MODEL LETTER OF UNDERWRITERS' COUNSEL

SECOND EDITION

National Association
of Bond Lawyers

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NOTICE

Neither the National Association of Bond Lawyers ("NABL") nor its Securities Law and Disclosure Committee (the "Committee") takes responsibility as to the completeness and accuracy of the materials contained herein; accordingly, readers are encouraged to conduct independent research of original sources of authority. This report is provided to further legal education and research and is not intended to provide legal advice or counsel as to any particular situation. If you discover any errors or omissions, please direct your comments to the President of NABL or to the Chair of the Committee.

National Association of Bond Lawyers
601 Thirteenth Street, NW
Suite 800 South
Washington, DC 20005-3875

INTRODUCTION

This Model Letter of Underwriters' Counsel is provided to assist NABL members in their representation of underwriters in connection with the issuance of municipal securities. The Model Letter contains references, indicated by italicized, bold-face letters, to Comments that follow the Model Letter, which expand upon issues relevant to the particular section of the Model Letter. Readers are encouraged to conduct their own independent research of original authority.

This Model Letter is intended as a guide. It includes alternative language, indicated by brackets. In addition, the Comments to this Model Letter provide, in some instances, alternatives to the language in the letter. Other language may be customary in some jurisdictions, and the language used in any particular underwriters' counsel letter should be reviewed in the context of the specific transaction, as well as internal firm and local opinion practice.

This Model Letter of Underwriters' Counsel is the second edition. The first edition was published in 1999. Among other changes, this second edition incorporates language reflecting changing practice. One of those changes is the inclusion in this Model Letter of an opinion on whether a continuing disclosure undertaking meets the requirements of paragraph (b)(5) of Rule 15c2-12, which has become a common request of underwriters. Another change is the inclusion of negative assurance language concerning the preliminary official statement. The inclusion of language concerning the preliminary official statement is less common, and its inclusion in this Model Letter is not a recommendation by NABL that such language be included but only a recognition that some underwriters request such language. NABL members are encouraged to examine the comments concerning both the opinion on continuing disclosure undertakings and negative assurance on preliminary official statements for a discussion of some of the issues involved.

NABL members who serve as counsel to underwriters are encouraged to discuss with their client at the outset of the representation the form and scope of letter to be provided. These understandings are best memorialized in an engagement letter.

This Model Letter was prepared by an ad hoc subcommittee of NABL's Security Law and Disclosure Committee and approved by NABL's Board of Directors. The members of the ad hoc subcommittee are listed in Appendix A.

MODEL LETTER OF UNDERWRITERS' COUNSEL

[NOTE: Parenthetical letter references are to the Commentary immediately following this letter.]

[Letterhead of Underwriters' Counsel]

(Date) ***(A)***

(Name(s) and Address(es)) ***(B)***

Re: (Name of Bonds) ***(C)***

We have acted as counsel to [you] [the underwriters] ***(D)*** in connection with [your] [their] purchase of the referenced bonds (the "Bonds") pursuant to a Bond Purchase Agreement dated_____ _____ (the "Agreement") between _____ (the "Issuer") and [you] [you, as representative(s) of the underwriters]. Capitalized terms not otherwise defined herein shall have the meanings assigned to them in the Agreement.

(E) In rendering the opinions set forth in the numbered paragraphs immediately below, we have examined such law and such certified proceedings, certifications, and other documents as we have deemed necessary to render such opinions. Regarding questions of fact material to such opinions, we have relied on the certified proceedings and other certifications of public officials and others furnished to us without undertaking to verify the same by independent investigation.

Based on the foregoing, we are of the opinion that:

1. As of the date hereof and under existing law, the Bonds are exempt from registration under the Securities Act of 1933, as amended, ***(F)*** and the [Trust Indenture] is exempt from qualification under the Trust Indenture Act of 1939, as amended. ***(G)***

2. The [Undertaking] complies with the requirements of paragraph (b)(5) of Rule 15c2-12 of the Securities Exchange Act of 1934, as amended, in effect as of the date hereof. ***(H)***

(I) In providing the statement of belief set forth in the paragraph immediately below, reference is made to [the Preliminary Official Statement and] ***(J)*** the Official Statement. As your counsel, we reviewed [the Preliminary Official Statement and] the Official Statement and certain other documents and have participated in conferences in which the contents of [the Preliminary Official Statement and] the Official Statement and other matters were discussed. The purpose of our professional engagement was not to establish or to confirm factual matters set forth [in the Preliminary Official Statement or] in the Official Statement, and we have not undertaken to verify independently any of such factual matters.

