NATIONAL ASSOCIATION OF BOND LAWYERS

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Closing Session: Tying It All Together

Faculty:

Ahmed Abonamah	City of Cleveland, Ohio - Cleveland, OH
Kimberly C. Betterton	McKennon Shelton & Henn LLP – Baltimore, MD
Deanna L.S. Gregory	Pacifica Law Group LLP – Seattle, WA
Carol J. McCoog	Hawkins Delafield & Wood LLP – Portland, OR
Doug Williams	Maynard Cooper & Gale P.C. – Birmingham, AL

This session will provide a final overview of a bond transaction, in an interactive and informal way, incorporating concepts from the General Sessions and the various targeted sessions. Panelists will take on the roles of issuer, underwriter, underwriter's counsel, bond counsel and tax counsel as they navigate through a bond transaction from start to finish.

I. Initial Diligence Call with Client

A. Use of Proceeds. The initial question asked at the start of a financing is often what are the intended projects for the financing (or, what prior debt is being refunded). This question is asked for many reasons – one of which being whether the debt may be issued on a tax-exempt basis. Section 103(b) of the Code provides that interest on a private activity bond that is not a qualified private activity bond is included in gross income.

1. The focus here is on determining whether we have a private activity bond and, if we do, whether it is a qualified private activity bond.

2. Generally, bonds are private activity bonds if either (i) both the 10% private business use test and the 10% private payment or security test of Section 141(b) of the Code are met or (ii) the private loan test of Section 141(c) of the Code is satisfied.

B. Private business use: The only use that is not private business use is use by (i) a state or local government, (ii) an individual not in a trade or business, or (iii) the general public. Note that use of bond-financed facilities is treated as the use of bond proceeds.

1. Organizations described in Section 501(c)(3) of the Code and the federal government are considered private business users (nongovernmental persons) for this purpose (but there are special qualified private activity bonds for 501(c)(3) organizations).

2. A "special legal entitlement" in favor of a nongovernmental person is considered private business use.

   a. Ownership by a nongovernmental person is private business use.

   b. Leases to nongovernmental persons represent private business use.

   c. Measurement of 10% use over term of bonds using a "space-time" analysis. *See below.*

   d. Certain wholesale purchase contracts in the utility context.

C. <u>Private payment or security test</u>.

Includes all private payments benefiting issuer, regardless of whether the payments are used to pay debt service on the bonds. (Note also that the payment can be a private payment even if it is not a payment made by the private business user.)

Limited to an amount corresponding to the amount of private business use.

Generally applicable taxes are not private payments.

D. <u>Unrelated or Disproportionate Use</u>: The 10% limit changes to a 5% limit if a portion of the bonds are used to financed private business uses that are "unrelated" to the governmental use. Similarly, a 5% limit applies where more than one facility is financed with the same issue and there is "disproportionate" private use.

E. <u>State Law Requirements</u>. Most states limit the types of projects that may be financed by any particular type of issuer (e.g., a municipality, county, industrial development board/authority, etc.) or type of obligations being issued (e.g., general obligations bonds, revenue bonds, etc.). Accordingly, during the early phase of a financing, bond counsel must determine the proposed use of proceeds from a borrowing satisfies applicable state law in this regard. State law will also dictate whether the bonds to be issued for the project must be sold competitively or on a negotiated basis. State law also dictates issuance authorization process requirements based on the type of obligation being issued (i.e., voter approval general obligation debt, versus revenue debt, etc.)

II. The Indenture and the Revenue Pledge

A. <u>Basic structure</u>. Typically, the main financing document to a bond transaction is the Trust Indenture or Trust Agreement (in some states and with certain issues/issuers, a master bond ordinance or resolution is used versus an indenture structure). There are two typical parties to this instrument: the issuer and the trustee. This is the basic security document of a bond transaction, providing the terms of the bonds, including payment dates, maturities, redemption provisions, registration, transfer and exchange, etc. The Indenture (or Trust Agreement) sets forth the legal structure for the security for the bonds, including:

i. creation/granting of the “trust estate” (the security for the bond issue);

