nabl

Model Bond Opinion Report

— FIFTH EDITION

NOTICE

The following is provided to further legal education and research and is not intended to provide legal advice or counsel as to any particular situation. The National Association of Bond Lawyers takes no responsibility for the completeness or accuracy of this material. You are encouraged to conduct independent research of original sources of authority. If you discover any errors or omissions, please direct those and any other comments to NABL.

National Association of Bond Lawyers
1775 Pennsylvania Ave. NW | Suite 950
Washington, D.C. 20006
(202) 503-3300

Learn more at www.nabl.org

MODEL BOND OPINION REPORT

National Association of Bond Lawyers
Committee on General Law and Practice

This report, prepared by a project subcommittee of the Committee on General Law and Practice (the "*Committee*") of the National Association of Bond Lawyers ("*NABL*"), is intended to assist practitioners when they give "bond opinions," *i.e.*, letters that contain opinions regarding the validity of, source of payment and security for, and tax status of bonds or other financial obligations of states or their political subdivisions ("*municipal bonds*"). The Board of Directors of NABL has authorized the distribution of this report.

This report is the fifth edition of NABL's model bond opinion report. Each report has been designed to reflect then-current municipal bond practice. This report and the model opinion letters included in it are updates of the following earlier reports and model opinion letters: (i) the Model Bond Opinion Project report prepared in 1982 and 1983 by the Committee on Opinions; (ii) the 1987 revision undertaken by the Special Committee on Opinions to reflect changes brought about by the Tax Reform Act of 1986 (the "*1987 Report*"); (iii) the Statement Concerning Standard Applied in Rendering the Federal Income Tax Portion of Bond Opinions adopted by the Board of Directors of NABL on November 29, 1993 ("*Tax Standard*"), (iv) the 1997 revision undertaken by the Committee on Opinions; and (v) the 2003 revision (the "*2003 Report*") undertaken by the Committee on Opinions and Documents.[1] The 2003 Report was supplemented by a 2009 report (the "*2009 Supplemental Report*") prepared by an *ad hoc* committee[2] to assist practitioners in preparing opinions and other written advice relating to Build America Bonds for which the issuer elected to receive a refundable tax credit, which were referred to in the 2009 Supplemental Report as "Direct Payment BABs."

This report reflects general developments in opinion practice and the municipal bond industry since the 2003 Report, including the increasing complexity in federal tax law. This report updates and supersedes the 2003 Report. As in the past, future revisions may be needed to reflect further changes.

In its consideration of general developments in opinion practice and the municipal bond industry, the Committee recognizes the continuing importance of bond opinions to bond purchasers, and what bond opinions are meant to convey and not convey. This report reaffirms the statement in the 2003 Report regarding the high degree of confidence bond counsel should have before giving an "unqualified" bond opinion and describes the examination process involved in reaching the conclusions necessary to give an

---

[1] The committee was comprised of J. Foster Clark, Chair, Linda L. D'Onofrio, Vice Chair, Frederic L. Ballard, Jr. (1942-2014), Michael A. Budin, Richard Chirls, William H. Conner, Julianna Ebert, Kristin H. R. Franceschi, Floyd C. Newton, III, Robert Dean Pope, and Fredric A. Weber. Significant portions of the 2003 Report were developed under the leadership of Kristin H. R. Franceschi while she chaired the committee.

[2] The *ad hoc* committee was comprised of Rene M. Adema, Frederic L. Ballard, Jr., Virginia D. (GiGi) Benjamin, Richard Chirls, David J. Cholst, J. Foster Clark, Michela Daliana, Linda L. D'Onofrio, Julianna Ebert, Kristin H. R. Franceschi, Brant A. Freer, Scott R. Lilienthal, Floyd C. Newton, III, Robert Dean Pope, and Fredric A. Weber. The 2009 Supplemental Report is not being updated by this report, but it continues to be a resource for practitioners for any issues that may arise with respect to opinions and other written advice relating to Direct Payment BABs. Readers of the 2009 Supplemental Report should be aware that the discussion regarding Circular 230 therein is outdated, and they should review Circular 230 as revised in 2014, which eliminated the "covered opinion" rules in their entirety. *See* Treasury Department Circular No. 230 (Rev. 6-2014), 31 C.F.R., Subtitle A, Part 10 ("*Circular 230*").

"unqualified" bond opinion.[3] This report states that bond counsel "may give an 'unqualified' opinion regarding the validity of the bonds and tax exemption of interest on the bonds if it is firmly convinced (also characterized as having a 'high degree of confidence') that, under the law in effect on the date of the opinion letter, the highest court of the relevant jurisdiction, properly briefed on the issues, would reach the legal conclusions stated in the opinion." The Committee believes that the standard articulated in the preceding sentence continues to reflect current practice, results in a consistent and rational basis on which practitioners can determine whether a bond issue can be the subject of an "unqualified" opinion, and comports with the high standard of care historically applied by municipal bond practitioners throughout the country.

The disclosure section of this report provides guidance to participants in public finance transactions with respect to opinion and tax related disclosure items, including the disclosure of post-issuance requirements.

Reference should be made to The Function and Professional Responsibilities of Bond Counsel, 2011 Third Edition ("*Function*"), published by NABL, which provides guidance and insight regarding the responsibilities of bond counsel in giving bond opinions. The discussion of the bond opinion and the 2003 Report in *Function* is superseded by the discussion in this report. Although some of the commentary accompanying this report refers to specific sections in *Function,* counsel giving bond opinions should read *Function* in its entirety. Further, bond counsel should refer to Model Engagement Letters*,* published by NABL in 1998 ("*Engagement Letters*"), which addresses in greater detail considerations relating to engagement letters and ethical issues encountered in giving bond opinions.

As with prior updates, in addition to significant other research, the Committee has given substantial attention to the forms of closing opinions given in business transactions generally and to numerous articles and publications on opinions by individuals and bar groups, many of which are listed in the "Bibliography" at the end of this report. Specific reference is made to the Statement of Opinion Practices, 74 *Bus. Law.* 801 (2019) *("Statement of Opinion Practices")*, a joint project of the Legal Opinions Committee of the American Bar Association's Business Law Section (the "*ABA Legal Opinions Committee*") and the Working Group on Legal Opinions Foundation that has been approved by a broad range of more than 30 bar groups, including NABL.[4] Specific reference is also made to Glazer and FitzGibbon on Legal Opinions, Third Edition*,* Aspen Publishers (2008, as supplemented annually) *("Glazer and FitzGibbon")*, which includes an extensive annotated bibliography and copies of reports of various bar groups, including NABL. The Committee cautions, however, that care should be taken in using such references, because bond opinions differ from closing opinions in business transactions generally in several important ways.[5] Some of these differences are discussed in the commentary accompanying this report.

---

[3] Reference is made to Comment (H) for further discussion of an "unqualified" bond opinion and the level of confidence required to give one.

[4] The *Statement of Opinion Practices* updates the Legal Opinion Principles, 53 *Bus. Law.* 831 (1998) (the "*Principles*"), and the Guidelines for the Preparation of Closing Opinion, 57 *Bus. Law.* 875 (2002) (the "*Guidelines*"), prepared by the ABA Legal Opinions Committee. It updates the *Principles* in their entirety and selected provisions of the *Guidelines*. An explanatory note to the *Statement of Opinion Practices* describes which provisions of the *Guidelines* were not updated by the Statement. *See* 74 *Bus. Law.* at 803-806. The *Statement of Opinion Practices* was intended to foster a national consensus on the key opinion practices described therein.

[5] *See Function* – The Bond Opinion – Unique Aspects of the Bond Opinion, at 13-14, for a discussion of these differences.

This report was developed by the project subcommittee, comprising the following members:

Kristin H.R. Franceschi, Co-Chair
Tyler J. Kalachnik, Co-Chair
Allen K. Robertson, Co-Chair
Teresa Metcalf Beasley
Michael J. Bradshaw, Jr.
Kane Burnette
Scott Bremer
Richard Chirls
Amy King Condaras
Matthias M. Edrich
Lauren Ferrero
Kendra Follett
Perry Israel (1952-2022)
Michael Larsen
Alexandra M. MacLennan
Craig Ongley
David Rothman
Parker Schenken
Mary Frances Skala
Fredric A. (Rick) Weber
Cynthia M. Weed

The project subcommittee received considerable support from Committee leaders, members of the Board of Directors of NABL, and others throughout the preparation of this report. Three key members of the Working Group on Legal Opinions, Arthur Norman Field, Donald W. Glazer and Stanley Keller, also volunteered their time to review and provide comments on this report.

As with prior model bond opinion reports, the model opinion letters and commentaries included in this report are intended to assist and support bond counsel and not to create a mandatory standard for a bond opinion, its wording, or the basis for giving it. Bond opinions given in practice will vary from the model opinion letters as a result of factual differences, different bond counsel presentation styles, and local practices. Coverage of any matter in a model opinion letter is not intended to suggest a duty to address that matter in any specific bond opinion. Conversely, the failure to cover any matter in a model opinion letter does not suggest that including that matter in any specific bond opinion is improper.

The model opinion letters and accompanying commentary included in this report represent the views of the project subcommittee and the Committee. Differing views are, from time to time, described in the commentary. The Committee welcomes comments so that future revisions may reflect additional considerations and correct any deficiencies.

Dawn P. Bookhardt
Chair
Committee on General Law and Practice

September 10, 2024

TABLE OF CONTENTS

Page

INTRODUCTION

This report is intended to be a resource for bond counsel in preparing opinions for three basic categories of bonds: (1) general obligation bonds, to which the full faith and credit of the issuer are pledged and that do not constitute private activity bonds within the meaning of the Internal Revenue Code of 1986 (the "*Code*"), (2) revenue bonds secured by specified revenues of the issuer and that do not constitute private activity bonds, and (3) certain private activity bonds that are conduit financing bonds. Although the model opinion letters have been drafted for these three basic categories of bonds, many other types of bonds exist, *e.g.*, general obligation bonds and revenue bonds that are private activity bonds but are not conduit financing bonds. Additional considerations and opinions may be appropriate for these other types of bonds. While those considerations and opinions are generally beyond the scope of this report, some explanatory cross references have been added to assist bond counsel in drafting a bond opinion that is a hybrid of the three basic forms.

This report presumes that bond counsel either is, or will become, knowledgeable of the relevant considerations in giving a bond opinion in a particular transaction. In this regard, in addition to the references cited in the cover letter for this report (namely, *Function*, *Engagement Letters*, the *Statement of Opinion Practices*, and *Glazer and FitzGibbon*), bond counsel should refer to Disclosure Roles of Counsel in State and Local Government Securities Offerings, Third Edition (2009) *("Disclosure Roles"),* a project co-sponsored by NABL and the American Bar Association. Together, these sources provide guidance on substantive issues to be considered in giving opinions, relevant disclosure issues, and ethical issues that bond counsel should consider.

The model opinion letters in this report assume that bond counsel is engaged to give a bond opinion typically accepted by bond purchasers for the particular category of bond. A different engagement could require more or fewer opinions than those included in the relevant model opinion letter. For example, in a private activity bond transaction in which bond proceeds are loaned to a third-party conduit borrower, bond counsel might be engaged to opine on the binding and enforceable nature of agreements against the conduit borrower as well as against the issuer. Similarly, if two firms are engaged to give different portions of the bond opinion (for example, where special tax counsel is engaged to give the federal tax opinion), each firm's opinion letter might address fewer issues than the relevant model opinion letter, although the combined opinion letters would normally cover all items in the model opinion letter. This division would also occur where the initial bond purchaser receives an opinion of the issuer's general counsel regarding all matters other than tax exemption, and bond counsel is engaged solely to give the tax exemption opinion.[6]

The comments following each model opinion letter are intended to explain language in the opinion letter, to provide background, to identify areas where different views exist, or to highlight issues that should be considered. The comments following the model opinion letter for general obligation bonds apply as well to corresponding language in the model opinion letters for revenue bonds and private activity bonds. Similarly, the comments following the model opinion letter for revenue bonds apply to corresponding language in the model opinion letter for private activity bonds. Although some comments

[6] *See Disclosure Roles*, at 96-97 and 114, for a discussion of bond counsel's ability to limit its opinion responsibility through a division of assignments among, or reliance on, competent counsel. *See also* the discussion of "Model Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer" in *Function*, at 24-25, which suggests that an engagement letter might be used to memorialize bond counsel's consultation with the issuer concerning the customary functions that are being omitted from the scope of representation and to evidence the issuer's consent to this limitation.

apply to similar opinions in other municipal finance transactions, this report, the model opinion letters, and the commentary are intended to address only bond opinions.

As with prior reports, this report includes a section discussing certain issues to be considered for inclusion in a disclosure document prepared and distributed by the issuer or those authorized to do so on its behalf. Although bond counsel's role does not always include assisting the issuer or conduit borrower with preparation of the disclosure document,[7] bond counsel does customarily either prepare or review specific portions of the disclosure document (*e.g.*, portions relating to the bond opinion) and, therefore, this report includes thoughts regarding the relationship between disclosure and the bond opinion. Cross references to relevant portions of the disclosure matters section appear in the comments. Under federal securities laws, responsibility for the accuracy of a disclosure document remains with the issuer.

This report also includes a bibliography of certain of the books, articles, reports, and cases cited.

[7] Since the publication of the 2003 Report, bond attorneys have increasingly been engaged to play the role of "disclosure counsel" for the issuer or conduit borrower. Disclosure counsel typically assists the issuer in the preparation of the disclosure document and provides a negative assurance letter with respect to it. In certain instances, bond counsel may also be engaged to serve as disclosure counsel. For a more complete discussion of the role and letter of disclosure counsel, *see* NABL's Model Letter of Disclosure Counsel published in 2018.

I. GENERAL OBLIGATION BONDS (A)

MODEL OPINION LETTER

[*Note*: Letters in bold parentheses refer to the Commentary immediately following this opinion letter.]

(Letterhead of Bond Counsel)
(Date) **(B)**

(Addressee) **(C)**

(Salutation) **(D)**

(Caption)

We have acted as bond counsel to *(Client Name)* **(E)** in connection with the issuance by (*Name of Issuer*) (the "Issuer") of *$(Par Amount)* (*Title of Bonds*) dated *(Date of Bonds)* (the "Bonds"). **(F)** In such capacity, we have examined such law and such certified proceedings, certifications, and other documents as we have deemed necessary to give the opinions below. **(G)**

Regarding questions of fact material to the opinions below, we have relied on the certified proceedings and other certifications of representatives of the Issuer and certifications of others furnished to us without undertaking to verify them by independent investigation. [As to certain matters of law material to the opinions below, we also have relied upon certifications of public officials.] **(G)**

Based on the foregoing, we are of the opinion **(H)** that:

1. The Bonds have been duly authorized and executed by the Issuer and are valid and binding general obligations of the Issuer. **(I) (J)**

2. All taxable property in the territory of the Issuer is subject to *ad valorem* taxation without limitation regarding rate or amount to pay the Bonds. **(K)** The Issuer is required by law to include in its annual tax levy the principal and interest coming due on the Bonds to the extent that necessary funds are not provided from other sources. (**L)**

3. Interest on the Bonds **(M)** is excludable **(N)** from gross income for federal income tax purposes under Section 103 of the Internal Revenue Code of 1986, as amended **(O)** (the "Code"), and is not an item of tax preference for purposes of the federal alternative minimum tax imposed on individuals; however, such interest on the Bonds may be taken into account for the purpose of computing the alternative minimum tax imposed on certain corporations **(P)**. The opinion set forth in the preceding sentence is subject to the condition that the Issuer comply with all requirements of the Code that must be satisfied subsequent to the issuance of the Bonds in order that the interest thereon be, and continue to be, excludable from gross income for federal income tax purposes under Section 103 of the Code. **(Q)** The Issuer has covenanted to comply with all such requirements. **(R)** Failure to comply with certain of such requirements may cause interest on the Bonds to be includable in gross income for federal income tax purposes retroactively to the date of issuance of the Bonds. **(S)**

4. [Opinion regarding state tax exemption, if any.] **(T)**

The rights of the owners of the Bonds and the enforceability of the Bonds are limited by bankruptcy, insolvency, reorganization, moratorium, and other similar laws affecting the rights and remedies of creditors, and by equitable principles, whether considered at law or in equity. **(U)**

We express no opinion [herein] regarding the accuracy, adequacy, or completeness of the (*name and date of disclosure document*) relating to the Bonds. **(V)** Further, we express no opinion [herein] regarding tax consequences arising with respect to the Bonds other than as expressly set forth herein.

[The opinions given in this opinion letter are given as of the date set forth above, and we assume no obligation to revise or supplement them to reflect any facts or circumstances that may later come to our attention, or any changes in law that may later occur.] **(B)**

Very truly yours,

COMMENTARY

(A) General Obligation Bonds

This form of opinion letter applies only to general obligation bonds that are not private activity bonds. Bond counsel preparing an opinion letter for general obligation bonds that are private activity bonds, but not conduit financing bonds, may begin with this form, modifying paragraph 3 (relating to the excludability of interest on the bonds) as indicated in Part III.

The precise source and priority of payment for general obligation bonds may vary considerably from issuer to issuer depending on applicable state or local law.[8] Paragraph 2 assumes the bonds are secured by a promise to levy *ad valorem* property taxes, unlimited as to rate or amount, on all taxable property within the issuer's territorial limits (sometimes referred to as an "unlimited tax general obligation bond"). If the bonds are not unlimited tax general obligation bonds, then paragraph 2 will need to be revised appropriately.