(K) Subject to the foregoing, and on the basis of the information we gained in the course of performing the services referred to above, we confirm to you that no facts have come to the attention of the attorneys in our firm rendering legal services in connection with this matter that cause them to believe that [the Preliminary Official Statement as of its date or] ***(L)*** the Official Statement as of its date or as of the date hereof contained or contains any untrue statement of a material fact or omitted or omits to state any material fact necessary to make the statements made therein, in the light of the circumstances under which

they were made, not misleading; ***(M)*** provided, however, we do not assume responsibility for the accuracy, completeness or fairness of the statements contained in [the Preliminary Official Statement or] the Official Statement, nor do we express any belief with respect to any financial and statistical data and forecasts, projections, numbers, estimates, assumptions, and expressions of opinion [, and information concerning the Letter of Credit and the Bank] [, and information concerning the Investment Agreement and the provider thereof] [, and information concerning the Bond Insurance Policy and the Bond Insurer] [, and information concerning the report of _____ contained in Appendix __thereto] [, and information concerning The Depository Trust Company and the book-entry system for the Bonds] contained or incorporated by reference in [the Preliminary Official Statement or] the Official Statement and its Appendices, which we expressly exclude from the scope of this paragraph. ***(N)***

This letter is furnished by us solely for your benefit in your role as underwriter and may not be relied upon by any other person or entity. ***(O)*** We disclaim any obligation to supplement this letter to reflect any facts or circumstances that may hereafter come to our attention or any changes in the law that may hereafter occur.

Very truly yours,

COMMENTARY

(A) Date of the Letter

The letter is ordinarily dated and delivered the date of closing and speaks only as of its date.

(B) Addressees; Clients; Conflicts

The letter generally is intended to be relied upon by the underwriters as a part of the performance of their reasonable investigation obligations under the securities laws discussed in Comment (K), Underwriters' Antifraud Liability. Therefore, it should be addressed to the sole underwriter or, if there are multiple underwriters, to one or more managers or representatives authorized to act on behalf of all the underwriters (usually authorized to do so in an "Agreement Among Underwriters") to engage counsel for this purpose.

The addressees may not all be the clients of underwriters' counsel since identifying the client in transactions with more than one underwriter may be a matter of firm or attorney practice or negotiation with the underwriters. There are several approaches, including that the client may be considered to be the underwriting syndicate as an entity, the managing underwriters or only the senior managing underwriter, or each separate underwriter in the syndicate. Selling group members (and others) whose interest is limited to a normal concession or allowance are not usually considered underwriters and therefore are not typically clients of underwriters' counsel and so are not included as addressees. Ideally the client identification is confirmed in an engagement letter at the inception of the relationship. *See* William H. McBride, *Who is the Client of Underwriters' Counsel?*, 27 The Bond Lawyer: The Journal of the National Association of Bond Lawyers 33 (no. 2, June 1, 2005) (discussing the considerations related to the question of who the underwriters' counsel's client is). See Comments (D), Scope of Representation, and (O), Reliance by Other Parties, for discussions related to the scope of representation of underwriters' counsel and reliance letters.

Even with a well-crafted engagement letter, because all clients of underwriters' counsel may not be identified at the beginning of a transaction, underwriters' counsel may need to analyze and address conflicts of interest well after commencement of work on the transaction. Both NABL's *The Function and Professional Responsibilities of Bond Counsel* (Third Edition, 2011) ("*Professional Responsibilities of Bond Counsel*") and NABL's *Model Engagement Letters* (1998 Edition) include a discussion of the American Bar Association's Model Rules of Professional Conduct (the "Model Rules") as they relate to conflicts of interest and provide guidance for dealing with situations involving conflicts of interest.

(C) Name of Bonds

Although this Model Letter uses the term "Bonds," the securities to which this letter can apply include bonds, notes, certificates of participation, and other forms of municipal securities.

(D) Scope of Representation

The phrase "we have acted as counsel to" can have a wide array of interpretations unless care has been taken to define the scope of the underwriters' counsel's responsibilities at the outset of the transaction. By specifying the terms of the representation in an engagement letter, counsel can clearly delineate the duties it is undertaking as underwriters' counsel. Although NABL's *Model Engagement Letters* deals specifically with bond counsel, many aspects of the publication are helpful to attorneys serving as underwriters' counsel. *Model Engagement Letters* addresses the scope of an engagement as well as the application of several of the Model Rules. Model Rule 1.2 (which provides that a lawyer may limit the objectives of the representation if the client consents after consultation) has particular significance for

underwriters' counsel. Consideration also should be given to modifying this Model Letter to refer expressly to the engagement letter and any limitations it places on underwriters' counsel's responsibilities.

Another purpose of the phrase "we have acted as counsel to" is to make clear that other transaction parties are not clients since an attorney's responsibilities for an opinion to non-clients is different from the responsibilities to a client.

See Comment (O), Reliance by Other Parties, for considerations in providing a reliance letter to other parties. If a reliance letter is provided, a description in the letter of underwriters' counsel's client relationship (*e.g.*, "acted as counsel to") will help prevent the recipient of the reliance letter from assuming a nonexistent attorney-client relationship.

Because of heightened awareness by issuers of the importance of disclosure and the disclosure process, and to provide continuity and coordination when multiple firms act as bond counsel from time to time or for particular series of bonds making up a single offering, it is customary in some jurisdictions for issuers to retain disclosure counsel whose role is to represent the issuer with respect to disclosure matters. In such transactions, the underwriters should nevertheless, as discussed below, conduct their own investigation, and underwriters' counsel will usually, in accordance with the terms of engagement and the engagement letter, assist in that investigation and deliver a negative assurance letter along the lines of this Model Letter.