ii. pledge of revenues and other collateral;

iii. flow of funds (establishing the priority for uses of pledged revenues);

iv. affirmative covenants (i.e., to maintain certain debt service coverage ratios or “rate covenant”, to maintain facilities or provide insurance);

v. negative covenants (covenant not to pledge facilities/revenues to other debt; covenant not to incur additional parity debt without meeting certain financial tests (i.e., an “additional bonds test” or “ABT”));

vi. default and remedy provisions;

vii. defeasance provisions (to allow for refundings);

viii. trustee-related provisions; and

ix. Opinions (e.g., that requirements for issuance of Additional Bonds have been satisfied)

B. Opinions. An opinion from bond counsel is customarily required to the effect that all conditions and requirements contained in the indenture for the issuance of parity bonds thereunder (e.g., certificate from independent accountant respecting satisfaction of the coverage requirement) are satisfied.

C. Revenue Pledge. The indenture pledges to securities issued thereunder a stream of revenues of the issuer. Additional securities may be issued in the future payable from such revenues on parity of lien provided certain conditions are satisfied.

D. Existing Parity Debt. Bond counsel should determine whether an issuer has other outstanding debt that affects the new issue. Information can be obtained from a combination sources, including the issuer, an underwriter, and a municipal advisor.

III. Preparation of Preliminary Official Statement and final Official Statement

A. The Preliminary Official Statement. Typically, counsel to the underwriter, disclosure counsel or bond counsel prepares the Preliminary Official Statement (“POS”) and the final Official Statement (the “OS”). The purposes of the POS and OS are to provide information to potential investors who need to make an investment decision.

Drafts of the POS may be used to provide potential credit enhancers, rating agencies and others data about the use of the bond proceeds, the project and sources of security for payment, and the issuer and other related information. The POS assists with marketing the securities. The OS describes the final terms of the marketing efforts and reflects the pricing information.

The POS and OS are not "contractual" documents in the deal, so they do not establish restrictions on the issuer as would an indenture, loan agreement, etc.; but, if post-closing, the descriptions or data described within the OS are different than the actual situation, the issuer could face investor concerns about misrepresentations in the original disclosure document.

B. Disclosure. The POS and the final OS contain information specific to the transaction (such as description of the bonds, the collateral securing repayment, summaries of events of default and remedies under the indenture and other indenture covenants. etc.). Certain of the "standard" areas covered in the POS and the OS include:

i. Summary of the Indenture/Authorizing Resolution or Ordinance

ii. Basic terms of the transaction and bonds

iii. Description of the function and characteristics of the financed property or the property being refinanced in the case of refunding bonds

iv. 2-5 year summary history of audited financials respecting the issuer or collateral and operating information

v. Basic risk factors for the type of security (i.e., revenues)

vi. Other "general" terms such as DTC language, forward-looking statements disclaimers, etc.

vii. Tax matters section

viii. continuing disclosure performance over Prior Five Years

ix. Ratings Section

C. Underwriter Responsibilities for POS and OS in Negotiated Transactions.

i. Pursuant to Rule 15c2-12, prior to the time an underwriter bids for, purchases, offers, or sells municipal securities, it must obtain and review a "deemed final" POS that contains information material to the securities being issued and a summary of any material failures to comply with prior continuing disclosure undertakings within the last five years.

ii. The underwriter will review the POS and OS for the bonds in accordance with and as part of its responsibilities to investors under the federal securities laws, as applied to the facts and circumstances of the transaction. An underwriter is deemed as making an implicit recommendation to investors to purchase securities it is offering. Consequently, the underwriter must have conducted proper due diligence to help ensure the POS and the OS do not contain any material misstatements or omit information necessary to make the information that is included not misleading. The underwriter is required under federal securities law to have a "reasonable basis" to make a recommendation;

iii. The underwriter must disclose whether underwriting compensation will be contingent on the closing of a transaction, and that compensation that is contingent on the closing of a transaction or the size of a transaction presents a conflict of interest because it may encourage the underwriter to recommend a transaction that is unnecessary, or to recommend that the size of the transaction be larger than is necessary; and

iv. The underwriter must disclose other potential conflicts of interest.