(B) Date of Opinion Letter; Lack of Obligation to Update

The opinion letter ordinarily is dated the date of original issuance, which is the date of delivery of, and payment for, the bonds (or, in the case of an issue of draw-down bonds, the date of the initial advance of proceeds of the issue[9]). The opinions given in the opinion letter speak only as of that date and reflect the law and facts on that date.[10] Unless expressly engaged to do so, bond counsel does not undertake to inform any person regarding any subsequent development that may affect the opinions it is giving.[11] Although this concept always has been implicit in bond opinions, bond counsel may wish to state it explicitly, as is done in the final optional paragraph of this opinion letter, particularly in light of the increasing complexity of the post-issuance compliance required of issuers (and conduit borrowers) to maintain the tax exemption of interest on the bonds.[12] Bond counsel also may wish to state this concept explicitly because original purchasers and subsequent owners of the bonds that are unfamiliar with customary bond opinion practice may not engage counsel to assist them.[13]

---

[8] *See* General Obligation Bonds: State Law, Bankruptcy and Disclosure Considerations, published by NABL in 2014.

[9] *See* Comment (J).

[10] *Statement of Opinion Practices*, Section 9.

[11] *Id.* Although beyond the scope of this report, a duty to update the client may exist, *e.g.*, under Model Rule 1.2(c), if the lawyer-client relationship continues beyond the closing of the transaction.

[12] *See* Comment (Q) for further discussion of this issue.

[13] Third-party legal opinion letters delivered at the closing of a business transaction ("*closing opinions*") and the opinions included in them are prepared and understood in accordance with the customary practice of lawyers who regularly give those opinions and lawyers who regularly review them for opinion recipients. *Statement of Opinion Practices,* Section 2. Customary practice applies to a closing opinion whether or not the closing opinion refers to it. *Id.* An opinion giver is entitled to presume that the opinion recipient is familiar with, or has obtained advice about, customary practice as it applies to the opinions it is receiving from the opinion giver. *Statement of Opinion Practices*, Section 8.1. Notwithstanding this presumption, bond counsel should consider whether unrepresented bondholders are or will be familiar with customary practice applicable to closing opinions, including bond opinions, and whether bond counsel therefore should include language in a bond opinion letter such as this optional paragraph. Bond counsel may choose to state matters of customary practice expressly for other reasons as well. Inclusion of a broader statement may be advisable if an unsophisticated and unrepresented party may rely on the opinion letter, including a statement that the letter can be understood only in light of the customary practice of lawyers who regularly give, and advise recipients regarding, bond opinions in municipal bond transactions.

(C) Addressees; Reliance

Practice varies regarding the addressees of the opinion letter. Frequently, the opinion letter is addressed to the issuer, the underwriters (or other original purchasers), or both. Occasionally, the opinion letter is addressed to an appropriate officer of the issuer or to another party (such as the paying agent). Sometimes an opinion letter is not addressed to anyone.

Under general opinion principles, a closing opinion in a business transaction may be relied on only by its addressee and any other person the opinion giver expressly authorizes to rely.[14] As a result, an opinion giver in a business transaction generally limits the addressees of a closing opinion and any other persons it expressly authorizes to rely on it. In contrast, a bond opinion is normally relied on by third parties, such as purchasers and subsequent owners of the bonds, notwithstanding who bond counsel is engaged to represent or the parties to whom a bond opinion is addressed.[15]

Without regard to who may bring an action against an opinion giver for a negligently prepared opinion letter, bond counsel should recognize that a bond opinion, by its very nature, is normally expected to be relied on by non-clients, such as underwriters, bondholders and, in certain circumstances, any trustee for the bondholders.[16] Frequently, a bond purchase contract conditions settlement on delivery of a bond opinion or a letter permitting reliance by specified parties (*e.g.*, the underwriters or the trustee) to avoid any claim that they may not rely on the bond opinion. An underwriting syndicate is sometimes described by referring to the designated managing underwriters in their capacity as representatives for the underwriters.

(D) Salutation

A salutation is unnecessary. Salutations, where used, vary from firm to firm or by local practice. If a salutation is used, a gender-neutral salutation such as "To the Addressees" should be considered.

(E) Who Engaged Bond Counsel

Because bond counsel is advised to have an identifiable client in a bond transaction (rather than, for example, purporting to represent the transaction or the owners of the bonds), bond counsel should identify its client in the bond opinion to dispel any belief by others that bond counsel represented them in the transaction by using the language "[w]e have acted as bond counsel to _____." Bond counsel also should notify other participants in the transaction of the identity of bond counsel's client early in the transaction if circumstances warrant.[17] That notification may take the form, for example, of identification

---

[14] *Statement of Opinion Practices*, Section 11.

[15] *See Disclosure Roles*, at 104-05 (the role of bond counsel evolved specifically to provide an opinion to be relied on by those purchasing bonds); *Bradford Securities Processing Services, Inc. v. Plaza Bank and Trust*, 653 P.2d 188 (Okla. 1982) (unless otherwise stated, subsequent owners of the bonds are also intended to rely on the opinion letter distributed with or printed on the bond).

[16] *See* the discussion of "Model Rule 2.3 Evaluation for Use by Third Persons" in *Function*, at 38-40, concerning whether bond counsel owes a duty to a third-party recipient (*e.g.*, the underwriter), even though that third-party recipient is clearly not the client, as a result of its being hired to disclose information that is normally confidential. *See also Function* – The Bond Opinion – Limited Nature of the Bond Opinion, at 12-13, for a discussion of jurisprudence addressing the basis of liability of counsel to non-clients, and *Function* – Professional Responsibilities of Bond Counsel – Client Relationship, at 15-17, which suggests that bond counsel should carefully consider and explain to its client the basis for and the implication of duties it may owe to non-clients.

[17] *See Function* – Professional Responsibilities of Bond Counsel – Client Relationship, at 15-17.

of clients in an offering document, a working group distribution list, or a statement as to the identity of bond counsel's client in an email introduction to the working group.

In the case of general obligation bonds and non-conduit revenue bonds, the issuer usually engages bond counsel. The engagement of bond counsel by a different party, however, may result from factors such as local custom, the nature of the financing, which parties are represented by counsel, or the history or specifics of a given transaction. In the case of conduit financing bonds, practice varies from state to state and issuer to issuer, and bond counsel may be engaged typically by any of the three principal parties: (1) the issuer, (2) the conduit borrower, or (3) the underwriter, placement agent, or bond purchaser. Often (particularly in conduit transactions) bond counsel represents the issuer but is paid by another party to the transaction, such as the conduit borrower. In these instances, bond counsel should make clear to the party paying bond counsel that bond counsel represents the issuer.

In any case, the basis for giving the bond opinion is the same, and the fact of engagement by one party or another does not change either the requisite level of confidence needed to give the opinion or the objectivity that bond counsel must maintain.[18]

If the bond opinion is addressed to anyone who is not bond counsel's client, bond counsel may wish to add language to its opinion or reliance letter to indicate that its representation does not extend to that addressee, such as:

> "This opinion does not create any attorney-client relationship."

This may be particularly relevant in private placements in which (1) a full working group with a distribution list indicating representation may not become available until substantial substantive work has been undertaken (if it becomes available at all) or (2) the bond purchaser is unfamiliar with the roles of counsel in a bond transaction.

(F) Description of Bond Issue and Transaction

A detailed description of the bonds need not be included in the opinion letter. All the important terms – the maturities, interest rates, and terms of redemption – ordinarily are set forth in the disclosure document accompanying the bonds and in the bond transcript.

Similarly, a detailed description of the transaction related to the bond issue need not be included in the bond opinion. The bond opinion is not a disclosure document, although it may be interpreted as a statement made in connection with the purchase and sale of securities and, therefore, should not mislead or misinform readers regarding the issues addressed.[19] As a result, the form of the bond opinion is almost always included in the applicable disclosure document so that all assumptions and limitations are apparent.

(G) Scope of Examination

Instead of listing specifically the materials that bond counsel has examined, an opinion letter can state that bond counsel has examined such law and documents as it has deemed necessary or

---

[18] *See Function* – The Bond Opinion – Objectivity of the Bond Opinion, at 12.

[19] *See Disclosure Roles* – Description of Transaction and – Security Provisions, at pages 109-111, for a discussion of certain issues that bond counsel should consider in this regard, including avoidance of unintended inferences by recipients of the bond opinion (such as inferences that bond counsel has verified factual matters or makes any representation regarding the adequacy of the security or the ability of the issuer to pay).

appropriate.[20] The reference to "law" includes all sources of law, whether constitutions, statutes, regulations, rulings, court decisions, or other authoritative sources, for the applicable jurisdiction that lawyers practicing in the jurisdiction, exercising customary diligence, would reasonably recognize as being applicable to the issuer and the bonds that are the subject of the opinion.[21]

The bracketed reference to certifications of public officials in the second paragraph is optional and could be used if bond counsel is relying on certifications of public officials other than representatives of the issuer (*e.g.*, a Secretary of State) as to matters of law (*e.g.*, the legal existence of the issuer).

Bond opinions do not state that bond counsel has examined an executed bond, although historically examination of a bond was a common practice (when bond certificates were printed, rather than produced by bond counsel, and issued and delivered to each initial and subsequent purchaser of the bonds). Today, almost all municipal bonds, except some that are privately placed, are delivered to a securities depository and held in a book-entry-only system,[22] with no delivery of physical bond certificates to the beneficial owners. As a result, bond counsel typically examines each executed bond, because bond counsel prepares the bonds, arranges for their execution, and delivers them to the securities depository (*e.g.*, The Depository Trust Company) or a custodian for the securities depository (*e.g.*, a transfer agent such as the trustee or a paying agent).

As used in the model opinion letter, the term "certified proceedings" refers to the authorizing or other proceedings essential to the validity of the bonds. The term does not imply that validation or other judicial proceedings have occurred. If, however, those proceedings have been held, bond counsel may decide to state that fact in the opinion letter.

Bond counsel generally does not rely on opinions of other counsel in giving the opinions in paragraphs 1 and 2 of the model opinion letter. Exceptions to this general practice usually involve reliance on opinions of issuer's counsel or other special situations. If opinions of other counsel are relied on, the bond opinion should state that fact explicitly unless, in giving its opinion, bond counsel is giving a concurring opinion.[23]

(H) "Unqualified" Opinion

In this report, the word "unqualified" describes an opinion stating the legal conclusion to be covered that (1) is subject only to assumptions, limitations, and qualifications that are commonly accepted by bond purchasers, which include those that need not be stated in the opinion based on customary practice,[24] and (2) is not otherwise "reasoned" or "explained." Using this definition, the model opinion letters are "unqualified" opinions. Consistent with this terminology, a bond opinion is not "unqualified" if it includes (1) an assumption, limitation, or qualification that is not commonly accepted, (2) a phrase

---

[20] Some bond counsel, however, do expressly state that they have reviewed the tax certificate.

[21] *See Statement of Opinion Practices*, Section 6.2.

[22] *See Demystifying DTC: The Depository Trust Company and the Municipal Bond Market,* published by NABL in 2017.

[23] *See* Comment (GG) for additional discussion regarding reliance on opinions of other counsel.

[24] Assumptions, limitations, and qualifications are essential to the conclusions reached in the opinion and, thus, should be considered by the recipients of the opinion letter and by others who rely upon it, *e.g.*, the discussion in Comment (Q) regarding post-issuance compliance. The model opinion letters include assumptions, limitations, and qualifications that are commonly accepted by bond purchasers, including the bankruptcy exception and equitable principles limitation and the condition regarding post-issuance compliance.

such as "while the matter is not free from doubt" (generally referred to as a "qualified" opinion), or (3) a legal analysis for the opinion (generally referred to as a "reasoned" or "explained" opinion).[25]

Bond counsel may give an "unqualified" opinion regarding the validity of the bonds and tax exemption of interest on the bonds if it is firmly convinced (also characterized as having a "high degree of confidence") that, under the law in effect on the date of the opinion letter, the highest court of the relevant jurisdiction, properly briefed on the issues, would reach the legal conclusions stated in the opinion.[26] For issues of state law, the relevant court is the highest court of that state; for issues of federal law (*e.g.*, matters relating to the federal income tax treatment of interest on the bonds), the relevant court is the U.S. Supreme Court. The recitation that the court has been "properly briefed" presupposes that the court has been duly briefed on the material facts and all relevant law.

In the area of federal income tax matters addressed in the opinion letter, certain special circumstances are recognized. Too little authoritative judicial precedent regarding federal income tax matters has been established in many instances to enable bond counsel to evaluate its conclusions against the potential conclusions of a court. This lack of judicial precedent is due in part to the difficulties of placing issues before the courts in the tax-exempt bond area where the bondholder (rather than the issuer) is treated as the taxpayer entitled to challenge an adverse decision of the Internal Revenue Service (the "*IRS*"). In addition, a significant and somewhat unique body of IRS administrative guidance exists, some of which is precedential and some of which is expressly not formally precedential, but which may nonetheless offer insight into the proper interpretation of federal income tax questions in appropriate cases. In recognition of these circumstances, bond counsel may give an "unqualified" opinion with respect to federal income tax matters if it is firmly convinced that, upon due consideration of the material facts and all of the relevant sources of applicable law on federal income tax matters described below, the U.S. Supreme Court, properly briefed on the issues, would reach the federal income tax conclusions stated in the opinion or the IRS would concur or acquiesce in the federal income tax conclusions stated in the opinion. In reaching this conclusion, bond counsel may consider authoritative and precedential sources for interpretation of relevant applicable law, including, without limitation the following: provisions of the Code and other statutory provisions; Congressional intent as expressed in committee reports, joint explanatory statements of managers included in Congressional conference committee reports, and Congressional floor statements made prior to enactment by one of a bill's managers; temporary and final Treasury Regulations construing or implementing the Code and other relevant statutes; and IRS and Treasury administrative pronouncements which may be relied on formally as precedent, including, without limitation, revenue rulings, revenue procedures, notices, and defined "written determinations" under the rules governing whether a taxpayer has "substantial authority" for the tax treatment of an item (Treas. Reg. § 1.6662-4(d)(3)(iv)(A) as of the date of this report) that address the specific tax issue for the specific matter involved in bond counsel's opinion (*e.g.*, a private letter ruling on the particular bond issue). In addition, bond counsel also may give appropriate consideration to non-precedential IRS administrative guidance, including, without limitation, proposed Treasury Regulations

[25] *See* "Other Types of Opinions" herein for a discussion of "qualified" and "reasoned" opinions. In contrast to municipal bond opinions, "unqualified" opinions in other business transactions sometimes contain reasoning. *See Function*, at 11, footnote 21 (citing Section 3.5 of the *Guidelines*, which was not updated by the *Statement of Opinion Practices*).

[26] In describing the degree of confidence that bond counsel, in their professional judgment, should reach before delivering an "unqualified" bond opinion, the 2003 Report used two phrases, "firmly convinced" and "high degree of confidence," that are referenced in the Second Edition of Glazer and FitzGibbon on Legal Opinions, Aspen Publishers (2001), at pages 71-74, as being applicable to "unqualified" opinions generally. These phrases are not used in the discussion of "unqualified" opinions in the Third Edition of *Glazer and FitzGibbon* because the authors concluded that the standard of care to which a lawyer is held in giving opinions is usually a matter of state law and the standard, therefore, varies from state to state. *See Glazer and FitzGibbon* at 103-07.

(when temporary or final regulations have not yet been adopted), IRS private letter rulings, IRS technical advice memoranda, IRS general counsel memoranda, IRS actions on decisions, IRS field service advisories, the IRS Internal Revenue Manual, and other IRS administrative announcements published in the IRS Cumulative Bulletin.

In giving an "unqualified" opinion based on the requisite degree of confidence in its conclusions on federal tax matters, bond counsel should consider all the facts and circumstances regarding the particular sources of authority for applicable law, including, without limitation, the weight, relevance, persuasiveness, age, frequency, and nature of the particular authority. Bond counsel may reach the requisite degree of confidence in its conclusion on a particular federal tax issue despite the absence of some types of authority. Thus, depending on all the facts and circumstances, bond counsel might be able to give an "unqualified" opinion on federal tax matters supported only by a well-reasoned interpretation of the applicable provisions of the Code, associated Treasury Regulations, and relevant legislative history.

Bond counsel, however, should not base an "unqualified" opinion on federal tax matters on non-precedential IRS administrative guidance that is inconsistent with authoritative and precedential guidance. Nor should bond counsel base an "unqualified" opinion with respect to federal tax matters on a belief that the applicable bonds will not be subject to an IRS audit or otherwise challenged, that a tax issue will not be raised in an IRS audit, that the amount in controversy in an IRS audit will be too little, that the IRS or other possible challengers will have too few resources to sustain the challenge, or that the IRS and the issuer or others are likely to enter into a closing agreement to resolve any federal tax issues to preserve the federal tax exemption.[27]

An opinion expresses the professional judgment of the opinion giver regarding the legal issues the opinion addresses. It is not a guarantee that a court will reach any particular result.[28] Accordingly, even with an "unqualified" opinion, some risk exists that the court will disagree. This risk is assumed by investors, but is generally considered so small as to require no special or additional disclosure in the disclosure document.

Of course, even when an "unqualified" opinion is given, failure by the issuer to comply with post-issuance requirements of the Code may cause interest on the bonds to be includable in gross income. A risk also exists that the conclusions expressed in the opinion will be challenged, with possible temporary adverse consequences to the value and liquidity of the bonds even if the issuer prevails. Even when giving an "unqualified" opinion, counsel may decide in some circumstances to disclose to investors in an accompanying disclosure document the potential for such challenges, as well as other facts and circumstances that may affect the validity or tax-exempt status of the bonds, such as lawsuits, court decisions, or IRS activities or positions.[29] Such disclosure is not necessarily inconsistent with giving an "unqualified" opinion in accordance with the above discussion.