(E) Underwriters' Counsel's Review and Investigation Related to Opinions

This language sets forth the basis for underwriters' counsel's opinions and includes the phrase "as we have deemed necessary." This phrase applies only to matters of law and the opinions expressed in the numbered paragraphs immediately below the phrase and not to the statements of belief in the subsequent paragraphs providing the negative assurance. Limiting the phrase to the numbered paragraphs avoids the implication that counsel has an obligation to seek out all potentially relevant factual information for purposes of the negative assurance; such an obligation would be contrary to the inherent limitations of the "negative assurance" discussed in Comment (M), Negative Assurance.

(F) Securities Act Registration Exemption

Section 3(a)(2) of the Securities Act of 1933 (the "1933 Act") exempts "[a]ny security issued or guaranteed by the United States or any territory thereof or any State of the United States, or by any political subdivision of a State or territory, or by any public instrumentality of one or more States or territories" from the requirement of the 1933 Act that certain publicly sold securities be registered with the Securities and Exchange Commission (the "SEC"). Thus, most obligations of states, political subdivisions, and public instrumentalities are exempt from registration under Section 3(a)(2) of the 1933 Act.

Underwriters in negotiated offerings typically require that bond counsel deliver a supplemental opinion addressed to the underwriters that, among other things, states that the bonds are exempt from registration under the 1933 Act. In these situations, underwriters' counsel is rendering a "second opinion" to its client regarding the exemption of the bonds from registration under the 1933 Act. If the status of the issuer is not addressed in bond counsel's approving opinion, underwriters' counsel may consider obtaining an opinion from bond counsel and/or issuer's counsel to the effect that the issuer is a territory of the United States, a state, a political subdivision, or a public instrumentality, to support its opinion that the bonds are

exempt from registration under the 1933 Act. We note that in some jurisdictions the rules of professional responsibility require counsel to state expressly whether counsel is relying on the opinion of other counsel.

When appropriate, the underwriters should obtain from other counsel involved in the transaction no-registration opinions addressed to the underwriters with respect to other possible separate securities involved in the transaction, such as guarantees, letters of credit, and bond insurance.

Additionally, in a conduit transaction in which bond proceeds are loaned by the issuer to a third party, that loan obligation (whether or not evidenced by a note) may be a separate security that must be registered unless a security or transactional exemption applies. Section 3(a) of the 1933 Act and SEC Rule 131 may provide other exemptions for such separate securities, which should be analyzed under the facts and circumstances of the particular transaction.

(G) Trust Indenture Act Exemption

The Trust Indenture Act of 1939 (the "1939 Act") requires that public offerings of debt securities be issued under an indenture containing (or deemed to contain) certain required provisions and that the indenture trustee be independent and meet various requirements. Section 304(a)(4) of the 1939 Act exempts from those requirements indentures providing for the issuance of "[a]ny security exempted from the provisions of the Securities Act of 1933 by paragraph (2) . . . of subsection 3(a) thereof." Since, as discussed in Comment (F), Securities Act Registration Exemption, above, most obligations of states, political subdivisions, and political instrumentalities are exempt from the registration requirements of the 1933 Act by virtue of Section 3(a)(2), trust indentures or bond resolutions related to such obligations are also generally exempt from the qualification requirements of the 1939 Act.

(H) Continuing Disclosure Undertakings

Rule 15c2-12 under the Securities Exchange Act of 1934 (the "1934 Act") requires underwriters to reasonably determine that an issuer (or an obligated person) has made a contractual commitment (an "Undertaking") to provide continuing disclosure of the type and in the manner specified in the Rule, unless the offering is exempt from the Rule's continuing disclosure requirements. As part of its engagement, underwriters' counsel may be responsible for drafting the Undertaking. To support the determination, some underwriters ask their counsel for an opinion regarding the Undertaking's compliance with Rule 15c2-12. Underwriters' counsel should take care in the phrasing of that opinion. An alternative to the language in this Model Letter is:

> We are of the opinion that the [Undertaking] contains the elements required by paragraph (b)(5) of Rule 15c2-12 of the Securities Exchange Act of 1934, as amended, in effect as of the date hereof.

The language in this Model Letter and the alternative above provide a basis for the underwriters to reach the reasonable determination required by Rule 15c2-12.

The sections of the Official Statement (or Preliminary Official Statement) describing the issuer's (or other obligated person's) obligations under Rule 15c2-12 and the terms of the continuing disclosure undertaking are also within the scope of underwriters' counsel's negative assurance discussed in Comment (M), Negative Assurance, unless expressly disclaimed. However, an opinion regarding the sufficiency of the quantity and quality of the issuer's filings may require an investigation or verification of the affairs of the issuer that goes beyond the underwriters' counsel standard engagement and would likely require additional discussions regarding the scope of the engagement.