D. <u>Opinions to be Delivered Respecting the POS and OS</u>.

i. <u>Underwriter's counsel negative assurance letter (sometimes referred to as the "underwriter's counsel opinion")</u>. Underwriter's counsel typically addresses the letter to the underwriter, or if a syndicate, either to all of the underwriters in the syndicate or to the representative underwriter on behalf of itself and the syndicate. What is covered?

a. Neither the sale of the bonds to the underwriter nor the resale of the bonds by the underwriter to the public requires that the bonds be registered under the Securities Act of 1933. (Sometimes broader – not necessary to register any security.)

b. The bond indenture or similar instrument need not be qualified under the Trust Indenture Act of 1939, as amended.

c. The 10b-5 or "negative assurance" statement - On the basis of the underwriter counsel's participation in the transaction, but without independent verification of factual matters, nothing has come to our attention that would lead us to believe that the OS [and POS], as of its date and as of the date of the opinion letter, contains any untrue statement of material fact or omits to state any material fact necessary to make the statements therein, in light of the circumstances under which they were made, not misleading. Generally excludes financial and statistical data, certain sections of the POS/OS, and disclosures related to failures to file, if any, pursuant to prior continuing disclosure undertakings.

d. Compliance of the continuing disclosure undertaking with Rule 15c2-12 with respect to form.

ii. Disclosure counsel letter concerning disclosure. If disclosure counsel has been hired (sometimes the same firm as bond counsel), it is likely that the issuer will expect disclosure counsel to deliver a letter addressed to the issuer that includes the 10b-5 or "negative assurance" statement similar to statement provided by underwriter's counsel described above. In some cases, the underwriter will request that disclosure counsel also address the letter to the underwriter or provide a reliance letter to the underwriter

iii. Bond counsel opinion concerning disclosure. Bond counsel is regularly called upon to deliver a "fair summary" opinion to the effect that certain information in the POS and the OS to which bond counsel has the best knowledge of all participants (e.g., summary of the bonds, summary of the indenture/resolution, and tax matters section) fairly summarizes the matters purported to be summarized thereby.

IV. Underwriting Process

A. Continuing Disclosure Analysis. Rule 15c2-12 requires that final official statements contain "a description of the undertakings to be provided…and of any instances in the previous five years in which each [obligated] person failed to comply, in all material respects, with any previous undertakings in a written contract or agreement."

i. In 1994, the SEC stated that, "Critical to the evaluation of a covenant is the likelihood that the issuer or obligated person will abide by the undertakings. The definition of final official statement thus has been modified to require disclosure of all instances in the previous five years in which any person providing an undertaking failed to comply in all material respects with any previous informational undertakings called for by the amendments. This information is important to the market, and should, therefore, be disclosed in the final official statement. The requirement should provide an additional incentive for issuers and obligated persons to comply with their undertakings to provide secondary market disclosure, and will ensure that Participating Underwriters and others are able to assess the reliability of disclosure representations." The 1994 Adopting Release at n. 52.

ii. In 2010, the SEC stated that, "The Commission has determined further to expound upon its prior interpretations regarding municipal underwriters' responsibilities. As articulated in a prior interpretation [the 1994 Adopting Release], the Commission believes that it is doubtful that an underwriter could form a reasonable basis for relying on the accuracy or completeness of an issuer's or obligated person's ongoing disclosure representations, if such issuer or obligated person has a history of persistent and material breaches or has not remedied such past failures by the time the offering commences. The Commission believes that if the underwriter finds that the issuer or obligated person has on multiple occasions during the past five years failed to provide on a timely basis continuing disclosure documents, including event notices and failure to file notices, as required in a continuing disclosure agreement for a prior offering, it would be very difficult for the underwriter to make a reasonable determination that the issuer or obligated person would provide such information under a continuing disclosure agreement in connection with a subsequent offering. In the Commission's view, it also is doubtful that an underwriter could meet the reasonable belief standard without the underwriter affirmatively inquiring as to that filing history. The underwriter's reasonable belief should be based on its independent judgment, not solely on representations of the issuer or obligated person as to the materiality of any failure to comply with any prior undertaking."

