

# Underwriter's Counsel Roundtable Advanced

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# Overview of Session

## Setting and managing expectations

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### Traditional roles of underwriter's counsel

- Due Diligence
  - Document Preparation/Review
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### Due diligence

- Goals/Timing/Scope
  - 2012 SEC Risk Alert/"Reasonableness" of Diligence Review
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### Disclosure considerations

- Statutory and Regulatory Requirements
  - "Stickers" the Offering Document
- 

### Recent developments and other considerations



# Setting and managing expectations

- Establish expectations early
- Outside counsel roles and responsibilities
- Role of in-house counsel
- Managing conflicts of interest
- Contents of engagement letter or memo to underwriter's counsel
- Does the engagement documentation include scope of due diligence, Rule 15c2-12 compliance check and opinion responsibilities?
- Does the issuer and/or borrower understand underwriter's counsel role (e.g. devil's advocate?)



# Role of underwriter's counsel

## Traditional Roles of Underwriter's Counsel

- Advise the underwriter regarding the rules promulgated by the MSRB e.g., MSRB G-17 letters
- Assisting the underwriter in conducting its due diligence investigation
  - Review compliance with ongoing disclosure undertakings
  - Review financial statements, underlying security documents, source of credit and security, board minutes
  - Due diligence checklists, memos and calls
- Prepare or review a preliminary official statement (or similar offering document)
- Deliver a 10b-5 assurance letter in connection with the offering document
  - See *Model Letter of Underwriters' Counsel* (NABL, June 2017)
- Prepare a bond purchase agreement
- Check that pre-conditions to closing set forth in the bond purchase agreement are satisfied
- Prepare a "blue sky" memorandum
- Review investor presentations
- Review bond documents, closing documents and opinions

# Due diligence

- Not defined in federal securities laws
- Shorthand reference to conduct and procedures that, if followed, could establish an affirmative defense against a claim that the underwriter was negligent or intentionally fraudulent
- Do interpretations suggest a “due diligence” obligation or is it just part of the underwriter’s duty to have a “reasonable basis” for belief in the key representations of the offering document before underwriting the offering?
- Goals
  - “Kick the tires”
  - Review underlying basis for tax-exempt status of bonds?
  - Confirm material compliance with prior ongoing disclosure undertakings
- Conducting due diligence
  - Goal is to conduct a “reasonable investigation”
    - Checklists, document review calls, document request memos, final due diligence call, site visit
    - Other ideas?
    - Pros/cons of each?



# Due diligence – specific considerations



## Timing

- What does it mean to for diligence to be “complete”?
- Bring-down before pricing?
- Considerations for forward delivery transactions



## Scope

- The “Goldilocks” issue
- Relevance of conduit issuer?
- Role of issuer’s counsel?  
Disclosure counsel?

# Due diligence – specific considerations



## Documentation

- Prepare comprehensive memo or summary?
- Identify “red flags” only?
- Memorializing the “live” diligence interview



## Rule 15c2-12 compliance

- Conduct independent review, hire outside consultant, or other?
- Review filings on EMMA to determine compliance
- “Diligence” the third-party diligence report



# Due diligence

## SEC Risk Alert – Strengthening Practices for the Underwriting of Municipal Securities (March 2012)



### National Examination Risk Alert

*By the Office of Compliance Inspections and Examinations<sup>1</sup>*

#### **In this Alert:**

*Topic: Duties of broker-dealers engaged in municipal underwriting.*

#### **Key Takeaways:**

*Examiners have observed that some broker-dealers have not maintained, nor did they require the maintenance of, adequate written evidence that they complied with their obligations under Securities Exchange Act Rule 15c2-12 and applicable Commission guidance regarding due diligence and supervision.*

*This Alert provides a number of examples of effective practices*

**Volume II, Issue 3**

**March 19, 2012**

### **Strengthening Practices for the Underwriting of Municipal Securities**

#### Background

In the aftermath of the 2008 financial crisis and related economic turmoil, there is greater awareness of the financial vulnerabilities faced by state and local governments. Thus, a current focus of the Commission's National Examination Program ("NEP") is the potential risk to investors in the municipal securities markets. Due to these potential risks, the staff believes it appropriate to examine a range of broker-dealers' municipal securities underwriting activities.