(I) Basic Opinion

The opinion that the bonds are valid general obligations means that (1) the issuer (unless it is the state itself) is a duly created and validly existing political subdivision or body corporate and politic and public instrumentality of the state, (2) the issuer has the power to issue the bonds, (3) the issuance and

---

[27] *See Circular 230*, Section 10.37(a)(2)(vi).

[28] *Statement of Opinion Practices*., Section 4.1.

[29] *See* "Disclosure Matters – Disclosure Issues – Tax Issues – Post-Issuance Tax Compliance," "Disclosure Matters – Disclosure Issues – Tax Issues – Risk of IRS Audit," and "Disclosure Matters – Disclosure Issues – Other Disclosure" herein.

sale of the bonds have been duly authorized by all requisite action of the issuer, (4) the bonds do not exceed any applicable limitation on indebtedness under governing law or the issuer's governing documents, (5) all required approvals or filings for the issuance and sale of the bonds to underwriters or other original purchasers that are a condition to the validity of the bonds have been obtained or have been made, and (6) the bonds are in proper form and have been duly executed and delivered. If a defect in any of the foregoing would not affect the validity of the bonds or has been overcome pursuant to applicable law, such as a statute of limitations, bond counsel may still be able to give the opinion; however, bond counsel does not generally give an "unqualified" opinion on the basis that a defect in the validity of the bonds has been overcome through the purchase of the bonds by a purchaser for value without notice of the defect.[30] Bond counsel does not customarily set forth these conclusions explicitly, although counsel giving opinions in business transactions do set forth their equivalent.[31]

Bond counsel generally does not give its opinion unless it has concluded that the original sale of the bonds to underwriters or other original purchasers is in accordance with law. Unless expressly stated, the opinion does not address the legal capacity of the purchasers to underwrite or invest in the bonds or the relationships between the public officials of the issuer and the original purchasers. Counsel customarily does not require each official covered by a conflict-of-interest provision to answer a questionnaire regarding the official's relationships with bond purchasers.[32] Key officers, however, do commonly certify (often in a "signature and no litigation" certificate) that, to their knowledge and belief, none of a designated class of officials (*i.e.*, those covered by any applicable self-dealing prohibition) has any personal interest in any of the bond purchasers or in the project being financed. Even if the prohibition makes a sale "void" rather than "voidable," a concealed violation of a self-dealing prohibition should not affect an innocent purchaser of the bonds. In this respect, comfort may be drawn from U.C.C. § 8-202, even though (as already stated) reliance is not generally placed on that provision with respect to matters affecting validity.

The opinion uses the word "binding," which is traditional in general obligation bond opinions, whereas the word "enforceable" is not. The word "binding" still means that remedies exist.[33] If the issuer is immune from suit on the bonds, the word "binding" may be inappropriate without qualification. An example would be the issuance of bonds by a state that has not waived sovereign immunity. If the issuer is subject to suit, but a judgment cannot be paid without a legislative appropriation, use of the word "binding" without qualification may similarly be inappropriate unless the appropriation can be judicially compelled.

The word "general" means that the obligation to pay is not limited to any particular source of funds. "General" also connotes that the full faith and credit of the issuer are pledged to the payment of the bonds unless a limitation is indicated.[34]

---

[30] *See* U.C.C. § 8-202(2). The Official Comment states: "A long and well established line of Federal cases recognizes the principle of estoppel in favor of bona fide purchasers where municipalities issue bonds containing recitals of compliance with governing constitutional and statutory provisions, made by the municipal authorities entrusted with determining such compliance." The Official Comment points out, however, that "[a]s a practical matter the problem of policing governmental issuers has been alleviated by the present practice of requiring legal opinions as to the validity of the issue."

[31] *See, e.g.*, Third-Party "Closing" Opinions, A Report of The Tri-Bar Opinion Committee, 53 *Bus. Law.* 592 (1998) (the "*TriBar 1998 Report*") (illustrative opinion letter attached as Appendix A-1 at 667-68).

[32] *Cf.* Securities and Exchange Commission Form T-1 relating to relationships of corporate officers and employees with indenture trustees.

[33] *See generally TriBar 1998 Report*, at 601, 619-21.

[34] *See* Comment (K).

(J) Draw-Down Bonds

A draw-down bond or loan (a "draw-down obligation") is commonly understood to be a bond, bonds, or loan the proceeds of which are committed to be advanced over time. Each advance may be evidenced by a separate instrument or may be reflected as an increase in the outstanding principal amount of the draw-down instrument. Commercial paper programs operate in a similar fashion whereby the outstanding principal amount may increase from time to time in an amount not exceeding the authorized aggregate principal amount of the program. A draw-down obligation bears interest only to the extent funded. State law varies concerning when a draw-down obligation is considered issued and how the obligation must be documented. For federal income tax purposes, the date of issuance of a draw on an obligation is the date on which the draw is funded, and the date of issuance of an issue of draw-down obligations is the date on which the aggregate draws on the issue exceed the lesser of $50,000 or five percent of the maximum issue price.[35] The entirety of the draw-down obligation must represent valid indebtedness as a condition to tax exemption of all advances under the draw-down obligation under federal income tax law.

For state law reasons bond counsel may wish to condition its opinion regarding validity and binding effect by adding the phrase "to the extent advanced" to make clear that a draw-down obligation is enforceable only to the extent of the principal amount and interest owed thereon. For state law purposes some bond counsel also include such a statement with respect to the excludability of interest from gross income for federal income tax purposes, based on a belief that, if undrawn portions of the obligation are not valid and binding under state law, such portions may not be indebtedness for federal tax purposes. If, however, the draw-down bond by its terms is payable only to the extent of funds advanced and interest thereon, then bond counsel may be able to conclude that such qualifications are not necessary. Bond counsel may decide to include a similar condition with respect to the excludability of interest on commercial paper from gross income for federal income tax purposes opinions. An example of such language is as follows:

> When the Notes have been duly executed by the authorized officers of the Issuer and authenticated and issued by the Issuing and Paying Agent and delivered and paid for in compliance with the Issuing and Paying Agency Agreement: (i) assuming compliance by the Issuer with the Tax Covenants, the interest on the Notes will be excludable from gross income for federal income tax purposes pursuant to Section 103 of the Internal Revenue Code of 1986, as amended (the "Code"), under existing federal statutes, decisions, regulations, and rulings, existing on the date hereof [except during such time as the Notes are held by a person who is a "substantial user" of the projects financed by the Notes or a "related person" thereto within the meaning of Section 147(a) of the Code and the regulations promulgated pursuant thereto]; [and (ii) interest received on the Notes shall be exempt under present laws from income taxation in the State.]

The Committee believes that, subject to unique state law issues, a statement to the effect that an obligation is valid to the extent advanced does not imply that, for federal income tax purposes, the undrawn portion of the obligation lacks sufficient validity and binding effect to constitute indebtedness once a valid draw under state law is actually made. Accordingly, a separate opinion related to each draw (at least as to federal tax exemption) may not be necessary. If relevant federal or state laws change after the date of the opinion, advances made after the date of the opinion may not be covered by the opinion.[36]

---

[35] Treas. Reg. § 1.150-1(c)(4)(i).
[36] *See* Comment (B).

(K) Property Taxes

This sentence would not ordinarily apply to state bonds. For state general obligation bonds, bond counsel customarily states that the full faith and credit of the state is pledged. This sentence also does not apply to all municipal general obligation bonds. For example, in many states "full faith and credit" extends only to *ad valorem* taxes on real property. In some states, prior to the delivery of general obligation bonds, a tax must be levied by the governing body of the issuer for future years at a rate or in an amount sufficient to pay the principal of and interest on the bonds when due.

The significance of this sentence is the elasticity of the rate that applies to the property tax base. When special categories of property (*e.g.*, motor vehicles) are exempted from the general property tax and subjected to a limited excise tax, the statement regarding the unlimited property tax remains correct.

If bonds are payable from limited property taxes, the following alternative paragraph is suggested:

> "2. All taxable property in the territory of the Issuer is subject to *ad valorem* taxation, within the limit prescribed by law, to pay the Bonds. [(*Statute*) provides (with exceptions, not including debt service on the Bonds) that the annual tax levy may not exceed ___ percent of the true value of the taxable property in the territory of the Issuer.]"

This alternative paragraph should be adapted to refer to the particular limitations applicable to the bonds. Bond counsel may appropriately refer to limited tax bonds as general obligations as long as payment is not limited to any particular source of funds (other than *ad valorem* taxes on real property); the opinion, however, should refer to the tax limitation.

(L) Security

This sentence obviously does not apply to all general obligation bonds; however, summarizing in the bond opinion the basic security for the bonds is useful if it can be done with this degree of brevity. In the context of a dedicated property tax pledge a sentence concerning the security may state "[t]he Bonds are the valid and binding limited obligations of the Issuer, as a special taxing district, payable solely from [tax increment]." A more detailed statement of security (and any relevant remedies) is better placed in any accompanying disclosure document, which can be supplemented by continuing disclosure over the life of the bonds if any of the details change, instead of the bond opinion, which addresses current law as of the date of issue and is not expected to be updated.

(M) Stated Interest vs. Amounts Properly Treated as Interest

As discussed in this report, the model opinion states that interest on the bonds is excludable from gross income under Section 103 of the Code. For bonds issued at par or with *de minimis* discount, interest will be equal to the stated interest or "coupon interest." For bonds issued with more than a *de minimis* discount, bonds issued at a premium, bonds that provide for more than one interest rate at different time periods, and bonds that are contingent payment debt instruments ("*CPDI*"), the amounts that are treated as "interest" for federal income tax purposes may differ from the stated interest on the bonds. It is generally the standard practice not to address the difference between stated interest and amounts properly treated as interest for tax purposes in the tax opinion (although occasionally bond counsel will refer to "amounts that are properly treated as interest are excluded from gross income under Section 103 of the Code"). The general view is that the opinion stating interest is excludable is deemed to refer to amounts that are properly treated as interest under tax law and a statement similar to one in the

foregoing sentence should be included only if bond counsel believes a unique issue exists regarding the treatment of payments as other than interest or if the potential disparity between coupon interest and interest for tax purposes is not disclosed in the offering document or elsewhere to the bond purchasers and bond counsel wishes to clarify its reference for bondholders not represented by counsel or another tax advisor. It is typical in public offerings of bonds to address original issue discount, original issue premium, or both, as applicable, in the disclosure document, with a direction in the disclosure advising holders of the bonds to consult with their tax advisors for further guidance. Bonds that are CPDI or bear more than one interest rate are not typically sold to the public, so CPDI issues are rarely, if ever, discussed in an offering document. Bond counsel generally assume the purchasers of such bonds will consult with their tax advisors as to the proper treatment of stated interest on those bonds for federal income tax purposes and may specifically advise purchasers to consult with their tax advisors.

(N) Excludable vs. Excluded

The wording of this opinion was revised in the 2003 Report to reflect then-recent changes in industry practice. Specifically, rather than describing interest on the bonds as "excluded from gross income" as in the prior reports, the model opinions state that interest on the bonds is "excludable from gross income."

Either formulation accurately indicates the result of a bond being described in Section 103 of the Code, *i.e.*, that the interest is excludable from gross income but is not necessarily "tax-exempt" for all purposes. For example, whereas generally the interest on the bond is excluded from gross income, other provisions of the Code may require certain taxpayers (*e.g.*, certain property and casualty insurance companies, certain S corporations, and recipients of Social Security and Railroad Retirement benefits) to include municipal bond interest in gross income. Whether characterizing interest as "excludable" or "excluded" from gross income, bond counsel is not addressing the applicability of collateral tax consequences that may apply to particular purchasers.[37] Further, the Committee is not aware of any market preference with respect to the use of "excludable" vs. "excluded" in the opinion itself.

(O) Definition of Code

The Tax Reform Act of 1986, Section 2(a), provides that the Internal Revenue Title enacted August 16, 1986, "as heretofore, hereby, or hereafter amended, may be cited as the Internal Revenue Code of 1986." Nonetheless, the Committee has retained the wording of this opinion to refer to the "Internal Revenue Code of 1986, as amended" rather than the "Internal Revenue Code of 1986" in order to avoid any ambiguity or potential confusion that the absence of "as amended" may cause the uninitiated reader. This choice is not meant to suggest that the use of "the Internal Revenue Code of 1986"—without "as amended"—is incorrect.

In the case of certain transitional refundings, in addition to referring to "the Internal Revenue Code of 1986, as amended," it may be appropriate also to reference either "its statutory predecessor" or "the Internal Revenue Code of 1954, as amended."

(P) Inflation Reduction Act of 2022

The Inflation Reduction Act of 2022, Public Law 117-169, the latest of several enactments since the publication of the 2003 Report affecting the alternative minimum tax, added a corporate alternative minimum tax of 15% on "adjusted financial statement income" for certain "applicable corporations." The

[37] *See* Comment (S), "Basic Tax Opinion," for further discussion of such collateral tax consequences.

tax is imposed on the amount by which the corporation's tentative minimum tax exceeds its regular tax liability for the year. Subject to certain exceptions, an "applicable corporation" is generally any corporation other than an S corporation, a regulated investment company, or a real estate investment trust that has for a consecutive three-year look back period had average annual financial statement income that exceeds $1 billion. As of the date of this report, the Committee notes that practice varies among bond counsel but that many bond counsel are adopting a more general statement as reflected in paragraph 3 of the model opinion and elsewhere in this report, rather than a statement that includes a specific reference the statutory text (such as the definition of "applicable corporation" in Section 59(k) of the Code) and relevant tax years.

(Q) Conditions to Federal Tax Opinions

Federal tax opinions are conditioned on future compliance with all post-issuance requirements of the Code the compliance with which is necessary to maintain the excludability of interest on the bonds from gross income. Among the requirements that must be satisfied, depending on the particular transaction, are restrictions on investment of bond proceeds and other amounts, restrictions on the use of bond proceeds and bond-financed assets, arbitrage rebate requirements, and the need to take "remedial action" after a "change in use" of the bond-financed facility (*e.g.,* to redeem all or an appropriate portion of the bonds if the property financed is subsequently no longer used for a purpose qualifying for tax-exempt financing). If bond counsel is responsible for preparing or reviewing relevant portions of any accompanying disclosure document, bond counsel may recommend including a brief description of such post-issuance requirements in such document.[38]

Conditioning the federal tax opinion on future compliance with such requirements is not intended to suggest on the one hand that bond counsel need not consider the legality and practicability of (or reasonableness of expectations for) such compliance, or on the other hand that bond counsel has any obligation for post-issuance monitoring or compliance. Indeed, absent a statement to the contrary in the opinion or any accompanying disclosure document, it should be assumed that bond counsel has no responsibility for post-issuance monitoring or compliance.

An alternative to the language in the text making the federal tax opinions conditioned on future compliance is the following, in which future compliance is assumed:

> "For the purpose of giving the opinion set forth in the preceding sentence, we have assumed compliance by the Issuer with all requirements of the Code that must be satisfied subsequent to the issuance of the Bonds in order that the interest thereon be, and continue to be, excludable from gross income for federal income tax purposes under Section 103 of the Code."

Practice varies in this area. Whether future compliance is assumed by, or is a condition of, the opinion, bond counsel should consider the scope of ongoing compliance required. Bond counsel may base the opinion on factual assumptions or conditions (*e.g.*, based on a certificate or other documentation), unless bond counsel knows that the assumption is incorrect or knows of facts that bond counsel recognizes make such reliance under the circumstances otherwise unwarranted.[39]

The Committee recommends that the bond opinion not list factors that could adversely affect the excludability of interest on the bonds from gross income for federal income tax purposes, because such a

---

[38] *See* "Disclosure Matters – Disclosure Issues – Tax Issues – Post-Issuance Tax Compliance" herein.
[39] *See Statement of Opinion Practices*, Sections 5.1, 5.2 and 5.5.

listing is neither necessary nor desirable. To the extent that bond counsel has responsibility for preparing or reviewing relevant portions of any disclosure document, bond counsel should suggest appropriate disclosure on this issue.

(R) Certifications and Covenants Regarding Tax Matters

The excludability of interest on the bonds from gross income for federal income tax purposes, both on the date of issuance and throughout the period during which the bonds are outstanding, will depend on (among other things) (1) the accuracy of certifications of fact made on the date of issuance and (2) continuing compliance with certain covenants by the issuer (and, in the case of conduit bonds, continuing compliance by one or more parties, including the conduit borrower, users of the facility, or guarantors). Those certifications and covenants generally are included either in the bond documents or in separate tax documents, or both, and recite in varying levels of detail the requirements for initial and ongoing excludability of interest from gross income. The certifications and covenants not only provide a basis for bond counsel's opinion on the excludability of interest, but also provide guidance to the financing participants regarding the post-closing conduct necessary to preserve such excludability.

Customarily, the issuer and, in the case of a conduit financing, the conduit borrower, covenant to comply with all requirements of the Code in order to preserve the tax exemption. While this covenant generally is made with respect to the Code both as it exists on the date of bond issuance and as it may be modified thereafter, in some circumstances the covenant is to comply with the Code only as it exists on the date of issuance. The language in the model opinion reflects the former approach. If the latter approach to the covenant is taken, bond counsel should consider using the following alternative language:

> "The Issuer has covenanted to comply with all such requirements as in effect on the date hereof."