(I) Underwriters' Counsel's Review and Investigation Related to Negative Assurance

This language sets forth the basis for underwriters' counsel's expression of negative assurance and is consistent with the limited scope of the "negative assurance" discussed in Comment (M), Negative Assurance. The language confirms that the purpose of underwriters' counsel's engagement was not to establish, or independently verify, factual matters set forth in the Preliminary Official Statement or the Official Statement.

As discussed in Comment (K), Underwriters' Antifraud Liability, underwriters' counsel often assists the underwriters in performing a reasonable investigation concerning the disclosure document. As stated in Comment (D), Scope of Representation, consideration should be given to detailing in an engagement letter or in another communication to the underwriters the scope of the activities to be undertaken by underwriters' counsel so as to make clear the areas where counsel will be assisting the underwriters in their investigation. Additionally, underwriters' counsel should address with the underwriters how the due diligence it performs should be documented. Underwriters' counsel's negative assurance letters would not typically disclose that documentation.

However, to the extent underwriters' counsel's review was limited in any way, consideration should be given to making that clear in the letter. For example, the second sentence of this paragraph could be revised as follows:

> As your counsel, our review was limited to reviewing [the Preliminary Official Statement and] the Official Statement and those documents described in Annex 1 hereto and we have participated in those conferences described in Annex 1 hereto in which the contents of [the Preliminary Official Statement and] the Official Statement were discussed.

To the extent underwriters' counsel consulted other counsel with regard to particular matters, underwriters' counsel may wish to indicate that, to the extent its negative assurance covers those matters, its belief is based on the advice of the other counsel. For example, the second sentence of this paragraph could be revised as follows:

> As your counsel, we reviewed [the Preliminary Official Statement and] the Official Statement and certain documents and have participated in conferences in which the contents of [the Preliminary Official Statement and] the Official Statement were discussed; further, our statement of belief set forth in the paragraph immediately below is based on the opinion of _____ with respect to the statements and information contained in [the Preliminary Official Statement and] the Official Statement under the heading "_____".

(J) Preliminary Official Statement

Underwriters' counsel may be asked by the client to address the Preliminary Official Statement, in addition to the final Official Statement, in this paragraph. Rule 159 under the 1933 Act codifies the SEC's position that disclosure for purposes of securities law liability under Sections 12(a)(2) and 17(a)(2) of the 1933 Act is measured by the disclosure available to the investor at the time the investor made the commitment to purchase the security. The disclosure document available to the investor when it commits to purchase the bonds in a primary offering is generally the Preliminary Official Statement, with the final Official Statement prepared subsequent to the sale and sent with the confirmations. The Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities, ABA Section of Business Law, *Negative Assurance in Securities Offerings (2008 Revision)* (the "ABA Report"), summarized the SEC's position as follows:

> [N]ew rules codified the SEC's view that the potential liability of a seller of securities for deficiencies in disclosure is based on the information about the issuer and the offering conveyed to prospective investors at or before the time when the contract of sale is entered into rather than the information in the prospectus sent with the confirmation of sale.

Because Rule 159 expressly applies to liability under Section 17(a)(2) of the 1933 Act, it applies in the municipal context. As such, underwriters may ask underwriters' counsel to address the Preliminary Official Statement as part of the underwriters' due diligence. If underwriters' counsel addresses the Preliminary Official Statement, certifications obtained from the issuer (and, if applicable and to the extent feasible, from other parties) and legal opinions (containing negative assurance or other comfort regarding disclosure) from other counsel should also address the Preliminary Official Statement, as well as the final Official Statement. Whether the Preliminary Official Statement is to be addressed in the letter should be discussed at the outset of the representation.

Additionally, if reference to the Preliminary Official Statement is included in the negative assurance letter, underwriters' counsel should be mindful of any differences between the Preliminary Official Statement and the Official Statement (other than with respect to "permitted omissions" under Rule 15c2-12). Any differences between the two documents should be analyzed to determine if a supplement to the Preliminary Official Statement is necessary in order to provide the requested negative assurance. If there are changes to the disclosure and no supplement to the Preliminary Official Statement was prepared, by including the Preliminary Official Statement in the negative assurance letter, counsel may be viewed as stating its belief that such changes were not material and no supplement was necessary.

For a discussion of other issues regarding Preliminary Official Statements, see Comment (L), Date of Assurance Regarding Preliminary Official Statement and Comment (N), Exclusions from Negative Assurance.

(K) Underwriters' Antifraud Liability

Underwriters in municipal securities transactions are subject to the antifraud provisions of Section 17(a) of the 1933 Act, Section 10(b) of the 1934 Act and Rule 10b-5 promulgated under Section 10(b). Underwriters are also subject to the antifraud provisions contained in Section 15(c) of the 1934 Act.

An element of a private cause of action under Rule 10b-5 is the existence of materially misleading misstatements or omissions in the offering document that were made or omitted with scienter. Scienter is an "intent to deceive, manipulate or defraud" and may include recklessness. One way to establish the absence of intent, or lack of recklessness, is to conduct a reasonable investigation concerning the accuracy and completeness of the disclosure document.