iii. iv. An underwriter's duty in selling securities include establishing a sufficient belief that the issuer will comply with its continuing disclosure obligations in the future. Therefore, it is critical that review of prior continuing disclosure compliance is undertaken and documented, and that past "failures to comply in all material respects," are disclosed in the offering document. For issuers that have had historical issues or failures, the underwriter may require the adoption of policies and procedures for the issuer to follow for primary market disclosure (i.e. when preparing and approving the POS and the final OS) and secondary market disclosure (i.e., preparing and submitting annual reports and notices of material events). The establishment of such policies by an issuer helps the underwriter demonstrate a reasonable belief that on a going forward basis the issuer will be more successful in its continuing disclosure compliance. Indeed, issuers that violate federal securities disclosure standards or that enter settlement agreements with the SEC incident to alleged failures are often required to adopt such policies and have the same analyzed by an independent consultant.

B. Financial Structuring. The underwriter works with the issuer and its municipal advisor, if any, to structure the proposed securities so, among other things, principal matures at such time and in such amounts as the issuer desires or needs

C. Credit and Liquidity Enhancement. Credit enhancement may be utilized if the rating of such enhancement provider is high enough that, after taking into account the cost of such enhancement and the interest rate savings from the higher rated security, the issuer's overall costs of financing are reduced. A credit enhancement provider may be a bank providing a letter of credit or a bond insurer providing a bond insurance policy, a debt service reserve fund surety policy, or, in the case of certain types of bonds to finance lending programs, the credit enhancement provider may be a savings and loan association, a mortgage insurer, a federal agency or a private guarantor. In each case, the purpose of the credit enhancement is to provide, for a fee, additional security for the bonds that improves the credit rating of the bonds and thereby lowers the borrowing costs to the issuer or conduit borrower.

i. Types of Credit Enhancement Documents.

a. Letter of Credit. The letter of credit is issued by a letter of credit bank to the trustee or the bondholders guaranteeing the payment on the bonds. If the letter of credit bank pays the principal and interest due on the bonds, the letter of credit bank seeks reimbursement for such payment from the issuer or the conduit borrower, as applicable. It is fairly typical for the letter of credit to be a direct pay letter of credit meaning that the letter of credit is drawn upon any time that principal or interest is due on the bonds. However, sometimes the transaction involves a stand-by letter of credit in which the letter of credit is drawn upon only after the issuer or conduit borrower fails to make a scheduled payment on the bonds. The document that creates the contractual obligation of the issuer or the conduit borrower to repay the letter of credit bank for the letter of credit bank's payment on the bonds is called the reimbursement agreement. Terms and conditions vary depending upon the type of transaction involved. Important provisions include representations and warranties, fees payable to bank (including "increased costs" provisions), ability of bank to "participate" the credit facility to other banks, renewals and extensions of the credit facility, default and remedy provisions, including any "term-out" provisions, collateral provisions and choice of law provisions.

b. Bond Insurance Policy. For a premium (generally paid upfront from the proceeds of the bond issue), a bond insurer will insure timely payment of principal of and interest on the bonds when due. Bond insurance is typically a contingent obligation of the bond insurer – meaning that the bond insurer only pays under the policy in the event that the issuer or conduit obligor/borrower default in its payment obligation. In the event of a payment by the bond insurer, the bond insurer becomes subrogated to the rights of the bondholder that was paid from the bond insurance proceeds. The bond documents generally contain additional covenants specifically required by the bond insurer and enforceable by the bond insurer as a third-party beneficiary.

c. Debt service reserve fund surety bonds or reserve policies. While not specifically a form of "credit enhancement", these are typically issued by bond insurers for an upfront premium as an alternative to funding a debt service reserve fund with cash and investments. If, under the bond documents, a draw is required to be made on the debt service reserve fund, such payment will be made by the bond insurer. Typically there is a reimbursement agreement between the bond insurer and the issuer or conduit borrower that would require the bond insurer to be reimbursed in much the same manner as the issuer or conduit borrower would be required to replenish a draw on a cash-funded debt service reserve fund. An underwriter will work on arrangements with the provider of a debt service reserve fund surety bond if the overall cost of the same, when considered against the cost of funding a required reserve with cash or proceeds of a borrowing, is advantageous to the issuer.