If, after the date of issuance, a new Code provision is adopted that applies to outstanding bonds (*i.e.*, a provision with a retroactive effective date), an issuer that made the covenant as stated in the model opinion has agreed to comply with this provision, whereas an issuer subject to the covenant stated in the alternative language above has not. This difference could result in interest on the bonds of the second issuer becoming taxable. Accordingly, a covenant to comply with the Code only as it exists on the date of bond issuance should be clearly disclosed in any accompanying disclosure document.[40]

(S) Scope of Federal Tax Opinion

1. Basic Tax Opinion

The formulation of the opinion addressing the federal income tax treatment of interest on the bonds used in bond opinions prior to adoption of the Tax Reform Act of 1986 (the "*1986 Act*"), *i.e.*, "interest on the Bonds is exempt from federal income taxes," was narrowed in the 1987 Report to the statement contained in the first sentence of the federal tax opinion paragraph, which conforms to the language of Code Section 103(a). This language, together with the disclaimer in the last sentence of the paragraph, is intended to eliminate any claim that this sentence addresses tax matters other than the excludability of interest on the bonds from the definition of gross income contained in Section 61 of the Code.

[40] *See also* Comment (Q).

Because of 1986 Act changes in the computation of the alternative minimum tax imposed on individuals and corporations by Section 55 of the Code, the market came to expect the bond opinion to address the applicability of such tax to owners of bonds. The suggested language for the federal tax opinion includes a brief statement regarding the applicability of such tax. Comment (P) above specifically addresses the applicability of the current version of the alternative minimum tax on certain corporations added by the Inflation Reduction Act of 2022.

The inclusion of the opinions regarding the applicability of the alternative minimum tax within the scope of the federal tax opinion, together with certain other changes in federal tax law effected by the 1986 Act (*e.g.,* elimination of the deductibility by financial institutions of interest expense allocable to tax-exempt interest), raises the question of whether additional tax consequences to bondholders should also be addressed in the opinion. Certain of such tax consequences (*e.g.*, the tax treatment of Social Security and Railroad Retirement benefits, and previous limitations on deductibility of interest by financial institutions) antedate the 1986 Act and have generally been regarded as beyond the scope of the bond opinion. The Committee believes bond counsel should consider recommending that such additional tax consequences (other than the applicability of the alternative minimum tax) be addressed, if at all, in any accompanying disclosure document or separate documentation directed to the bond purchaser, such as a side letter, rather than in the bond opinion.[41] The disclaimer in the final sentence of the federal tax opinion language emphasizes its limited scope.

Where appropriate, in the case of bonds determined to be "qualified tax-exempt obligations" within the meaning of Section 265(b)(3) of the Code, the bond opinion (or a supplemental opinion of bond counsel) may also include the following statement (or only the first portion thereof):

> "The Issuer has designated the Bonds as 'qualified tax-exempt obligations' within the meaning of Section 265(b)(3) of the Code, and, in the case of certain financial institutions (within the meaning of Section 265(b)(5) of the Code), a deduction is allowed for 80% of that portion of such financial institutions' interest expense allocable to interest on the Bonds."

Although not phrased as an opinion, inclusion of this statement should be made only if bond counsel has satisfied itself that the factual basis exists for the bonds to be "qualified tax-exempt obligations" and that the issuer is a "qualified small issuer" within the meaning of Section 265(b)(3) of the Code. Further, because the foregoing statement may be taken into account by purchasers in deciding whether to purchase, and the price to pay for, the bonds, bond counsel may consider recommending that some disclosure with respect to the applicability of Section 265(b)(3) of the Code be included in any accompanying disclosure document. Certain bond counsel do opine on the application of Section 265(b)(3) of the Code and modify the above-referenced language in the following form:

> "Based on reasonable expectations certified by the Issuer, Bond Counsel is of the opinion that the Bonds are "qualified tax-exempt obligations" within the meaning of Section 265(b)(3) of the Code . . ."

[41] *See* "Disclosure Matters – Disclosure Issues – Tax Issues – Collateral Tax Consequences to Holders" herein. Additional tax disclosure may be included in a side letter, *e.g.*, an investor letter, especially in direct placements.

Neither the federal tax opinion nor any accompanying disclosure normally addresses whether any bondholder, by reason of any understanding that it will sell or resell the bonds to another party, will be treated for tax purposes as a lender to that other party, rather than as the tax owner of the bonds.[42]

2. Original Issue Discount

In the case of bonds sold at a discount upon original issuance, most bond counsel prefer to refer in the opinion only briefly, if at all, to the treatment of original issue discount as tax-exempt interest and, where bond counsel's role includes preparation or review of relevant portions of an accompanying disclosure document, to include or recommend inclusion of a more complete discussion in the disclosure document.[43] The effect of treating original issue discount as interest, coupled with a corresponding basis adjustment, is to exclude from gross income for federal income tax purposes an amount that would otherwise constitute capital gain on the sale, exchange, redemption, or maturity of the bonds.

In a publicly underwritten issue, original issue discount for any particular bond is any excess of its stated redemption price at maturity over the initial offering price to the public, excluding underwriters and other intermediaries, at which price a substantial amount of the bonds of such maturity was sold.[44] In a private placement, the original issue discount on a bond is the excess of its stated redemption price at maturity over the price paid by the first buyer.[45]

When original issue discount is present, the following opinion language may be used in place of the first clause of paragraph 3 of the model opinion:

> "Interest on the Bonds (including any original issue discount properly allocable to an owner thereof) is excludable from gross income for federal income tax purposes under Section 103 of the Internal Revenue Code of 1986, as amended (the "Code") . . ."

For an illustrative statement regarding original issue discount that bond counsel could recommend be included in any accompanying disclosure document, *see* "Disclosure Matters—Disclosure Issues—Tax Issues— Original Issue Discount" herein.

3. Taxable Bonds

If interest on the bonds is not intended to be excludable from gross income for federal income tax purposes, the opinion of bond counsel will sometimes include a specific opinion to that effect. A typical opinion is as follows:

> "Interest on the Bonds is not excludable from gross income for federal income tax purposes under Section 103 of the Internal Revenue Code of 1986, as amended."

Such opinion may also be stated as follows:

---

[42] *See*, *e.g.*, *American National Bank of Austin v. United States*, 421 F.2d 442 (5th Cir. 1970); *American National Bank of Austin v. United States, 573 F.2d 1201* (Ct. Cl. 1978).

[43] For background, *see* Sections 1271-1275, 1286, and 1288 of the Code, and Treasury Regulations Sections 1.1271-1 through 1.1275-5.

[44] Sections 1273(a) and (b)(1) of the Code. If bonds of a maturity bear interest at different rates, then bonds bearing interest at the same rate are treated as if they are a separate maturity from bonds of the maturity bearing interest at a different rate.

[45] Sections 1273(a) and (b)(2) of the Code.

"We call to your attention that interest is includable in gross income for federal income tax purposes under Section 103 of the Internal Revenue Code of 1986, as amended."

If an opinion is required regarding state income tax, it would similarly address whether interest on the bonds is taxable for state tax purposes.

Other collateral tax consequences result from taxable interest, including the treatment of original issue discount, market discount, premium, sale or redemption, back-up withholding, treatment of foreign bondholders and other specific categories of bondholders, and state and local taxes. These considerations should be addressed by specific language in any disclosure document accompanying the bonds rather than in the bond opinion itself. The scope and extent of such discussion vary.

4. "Exploding" Opinions

Opinions that cease to be applicable under certain circumstances are often referred to as "exploding" opinions. In a sense, all bond opinions are "exploding" opinions, as the inaccuracy of various facts represented to bond counsel, or the failure of the issuer or another party to comply with the myriad tax-related covenants, could adversely affect the validity or tax exemption, or both, of the bonds, with possible retroactive effect. This aspect of bond opinions is generally well understood, and bond counsel need not make any special mention of it in opinions or recommend any special mention of it in disclosure documents beyond statements indicating reliance on representations of facts and conditioning the opinion on continuing compliance with covenants.[46] References in this report to "exploding" opinions refer only to opinions that, by their express terms, cease to be applicable under certain specific circumstances.[47] "Exploding" opinion language should cause a holder at a later date or a subsequent purchaser to undertake an inquiry as to whether the circumstance that could give rise to the "explosion" has occurred. The Committee is not aware of "exploding" opinions being given in recent years and takes the position that all opinions speak only as of their date.

(T) State Tax Exemptions

Generally, an opinion addresses the excludability of interest on the bonds from taxation in the state of issuance if the state imposes a tax on income. Because of the disparate nature of state legislation addressing the issue, virtually no uniformity of language exists with respect to the tax treatment of bonds for state tax purposes. Many counsel prefer to use opinion language that follows closely the applicable legislation; others use a more generic formulation.

It should be noted that, in some states, tax treatment of interest is tied to its treatment under federal tax law. In such a case, it may be appropriate to note that both the excludability of interest on the bonds for federal income tax purposes and the state and/or local tax treatment of interest on the bonds depends on the accuracy of representations and compliance with covenants made by the issuer and other applicable parties (*see* Comments (Q) and (R)).

If the bonds are exempt from intangible property taxes, if any, in the state of issuance, a statement to that effect is often included in the opinion.

---

[46] *See*, *e.g.*, Comment (Q).

[47] *See* "Disclosure Matters – Disclosure Issues – Tax Issues – Exploding Opinions" herein for further discussion of "exploding" opinions and suggested disclosure relating thereto.

With respect to state income taxes, even if the applicable statute broadly states that interest on bonds is exempt from taxation within the state, the state may include it in the "measure" of corporate excise or franchise taxes.[48] Indeed, if interest on U.S. Treasury obligations is included in the measure of those taxes, the state is required by federal law to include interest on state and local obligations as well.[49] If bond interest is, or may be, includable in the measure of corporate excise or franchise taxes, corporate purchasers may misinterpret a statement that interest is excludable from state income taxes. In such a case, a qualification should be included.

In 2008 the U.S. Supreme Court held that Kentucky's taxation of interest on bonds issued by other states and their political subdivisions, while exempting from taxation interest on bonds issued by the Commonwealth of Kentucky or its political subdivision, does not impermissibly discriminate against interstate commerce under the Commerce Clause of the United States Constitution.[50] The U.S. Supreme Court's opinion left open the possibility of a challenge to a state's differential treatment of the interest on tax-exempt private activity bonds issued in other states. If a state's treatment of such bonds were held to unlawfully discriminate against interstate commerce, the court making such a finding would have to decide upon a remedy for the tax years at issue in the case. Bond counsel may consider recommending that the consequences of this case be addressed, if at all, in any accompanying disclosure document, rather than in the bond opinion.

If an opinion is given regarding state tax treatment of interest on the bonds, bond counsel may wish to include a disclaimer similar to the last sentence of the federal tax opinion in paragraph 3 of the model opinion. Some bond counsel prefer to put such tax disclaimers in a paragraph following the numbered paragraphs.

(U) Bankruptcy and Equitable Principles

The reference to bankruptcy and similar laws is limited to laws affecting creditors' rights generally.[51] If a law would affect only one particular type of creditor, that law should be discussed or disclosed in either the disclosure document or in another place in the opinion. State law remedies against governmental entities may be limited by state law, and bond counsel may elect to describe those limitations in this paragraph because, *e.g.*, with respect to a claim against a governmental issuer, additional procedural requirements may exist.[52]

An example of the possible adverse exercise of equitable principles would be judicial permission to pay essential operating expenses ahead of debt service.[53]

The Committee notes that the bankruptcy exception and equitable principles limitation are understood to apply to bond opinions even if they are not expressly stated.[54]

---

[48] *See Connecticut Bank & Trust Co. v. Tax Commissioner*, 178 Conn. 250, 423 A.2d 883 (Conn. 1979).
[49] *See* 31 U.S.C. § 3124 (1983); *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983).
[50] *Department of Revenue of Kentucky v. Davis* 553 U.S. 328 (2008).
[51] To learn more about many possible effects of an issuer bankruptcy proceeding on the enforceability of a bondholder's right to payment, s*ee* General Obligation Bonds: State Law, Bankruptcy and Disclosure Considerations, published by NABL in 2014, and the third edition of Municipal Bankruptcy: A Guide for Public Finance Attorneys, published by NABL in 2015, at 65-75.
[52] *See* the discussion about sovereign immunity in Comment (I).
[53] *See Borough of Fort Lee v. United States*, 104 F.2d 275, 284 (3rd Cir. 1939).
[54] *See Statement of Opinion Practices*, Section 4.2.

Some adverse effects of an issuer bankruptcy case can be mitigated if the bonds are secured by a statutory lien on pledged tax revenue or if the pledged taxes are "special revenues," *i.e.*, specifically levied to finance one or more projects or systems of the issuer, as opposed to the dedication of a portion of general property, sales, or income taxes (other than in tax increment financings) levied to finance the issuer's general purposes.[55] However, any opinion regarding statutory liens and special revenues, if given, is generally relegated to a supplemental opinion, in view of the limited judicial precedent, residual risks, and consequent qualifications and explanations associated with such bankruptcy opinions.

The Committee notes that "good delivery" of the bond opinion requires an opinion regarding only the validity of the bonds, not the enforceability of the security documents. Nevertheless, there may be a difference between the need for qualifications, depending on the type of bond with respect to which the bond opinion is being given (for example, general obligation bonds compared and contrasted to revenue bonds or private activity conduit bonds, when an opinion is expressed concerning a pledge of revenues, as in the model opinion letters in Parts II and III). Further, a bond opinion given with respect to certificates of participation may need more qualifications than a general obligation bond opinion. In the case of qualifications to the enforceability of an agreement that do not apply to the enforceability of the bonds, bond counsel should consider addressing the agreement only in a supplemental opinion to the underwriter or direct purchaser in which qualifications that would be customary in closing opinions generally may be included.

(V) Opinion Regarding Disclosure Document

This statement is consistent with the general approach taken by bond counsel to neither express an opinion on, nor give any other advice in, the bond opinion regarding any disclosure document accompanying the bonds. The statement does not necessarily mean that bond counsel has not been engaged to review the accuracy or completeness of specific portions of any disclosure document or to give a separate opinion or other assurance in addition to the bond opinion on the disclosures in that document. Indeed, bond counsel's engagement now often includes (1) the preparation of summaries and descriptions of the bonds and relevant documents for inclusion in a disclosure document and (2) the giving of a supplemental opinion or delivery of a negative assurance letter, in addition to the bond opinion, to one or more specified parties, on those summaries and descriptions, as well as the portions of the disclosure document describing tax and certain legal matters. That supplemental opinion or letter usually is given to the underwriters, and the Committee believes its contents should not be included in the bond opinion. In that case, the word "herein" could be added to the disclaimer, as shown in the model opinion letters, to make the disclaimer accurate. Unless specifically engaged to do so, bond counsel usually does not give an opinion or provide assurances regarding other portions of the disclosure document or assume any responsibility for reviewing those portions.[56]

In situations where bond counsel is not engaged to review the accuracy, completeness, or sufficiency of all or part of any accompanying disclosure document and will not be giving any opinion or other advice on that document, bond counsel may wish to include a statement to that effect in the bond

---

[55] *See* 26 U.S.C. §§ 902(2)(E), 922(d), and 928. *See also* Comment (CC).

[56] *See Disclosure Roles* – Official Statement Responsibility; Supplemental Opinion of Bond Counsel, at 117-121, for a discussion of the scope and content of an opinion or letter regarding material in a disclosure document, including examples of language that can be used and the need to avoid language "that implies that the document summaries include every provision of the bond documents that might be material to an investor under every circumstance."

opinion or disclosure document. While such a statement will inform investors of the limited role of bond counsel, it may not be an effective shield against statutory or common law liability.[57]

Some bond counsel also include in their bond opinions a disclaimer of responsibility regarding the creditworthiness of the instrument or the issuer's ability to pay. Such disclaimers are unnecessary because bond opinions cannot reasonably be construed to reach such matters.[58] Factual matters bearing on credit or ability to pay should be addressed in any accompanying disclosure document and not in the bond opinion. The bond opinion is not intended to serve as a "prospectus" and should not be viewed as a disclosure document.[59]

(W) Miscellaneous

1. Contingent Fees

The model opinion letter does not refer to the financial terms on which bond counsel is retained. The same standard of care should apply in giving the opinion, regardless of the basis for compensation. Accordingly, so long as bond counsel is applying the same standard, the basis for compensation is not material to the bond opinion and need not be disclosed.[60] It is important to note that, except in enumerated circumstances, Section 10.27(b) of Circular 230 prohibits contingent fees in matters that are before the IRS. Matters before the IRS include "preparing and filing documents" for presentation to the IRS. A contingent fee is any fee that is based, in whole or in part, on whether or not a position taken on a tax return (such as Form 8038 for example) or other filing avoids challenge by the IRS or is sustained either by the IRS or in litigation.[61]

2. No-Litigation Certificate

The delivery of an "unqualified" opinion regarding validity has traditionally meant that counsel for the issuer (or a responsible officer or officers) has certified that no litigation is pending or, to such person's knowledge, threatened, affecting either the validity of the bonds or, if applicable, the power of the issuer to levy and collect taxes or to provide any other security for the payment of the bonds.[62] The requirement of an unqualified no-litigation certificate has at times impeded financings where, notwithstanding pending or threatened litigation, no substantial basis existed for questioning the validity of, or security for, the bonds. As a result, a more reasonable standard has emerged, under which bond counsel can give an "unqualified" opinion on the validity of the bonds, notwithstanding pending or threatened litigation challenging the validity of, or adversely affecting the security for, the bonds, if bond

---

[57] *See* "Disclosure Matters" herein.

[58] *See Disclosure Roles* – Security Provisions, at 109-111. The Committee notes, however, if bond counsel's diligence reveals that the issuer or conduit borrower is not reasonably expected to be able to pay the debt service on the bonds, bond counsel will need to consider whether the bonds are "debt" versus "equity" and the impact that analysis may have on its opinion.

[59] *See* "Disclosure Matters" herein.