In proposing Rule 15c2-12, the SEC stated its view that underwriters, in order to satisfy their obligations under the antifraud provisions, must have a "reasonable basis for belief in the truthfulness and completeness of the key representations made in any disclosure documents used in offerings" and should "review the issuer's disclosure documents in a professional manner for possible inaccuracies and omissions." *See Municipal Securities Disclosure*, Exchange Act Release No. 34-26100, 53 Fed. Reg. 37778 (Sept. 22, 1988). Therefore, although the accuracy of a disclosure document is the responsibility of the issuer of the bonds (*see Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others,* Securities Act Release No. 33-7049 (March 9, 1994), 59 Fed. Reg. 12748 (March 17, 1994) (the "1994 Interpretive Release")), as recognized in SEC statements regarding the responsibilities of underwriters, underwriters are required to investigate the accuracy and adequacy of the disclosure. Underwriters' counsel often is asked to assist in this activity.

The scope and nature of an underwriter's investigation will depend upon the particular circumstances surrounding an issue and take into account such matters as materiality, reasonableness and practicability. This investigation by underwriters is sometimes referred to as "due diligence," but should not be confused with the "due diligence defense" available to defendants under Sections 11 and 12 of the 1933 Act, neither of which sections is applicable to municipal securities. *See* John M. McNally, *Due Diligence in the Context of Municipal Securities Underwritings*, 18 The Quarterly Newsletter of the National Association of Bond Lawyers 42 (no. 1, March 1, 1997) (discussing the legal justification for investigatory activity by underwriters in municipal offerings). *See also* American Bar Ass'n, *Disclosure Roles of Counsel in State and Local Government Securities Offerings* 123 (3rd ed. 2009) ("*Disclosure Roles*") (discussing disclosure responsibilities of underwriters).

The receipt of a negative assurance letter from counsel to the underwriters is only one part of an underwriter's due diligence. Due diligence may also include, among other things, obtaining representations from the issuer and other transaction participants, certifications from the issuer's officers and other transaction participants, "agreed upon procedures letters" from accountants, conversations with the issuer's management and other transaction participants, and other procedures the underwriters consider appropriate under the circumstances. *See* the ABA Report.

With respect to due diligence by all members of an underwriting syndicate, according to the 1994 Interpretive Release, each member of the underwriting syndicate should either review the disclosure document and raise questions (and have them settled to its satisfaction) if it sees any "red flags," or determine that the senior manager is performing an adequate investigation on its behalf.

This paragraph of this Model Letter (and similar statements or opinions from other counsel participating in the transaction) provides evidence of appropriate investigation by the underwriters and the absence of recklessness.

(L) Date of Assurance Regarding Preliminary Official Statement

Although the model language provides the option for assurance regarding the Preliminary Official Statement only as of its date, underwriters may request that the Preliminary Official Statement be addressed both as of its date and as of the date of pricing or the date of the bond purchase agreement. If counsel is inclined to provide assurance as of a date in addition to the dated date, consideration should be given to the fact that, in many transactions, pricing may occur over multiple days. Therefore, caution should be taken in addressing the Preliminary Official Statement as of the date of pricing in light of the uncertainty as to exactly when pricing occurs and the continuing due diligence that is required through the pricing period. Because of the certainty of the date, addressing the Preliminary Official Statement as of the date of the Bond Purchase Agreement is preferable to addressing the Preliminary Official Statement as of the date of pricing. Addressing the Preliminary Official Statement as of the closing date is not appropriate since the Preliminary Official Statement is superseded by the final Official Statement.

For a discussion of other issues regarding Preliminary Official Statements, see Comment (J), Preliminary Official Statement, and Comment (N), Exclusions from Negative Assurance.

(M) Negative Assurance

The latter part of this sentence tracks the language of Rule 10b-5. The sentence is framed as "negative assurance" that, in general terms, in the course of underwriters' counsel's representation of the underwriters it did not learn of material untrue statements in the disclosure document or the omission of any material information. Alternative formulations of the negative assurance sentence are also common, such as "led us to conclude" in place of "caused us to believe," and "no information" in place of "no facts."

The ABA Report suggests that these differences in formulation do not change the subjective nature of the negative assurance being given. The sentence implies that if counsel discovered material facts in the course of its representation of the underwriters, those facts have been disclosed in the Official Statement. However, the sentence does not imply that counsel has made an investigation of every statement in the Official Statement or undertaken to identify relevant facts not stated in the Official Statement. (*See also* Comment (H), Continuing Disclosure Undertakings, above.) It only confirms that the work that underwriters' counsel did perform in connection with preparing and reviewing the Official Statement and other diligence documents did not cause counsel to believe that the Official Statement contained a misstatement or omission of a material fact. *See* the ABA Report.