d. Standby bond purchase agreement. This bank instrument functions in much the same way as a standby letter of credit but is only available in the instance of a failed remarketing on variable rate tender bonds on which the interest rate is reset on a daily or weekly basis. If the remarketing agent is unable to sell the bonds to a sufficient number of buyers and the borrower does not have sufficient amounts set aside to pay the bondholders, the standby bond purchaser will provide the liquidity necessary to purchase the unsold bonds. At this point the bonds will become "bank bonds" likely with a higher interest rate and potentially a shorter principal amortization schedule if not remarketed in a time certain period.

V. Tax Matters

A. Ownership; Lease; Management Contracts. As noted above, Private Business Use is the first of the two prong private activity bonds test. In general, the Private Business Use Test is met if a "nongovernmental person" directly or indirectly uses more than 10% of the proceeds of a bond issue in the aggregate (counting all private business uses together).

i. Who is a Nongovernmental Person? A nongovernmental person is an entity other than a state or local government, or an instrumentality of a state or local government. For example, a "nongovernmental person" would include any of the following: (a) the federal government, (b) a section 501(c)(3) organization, or (c) any for-profit entity or non-profit entity that is not a section 501(c)(3) organization (e.g., a corporation or partnership).

ii. How does Private Business Use Generally Occur? Under the Internal Revenue Code of 1986, as amended, and related regulations (the "Regulations"), a nongovernmental person will generally be a user of bond proceeds and bond-financed property as a result of: (a) ownership (meaning ownership for federal tax law purposes), (b) a lease/sublease, (c) a nonconforming management contract (see below), (d) a "take or pay" contract and certain other output contracts, (e) a research agreement with a nongovernmental person (see below), (f) a joint venture, or (g) other types of arrangements that convey a "special legal entitlement" or, in some cases, a "special economic benefit" with respect to the bond-financed property.

iii. Management Contract Guidelines**.** A management contract between a governmental entity and a nongovernmental person or entity with respect to bond-financed property may result in private use. The Regulations adopt a "facts and circumstances" approach in determining whether such use gives rise to private business use.

a. Revenue Procedure 2017-13**.** For a number of years Revenue Procedure ("Rev. Proc.") 97-13 set forth the "safe harbor" management contract guidelines issuers adhered to when entering into contracts for management of certain bond financed property. The Internal Revenue Service, however, has recently made a number of changes to these guidelines issuing Rev. Proc. 2016-44 on August 23, 2016, and Rev. Proc. 2017-13 on January 17, 2017, which modifies, amplifies and supersedes Rev. Proc. 2016-44. Under Rev. Proc. 2017-13 the Internal Revenue Service has established new "safe harbor" management contract guidelines that, if satisfied, will not cause the use under the management contract to result in private business use. Rev. Proc. 2017-13 is generally effective for management contracts entered into, materially modified or extended (other than pursuant to a renewal option) on or after January 17, 2017. Issuers may elect to apply Rev. Proc. 97-13 to contracts entered into before August 18, 2017.

b. General Requirements. If the contract is an eligible expense reimbursement arrangement it does not result in private business use. An eligible expense reimbursement arrangement is a contract under which the only compensation consists of reimbursements of actual and direct expenses paid by the service provider (i.e. the entity providing the management services for the issuer) to unrelated third parties and reasonable related administrative overhead expenses of the service provider. In addition, use of the tax-exempt bond financed property by a service provider will not be considered private business use so long as such use is functionally related to the services being provided under a "qualified management contract." A "qualified management contract" is one that complies with the provision of Rev. Proc. 2017-13.