[60] *See* "Disclosure Matters – Disclosure Issues – Other Disclosure – Potential Conflicts of Interest" herein. However, the SEC brought a successful civil action against an underwriter for failing to disclose additional compensation to the underwriter that was tied to the issuance of municipal bonds. *Securities and Exchange Commission v. Rhode Island Commerce Corporation (f/k/a Rhode Island Economic Development Corporation)*, SEC Litigation Release No. 24428 (March 20, 2019). Consequently, many bond counsel choose to disclose the contingent nature of their fees, when applicable.

[61] *Circular 230*, Section 10.27(c)(1).

[62] *Cf.* "Preparing the Preliminary Official Statement – Body – Legal and Tax Matters" in Best Practices Primary Market Disclosure published by the Government Finance Officers Association in 2020.

counsel is satisfied that a material adverse outcome is remote and if terms of the sale permit delivery of the bonds in these circumstances.[63] In reaching this conclusion, bond counsel may assume the accuracy of a "no merit" opinion of other counsel familiar with the litigation if bond counsel is satisfied regarding the competence of that other counsel through its reputation or otherwise.[64] The Committee believes that bond counsel should recommend that the litigation be described in any accompanying disclosure document, together with a statement to the effect that a no merit opinion, if sought, was reviewed by bond counsel, who has assumed its accuracy.[65] Some bond counsel may choose to include a description of the litigation in the opinion itself, particularly when a separate disclosure document containing the disclosure is not being provided to the bond purchaser.

Litigation affecting the valid existence of the issuer or the title to office of the officers acting for the issuer is not considered relevant to the opinion if the validity of, and security for, the bonds would not be affected by an adverse decision in that litigation. As an example, the validity of, and security for, the bonds may be unaffected because, under applicable law, the issuer would be recognized as a *de facto* entity, or the officers would be recognized as *de facto* officers. Here again, however, depending on the materiality of the litigation in other respects, describing the litigation in any accompanying disclosure document may be appropriate.

3. Securities Laws

a. Federal

Common practice has been not to refer to the exemptions from registration and qualification under federal securities laws in the bond opinion. If an opinion is required regarding exemption from registration under the Securities Act of 1933, and exemption of a trust indenture or equivalent document from qualification under the Trust Indenture Act of 1939, it is usually given by bond counsel in a supplemental opinion rather than in the bond opinion, or it may be given by counsel to the underwriter. The following language could be used for such an opinion:

> "The Bonds are exempt from registration under the Securities Act of 1933, as amended, and the [*insert term given to trust document pursuant to which Bonds are issued*] is exempt from qualification under the Trust Indenture Act of 1939, as amended."

b. State

Before giving a bond opinion, bond counsel usually satisfies itself that state securities law requirements have been met regarding the original sale of the bonds by the issuer to the underwriter (or private placement purchaser); however, unless specifically engaged to do so, bond counsel does not assume responsibility for compliance with "blue sky" requirements for resale of the bonds by underwriters and dealers or eligibility for investment by institutional investors. In states that have adopted the Uniform Securities Act, general obligation bonds are generally exempt from securities registration, although the filing of offering literature may be required.[66] Under the Uniform Securities

---

[63] *Cf.* American Bar Association, Statement of Policy Regarding Lawyers' Responses to Auditors' Request for Information, 31 *Bus. Law.* 1709, 1713, 1723 (1976) (definition of "remoteness" in litigation situation).

[64] *See TriBar 1998 Report* at 636-40.

[65] *See* "Disclosure Matters – Other Disclosure – Litigation" herein.

[66] Unif. Sec. Act (2002 with 2005 Amendments) § 202, 7B U.L.A. (1994 Cum.) 105; *see*, *e.g.*, Mass. Gen. Laws Ann. ch. 110A, § 403 (West 1982).

Act, brokers or dealers executing transactions in municipal bonds are not exempt from broker-dealer registration, and the issuer is not treated as a broker-dealer.[67]

4. Credit Enhancement

If bond insurance, a letter of credit, or other credit enhancement secures the bonds, reference to the credit enhancement is sometimes made in the bond opinion. This is particularly the case for a direct-pay letter of credit. To address tax concerns resulting from a possible "reissuance" of the bonds if a change occurs in the credit enhancement, bond counsel often includes a limitation in the opinion with respect to the excludability of interest on the bonds after such a future change (although this may not be necessary, since the opinion, by its terms, speaks only as of its date and assumes ongoing compliance with covenants, *etc.*). The purpose of such a limitation is generally to alert purchasers to the need to retest for the continued tax exemption of interest on the bonds after such a change in credit enhancement.[68]

[67] Unif. Sec. Act (2002 with 2005 Amendments) § 401(a), 401(b)(1)(A), 7B U.L.A. (1994 Cum.) 75.

[68] *See also* discussion in Comment (S), Paragraph 4, and "Disclosure Matters" herein with respect to "exploding" opinions.

II. REVENUE BONDS (X)

MODEL OPINION LETTER

[Note: Letters in bold parentheses refer to Commentary immediately following this opinion letter or the Commentary following the General Obligation Bonds Model Opinion Letter, as appropriate.]

(Letterhead of Bond Counsel)
(Date) **(B)**

(Addressee) **(C)**

(Salutation) **(D)**

(Caption)

We have acted as bond counsel to *(Client Name)* **(E)** in connection with the issuance by (*Name of Issuer*) (the "Issuer") of $*(Par Amount)* (*Title of Bonds*) dated *(Date of Bonds)* (the "Bonds"). **(F)** In such capacity, we have examined such law and such certified proceedings, certifications, and other documents as we have deemed necessary to give the opinions below. **(G)**

The Bonds are issued pursuant to (*Enabling Act*) and a Revenue Bond Resolution (the "Resolution") of the Issuer adopted *(Date of Adoption)*. **(Y)** Under the Resolution, the Issuer has pledged certain revenues (the "Revenues") for the payment of principal of, premium (if any), and interest on the Bonds when due.

Regarding questions of fact material to the opinions below, we have relied on the representations of the Issuer contained in the Resolution, and on the certified proceedings and other certifications of representatives of the Issuer and certifications of others furnished to us without undertaking to verify them by independent investigation. [As to certain matters of law material to the opinions below, we also have relied upon certifications of public officials.] **(G)**

Based on the foregoing, we are of the opinion **(H)** that:

1. The Issuer is validly existing as a body corporate and politic and public instrumentality of (*State*) with the power to adopt the Resolution, perform the agreements on its part contained therein, and issue the Bonds. **(Z)**

2. The Resolution has been duly adopted by the Issuer (**Z)** and constitutes a valid and binding agreement of the Issuer. **(AA)**

3. The Resolution creates a valid lien on the Revenues and other funds pledged by the Resolution for the security of the Bonds [on a parity with other bonds (if any) issued or to be issued under the Resolution]. **(BB)**

4. The Bonds have been duly authorized and executed by the Issuer, **(J) (Z)** and are valid and binding limited obligations of the Issuer, payable solely from the Revenues and other funds provided therefor in the Resolution.

5. Interest on the Bonds **(M)** is excludable **(N)** from gross income for federal income tax purposes under Section 103 of the Internal Revenue Code of 1986, as amended **(O)** (the "Code"), and is

not an item of tax preference for purposes of the federal alternative minimum tax imposed on individuals; however, such interest on the Bonds may be taken into account for the purpose of computing the alternative minimum tax imposed on certain corporations. **(P)** The opinion set forth in the preceding sentence is subject to the condition that the Issuer comply with all requirements of the Code that must be satisfied subsequent to the issuance of the Bonds in order that the interest thereon be, and continue to be, excludable from gross income for federal income tax purposes under Section 103 of the Code. **(Q)** The Issuer has covenanted to comply with all such requirements. **(R)** Failure to comply with certain of such requirements may cause interest on the Bonds to be includable in gross income for federal income tax purposes retroactively to the date of issuance of the Bonds. **(S)**

6. [Opinion regarding state tax exemption, if any.] **(T)**

The rights of the owners of the Bonds and the enforceability of the Bonds and the Resolution are limited by bankruptcy, insolvency, reorganization, moratorium, and other similar laws affecting the rights and remedies of creditors, and by equitable principles, whether considered at law or in equity. **(U) (CC)**

We express no opinion [herein] regarding the accuracy, adequacy, or completeness of the (*name and date of disclosure document*) relating to the Bonds **(V)**, or regarding the attachment, perfection, or priority of the lien on Revenues or other funds created by the Resolution. **(BB)**. [If UCC applicable: We note that, unless attached and perfected, the lien on Revenues may not be effective or enforceable against competing creditors.] Further, we express no opinion [herein] regarding tax consequences arising with respect to the Bonds other than as expressly set forth herein.

[The opinions given in this opinion letter are given as of the date set forth above, and we assume no obligation to revise or supplement them to reflect any facts or circumstances that may later come to our attention, or any changes in law that may later occur.] **(B)**

Very truly yours,

COMMENTARY

(X) Revenue Bonds

In its current form, the opinion letter is applicable only to revenue bonds that are not private activity bonds; however, bond counsel preparing an opinion letter for revenue bonds that are private activity bonds, but not conduit financing bonds, may wish to start with this form, modifying paragraphs 5 and 6 (relating to the excludability of interest on the bonds) as indicated in Part III.

(Y) Resolution or Trust Agreement

If the bonds are secured by a trust agreement, a trust indenture, or other document, rather than by a resolution or ordinance, the references in the opinion letter should be modified appropriately.

(Z) Subsidiary Conclusions

At one time, opinion letters in business transactions often included an opinion that the transaction (including performance of obligations undertaken by the issuer) did not violate "any agreement, instrument, order, writ, judgment, or decree known to us to which the Corporation is a party or is subject." That formulation has largely been superseded today by an opinion that the transaction does not breach or result in a default under any agreement or instrument specifically identified in an attached schedule.[69] If this opinion is to be given in a municipal revenue bond transaction, local or general counsel most familiar with the affairs of the issuer ordinarily will be in a better position to give it rather than bond counsel. If this opinion is to be given by bond counsel, that counsel may choose to include it in a supplemental opinion letter addressed to the underwriters.

(AA) Enforceability

In a revenue bond transaction, the issuer ordinarily undertakes a number of obligations beyond the basic promise to pay, such as obligations to operate and maintain the revenue-producing facility or system in a sound and economical manner, to charge and collect sufficient rates to operate and maintain the facility or system, and to pay the bonds. These obligations are set forth in the resolution, the bond indenture, or a similar document. With respect to these obligations, "valid and binding" implies "enforceable" and "enforceable" is understood to have the same meaning as "enforceable in accordance with its terms."[70] Some opinion recipients prefer to have the words "in accordance with its terms" added to make this explicit.[71] The use of the phrase "valid and binding" as compared to "valid, binding and enforceable" is based on custom and should not imply a different meaning.

In some situations, bond counsel may not be satisfied that certain terms of the resolution are enforceable. For example, a resolution may prohibit the assignment of the issuer's right to receive revenues, which might be unenforceable against the issuer under its state's version of Uniform Commercial Code Sections 9-401(b) or 9-406(f). In such a case, the opinion may be appropriately qualified, or each potentially unenforceable provision may itself be qualified. Alternatively, the opinion concerning the enforceability of the resolution could be deleted from the bond opinion and included in a supplemental opinion, where additional qualifications to enforceability are more commonly accepted.

---

[69] *See TriBar 1998 Report*, at 654-661.

[70] *See TriBar 1998 Report*, at 619-620. *See also* The Remedies Opinion – Deciding When to Include Exceptions and Assumptions, 59 *Bus. Law.* 1483 (2004).

[71] *See also* the discussion of "binding" in Comment (I).

(BB) Uniform Commercial Code

The Uniform Commercial Code (the "*U.C.C.*") was revised in 1998 to provide that, effective July 1, 2001 (or 2002 under a transition rule) and contrary to the 1972 revision, the creation, perfection, priority, and enforcement of security interests granted by governmental units (including their bond issuing instrumentalities) are governed by Article 9 of the U.C.C., except to the extent that another statute of the governmental unit's state expressly governs such matters.[72] Although all states have enacted the 1998 revisions, more than half the states enacted non-conforming amendments that continue to exclude from the scope of U.C.C. Article 9 security interests granted by governmental units, and at least one state enacted a pre-empting statute that is recognized by the U.C.C.[73]

Revenue bonds have traditionally been issued under laws that expressly authorize a lien on future revenues. This lien is frequently called a "pledge" even though at common law a pledge is made only by a transfer of possession of the collateral to the pledgee.[74] The U.C.C., to the extent applicable, distinguishes among "enforceable," meaning the secured party may enforce a pledge against the issuer, "perfected," meaning the secured party may enforce a pledge against unsecured creditors of the issuer, and "priority," meaning the secured party may enforce a pledge against other creditors with perfected, but subordinate, pledges of the same collateral. In general, under the U.C.C, to be "enforceable" against the issuer, a pledge must adequately describe the pledged collateral and the issuer must have rights to the collateral (so that the pledge may "attach" to the collateral);[75] to be "perfected," a pledge must be described in a notice filing made in the issuer's state U.C.C. records or the pledgee must have possession or control of the pledged collateral, depending on the type of collateral; and to have "priority," the notice filing for the pledge must be prior in time or the pledgee must have possession or control, depending on the collateral. To avoid any argument that the pledge of future revenues is subject to the filing of a financing statement under U.C.C. Article 9, enabling laws often expressly provide that the pledge is effective and enforceable without any such filing. If the enabling laws state that the pledge is effective or enforceable, it effectively pre-empts U.C.C. Article 9 regarding this issue, but not necessarily perfection or priority. In at least some jurisdictions, the enabling statute also provides for the perfection of the lien and its priority relative to other liens. These types of automatic lien perfection provisions are sometimes referred to as statutory liens, but care should be taken to distinguish this state law perfection issue from treatment under the United States Bankruptcy Code, where the phrase "statutory lien" refers to a specific type of nonconsensual lien.

If U.C.C. Article 9 applies and the bond enabling or other statute does not expressly state that the pledge is enforceable, bond counsel will need to satisfy itself that the pledge will be enforceable under Article 9. To do so, bond counsel generally must conclude that the resolution includes a pledge, adequately describes the pledged property, and establishes that the issuer then has rights to the pledged property.[76] If the issuer does not have rights to the pledged property (*e.g.*, in the case of future revenues

---

[72] *See* U.C.C. §§ 9-109(c)(2) and (3).

[73] *See* Texas Government Code chapter 1208.

[74] *Black's Law Dictionary*, at page 1397 (11th Ed. 2019).

[75] In insolvency proceedings for the Puerto Rico Electric Power Authority ("*PREPA*"), the U.S. District Court concluded that a governmental utility did not have rights to future revenues that had not yet been earned by performance at the time of its filing for relief under an insolvency regime. *In re Financial Oversight and Management Board for Puerto Rico,* 649 B.R. 381 (2023). On appeal the First Circuit reversed this part of the District Court's order, holding that the bondholders' lien on PREPA's net revenues applied to future revenues. *In re Financial Oversight and Management Board for Puerto Rico,* 2024 WL 2952154 (1st Cir. June 12, 2024).

[76] *See* U.C.C. § 9-108 for the adequacy of pledge descriptions. For a description of special issues raised by "net revenue" pledges, *see* Report of the National Association of Bond Lawyers Opinions and Documents Committee Re: Revised Article 9 of the U.C.C., dated July 17, 2000.

the rights to which have not yet been earned by the delivery of goods or services), the lien enforceability opinion may be qualified by adding a phrase such as "as and to the extent that the issuer obtains rights to the Revenues and funds."

It is not uncommon for the title of bonds to imply the priority position of the pledge of revenues made to secure the bonds (*e.g.*, "Senior" or "Prior" Lien Revenue Bonds). Unless the perfection and priority of the pledge are governed by the bond enabling or other statute, the perfection and priority of the pledge will be governed by U.C.C. Article 9, to the extent applicable. Under the U.C.C., depending on the form, possession, and location of the revenues, perfection and priority could be governed by the law of other states and could depend not only on the filing of a conforming financing statement but also on the existence of possession or control of the revenues by bondholders or their representatives (in the case of revenues in the form of money or a deposit account balance).[77] In view of the possible complexity of perfection and, especially, priority opinions, the model opinion addresses only the creation of an enforceable bond pledge. To avoid an implied perfection and priority opinion by reference to the bond title, an express disclaimer is recommended. If perfection opinions are required to be given, it is suggested that they be given by the issuer's other counsel or be included in a supplemental opinion of bond counsel addressed to the underwriter. The Committee considers it inappropriate to request a priority opinion in most circumstances, since priority is usually addressed by bond resolutions, and such opinions are complex and add little to a reading of U.C.C. Article 9. To avoid any unwarranted inference that the lien opinion is intended to address perfection or priority, the model opinion expressly disclaims any opinion on such issues.

If a separate pledge for each revenue bond issue is made (rather than a single pledge made under an open-ended indenture), but the bond documents provide that the pledge is on a parity with prior pledges (and permit future parity pledges), then an opinion to the effect that the pledge secures the bonds "on a parity with other bonds" would speak to the relative priority and, therefore, perfection of the current and prior pledges. Such an opinion may be inconsistent with the later disclaimer of any opinion as to the perfection or priority of the pledge. Accordingly, if a separate pledge for each revenue bond issue is made, bond counsel may prefer to omit any statement as to parity status.

(CC) Bankruptcy and Related Matters

In general, by virtue of Section 552 of the United States Bankruptcy Code (11 U.S.C. §§ 101 *et seq.*), a lien resulting from a security agreement entered into by the debtor before commencement of a bankruptcy case is ineffective regarding revenues received after the filing of a bankruptcy case unless: (i) the security interest created by the security agreement extends to revenues acquired before commencement of the bankruptcy case, (ii) the post-petition revenues are proceeds, products, or rents of property acquired before the commencement of the bankruptcy case, and (iii) the security interest or the transfer of revenues under the security interest cannot otherwise be avoided by the trustee in bankruptcy.[78] Section 552 applies only to consensual liens meeting the above criteria and does not limit the effectiveness of statutory liens on post-petition revenue.