The sentence also limits the negative assurance to the lawyers in the underwriters' counsel's firm "rendering legal services in connection" with the bond issue. The ABA Report advises as follows:

> A statement of negative assurance by a law firm necessarily expresses only the actual subjective belief (*i.e.*, conscious awareness) of those lawyers in the firm who have actively participated in the process of preparing the offering document . . . .
>
> When a law firm acts as counsel to the underwriters, the lawyers who work on the offering are likely to be the only lawyers in the firm who are knowledgeable about the issuer. . . .
>
> While some underwriters object to the inclusion in a negative assurance letter of 'ring fencing' language to this effect, most lawyers believe that, based on custom and practice, the negative assurance statement should be understood by the recipient to be based solely on the knowledge of this limited group of lawyers.

Limiting the negative assurance in the manner suggested in the Model Letter makes explicit what the ABA Report advises should be the understanding of the recipients.

Recipients often request, and the Model Letter provides, that negative assurance letters address the Official Statement both as of its date and as of the closing date. Although most lawyers are willing to give negative assurance as of the closing date, recipients' liability is unlikely to be determined by reference to that date (as noted above, under the SEC's rules applicable to municipal securities, the time of sale is the key reference point). Lawyers who give negative assurance as of the closing date often perform additional procedures to update their work to the closing date.

(N) Exclusions from Negative Assurance

Underwriters' counsel typically excludes from the scope of its negative assurance (and therefore from any implication of responsibility for) certain information provided by other parties or otherwise outside the scope of what underwriters' counsel can reasonably be expected to address. This list is subject to adjustment (by either adding or deleting items, such as information concerning particular litigation) based on the particulars of a transaction. The exceptions reflect the fact that other participants in the transaction *(e.g.,* underwriters, accountants, consultants, or issuer's or borrower's counsel) are either in a better position to address such matters or that counsel does not bring any special expertise to bear on the topics involved.

When negative assurance refers to the Preliminary Official Statement as of any date other than its date, counsel should consider excluding from its coverage of the Preliminary Official Statement the items that Rule 15c2-12(b)(1) says do not have to be in the deemed final (*i.e.*, Preliminary) Official Statement: "The offering price(s), interest rate(s), selling compensation, aggregate principal amount, principal amount per maturity, delivery dates, any other terms or provisions required by an issuer of such securities to be

specified in a competitive bid, ratings, other terms of the securities depending on such matters, and the identity of the underwriter(s)."

For a discussion of other issues regarding Preliminary Official Statements, see Comment (J), Preliminary Official Statement, and Comment (L), Date of Assurance Regarding Preliminary Official Statement.

(O) Reliance by Other Parties

This Model Letter is intended only for the benefit of its addressees. Occasionally other parties, such as the issuer or the conduit borrower, request a "reliance letter" allowing those parties to rely on the letter of underwriters' counsel as if it had been addressed to those parties. Underwriters' counsel should use its own judgment in deciding whether to allow others to rely on its negative assurance, recognizing that (a) the primary purpose of the negative assurance from underwriters' counsel is to assist the underwriters in establishing a reasonable basis for their believing in the truthfulness and completeness of key representations in the disclosure document as discussed in Comment (I), Underwriters' Counsel's Review and Investigation Related to Negative Assurance, and (b) providing a reliance letter will expand the number of parties to whom underwriters' counsel may be liable. Also, the "negative assurance" paragraph of underwriters' counsel's letter is limited by the terms of the engagement between the underwriters and their counsel, based on a mutually agreed upon allocation of responsibility. Because those limitations may not apply to third parties, underwriters' counsel should consider describing them in its reliance letters. Moreover, because the issuer or conduit borrower is responsible for the disclosure, "reliance" on underwriters' counsel expressions of belief is of little probative value as to whether the issuer or conduit borrower acted negligently or with "scienter."

Additionally, as the ABA Report states, ultimate purchasers of securities do not have liability under the federal securities laws; thus, requests from ultimate purchasers for negative assurance are inappropriate. In municipal securities transactions, a similar issue can arise with municipal bond insurers and other credit enhancers. Although bond insurers and other credit enhancers potentially have liability for information they provide for inclusion in the offering document, generally they do not have liability for other information in the offering document; thus, requests from bond insurers and other credit enhancers for negative assurance are not appropriate.

Model Rule 2.3 indicates certain prerequisites for undertaking an evaluation of a matter, whether in the form of an opinion or otherwise, for a third party who is not a client. Giving opinions to non-clients can, under certain circumstances and under the laws of some states, negatively affect the attorney-client privilege and certain client defenses and claims.

Additional NABL Resources

Guidance on the role of underwriters' counsel in municipal transactions may be found in *Disclosure Roles*, a joint project between NABL and the ABA Section of State and Local Government Law and Business Law Section, which provides a detailed discussion of the roles and opinions of various counsel in bond transactions, including underwriters' counsel. *Disclosure Roles* discusses the various formulations of letters or opinions of underwriters' counsel, as well as the legal framework for those letters, the responsibilities of counsel in investigating and giving the opinion or advice, and the potential liabilities of counsel. Also, many of the substantive legal areas discussed in the above Comments are covered in greater depth in the "Securities Laws" section of NABL's *Fundamentals of Municipal Bond Law*. Other NABL publications may also be of some assistance to underwriters' counsel in performing their role. For example, the *Model Bond Opinion Report* (2003 Edition) provides helpful references to publications dealing with

the drafting of legal opinions in general, and the *Professional Responsibilities of Bond Counsel* provides a survey of the Model Rules that pertain generally to municipal finance practice.

