changes in the scope or working of the issuer's counsel opinion – provided you work with all stakeholders who depend or rely on the opinion – including, first and foremost, bond counsel – on any changes well in advance of pricing.

Once the scope of the opinion is established, you should give consideration to what additional diligence is appropriate in order to render the opinion (*e.g.*, internal certifications). Some or all of the following matters may be included in an issuer's counsel opinion, depending on the issuer and the transaction:

- Nature of the organization (*e.g.*, political subdivision, municipal corporation, special district, public instrumentality).
- Due creation, valid existence, or both.
- Satisfaction of public meeting requirements.
- Due adoption of resolution or enactment of ordinance authorizing transaction.
- Enforceability of documents (with bankruptcy and other customary exceptions).
- No further approvals required.
- No conflict with material laws or regulations or material contracts.
- Absence of material litigation.

Practice tip: If requested to provide any opinion or other statement regarding official statement disclosures, know that this practice varies across the country. A negative assurance (*i.e.*, nothing has come to the attention of those lawyers working on the transaction) may be appropriate with respect to litigation and other regulatory matters, but not necessarily on the entire disclosure document. Interestingly, however, it is typical for issuer's counsel in corporate transactions to provide broader negative assurance.

8. **After the closing.** Post-issuance compliance is more important than ever – make sure your client is prepared to discharge its post-issuance responsibilities. After a bond issue closes, there are tax law requirements under the Internal Revenue Code ("Code") and related regulations and under the securities laws that continue to apply to the bonds. On the tax side, there are Code and regulation provisions governing the investment and expenditure of bond proceeds, the ownership, use and disposition of the bond-financed facilities, other qualified use of proceeds requirements, and arbitrage rebate requirements, among others. On the securities law side, there are contractual commitments to make annual financial disclosures and special event disclosures under continuing disclosure agreements.

    - If the issuer does not have existing post-closing policies and procedures, then before the bond issue closes, the issuer's counsel should work closely with bond and/or disclosure counsel and the municipal advisor to help the issuer develop these policies and procedures.

    - After closing, the issuer's counsel should work with the issuer to make sure it takes these policies and procedures seriously and follows them. Two great ways to keep policies front-of-mind are: (1) an annual training on matters relevant to the policies, and (2) planned periodic review of the policies for necessary updates.

    - In a conduit transaction, the issuer's policies may include delegation of certain post-issuance monitoring and compliance responsibilities to the conduit borrower (*e.g.*, the requirement that the borrower engage an arbitrage rebate consultant). The issuer and its counsel should coordinate the conduit issuer's policies with the borrower's policies to assure all areas of compliance are addressed and to determine how the borrower, if delegated certain post-issuance diligence review, complies with its responsibilities. For example, if the conduit borrower conducts port-issuance compliance review at certain intervals, how are the results of that review communicated to the issuer? Operationally, how will the issuer monitor compliance of multiple conduit borrowers?

9. **Be skeptical and advocate zealously.** When issuer's counsel is working on a financing, the transaction may often have the feel of a non-adversarial proceeding, but the stakes for your client are very high. The success of the financing is often integral to the issuer's economic well-being. Issuer's counsel should approach the financing being mindful of two things: the deal team will benefit from all counsel bringing an accommodating "let's get the deal done" frame of mind, but you should also bring the same mindset as you would a piece of litigation for your issuer – be a little skeptical,

ask questions, and above all pay attention to your gut instincts. If something bothers you, do not worry about your lack of expertise in public finance; do what you always do – diligently look out for your client.