c. General financial requirements. Payments to the service provider under the contract must be reasonable compensation for services that were rendered during the term of the agreement. The elements of reasonable compensation consist of eligibility for, the amount of and the timing of the payments of the compensation. Note, compensation cannot include a share of net profits from the operation of the property and the contract cannot impose on the service provider the burden of bearing any share of net losses from the operation of the property. Notwithstanding the foregoing, incentive awards are permissible if the incentive award is determined by the service provider's performance in meeting certain requirements (i.e. quality of services, performance or productivity – for instance, occupancy rate).

d. Term of the contract and revisions. The term of the contract, including all renewal options, must be no greater than the lesser of 30 years or 80% of the weighted average reasonably expected economic life of the property. A contract that is "materially modified" following its effective date must be retested to determine compliance with these guidelines and treated as a new contract.

e. Control over use of the property**.** The qualified user must exercise a significant degree of control over the use of the property. This requirement is satisfied if the qualified user must approve (i) the annual budget of the property, (ii) the capital expenditures, (iii) the disposition of any part of the property, (iv) the rates to be charged for the use of the property and (v) the use of the property.

f. Risk of loss of the Property. The qualified user must bear the risk of loss upon damage or destruction of the managed property. This does not prevent the qualified user from procuring insurance for the property.

g. <u>No inconsistent tax position</u>. The service provider must agree that it is not entitled to and will not take any tax position that is inconsistent with being a service provider to the qualified user with respect to the property. For example, the service provider must agree not to take depreciation or amortization deductions, investment tax credits or deduction for any payment as rent with respect to the property.

h. <u>No circumstances substantially limiting exercise of rights</u>. The service provider may not have any role or relationship with the qualified user that, in effect, substantially limits the qualified user's ability to exercise its rights under the contract.

B. <u>Other Use (including 501(c)(3) use)</u>. Certain types of private business uses are nevertheless permitted under special provisions of the Code. These are known as "qualified private activity bonds" and the Code contains several types. One common example are 501(c)(3) bonds.

D. <u>501(c)(3) Bonds</u>. This category of bonds has some features of governmental bonds and some features of private activity bonds so are sometimes considered a "hybrid" of the two.

i. <u>Section 145(a)(1): Ownership requirement</u>. All property to be financed must be owned by a Section 501(c)(3) organization or a governmental unit.

ii. <u>Use Requirement</u>. At least 95% of net proceeds (i.e., net of debt service reserve fund but including certain earnings on the investment of bond proceeds) must be used only by Section 501(c)(3) organizations engaged in exempt activities, or by states or local governmental units. Use by the federal government is not a "good" use as the federal government is considered a private party for this purpose.

iii. <u>Costs of issuance</u>. Costs of issuance (attorneys, underwriter discount) are limited to 2% of the issue price of the 501(c)(3) bonds.

E. <u>Private Payments</u>. In general, the Private Payments or Security Test (the second "prong" of the private activity bonds test) is met if payment of more than 10% of debt service on the bond issue is directly or indirectly (a) secured by any interest in property used or to be used for a private business use or payments in respect of such property or (b) to be derived from payments (whether or not to the issuer or any related party) in respect of property, or borrowed money, used or to be used for a private business use.

F. Private Payments or Private Security Test. The private payment test of the Private Payments or Private Security Test is met if the present value of all private payments over the term of the bond issue exceeds 10% of the present value of the debt service on the bond issue. The private security test of the Private Payments or Private Security Test is met if the fair market value of the pledged property determined as of the first date such property secures the bonds exceeds 10% of the present value of the debt service on the bond issue.

i. Payments Taken into Account. The Regulations provide that private payments include direct and indirect payments, made by private business users (whether or not to the issuer), to the extent allocable to that private business use. In addition, payments are only taken into account for the period of time that the financed property is actually used for a private business use.

ii. Generally Applicable Taxes Excluded. The Private Payments or Security Test excludes "generally applicable taxes." A generally applicable tax must have a uniform tax rate that is applied to all persons of the same classification in the jurisdiction and a generally applicable manner of determination and collection. An example is property taxes that are collected in a TIF district.