BIBLIOGRAPHY

American Bar Association, *Disclosure Roles of Counsel in State and Local Government Securities Offerings* (3rd ed. 2009) (from a project sponsored by National Association of Bond Lawyers and American Bar Association).

Donald W. Glazer, Scott T. FitzGibbon & Steven O. Weise, *Glazer and FitzGibbon on Legal Opinions,* Chapter 18: Negative Assurance (3rd ed. 2015).

William H. McBride, *Who is the Client of Underwriters' Counsel?*, 27 The Bond Lawyer: The Journal of the National Association of Bond Lawyers 33 (no. 2, June 1, 2005).

John M. McNally, *Due Diligence in the Context of Municipal Securities Underwritings*, 18 The Quarterly Newsletter of the National Association of Bond Lawyers 42 (no. 1, March 1, 1997).

National Association of Bond Lawyers, *The Function and Professional Responsibilities of Bond Counsel* (3rd ed. 2011).

National Association of Bond Lawyers, *Model Bond Opinion Report* (4th ed. 2003).

National Association of Bond Lawyers, *Model Engagement Letters* (2nd ed. 1998).

Securities and Exchange Commission, *Municipal Securities Disclosure*, Exchange Act Release No. 34-26100, 53 Fed. Reg. 37778 (Sept. 22, 1988).

Securities and Exchange Commission, *Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others,* Securities Act Release No. 33-7049 (March 9, 1994), 59 Fed. Reg. 12748 (March 17, 1994).

Subcommittee on Securities Law Opinions, Committee on Federal Regulation of Securities, American Bar Association Section of Business Law, *Negative Assurance in Securities Offerings (2008 Revision)*, 64 Bus. Lawyer 395 (2008).

APPENDIX A

NABL Ad Hoc Subcommittee Members

Carol J. McCoog
Principal Drafter
Hawkins Delafield & Wood LLP
200 SW Market St., Suite 350
Portland, OR 97201-5753
Telephone: (503) 402-1323
Email: cmccoog@hawkins.com

Jacob A. Bachelor
Centennial Law Group
108 S 9th St.
Duncan, OK 73533-4912
Telephone: (580) 252-3755
Email: jacob@centenniallawgroup.com

Michael P. Botelho
Updike, Kelly & Spellacy, P.C.
100 Pearl St., Floor 17
Hartford, CT 06103-4511
Telephone: (860) 548-2637
Email: mbotelho@uks.com

Alexis S. M. Chiu
Law Offices of Alexis S.M. Chiu
1300 Clay St., Suite 810
Oakland, CA 94612-1428
Telephone: (415) 777-9500
Email: achiu@chiulaw.com

Camille M. Evans
Greenberg Traurig, P.A.
450 S Orange Ave., Suite 650
Orlando, FL 32801-3311
Telephone: (407) 999-2521
Email: evansca@gtlaw.com

Meredith L. Hathorn
Foley & Judell, L.L.P.
365 Canal St., Suite 2600
New Orleans, LA 70130-1138
Telephone: (504) 568-1249
Email: mhathorn@foleyjudell.com

M. Jason Akers
Foley & Judell, L.L.P.
365 Canal St., Suite 2600
New Orleans, LA 70130-1138
Telephone: (504) 568-1249
Email: jakers@foleyjudell.com

G. Allen Bass
4027 Foxpointe Dr.
West Bloomfield, MI 48323-2601
Telephone: (313) 485-0528
Email: gabass@pobox.com

Scott A. Bremer
Hardwick Law Firm, LLC
321 N Clark St., Suite 500
Chicago, IL 60654-4769
Telephone: (312) 445-6252
Email: sbremer@hardwicklaw.com

Kathleen A. Collier
Balch & Bingham LLP
1901 6th Ave N., Suite 1500
Birmingham, AL 35203-4642
Telephone: (303) 297-2400
Email: kcollier@balch.com

Teri M. Guarnaccia
Ballard Spahr LLP
300 E Lombard St., Floor 18
Baltimore, MD 21202-3268
Telephone: (410) 528-5526
Email: guarnacciat@ballardspahr.com

William L. Hirata
U.S. Bank
214 N Tryon St., 27th Floor
Charlotte, NC 28202-1078
Telephone: (704) 335-7888
Email: william.hirata@usbank.com

Michael T. Kersten
Ballard Spahr LLP
300 E Lombard St., Floor 18
Baltimore, MD 21202-3268
Telephone: (410) 528-5853
Email: kerstenm@ballardspahr.com

Ernest M. Lorimer
Soeder & Associates LLC
280 Trumbull St., 21st Floor
Hartford, CT 06103-3509
Telephone: (860) 246-1600
Email: elorimer@soeder-associates.com