Notwithstanding the foregoing, under Section 928 of the Bankruptcy Code, "special revenues" acquired by the debtor after the commencement of the bankruptcy case remain subject to any lien resulting from a security agreement entered by the debtor before commencement of the bankruptcy case. "Special revenues," as defined by Section 902(2) of the Bankruptcy Code, include: (A) receipts derived

[77] *See* U.C.C. §§ 9-301-307, 312(b).

[78] *See* Comment (BB). *See also In re County of Orange*, 179 B.R. 185, 193 (Bkrtcy. C.D. Cal. 1995) (remanded 189 B.R. 499 (C.D. Cal. 1995)).

from the ownership, operation, or disposition of projects or systems of the debtor that are primarily used or intended to be used primarily to provide transportation, utility, or other services, including the proceeds of borrowings to finance the projects or systems; (B) special excise taxes imposed on particular activities or transactions; (C) incremental tax receipts from the benefited area in the case of tax-increment financing; (D) other revenues or receipts derived from particular functions of the debtor, whether or not the debtor has other functions; or (E) taxes specifically levied to finance one or more projects or systems, excluding receipts from general property, sales, or income taxes (other than tax-increment financing) levied to finance the general purposes of the debtor."

If the pledged revenues are neither "special revenues" nor proceeds of property that is the subject of a consensual pre-petition security interest that cannot be avoided by a trustee in bankruptcy, the pledge will be ineffective as to post-petition revenue if a bankruptcy case is commenced by the issuer.[79]

The Committee does not consider it necessary to specifically include in this paragraph of the opinion letter a reference to the state or federal "police" power. Municipalities are inherently subject to these police powers and judicial recognition of the existence of police power as overriding public policy is generally clear and recognized as an unstated exception. Where the exercise of the police power takes the form of a moratorium or similar act, it is covered by this paragraph of the opinion as written. An exercise of the police power may also take the form of a regulation of land use, utility rates, or the like. Regulatory laws of this character could affect the validity or enforceability of payment obligations.[80] Obligations of other types of entities, including corporate issuers, also are subject to exercises of the police power and no exception is typically made in corporate securities opinions.

[79] *See* Comment (BB), however, regarding opinions as to "special revenues" and statutory liens.
[80] *See* Comment (BB).

III. PRIVATE ACTIVITY BONDS (DD)

MODEL OPINION LETTER

[Note: Letters in bold parentheses refer to the Commentary immediately following this opinion or the Commentaries following the General Obligation Bonds Model Opinion Letter and the Revenue Bonds Model Opinion Letter, as appropriate.]

(Letterhead of Bond Counsel)
(Date) **(B)**

(Addressee) **(C)**

(Salutation) **(D)**

(Caption)

We have acted as bond counsel to *(Client Name)* **(E)** in connection with the issuance by (*Name of Issuer* (the "Issuer") of $*(Par Amount)* (*Title of Bonds*) dated *(Date of Bonds)* (the "Bonds"). **(F)** In such capacity, we have examined such law and such certified proceedings, certifications, and other documents as we have deemed necessary to give the opinions below. **(G)**

The Bonds are issued pursuant to (*Enabling Act*), a Trust Indenture (the "Indenture") between the Issuer and *(Name of Trustee)*, as trustee (the "Trustee"), and a resolution (the "Resolution") of the Issuer authorizing the issuance and sale of the Bonds. The Issuer and (*Name of Company*) (the "Company") have entered into a loan agreement (the "Loan Agreement") pursuant to which the Issuer is lending the proceeds of the Bonds to the Company. **(EE)** Under the Loan Agreement, the Company has covenanted to make payments to the Issuer to be used to pay when due the principal of, premium (if any), and interest on the Bonds, as well as other payments (collectively, the "Revenues"). Under the Indenture, the Issuer has pledged and assigned its rights in and to the Loan Agreement and the Revenues (except certain rights to indemnification, reimbursements, and administrative fees) as security for the Bonds. The Bonds are payable solely from the Revenues. **(FF)**

We note that various issues concerning [specify legal issues] are addressed in the opinion letter of [identify counsel and their relationship] provided to [identify addressee], and we assume the accuracy of the opinions in that opinion letter and express no opinion with respect to those issues.

Regarding questions of fact material to our opinion, we have relied on representations of the Issuer and the Company contained in the Indenture and the Loan Agreement, and on the certified proceedings and other certifications of representatives of the Issuer and certifications of others furnished to us, including certifications furnished to us by or on behalf of the Company, without undertaking to verify them by independent investigation. [As to certain matters of law material to the opinions below, we also have relied upon certifications of public officials.] **(G)**

Based on the foregoing, we are of the opinion **(H)** that:

1. The Issuer is validly existing as a body corporate and politic and public instrumentality of (*State*) with the power to enter into and perform its obligations under the Indenture and the Loan Agreement and to issue the Bonds. **(HH)**

2. The Indenture has been duly authorized, executed, and delivered by the Issuer and is a valid and binding agreement of the Issuer. **(HH) (II)** The Indenture creates a valid lien on the Revenues and the other funds pledged by the Indenture as security for the Bonds. **(JJ)**

3. The Bonds have been duly authorized and executed by the Issuer, and are valid and binding limited obligations of the Issuer, payable solely from the Revenues.

[The following paragraph 4 should be used if the bonds are "qualified small issue bonds" within the meaning of Section 144(a) of the Code, "exempt facility bonds" within the meaning of Section 142 of the Code, "mortgage revenue bonds" that are exempt under Section 143 of the Code, "qualified student loan bonds" within the meaning of Section 144(b) of the Code, or "qualified redevelopment bonds" within the meaning of Section 144(c) of the Code:]

4. Interest on the Bonds **(M)** is excludable **(N)** from gross income for federal income tax purposes under Section 103 of the Internal Revenue Code of 1986, as amended **(O)** (the "Code"), except for interest on any Bond for any period during which such Bond is held by a "substantial user" of the facilities financed by the Bonds, or a "related person" within the meaning of Section 147(a) of the Code **(KK) (LL)**; however, interest on the Bonds is an item of tax preference for purposes of the federal alternative minimum tax imposed on individuals **(NN)** and may be taken into account for the purpose of computing the alternative minimum tax imposed on certain corporations. **(P)** The opinion set forth in this paragraph is subject to the condition that the [Issuer and the Company] comply with all requirements of the Code that must be satisfied subsequent to the issuance of the Bonds in order that interest thereon be, and continue to be, excludable from gross income for federal income tax purposes. **(Q)** The [Issuer and the Company] have covenanted to comply with all such requirements. **(R)** Failure to comply with certain of such requirements may cause interest on the Bonds to be includable in gross income for federal income tax purposes retroactively to the date of issuance of the Bonds. **(S)**

[The following paragraph 4 should be used if the bonds are qualified 501(c)(3) bonds within the meaning of Section 145 of the Code:]

4. Interest on the Bonds **(M)** is excludable **(N)** from gross income for federal income tax purposes under Section 103 of the Internal Revenue Code of 1986, as amended **(O)** (the "Code"), and is not an item of tax preference for purposes of the federal alternative minimum tax imposed on individuals; **(MM)** however, such interest on the Bonds may be taken into account for the purpose of computing the alternative minimum tax imposed on certain corporations. **(P)** The opinion set forth in this paragraph is subject to the condition that the [Issuer and the Company] comply with all requirements of the Code that must be satisfied subsequent to the issuance of the Bonds in order that interest thereon be, and continue to be, excludable from gross income for federal income tax purposes. **(Q)** The [Issuer and the Company] have covenanted to comply with all such requirements. **(R)** Failure to comply with certain of such requirements may cause interest on the Bonds to be includable in gross income for federal income tax purposes retroactively to the date of issuance of the Bonds. **(S)** [In giving the opinion set forth in this paragraph, we have [relied upon/assumed the accuracy of] the opinion of _____, counsel to the Company, that the Company [is/has been determined by the Internal Revenue Service to be] an organization described in Section 501(c)(3) of the Code.] (**GG**)

5. [Opinion regarding state tax exemption, if any.] **(T)**

The rights of the owners of the Bonds and the enforceability of the Bonds and the Indenture are limited by bankruptcy, insolvency, reorganization, moratorium, and other similar laws affecting the rights and remedies of creditors, and by equitable principles, whether considered at law or in equity. **(U) (CC)**

We express no opinion [herein] regarding the accuracy, adequacy, or completeness of the (*name and date of disclosure document*) relating to the Bonds, **(V)** or regarding the perfection or priority of the lien on Revenues or other funds created by the Indenture. **(BB)** Further, we express no opinion [herein] regarding tax consequences arising with respect to the Bonds other than as expressly set forth herein.

[The opinions given in this opinion letter are given as of the date set forth above, and we assume no obligation to revise or supplement them to reflect any facts or circumstances that may later come to our attention, or any changes in law that may later occur.] **(B)**

Very truly yours,

COMMENTARY

(DD) Private Activity Bonds

This opinion letter is applicable to private activity bonds issued in a conduit financing where the issuer loans the bond proceeds to a third-party conduit borrower. With appropriate revisions, it should also suffice for conduit financings in which the issuer leases or sells the bond-financed facilities to the third-party conduit beneficiary. Non-conduit general obligation or revenue bonds may also be private activity bonds because of, for example, private business use of bond proceeds and either private security or payment supporting the bonds, as provided in Section 141 of the Code. For such bonds, the General Obligation Bonds Opinion Letter or Revenue Bonds Opinion Letter should be used, but with paragraph 4 of this model opinion letter substituted for the respective paragraph addressing the federal income tax treatment of interest on the bonds.

(EE) Documentation

Documentary formats used in private activity bond financing vary considerably, and may include: (1) a trust agreement between the issuer and the trustee, a loan agreement, lease, or installment sale agreement between the issuer and the conduit borrower, and, if secured, a separate master indenture, security agreement, or mortgage between the issuer or trustee and the conduit borrower, and (2) a single trust, loan, and security agreement among the issuer, the trustee, and the conduit borrower. This opinion assumes format (1), with no security granted by the conduit borrower. If a different format is used, appropriate changes should be made. Representative language for an opinion in a transaction utilizing a multi-document format is as follows:

> The Bonds are issued pursuant to (*Enabling Act*) and a Trust Agreement (the "Agreement") among the Issuer, (*Name of Company*) (the "Company"), and _____, as Trustee (the "Trustee"). Under the Agreement, the Company has agreed to make payments to be used to pay when due the principal of, premium (if any), and interest on the Bonds, and such payments and other revenues under the Agreement (collectively, the "Revenues"), and the rights of the Issuer under the Agreement (except certain rights to indemnification, reimbursements, and administrative fees) are pledged and assigned by the Issuer as security for the Bonds. The Bonds are payable solely from the Revenues.

Additional paragraphs may be added to the opinion letter addressing the authenticity and enforceability of the additional documents. Also, where other documents secure the conduit borrower's obligations or the bonds (*e.g.*, a guaranty or letter of credit), reference should be made to those documents.

(FF) Right to Receive Revenues

Where bond counsel concludes that the power to pledge revenues includes the power to collaterally assign the rights under the trust agreement (or other financing document) to receive the revenues, it may be useful to include an assignment. Even without an assignment, however, this problem is probably not significant in a conduit financing. Legislative history to the Bankruptcy Code indicates that, in a conduit financing, the issuer's rights and obligations would not be treated as property and obligations of the issuer in an issuer bankruptcy proceeding.[81]

(GG) Opinions of Other Counsel

The reference to opinions of other counsel is included both for information and to make clear that bond counsel is not giving certain opinions. Such reference does not express reliance on or concurrence in the

[81] *See* S. Rep. No. 95-989, 95th Cong., 2d Sess., 5859-86, reprinted in 1978 U.S. Code Cong. & Ad. News, 5859-86.

opinions of other counsel and is not intended to have the meanings attributed to an opinion that expresses reliance on the opinion of another.[82] Regarding the title to mortgaged property (if any), reference may be made to a title policy in place of, or in addition to, a title opinion. In a conduit financing such as that contemplated by the Private Activity Bonds Opinion, counsel for the conduit borrower usually gives an opinion regarding (1) the due authorization, execution, and delivery of documents by the conduit borrower, (2) the valid and binding nature of documents to which the conduit borrower is a party, and (3) where "qualified 501(c)(3) bonds" are involved, that the conduit borrower is an organization described in Section 501(c)(3) of the Code. Bond counsel is generally an addressee of such opinion. The prevailing practice in qualified 501(c)(3) bond transactions is for bond counsel to express reliance on such Section 501(c)(3) opinion in the bond opinion, and the bracketed language is an example of a statement of reliance.[83]

In opinion practice generally, the primary opinion giver's responsibility for the conclusions in an opinion letter of other counsel depends on how the reliance is stated. The *TriBar 1998 Report* states that an opinion reciting that counsel is relying on another opinion (*e.g.*, a bond opinion reciting that bond counsel is relying on a Section 501(c)(3) opinion provided by the conduit borrower's counsel) means that such other opinion addresses the legal issues on which counsel is purporting to rely and that, in the professional judgment of the counsel giving the opinion, reliance on that other opinion is reasonable.[84] The *Statement of Opinion Practices* provides that stating reliance on an opinion of other counsel does not imply concurrence in the substance of that opinion.[85] By contrast, an opinion stating "concurrence" with the other opinion or that the other opinion is "satisfactory in form and substance" requires the primary opinion giver to make some independent investigation of the law involved.[86] The use of assumptions in lieu of reliance (resulting in an "unbundled" opinion) has been developing over the years and has become common in general opinion practice, so that approach is included as an option in the bracketed language.[87] In view of the absence of definitive judicial rulings on this subject, bond counsel relying on an opinion of another counsel should draft the language used in its opinion with care and should perform its diligence accordingly. In giving the bond opinion, if bond counsel relies on, or assumes, but does not itself adopt, the conclusions expressed by other counsel, that fact should be disclosed clearly to prospective bond purchasers.

(HH) Issuer Counsel Coverage

Depending on bond counsel's client and scope of engagement, the issuer's counsel may give these opinions in addition to, or in lieu of, bond counsel.

(II) Assumptions Regarding Other Parties

An opinion that an agreement is binding on one party implicitly assumes that it is binding on the other parties to the extent necessary to satisfy requirements of mutuality.[88] Opinion givers may choose to state that expressly.

---

[82] *Cf. TriBar 1998 Report*, at 636-640 (concerning reliance on the opinion of other counsel).

[83] *See* The 501(c)(3) Opinion in Qualified 501(c)(3) Bond Transactions, published by NABL in 2014 (the "*501(c)(3) Opinion Report*").

[84] *See TriBar 1998 Report*, at 636¬640.

[85] *Statement of Opinion Practices*, Section 8.2.

[86] *See TriBar 1998 Report*, at 637. For a more complete discussion of the issues related to reliance on the opinions of other counsel, *see Glazer and FitzGibbon*, 2022 Cumulative Supplement, at 179-196 (replacing entire Chapter 5).

[87] *See TriBar 1998 Report*, at 638; *Glazer and FitzGibbon*, 2022 Cumulative Supplement, at 182-185.

[88] *See TriBar 1998 Report*, at 615.

(JJ) Revenue Pledge

This opinion assumes that only the issuer has granted a security interest under the indenture.[89] If the conduit borrower pledges property as security for the bonds, its counsel more commonly addresses the enforceability and priority of that pledge.

(KK) Substantial User and Related Person Exception

The "substantial user" and "related person" exception set forth in Section 147(a) of the Code is inapplicable to mortgage revenue bonds under Section 143 of the Code, to qualified student loan bonds under Section 144(b) of the Code, and to qualified 501(c)(3) bonds under Section 145 of the Code, and should be omitted from the opinion with respect to such bonds.

(LL) $10,000,000 and $40,000,000 Limitations

Some bond counsel also prefer in this paragraph to specify exceptions to the excludability of interest related to the $10,000,000 and $40,000,000 limitations of Section 144(a) of the Code, in which case the following language may be added:

> ", and except that the Company or another person, by taking action after the date hereof that causes the $10,000,000 limitation set forth in Section 144(a)(4) of the Code or the $40,000,000 limit set forth in Section 144(a)(10) of the Code to be exceeded, may cause interest on the Bonds to be includable (retroactively to the date hereof, in the case of the $40,000,000 limitation) in gross income for federal income tax purposes."

The Committee believes that such language can appropriately be placed in a disclosure document rather than the bond opinion.

(MM) $150,000,000 Limitation

Although Section 145(b)(5) of the Code has made the $150,000,000 limitation inapplicable to most qualified 501(c)(3) new money issues, the $150,000,000 limitation continues to apply to many qualified 501(c)(3) bond issues, or portions thereof. For such financings, some bond counsel prefer to specify an exception for the $150,000,000 limitation, in which case the following language may be added:

> ", except that the Company or another person, by taking action after the date hereof that causes the $150,000,000 limitation set forth in Section 145(b) of the Code to be exceeded, may cause interest on the Bonds to be includable in gross income retroactively to the date hereof. Moreover, such interest is not an item of tax preference …."

The Committee believes that such language can appropriately be placed in a disclosure document rather than the bond opinion.

(NN) Alternative Minimum Tax

Pursuant to Section 57(a)(5) of the Code, the alternative minimum tax imposed on individuals is inapplicable to (1) an exempt facility bond issued as part of an issue 95% or more of the net proceeds of which are to be used to provide qualified residential rental projects (as defined in Section 142(d) of the Code), (2) a qualified mortgage bond (as defined in Section 143(a) of the Code), and (3) a qualified veterans' mortgage

[89] *See* Comment (BB).

bond (as defined in Section 143(b) of the Code). Furthermore, certain special rules relating to alternative minimum tax apply to refunding bonds and bonds under pre-1986 Act provisions. As noted in Comment (P), the alternative minimum tax applies to certain corporations as a result of the Inflation Reduction Act of 2022. The alternative minimum tax references should be omitted or adjusted accordingly.