G. Reimbursements (a/k/a "pyramid bonds") (Regulations §1.150-2). Cannot finance facility costs paid before municipal issuer adopts a resolution of intent to finance with bonds and other requirements under §1.150-2 of the Regulations are satisfied. Special rules apply for qualified 501(c)(3) bonds that permit the resolution to be adopted by the user of the proceeds (i.e., the 501(c)(3) organization).

VI. Ratings

A. Ratings. Not all bonds are rated. Debt issued without an investment grade rating (casually referred to as "junk bonds") is not examined by any rating agency or other "seal of approval." For debt that is rated, the underwriter, along with the issuer and other members of the financing team, work with one or more rating agencies – the three primary agencies being S&P Global Ratings, Moody's Investors Service, Inc., and Fitch Rating Service - to obtain a credit rating for the securities to be issued.

B. Rating Presentation. Typically, a "rating presentation" is prepared and presented to one or more of the rating agencies from which the issuer desires a rating. This is typically accomplished over the telephone, though sometimes representatives of the rating agency will visit the issuer or the issuer will meet with them in New York. This presentation is the presentation of the issuer; however, it is typically prepared by the underwriter on behalf of the issuer or a financial advisor who may prepare reports for competitive deals or deals without an underwriter.

C. Rating Report. In issuing its rating, the rating agency prepares a report that is made available to the public. The report includes the rating and provides the agency's rationale in issuing it. The rating or ratings is/are included as part of the POS before being posted, although it is possible to post the POS without the rating so long as the rating is in place and properly circulated (likely via a pricing wire) prior to sale.

VII. Posting the POS/Pre-Pricing Items

A. Due Diligence Call. As mentioned above, the underwriter must have conducted proper due diligence to help ensure the POS and the OS does not fail to include material information as part of its obligations under Rule 15c2-12. One element of this diligence is a meeting or conference with the issuer where certain questions are asked about the content, scope and issuer's examination of the offering statement. This is commonly known as the "due diligence call".

B. Deemed final certificate. Rule 15c2-12 requires that the underwriter obtain and review a "deemed final" POS by the issuer before being sent to investors to make an investment decision. Being "deemed final" means that, but for the information that becomes available on the day of pricing (e.g., interest rates, what bonds are serials and what are term bonds and in what principal amounts, the amounts and timing of sinking fund installments, optional redemption provisions, sources and uses of funds and such other terms that are depended upon the pricing information), the POS has been officially determined by the issuer to be ready to send to investors. It is good practice to require the delivery of a certificate from an authorized officer or official of the issuer to the effect that the POS has been "deemed final" by the issuer in accordance with this rule (known as the "deemed final certificate").

C. Bond Purchase Agreement. A bond purchase agreement (a "BPA") is used in negotiated underwritings to commit to writing between the issuer and the underwriter (and the borrower in a conduit financing) the terms and conditions by which the issuer will issue the bonds to the underwriter and the price the underwriter will pay. Underwriter's counsel prepares the BPA before the sale date of the securities. Upon the sale, the BPA is updated to include the final pricing terms. Some of the subjects and items covered by a BPA include:

i. Pricing terms upon which the underwriter agrees to purchase the bonds upon their issuance;

ii. Representations and warranties of the underwriter and the issuer/borrower relating to the offering and sale of the bonds;

iii. Closing conditions (e.g., delivery of certain documents, certificates, opinions, etc.);

iv. "Outs" or events which would allow the underwriter to refuse delivery of the securities;

v. Indemnity provisions, choice of law, severability, etc.; and

vi. Deemed final representations.

D. Blue Sky Memorandum. Each state has its own laws for sale of securities. These laws are designed to prevent fraudulent practices, to, in some cases, require registration of entities selling or offering securities and to, in some cases, register the securities or provide notice of sale.

As a general rule, municipal general obligation securities are exempt from state securities registration, although notice filings and fees may be required depending on the type of security being sold. Nonetheless, recent defaults by the issuer on non-general obligation securities for the bonds may result in registration requirements. In addition, the type of sales (institutional vs. retail) will impact the application of the blue sky laws.