William H. McBride
Hunton & Williams LLP
PO Box 109
Raleigh, NC 27602-0109
Telephone: (919) 899-3030
Email: wmcbride@hunton.com

William M. Musser
McNair Law Firm, P.A.
1221 Main St.
PO Box 11390
Columbia, SC 29211-1390
Telephone: (803) 799-9800
Email: bmusser@mcnair.net

Bradley D. Patterson
Gilmore & Bell, P.C.
15 West South Temple, Suite 520
Salt Lake City, UT 84101-1531
Telephone: (801) 258-2724
Email: bpatterson@gilmorebell.com

David E. Reid
Bryan Cave LLP
1200 Main St., Suite 3800
Kansas City, MO 64105-2122
Telephone: (816) 391-7656
Email: dereid@bryancave.com

Kenneth B. Roberts
Hawkins Delafield & Wood LLP
28 Liberty St., 42nd Floor
New York, NY 10005-1415
Telephone: (212) 820-9512
Email: kroberts@hawkins.com

Andrew R. Kintzinger
Hunton & Williams LLP
2200 Pennsylvania Ave NW
Washington, DC 20037-1709
Telephone: (202) 955-1837
Email: akintzinger@hunton.com

Alexandra M. MacLennan
Square Patton Boggs
201 N Franklin St., Suite 2100
Tampa, FL 33602-5813
Telephone: (813) 202-1353
Email: sandy.maclennan@squirepb.com

John M. McNally
Hawkins Delafield & Wood LLP
601 13th St. NW, Suite 800S
Washington, DC 20005-3875
Telephone: (202) 682-1495
Email: jmcnally@hawkins.com

Sujyot S. Patel
Dinsmore & Shohl LLP
255 E 5th St., Suite 1900
Cincinnati, OH 45202-4720
Telephone: (513) 639-9256
Email: sujyot.patel@dinsmore.com

Krishna L. Pettitt
Garcia, Hernández, Sawhney & Bermudez, LLP
1330 Broadway, Suite 1701
Oakland, CA 94612-2517
Telephone: (510) 295-4896
Email: kpettitt@ghsblaw.com

Timothy J. Reimers
Polsinelli LLP
2049 Century Park E.
Los Angeles, CA 90067-3125
Telephone: (310) 203-5316
Email: treimers@polsinelli.com

Jennifer L. Roth
Tucker Ellis LLP
950 Main Ave., Suite 1100
Cleveland, OH 44113-7213
Telephone: (216) 696-3782
Email: jennifer.roth@tuckerellis.com

W. Michael Russ
Butler Snow LLP
1020 Highland Colony Pkwy., Suite 1400
Ridgeland, MS 39157-2139
Telephone: (601) 985-4597
Email: michael.russ@butlersnow.com

Douglass P. Selby
Hunton & Williams LLP
600 Peachtree St. NE
Bank of America Plaza, Suite 4100
Atlanta, GA 30308-2217
Telephone: (404) 888-4207
Email: dselby@hunton.com

Joseph (Jodie) E. Smith
Maynard Cooper & Gale P.C.
1901 6th Ave N, Suite 2400
Birmingham, AL 35203-4604
Telephone: (205) 254-1109
Email: jodie.smith@maynardcooper.com

Barron F. Wallace
Bracewell LLP
711 Louisiana St., Suite 2300
Houston, TX 77002-2770
Telephone: (713) 221-1219
Email: barron.wallace@bracewelllaw.com

Kevin A. White
Kaufman & Canoles, P.C.
1021 E Cary St., Floor 14
Richmond, VA 23219-4031
Telephone: (804) 771-5770
Email: kawhite@kaufcan.com

Howard Zucker
Hawkins Delafield & Wood LLP
28 Liberty St., Floor 42
New York, NY 10005-1415
Telephone: (212) 820-9362
Email: hzucker@hawkins.com

Allison C. Schwartzman
Foster Pepper PLLC
1111 3rd Ave., Suite 3000
Seattle, WA 98101-3264
Telephone: (206) 447-6406
Email: a.schwartzman@foster.com

Blake C. Sharpton
Butler Snow LLP
435 Second St., Suite 204
Macon, GA 31201-8201
Telephone: (478) 238-1360
Email: blake.sharpton@butlersnow.com

Mark H. Vacha
Cozen O'Connor
One Liberty Place
1650 Market St., Floor 28
Philadelphia, PA 19103-3527
Telephone: (215) 665-6975
Email: mvacha@cozen.com

Glenn E. Weinstein
Pugh, Jones & Johnson, P.C.
180 N La Salle St., Suite 3400
Chicago, IL 60601-2807
Telephone: (312) 768-7850
Email: gweinstein@pjjlaw.com

Peter J. Whitmore
Sherman & Howard L.L.C.
633 17th St., Suite 3000
Denver, CO 80202-3622
Telephone: (303) 299-8438
Email: pwhitmore@shermanhoward.com

Andrew Q. Conroy
Pittsford, NY

Ruth M. Levine
Valley Forge, PA