IV. DISCLOSURE MATTERS

A. General

Municipal bonds are customarily sold in public offerings with a disclosure document typically referred to as an "Official Statement"—a bond prospectus—the purpose of which is to provide information about both the bonds being offered and the credit behind the payment of the bonds. A similar document, sometimes more limited in scope, often is used in private placements or other limited offerings.

The disclosure document is customarily a document of the issuer, although practice varies widely regarding which party drafts it. It is the "selling document" under both federal and state securities laws. As such, its purposes include making appropriate disclosure to investors. The discussion below is intended to assist counsel in identifying issues to consider in preparing or reviewing any portions of the disclosure document relevant to either the role or the opinion of bond counsel. A general discussion of the applicability of federal and state securities laws to bond offerings is beyond the scope of this report, but readers can refer to *Disclosure Roles* to learn more. The discussion below is not intended to identify or create standards for disclosure. In particular, the illustrative language is not intended to imply that the particular issue discussed always requires disclosure, or that the language suggested is always appropriate. Disclosure, as is frequently acknowledged, should reflect the particular facts and circumstances of the bond financing.

B. Role of Bond Counsel

Bond counsel does not customarily assume responsibility for the preparation of the disclosure document or the delivery of any opinion regarding its accuracy and completeness, although bond counsel may be retained to play a larger role, *e.g.*, disclosure counsel. Bond counsel's engagement should reflect the limits on its responsibility for information in the disclosure document. Material in *Engagement Letters* and in *Disclosure Roles*[90] provides useful insights and suggestions regarding the ability of bond counsel to limit its responsibility for information in the disclosure document. Familiarity with such material should sensitize bond counsel to appropriate actions needed to clarify its role and to limit liability for matters for which it does not assume responsibility. If bond counsel is also acting as disclosure counsel, bond counsel may wish to describe this additional role in the disclosure document.

Bond counsel does, however, customarily either prepare or review specific portions of the disclosure document. These portions may include the description of the bonds and their security, descriptions of certain aspects of the bond opinion and the tax status of the bonds, and summaries of the basic financing documents. Bond counsel in many cases delivers a separate or supplemental opinion to the underwriter regarding these sections. While its language varies significantly, the supplemental opinion usually addresses the accuracy of such sections as to legal matters. In most instances, the proposed form of the bond opinion (but not any supplemental opinion) is attached as an exhibit to the disclosure document.

When authorized to be shared with investors, the bond opinion itself may be interpreted as a statement made in connection with the purchase or sale of securities, so that any material misstatement or materially misleading statement in the opinion could be actionable as a primary violation of Securities Exchange Act Section 10(b) and Rule 10b-5.[91] Even when bond counsel is not the drafter of language used to describe the

---

[90] *See Disclosure Roles* – Disclosure Roles of Counsel to Issuers – Disclaimers and Limitations in Engagement Letters, at 95.

[91] The bond opinion also can be the basis for an SEC enforcement action under other federal securities law antifraud provisions. In *Weiss v. SEC*, 468 F.3d 849 (D.C. Cir. 2006), the United States Court of Appeals for the District of Columbia Circuit upheld the SEC's finding that bond counsel violated Sections 17(a)(2) and 17(a)(3) of the 1933 Act

bond opinion in the disclosure document, bond counsel appropriately may insist that any description of its opinion and role be accurate and complete. In any event, best practice is to include the form of the bond opinion in the disclosure document and a cross reference to the form of the bond opinion when any portion of the opinion is described.

C. Disclosure Issues

The following are areas where disclosure of opinion-related issues in the disclosure documents may be appropriate. This list is not intended to be comprehensive, and the appropriateness or extent of disclosure of any issue will depend on the facts and circumstances of a particular transaction. Disclosure in offering documents need not be limited to those items required under a Rule 10b-5 standard. Even if an "unqualified" opinion is to be delivered by bond counsel regarding the validity and tax status of the bonds, bond counsel should consider whether special or additional disclosure is necessary with respect to the matters addressed in the opinion where a unique or unusual situation presents itself.[92]

1. Description of Opinion and Role of Bond Counsel.

The bond opinion is customarily referenced in a section variously titled "Legal Matters," "Legal Opinions," or "Bond Counsel Opinion." As discussed below, matters relating to the opinion regarding federal and state tax matters are frequently addressed in a separate section, such as "Tax Matters" or "Tax Exemption."

To ensure that bond counsel's limited disclosure role is made clear, this section of the disclosure document often contains language indicating the limited role of bond counsel and reflecting the specific language of the bond opinion, as suggested in the model opinions, disclaiming responsibility for the general accuracy and adequacy of the disclosure document. The scope of this language may depend on whether the form of the bond opinion is attached to the disclosure document and whether bond counsel is playing any additional role, such as disclosure counsel. The following is illustrative of language used:

> "The opinion of bond counsel will be limited to matters relating to the authorization and validity of the Bonds and the tax status of interest thereon, as described in the section "Tax Matters," and will make no statement regarding the accuracy and completeness of this [disclosure document]."

As discussed more fully below, and particularly where such ideas are expressed in the bond opinion, disclosure may include the fact that the bond opinion speaks only as of its date, and that bond counsel is not retained to monitor compliance by the parties after issuance. In addition, the limited assurance of a legal opinion (in contrast to a guaranty) is sometimes disclosed in language substantially similar to the following:

> "Bond Counsel's opinions are based on existing law, which is subject to change. Such opinions are further based on factual representations made to Bond Counsel as of the date thereof. Bond Counsel assumes no duty to update or supplement its opinions to reflect any facts or circumstances that may thereafter come to Bond Counsel's attention, or to reflect any changes in law that may thereafter occur or become effective. Moreover, Bond Counsel's

---

because his opinions to prospective bond investors misrepresented the risk that interest on the bonds would be taxable. The parties in *Weiss* agreed that *Tax Standard* was the standard applicable to bond counsel's "unqualified" opinion, which was dated June 28, 2000, prior to the publication of the 2003 Report. The *Weiss* court cited *Tax Standard* (which had in turn cited the First Edition of *Function*) in concluding that the examination made by bond counsel must be "reasonably sufficient" and that a bond opinion must be based on "reasonable" certainty. 468 F.3d at 855.

[92] *See*, *e.g.*, "Tax Issues – Post-Issuance Tax Compliance" herein.

opinions are not a guarantee of a particular result and are not binding on the IRS or the courts; rather, such opinions represent Bond Counsel's professional judgment based on its review of existing law and in reliance on the representations and covenants that it deems relevant to such opinions."

An alternative to the final sentence above is as follows:

> "The legal opinions to be delivered concurrently with the delivery of the Bonds express the professional judgment of the attorneys giving the opinions regarding the legal issues expressly addressed therein. By giving a legal opinion, the opinion giver does not become an insurer or guarantor of the result indicated by that expression of professional judgment, of the transaction on which the opinion is given, or of the future performance of parties to the transaction. Nor does the giving of an opinion guarantee the outcome of any legal dispute that may arise out of the transaction."

If this clarification is not included in the section that describes the tax opinion, a cross-reference to the clarification may be included in that section.

2. Tax Issues

a. Post-Issuance Tax Compliance

Bond counsel's tax opinion is limited to existing law and, as discussed above in Comment (Q), is conditioned on the assumption of future compliance with all post-issuance requirements of the Code and other law applicable to the bonds. Federal tax law in the last four decades (since the publication of the first model bond opinion report), especially provisions of the 1986 Act, has vastly complicated the qualifications for federal tax-exempt status, and has multiplied the circumstances in which tax exemption can be lost subsequent to issuance. This loss of tax exemption may be applied retroactively to the date of issuance. The disclosure document customarily includes disclosure regarding the existence of the post-closing risk of loss of tax exemption. Depending on state law, such risk may also exist with respect to state tax exemption.

Where, as with the model opinion letters, the bond opinion does not specify the scope of the post-issuance compliance by which the opinion is qualified, the disclosure document typically does so in the "Tax Matters" section, or by cross-references to summaries of the tax compliance covenants. This section may refer to post-issuance concerns involving proper use of bond proceeds, rebate and capital expenditure violations, change in use of the bond-financed facility, *etc*., but may also include more specific requirements depending on the type of bonds offered (*e.g.*, multi-family or single-family housing, 501(c)(3) financings). Such disclosure may be tailored to the specific post-issuance compliance requirements applicable to the type of bond issue being sold. In addition, particularly where such ideas are expressed in the bond opinion, the disclosure appropriately may point out that the bond opinion speaks only as of its date, and that, in most cases, bond counsel is not retained to monitor compliance by the parties after issuance. The following is one example of disclosure for a 501(c)(3) bond issue:

> "The Internal Revenue Code and the Treasury Regulations promulgated thereunder contain a number of requirements that must be satisfied subsequent to the issuance of the Bonds in order for interest on the Bonds to be and remain excludable from gross income for purposes of federal income taxation. Examples include: the requirement that the Borrower maintain its status as an organization exempt from federal income taxation by reason of being described in Section 501(c)(3) of the Code; the requirement that the Issuer rebate certain excess earnings on proceeds and amounts treated as proceeds of the Bonds to the United States Treasury; restrictions on investment of such proceeds and other amounts; and restrictions on

the ownership and use of the facilities financed with proceeds of the Bonds. The foregoing is not intended to be an exhaustive listing of the post-issuance tax compliance requirements of the Internal Revenue Code, but is illustrative of the requirements that must be satisfied by the Issuer and the Borrower subsequent to issuance of the Bonds to maintain the excludability of interest on the Bonds from income for federal income taxation purposes. Failure to comply with such requirements may cause interest on the Bonds to be included in gross income retroactively to the date of issuance of the Bonds. The Issuer and the Borrower have covenanted in the Indenture and the Loan Agreement to comply with these requirements. The opinion of Bond Counsel delivered on the date of issuance of the Bonds is conditioned on compliance by the Issuer and the Borrower with such requirements, and Bond Counsel has not been retained to monitor compliance with requirements such as those described above subsequent to the issuance of the Bonds."

In appropriate circumstances and when consistent with the financing documents, the following language may be inserted into this paragraph:

"The Indenture, however, does not require the Issuer to redeem the Bonds or to pay any additional interest or penalty in the event that interest on the Bonds becomes taxable."

If the disclosure document contains a "Bondholder Risks" section, the following language may be used:

"For information with respect to events occurring subsequent to issuance of the Bonds that may require that interest on the Bonds be included in gross income for purposes of federal income taxation, *see* "TAX MATTERS" herein."

While all bonds are subject to loss of tax exemption for, as an example, failure to pay rebate, certain types of bonds involve specific requirements. Disclosure of post-issuance compliance obligations and the possible consequences of failure to comply may be accompanied by any language from the bond opinion regarding the same.

If the covenants of the issuer (or another party, such as a conduit borrower) to meet the requirements necessary to maintain tax exemption are limited to the requirements under existing law, consideration should be given to disclosing this fact and modifying the tax opinion accordingly.[93]

b. Reliance

In the case where one firm delivers the validity opinion and another firm delivers the tax opinion, disclosure may indicate that the firm's tax opinion relies on the validity opinion of the other firm, as tax exemption is dependent on the bonds having been validly issued. Any additional reliance may also merit disclosure. One example is the reliance by bond counsel, in giving its tax opinion, on the opinion of other counsel regarding the status of a conduit borrower as an "exempt organization" under Section 501(c)(3) of the Code.[94] Indeed, disclosure may be appropriate in any case where bond counsel is relying on any other counsel for any matter essential to the conclusion of tax exemption. This issue frequently arises in connection with certificates of participation ("*COPs*") in government leases where special tax counsel sometimes relies on the opinion of a local government attorney. If the opinion being relied on includes material qualifications or other limitations different from those included in the bond opinion, such other qualifications or limitations should be disclosed in the bond opinion itself.

---

[93] *See* Comment (R).

[94] *See 501(c)(3) Opinion Report*, *supra*, footnote 83.

c. "Exploding" Opinions

As noted in Comment (S), paragraph 4, opinions that cease to be applicable under certain circumstances are often referred to as "exploding" opinions. "Exploding" opinions were being used by some bond counsel prior to the 2003 Report, primarily in connection with the issuance of publicly offered variable rate bonds (*e.g.*, variable rate demand bonds) under multi-modal bond indentures. One example of an "exploding" opinion is:

> ". . . except that we express no opinion concerning any effect on such excludability of subsequent action that under the terms of the [Resolution/Indenture or Loan Agreement] may be taken only upon receipt of an opinion of counsel that such action will not adversely affect such excludability . . . ."

In this formulation, the full original bond opinion remains in effect, and only the effect of the post-issuance action is excluded. In such a situation, only a "no adverse tax effect" opinion needs to be given to permit a change, and investors may rely on the "no adverse tax effect" opinion for the issues that it addresses, and investors may continue to rely on the original opinion for all other issues.[95]

The 2003 Report committee took no position on the appropriateness or validity of "exploding" opinions. In light of the increase since 2009 in the issuance of variable rate bonds directly purchased by banks (and the corresponding decrease in publicly offered variable rate bonds), the Committee is not aware of "exploding" opinions being given in recent years and takes the position that all opinions speak only as of their date.

If bond counsel uses an express form of "exploding" opinion limitation, any accompanying disclosure document should clearly disclose that limitation and its consequences to promote understanding by both initial recipients and subsequent purchasers of the limitations of the opinion and the circumstances and manner in which it ceases to be applicable. If an opinion "explodes" after the issuance of the bonds, bondholders may have difficulty learning that the opinion may no longer be relied on with respect to some or all of the issues originally covered by the opinion. Additionally, bond purchasers after the date that the opinion "exploded" might be unaware that the opinion (or affected portion thereof) is no longer in effect. For that reason, consideration should be given to disclosing whether a new opinion must be received as a condition to the action that terminates or limits the original bond opinion (and, if so, the requirements, if any, for the new opinion) and whether (and, if so, how and when) bondholders will be notified of the action.

d. "Qualified" and "Unqualified" Opinions

Because the vast majority of bond opinions currently are "unqualified" opinions as described in Comment (H), disclosure should be made if the bond opinion is "qualified" or "reasoned" (or "explained") or otherwise is not "unqualified" as discussed in this report. The form of a "qualified" or "reasoned" (or "explained") opinion should be included as an exhibit to the offering document. [96]

e. Alternative Minimum Tax

The model opinions include language addressing the federal tax treatment of interest on the bonds under the alternative minimum tax. Disclosure with respect to the alternative minimum tax treatment of interest on the bonds should be included in the disclosure document.

---

[95] *See* "Other Types of Opinions – 'No Adverse Tax Effect' Opinions" herein.
[96] *See* "Other Types of Opinions – 'Qualified' and 'Reasoned' or 'Explained' Opinions" herein.

f. "Bank Qualified Bonds"

If the issuer has designated the bonds as "qualified tax-exempt obligations" within the meaning of Section 265(b)(3) of the Code, appropriate disclosure of such fact and its consequences should be included in the disclosure document. The following is one example of disclosure that may be used in this circumstance for a new money bond issuance:

> "The Issuer has represented that it does not reasonably anticipate issuing greater than $10,000,000 of tax-exempt obligations in the current calendar year (excluding certain private activity and refunding bonds) and that it has designated the Bonds as "qualified tax-exempt obligations" within the meaning of Section 265(b)(3) of the Code. Accordingly, assuming the accuracy of such representations, in the case of certain banks, thrift institutions or other financial institutions owning the Bonds, a deduction is allowed for 80 percent of that portion of such institutions' interest expense allocable to interest on such Bonds. Bond Counsel has expressed no opinion with respect to any deduction for federal tax law purposes of interest on indebtedness incurred or continued by an owner of the Bonds or a related person to purchase or carry such Bonds."

g. Risk of IRS Audit

Since the 2003 Report was published, the IRS has continued its program of both random and targeted audits. Any audit of particular bonds can affect their market value. From time to time the IRS has announced that it will audit bonds of a particular type or bonds implicating the interpretation of a particular section of the Code. Practice varies, but many times the general risk of audit is set forth in the disclosure document. The following is one example of general disclosure that may be used if disclosure of the general risk of audit is determined to be appropriate:

> "The Internal Revenue Service (the "IRS") has established an ongoing program to audit tax-exempt obligations to determine whether interest on such obligations is includible in gross income for federal income tax purposes. Bond Counsel cannot predict whether the IRS will commence an audit of the Bonds. Owners of the Bonds are advised that, if the IRS does audit the Bonds, under current IRS procedures, at least during the early stages of an audit, the IRS will treat the Issuer as the taxpayer, and the owners of the Bonds may have limited rights to participate in such procedures. The commencement of an audit could adversely affect the market value and liquidity of the Bonds until the audit is concluded, regardless of the ultimate outcome."