E. Posting the POS. After the foregoing has been completed the underwriter will deliver the POS to potential investors. This is typically accomplished by the underwriter uploading or "posting" the POS to a website that is accessed by potential investors in municipal securities. Typically a working group uses a professional printer like ImageMaster to facilitate putting the pieces of the POS together and delivering a final, signed-off proof to certain investor groups or lists.

VIII. Sale Date; Final OS

A. Agreement to Purchase and Issue Securities. On the sale date, the underwriter agrees to purchase and acquire the bonds from the issuer, and the issuer agrees to sell the bonds to the underwriter, at the prices and on the terms and conditions described in the BPA. When the BPA is signed the underwriter will then "write tickets" - selling such securities to customers of the underwriter, including retail customers (e.g., individuals) and institutional investors (e.g., mutual funds and insurance companies).

B. Preparation of Final OS. The POS is updated to reflect these final pricing terms and becomes the final OS. The final OS is defined by in Rule 15c2-12(f)(3) as "a document or set of documents prepared by an issuer of municipal securities or its representatives that is complete... and that sets forth... information, including financial information or operating data, concerning such issuers of municipal securities and those other entities, enterprises, funds, accounts and other persons material to an evaluation of the Offering...". The OS must be prepared within seven business days of the sale date and distributed by the underwriter to all initial investors in the securities.

IX. Pre-Closing and Closing

A. Closing and delivery papers. All certifications and evidence required to be delivered by the issuer necessary for bond counsel to deliver its opinion are executed and delivered by the issuer and other appropriate parties to an organizer of the closing (typically bond counsel). These typically include certificates, receipts, directions, requests, and requisitions that generally:

i. Document and certify the absence of material litigation or issues that could materially impair the financial position of the issuer and/or of the systems or revenue stream pledged to pay debt service;

ii. Document the incumbency of officers and officials of the governing body and document compliance with procedural matters such as open meeting law requirements;

iii. Document factual representations required by the BPA and the accuracy and completeness of "expertized" portions of the disclosure (feasibility reports and appraisals);

iv. document compliance with legal requirements (statutory, local resolution and contractual) for the issuance of the bonds (including effectiveness of resolutions, due execution of documents);

v. document the flow of funds at closing - the deposit and receipt of bond proceeds, investments of funds, payment of costs, defeasance of prior bonds (for refundings);

vi. instruct parties to take certain actions upon closing - deposit funds into accounts, record documents, file reports, release security (for refundings) and the like; and

vii. verify the accuracy of representations, warranties, certifications, elections, and requisitions (to determine correctness of payments, deposits and transfers), as well as allocation of proceeds, useful life calculations and good cost/bad cost issues.

B. IRS Forms. These are delivered to an organizer of the closing (typically bond counsel) and typically include:

i. 8038-G for governmental bond issues,

ii. 8038 for qualified private activity bond,

iii. Background evidence (e.g., IRS determination letter for qualified 501(c)(3) bonds) supporting qualified private activity bond financings, and

iv. Tax certificate setting forth certain findings and declarations required for the issuance of federally tax-exempt securities.

C. Approvals/signatures. Certified, signed minutes of all approvals of the securities, financing documents and other instruments and actions, along with signed copies of all financing documents (e.g., bonds, indenture, continuing disclosure agreement) are submitted to an organizer of the closing (typically bond counsel).

D. Delivery of opinions. At closing all requisite opinions are delivered. These typically include:

i. Approval opinion of bond counsel (and sometimes reliance letters),

ii. Supplemental opinion/fair summary opinion of bond counsel,

iii. Opinion of counsel to the Underwriter respecting the POS and OS, and

iv. Opinion of bond counsel respecting compliance with requirements for issuing parity bonds

E. Litigation check. Typically, litigation has been checked to make sure that there is no litigation existing that would affect the issuance of the bonds.

F. Transfer of funds. At closing, the underwriter pays the purchase price for the securities as directed by the issuer (typically, the indenture trustee or the paying agent for the securities) as detailed in a closing statement delivered at the pre-closing directing the funds at closing. Upon receipt, the trustee/paying agent and the underwriter contact The Depository Trust Company to close the transaction.