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# Factors for determining reasonableness in diligence review

The Commission has provided a non-exclusive list of six factors that it believes generally would be relevant in determining the reasonableness of an underwriter's basis for assessing truthfulness of key representations in a final official statement.

- 1 The extent to which the underwriter relied on municipal officials and other persons whose duties have given them knowledge of particular facts;
- 2 The role of the underwriter (e.g., manager, syndicate member, selling dealer);
- 3 The type of bonds being offered (general obligation, revenue, or private activity);
- 4 The past familiarity of the underwriter with the issuer;
- 5 The length of time until maturity of the securities; and
- 6 Whether the bonds are competitively bid or are distributed in a negotiated offering.

# Statutory and regulatory requirements re: disclosure and antifraud considerations



Section 10(b) of the  
1933 Act

Rule 10b-5

Section 15(c) of the  
1934 Act

Section 17(a) of the  
1933 Act

MSRB Rule G-17

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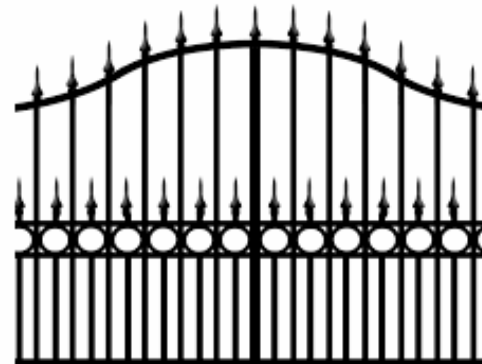
# Disclosure considerations

“By participating in an offering, an underwriter makes an implied recommendation about the securities. Because the underwriter holds itself out as a securities professional, and especially in light of its position vis-à-vis the issuer, this recommendation itself implies that the underwriter has a reasonable basis for belief in the truthfulness and completeness of the key representations made in any disclosure documents use in the offerings.”

## **-1988 Release by SEC**

“Underwriters are critical gatekeepers relied upon by investors to ensure that accurate information is being provided in municipal bond offering documents.”

**- Andrew M. Calamari, Director of the SEC’s New York Regional Office,  
Press Release 2017-77 (April 5, 2017)**



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# Disclosure considerations: supplementing the offering document

The offering document must at all times be in compliance with 10b-5 provisions

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 the light of the circumstances under which they were made, not misleading;

Opinion coverage usually contains the phrase that disclosure is “accurate [or complete and correct] in all material respects”.

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# Recent developments: limited offerings and private placements

**15c2-12(d) Exemption** – the Limited Offering Exemption applies to primary offerings of municipal securities if the offered securities are sold:

- “in authorized denominations of \$100,000 or more;” and
- “to no more than thirty-five persons each of whom the [underwriter] reasonably believes:
  - has such knowledge and experience in financial and business matters that it is capable of evaluating the merits and risks of the prospective investment; and
  - is not purchasing for more than one account or with a view to distributing the securities.”

# Recent developments: forward deliveries

Disclosure

Diligence

Deliverables (and timing thereof)

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# Other considerations

## Opinions

- The sooner distributed, the better
- Underwriter requirements
- Negotiating opinion coverage

## Bond Purchase Agreement

- Attaching the agreed upon form of opinion to the Bond Purchase Agreement
- Indemnities

## The Investor Presentation

- Underwriter's counsels role in preparation
- Questions from investors



# Other considerations

## Practice tips

- Direct, clear and ongoing communication with underwriter about roles/responsibilities, due diligence status, other considerations (what is keeping you up at night)
- Not all engagements are the same
- Understand the law and legal developments relating to obligations of underwriter client and how best to ensure that such obligations are met
- Assume SEC will knock on your door
  - Fashion your conduct and follow procedures to minimize such a risk
  - Assist underwriter in creation of a due diligence record that reflects such conduct and adherence to such procedures and conforms to underwriter's needs and expectations

Questions?

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