Other issues to be considered for disclosure include whether the bonds are of a type more likely to be selected by the IRS for investigation, and whether ongoing audits are being conducted either of issues of the same type or of the same issuer.

h. Collateral Tax Consequences to Holders

If disclosure of tax consequences in addition to those covered by the bond opinion is deemed appropriate for the disclosure document, the following statement, or an expanded form thereof, is an example of what may serve as appropriate disclosure:

> "Prospective purchasers of the Bonds should be aware that ownership of the Bonds may result in collateral federal income tax consequences to certain taxpayers, including, without limitation, financial institutions, property and casualty insurance companies, individual recipients of Social Security or Railroad Retirement benefits, certain S corporations with

"excess net passive income," foreign corporations subject to the branch profits tax, life insurance companies, and taxpayers that may be deemed to have incurred or continued indebtedness to purchase or carry or have paid or incurred, certain expenses allocable to the Bonds. Bond Counsel does not express any opinion regarding such collateral tax consequences. Prospective purchasers of the Bonds should consult their tax advisors regarding collateral federal income tax consequences."

i. Original Issue Discount

When bonds are sold with original issue discount, counsel should consider disclosure of this fact. The following language is one example of disclosure regarding original issue discount:

The initial public offering prices of the Bonds maturing on _____ (collectively, the "Discount Bonds"), are less than the principal amounts payable at maturity for such Bonds, and as a result, the Discount Bonds will be considered to be issued with original issue discount. The difference between the initial public offering prices of the Discount Bonds as set forth on the [inside] cover page of this Official Statement (assuming they are the first prices at which a substantial amount of each such maturity are sold) (the "Issue Price" for each such maturity), and the amounts payable at maturity of the Discount Bonds will be treated as "original issue discount." A taxpayer that purchases a Discount Bond in the initial public offering at the Issue Price for such maturity and that holds such Discount Bond to maturity may treat the full amount of original issue discount as interest which is excludable from the gross income of the owner of that Discount Bond for federal income tax purposes and will not, under present federal income tax law, realize taxable capital gain upon payment of the Discount Bond at maturity.

The original issue discount on each of the Discount Bonds is treated as accruing daily over the term of such Discount Bonds on the basis of the yield to maturity determined on the basis of compounding at the end of each six-month period (or shorter period from the date of the original issue) ending _____1 and _____1 (with straight line interpolation between compounding dates).

Section 1288 of the Code provides, with respect to tax-exempt obligations such as the Discount Bonds, that the amount of original issue discount accruing each period will be added to the owner's tax basis for the Discount Bonds. Such adjusted tax basis will be used to determine taxable gain or loss upon disposition of the Discount Bonds (including sale, redemption, or payment at maturity). Owners of the Discount Bonds that dispose of Discount Bonds prior to maturity should consult their tax advisors as to the amount of original issue discount accrued over the period held and the amount of taxable gain or loss upon the sale or other disposition of such Discount Bonds prior to maturity.

As described under "TAX MATTERS," the original issue discount that accrues in each year to an owner of a Discount Bond may result in certain collateral federal income tax consequences. Owners of any Discount Bonds should be aware that the accrual of original issue discount in each year may result in a tax liability from these collateral tax consequences even though the owners of such Discount Bonds will not receive a corresponding cash payment until a later year.

Owners that purchase Discount Bonds in the initial public offering but at a price different from the Issue Price for such maturity should consult their own tax advisors with

respect to the tax consequences of the ownership of the Discount Bonds.

The Code and Treasury Regulations contain certain provisions relating to the accrual of original issue discount in the case of subsequent purchasers of bonds such as the Discount Bonds. Owners that do not purchase Discount Bonds in the initial public offering should consult their own tax advisors with regard to the other tax consequences of owning the Discount Bonds.

Owners of Discount Bonds should consult their own tax advisors with respect to the state and local tax consequences of owning Discount Bonds. It is possible under the applicable provisions governing the determination of state and local income taxes that accrued interest on the Discount Bonds may be deemed to be received in the year of accrual even though there will not be a corresponding cash payment until a later year.

The suggested language assumes that all interest payments made on the bond are "qualified stated interest payments" as defined in Treasury Regulations Sections 1.1273-1(c)(1)(i) or 1.1275-5(e), as applicable. If interest payments are not "qualified stated interest payments," then such payments must be included in the stated redemption price at maturity, for the purpose of calculating original issue discount, and will be accrued as part of the original issue discount.

Other special circumstances might merit additional disclosure. For example, original issue discount bonds subject to mandatory sinking fund redemption may require additional disclosure. Often with respect to tax-exempt bond transactions, neither the opinion nor the disclosure document addresses circumstances where disposition of a bond may result in capital gain or loss or the consequences of secondary market discount. Counsel may consider whether disclosures relating to such topics should be included in certain circumstances.

j. Premium

Counsel should consider disclosure of the consequences to the initial purchasers when bonds are sold at a premium in the initial offering. Although neither the bond opinion nor the disclosure document typically addresses premium in the secondary market, counsel should also consider whether such disclosure should be included in certain circumstances. The following language is one example of disclosure in either event:

"An amount equal to the excess of the purchase price of a Bond over its stated redemption price at maturity constitutes premium on such Bond. A purchaser of a Bond must amortize any premium over such Bond's term using constant yield principles, based on the Bond's yield to maturity (or, in the case of premium bonds callable prior to their maturity, generally by amortizing the premium to the call date, based on the purchaser's yield to the call date and giving effect to any call premium). As premium is amortized, the purchaser's basis in such Bond and the amount of tax-exempt interest received will be reduced by the amount of amortizable premium properly allocable to such purchaser. This will result in an increase in the gain (or decrease in the loss) to be recognized for federal income tax purposes on sale or disposition of such Bond prior to its maturity. Even though the purchaser's basis is reduced, no federal income tax deduction is allowed. Purchasers of any Bond at a premium, whether at the time of initial issuance or subsequent thereto, should consult their tax advisors with respect to the determination and treatment of premium for federal income tax purposes, and with respect to state and local tax consequences of owning such Bonds."

3. Other Disclosure

a. Prospective Legislation

Disclosure of legislation currently before a state legislature or the U.S. Congress that may affect validity, tax status, or market value of bonds appropriately may be included in the disclosure document. In past years, legislation has been introduced in Congress that, if enacted, would retroactively deny tax exemption to interest on bonds even though, upon issuance, all then-existing qualifications for tax exemption were met. Some bond counsel insist on disclosure of this generic risk; others disclose only when specific legislation is pending. Facts and circumstances will affect disclosure decisions on specific legislation. These facts and circumstances may include the identities and status of the sponsors of the bill and its status in the legislative process.

b. Litigation

As discussed above in Comment (W) under "No-Litigation Certificate," in some circumstances bond counsel may deliver an "unqualified" opinion even if litigation is pending that challenges the validity of the bonds or some critical covenant or security pledge with respect to the bonds. Such litigation may involve the bonds being issued or may challenge other obligations being issued under the same statutory provisions or in reliance on legal conclusions required for bond counsel's opinion. Even if bond counsel delivers an "unqualified" opinion, disclosure of the existence of such litigation and its status may be appropriate. Bond counsel may reference such litigation in the bond counsel opinion, and a description of the litigation in the section of the disclosure document discussing the bond opinion may also be appropriate. Disclosure also may be appropriate if bond counsel is relying on the opinion of other counsel regarding the outcome of such litigation, as such other opinion is an essential link in the chain of conclusions sustaining the validity of the bonds.

This discussion does not address the issues relating to disclosure of litigation that may affect the creditworthiness of the issuer or conduit borrower.

c. Potential Conflicts of Interest

The Securities and Exchange Commission has asserted that "[i]nformation concerning financial and business relationships and arrangements among the parties involved in the issuance of municipal securities may be critical to any evaluation of any offering."[97] This assertion might be read to suggest that, at least in the view of the Securities and Exchange Commission, in certain cases the relationship of bond counsel to other parties, the assumption by bond counsel of other roles, or even the nature of bond counsel's compensation may be material and therefore require disclosure.

[97] *See* Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others, SEC Release 34-33741 (Mar. 17, 1994) (the "*1994 Interpretive Release*") – Primary Offering Disclosure – Areas Where Improvement is Needed – Conflicts of Interest and Other Relationships or Practices. *See also* footnote 60, *supra*.

V. OTHER TYPES OF OPINIONS

A. "Qualified" and "Reasoned" or "Explained" Opinions

Opinions other than "unqualified" opinions were considered to be beyond the purview of model bond opinion reports prior to 2003. While preparing the 2003 Report, the report committee learned that, although opinions other than "unqualified" opinions were given only rarely, "qualified" or "reasoned" (or "explained") opinions were sometimes being given by bond counsel, particularly in some privately-placed or secondary-market financings. The 2003 Report included a discussion of "qualified" or "reasoned" opinions, but it was not intended as a recommendation that bond counsel give such opinions in lieu of "unqualified" opinions in any particular circumstance. In preparing this report, the Committee notes that it is not aware of a "qualified" opinion being delivered in connection with a publicly offered bond issue, but it has seen "qualified" opinions occasionally given in private placements. The discussion below is also not intended as a recommendation that bond counsel give such "qualified" or "reasoned" opinions in any particular circumstance.

As with "unqualified" opinions, "qualified" or "reasoned" opinions express bond counsel's professional judgment regarding the legal matters being considered but indicate a lesser degree of confidence that a court would agree with those legal conclusions.[98] The form of qualification or degree of reasoning in a "qualified" or "reasoned" opinion will depend on the particular legal issue, the facts of the transaction, and relevant legal precedents and authority. The opinion should provide sufficient information for potential purchasers to determine whether an opinion is an "unqualified" opinion or a "qualified" or "reasoned" opinion. A potential purchaser should conclude that an opinion is "qualified" or "reasoned" if the opinion contains any discussion of conflicting cases or rulings, an analysis of legal authorities and precedents, or a phrase such as "while the matter is not free from doubt." Additionally, "reasoned" opinions frequently provide that the conclusion "should" or "would" be as set out in the opinion (rather than "will" or "is").[99] In opinions in business transactions, "should" and "would" opinions are viewed generally as conveying an equal degree of professional judgment regarding the judicial resolution of issues in the opinion.[100]

To the extent possible, "qualified" or "reasoned" opinions should indicate counsel's level of confidence so that holders and prospective purchasers, in making an investment decision and in pricing the obligations, can evaluate the likelihood that the court will disagree with the conclusions stated by the opinion. A common phrase used in transactional tax opinions is "more likely than not." Such an opinion indicates that, in the opinion giver's professional judgment, more than a 50% likelihood exists that a court would concur with the conclusions in the opinion.[101]

"Qualified" and "reasoned" opinions reflect a lower level of certainty in the conclusions expressed than an "unqualified" opinion. Accordingly, in addition to attaching the form of opinion to any disclosure document prepared for the issue, the opinion's limitations should be disclosed in the disclosure document. So long as "qualified" and "reasoned" opinions remain infrequent in the municipal securities marketplace, this disclosure should be conspicuous.[102]

---

[98] This is in contrast to the practice regarding opinions in other business transactions, in which an "unqualified" opinion may contain reasoning at the same level of confidence. *See* footnote 25, *supra*.

[99] *See Glazer and FitzGibbon*, at 103-114, for a general discussion of "qualified" and "reasoned" opinions.

[100] *See TriBar 1998 Report*, at 607, citing TriBar Opinion Committee*, Opinions in the Bankruptcy Context: Rating Agency, Structured Financing, and Chapter 11 Transactions*, 46 *Bus. Law.* 717, 733 (1991).

[101] *See* Treas. Reg. § 1.6662-4(d)(2); *see also* Treas. Reg. § 1.6694-2(b)(1) ("position has a greater than 50 percent likelihood of being sustained on its merits").

[102] *See* "Disclosure Matters – Disclosure Issues – Tax Issues – 'Qualified' and 'Unqualified' Opinions" herein.

B. "No Adverse Tax Effect" Opinions

In certain instances, bond counsel may be asked to give a "no adverse tax effect" opinion with respect to outstanding bonds. Most commonly, a "no adverse tax effect" opinion covers one or more proposed changes to the terms of the bonds, the applicable financing documents, or a proposed use of the property financed by the bonds.

The following is an example of a "no adverse tax effect" opinion requirement included in bond documents:

> "The Borrower will not enter into any management or service agreement with respect to the Project without first obtaining an opinion of nationally recognized bond counsel that such agreement will not adversely affect the excludability of interest on the Bonds from gross income for federal income tax purposes."

The following is an example of a "no adverse tax effect" opinion:

> "Based upon and subject to the foregoing and the further limitations and qualifications hereinafter expressed, it is our opinion that entering into the Management Agreement will not in and of itself adversely affect any exclusion from gross income for federal income tax purposes of interest on the Bonds under Section 103 of the Code.
>
> We have not made any inquiry or investigation with respect to whether any other circumstances that may have occurred after the original issuance date of the Bonds would have adversely affected the exclusion of interest on the Bonds from gross income for federal income tax purposes; therefore, we express no opinion as to whether interest on the Bonds is excludable from the gross income for federal income tax purposes as of the date hereof."

Bond counsel differ on whether it is appropriate to give a "no adverse tax effect" opinion covering one or more issues without undertaking the review, and having the requisite level of confidence, necessary to give an "unqualified" opinion with respect to the entire bond issue. Some bond counsel are comfortable that a "no adverse tax effect" opinion triggered by one or more specific circumstances may be given if bond counsel has reached an "unqualified" opinion level of confidence solely with respect to those particular circumstance(s) as of the date of delivery of the opinion (assuming bond counsel is not aware of other circumstances that may adversely affect the excludability of interest), especially if the opinion letter states that no opinion is being given as to any other circumstances that may have occurred after the original issuance date of the Bonds. Other bond counsel take the position that a "no adverse tax effect" opinion may not be given without being comfortable that bond counsel could give a new "unqualified" tax opinion with respect to the bonds as of the date of delivery of the opinion. Bond counsel may also take different approaches depending on whether the issue giving rise to the need for an opinion results in a reissuance of the affected bonds under Section 1001 of the Code (*e.g.*, some bond counsel believe an updated approving opinion should be given instead of a "no adverse tax effect" opinion because a reissuance is a deemed current refunding of the affected bonds).

Bond counsel is cautioned that the standards articulated in regulations under Circular 230 governing practice before the IRS apply to "no adverse tax effect" opinions, and that such standards extend to, among other things, preparation of the IRS Form 8038 and Form 8038-G in the event a change takes place that results in a reissuance under Section 1001 of the Code.

BIBLIOGRAPHY

Books, Articles and Reports

Best Practices Primary Market Disclosure, published by the Government Finance Officers Association (2020).

Demystifying DTC: The Depository Trust Company and the Municipal Bond Market, published by the National Association of Bond Lawyers (2017).

Disclosure Roles of Counsel in State and Local Government Securities Offerings, Third Edition (a project sponsored by the National Association of Bond Lawyers and the American Bar Association), published by the American Bar Association (2009).

General Obligation Bonds: State Law, Bankruptcy and Disclosure Considerations, published by the National Association of Bond Lawyers (2014).

Glazer and FitzGibbon on Legal Opinions, Second Edition, Aspen Law & Business (2001).

Glazer and FitzGibbon on Legal Opinions, Third Edition, Aspen Publishers (2008, as supplemented annually).

Guidelines for the Preparation of Closing Opinions, 57 *Bus. Law*. 875 (2002).*

Legal Opinion Principles, 53 *Bus. Law*. 831 (1998).*

Model Engagement Letters, published by the National Association of Bond Lawyers (1998).

Model Letter of Disclosure Counsel, published by the National Association of Bond Lawyers (2018).

Municipal Bankruptcy: A Guide for Public Finance Attorneys, Third Edition, published by the National Association of Bond Lawyers (2015).

Report of the National Association of Bond Lawyers Opinions and Document Committee: Revised Article 9 of The Uniform Commercial Code (2000).

Statement Concerning Standard Applied in Rendering the Federal Income Tax Portion of Bond Opinions adopted by the Board of Directors of the National Association of Bond Lawyers (1993).

Statement of Opinion Practices, 74 *Bus. Law.* 801 (2019).*

Statement of Policy Regarding Lawyers' Responses to Auditors' Request for Information, 31 *Bus. Law.* 1709 (1976).*

The 501(c)(3) Opinion in Qualified 501(c)(3) Bond Transactions, published by the National Association of Bond Lawyers (2014).*

The Function and Professional Responsibilities of Bond Counsel, 2011 Third Edition, published by the National Association of Bond Lawyers (2011).

The Remedies Opinion – Deciding When to Include Exceptions and Assumptions, 59 *Bus. Law.* 1483 (2004).*

Third-Party "Closing" Opinions, A Report of The Tri-Bar Opinion Committee, 53 *Bus. Law.* 592 (1998).*

---

* These reports are publicly available from the ABA Legal Opinions Resource Center, https://www.americanbar.org/groups/business_law/resources/legal-opinions-resource-center/.

Cases

American National Bank of Austin v. United States, 421 F.2d 442 (5th Cir. 1970).

American National Bank of Austin v. United States, 573 F.2d 1201 (Ct. Cl. 1978).

Borough of Fort Lee v. United States, 104 F.2d 275, 284 (3rd Cir. 1939).

Bradford Securities Processing Services, Inc. v. Plaza Bank and Trust, 653 P.2d 188 (Okla. 1982).

Connecticut Bank & Trust Co. v. Tax Commissioner, 178 Conn. 250, 423 A.2d 883 (Conn. 1979).

In re County of Orange, 179 B.R. 185 (Bkrtcy. C.D. Cal. 1995) (remanded 189 B.R. 499 (C.D. Cal. 1995)).

Department of Revenue of Kentucky v. Davis, 553 U.S. 328 (2008).

In re Financial Oversight and Management Board for Puerto Rico, 649 B.R. 381 (D.P.R. 2023) (affirmed in part and reversed in part 2024 WL 2952154 (1st Cir. June 12, 2024)).

Memphis Bank & Trust Co. v. Garner, 459 U.S. 392 (1983).

Other

Treasury Department Circular No. 230 (Rev. 6-2014), 31 C.F.R., Subtitle A, Part 10

National Association of Bond Lawyers
1775 Pennsylvania Ave. NW | Suit 950
Washington, DC 20006

Learn more at www.nabl.org