

The Role of Issuer's Counsel

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The Prime Directive



Protect the
Issuer!!!

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Considerations for Issuers

Procedural requirements.

Availability of payment
source.

Entering into a complex
structure.

Tax risks.

Disclosure risks.

Post-Issuance Risks.

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.

Who? Where?

Who is who and what are their interests?

- Parties that 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. Issuer should consider whether it needs to retain disclosure counsel.
- Parties that do not owe a fiduciary duty to the issuer and may be ADVERSE: underwriter, trustee/paying agent, swap counterparty, credit enhancer, conduit issuer.

Underwriter's duty of fair dealing with all parties. Rule G-17.

Make sure the issuer understands the nature of its relationship with each such party.

Be wary of any conflicts of interest of these parties and be aware of any "special relationships" among such parties.

The Issuer's Team

- **The Staff**

- Identify the internal financing team and their individual roles.
 - Figure out who the internal decision maker is.
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- **Issuer's counsel:** Understand how your role as counsel fits in with the staff's roles including internal or local counsel.
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- **Disclosure counsel:** Coordinate development of disclosure.
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- **Tax counsel:** Gather information needed by tax counsel.
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- **Financial Advisor:** What is the role?
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- Focus on compliance with additional bond tests (ABT) or other requirements.
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- **The Board:** Keep the board informed throughout the process. Coordinate the board's official action (resolution/ordinance). Coordinate review of OS by appropriate issuer officials.
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- Coordinate execution of documents.

Disclosure Document



In non-conduit deals, THE OFFICIAL STATEMENT IS PRIMARILY THE ISSUER'S DOCUMENT, even if the "drafter" or "scrivener" of the document is another party.



On conduit deals, confirm that the conduit issuer provides appropriate certifications as to the applicable sections of the OS.



Carefully review the OS, particularly the descriptions of the issuer and its operations and finances.



Consult with the relevant subject-matter experts to confirm that the disclosure is accurate and complete, such as the CFO or engineers or environmental experts.



It is particularly important that YOU as issuer's counsel carefully review the disclosure, because YOU know the issuer better than any of the outside consultants or experts do.



This process can be time intensive if the issuer has not issued debt in several years. Do not let "the market is hot" drive the schedule if more time is needed for disclosure.

Kick the Tires

- You, the issuer's counsel, may not be an expert in public finance, but you should be the OFFICIAL TIRE KICKER for the issuer. Don't be afraid to be a bit of a pain in the neck.
- Ask questions if you do not understand something.
- Insist on clear, plain language answers.
- Ask bond counsel if there are any significant tax challenges or issues they are analyzing and how they are getting comfortable with those issues. Even the smallest bond issue usually has an interesting tax issue or two, so "none" is probably not a responsive answer from bond counsel (or bond counsel may be sleeping).
- Ask the financial advisor or underwriter if there are financial risks associated with the structure.
- Once again, make sure the issuer is laser focused on disclosure.

Issuer's Counsel Opinion

You as issuer's counsel should inquire early on in the transaction what opinion, if any, you will be required to deliver at closing.

Review the proposed opinion carefully and make sure you are comfortable with it.

Pay particular attention to opinions regarding any existing or potential litigation BEFORE THE POS IS POSTED.

Past practice and consistency are important.

Negotiate changes to your opinion form with other parties well in advance of pricing.

Make sure factual assumptions in your opinion are covered in the issuer's general certificate.

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After the Closing

For many of the professionals involved in a bond issue, the closing is the end of the story. For the issuer, it is just the beginning. The issuer has significant post-issuance responsibilities.

Post-closing tax issues: investment and spending of bond proceeds, arbitrage, (private) use of bond financed facilities, sale of bond finance facilities.

Post-closing securities issues: SEC Rule 15c2-12 – annual financial and operational disclosures, special event disclosures (e.g., defaults, redemptions, rating changes).

Issuer should have written policies and procedures regarding post-issuance obligations. Issuer's counsel should be involved in developing them, along with bond counsel, the financial advisor and others.

In conduit deals, many of these obligations should be undertaken by the borrower.

Issuer's counsel should make sure the issuer or borrower is taking these policies and procedures seriously.

Be Skeptical and Advocate Zealously

- A bond issue may have the feel of a non-adversarial proceeding, but the stakes for the issuer are very high! It will have a profound effect on the issuer's financial condition.
- As issuer's counsel, approach the financing mindful of two things:
 - The deal team will benefit from all counsel bringing an accommodating "let's get the deal done" frame of mind.
 - Bring the same mindset as you would a piece of litigation for the issuer.
- Be skeptical! Ask questions! Pay attention to your gut instincts!

Final Thoughts

- **Enjoy the experience.** Bond issues are interesting endeavors, you get to interact with lot of interesting people, and you are serving the public interest. What could be better than that?
- **Be confident** in yourself and in the importance of your role. For the issuer and its self-interest, you are more important than anyone else at the table.

And... don't forget to...

PROTECT THE ISSUER!!!

Questions

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