Bond Case Briefs

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The Role of Issuer's Counsel in a Municipal Bond Offering.

Municipalities have their general counsels who handle their normal legal work, including litigation, contracts and labor matters. These lawyers go by different names in different states, such as city attorney, corporation counsel or solicitor. In this column, in the context of their client acting as an issuer of debt, we will refer to them as issuer's counsel.

Sometimes these lawyers are full-time municipal employees and sometimes they are attorneys in private practice and the municipality is just one of their clients. Usually they do not have any significant expertise in the law of debt issuance. Nevertheless, they serve an important function when their municipal clients issue debt.

Here is some advice to issuer's counsel regarding their role in bond issues:

(1.) Make sure your client understands the roles of the entities involved in the bond issue. Your role is clear: you represent your municipal client, the issuer. The bond counsel usually considers your municipality to be his or her client, too.

Review the bond counsel's engagement letter to confirm that the bond counsel has identified the issuer as his or her client. Make sure bond counsel understands that you expect to be kept in the loop if there are any problems that could negatively affect the municipality. The level of anticipated communication required of the bond counsel by the issuer may be confirmed in the bond counsel's engagement letter.

The financial advisor to the municipal issuer has a fiduciary duty to your client, but underwriters, bank lenders, investment providers and swap providers may have limited or no duties to your client. Make sure you and your client understand the duties and roles of these other parties.

(2.) Kick the tires; ask questions. You are probably not an expert in public finance, but you are an experienced attorney. As the transaction moves forward, ask questions if you do not understand something. There are no "stupid" questions whether one dollar or millions of dollars of public funds are involved. The odds are, if you don't understand something, your client probably doesn't understand it either.

Don't accept "that's just the way it's done" as an answer. You and your client deserve clear answers to your questions. Here are a few examples of good general questions. To bond counsel: are there any thorny tax issues you are analyzing? To the financial advisor: do you think the issuer's disclosure is appropriate? If at any point you feel uncertain or uncomfortable regarding the transaction, stop the train until you get comfortable.

(3.) The Official Statement is your client's document, no matter who prepares it; make sure it's accurate. The prospectus in a bond issue is called an official statement, or OS. In many transactions, the financial advisor or the underwriter's counsel will draft the OS, but no matter who drafts the OS, it is considered your client's — the issuer's — disclosure.

Because you represent and interact with the municipality on a daily basis, you know more about it than any of the other professionals involved in the financing. Be sure to carefully read the draft OS, and make sure your client carefully reviews it too. The OS usually contains a description of the local area and economy; make sure all of that information is accurate. Pension liabilities, OPEB (other post-employment benefits) liabilities, litigation and swap liabilities are areas of specific concern to regulators and investors.

(4.) Follow the Sunshine Law. Make sure the official action to approve the debt taken by the governing body of your municipal client is in conformity with your required procedures, including your Sunshine Law.

(5.) Understand your legal opinion. In many cases, the bond counsel will prepare a draft of your legal opinion to be delivered at closing. Ask bond counsel to give you a draft of the opinion very early on in the course of the transaction. Review it carefully and make sure you are comfortable with the opinions you are required to render. Pay particular attention to opinions regarding outstanding or potential litigation. If there are any complicated litigation matters, be sure to review them with the other parties before the preliminary OS is distributed.

(6.) Get paid an appropriate fee. If you are in private practice, charge an appropriate fee to cover the time it will take you to diligently represent your client. The duties outlined in this article take time and involve your general expertise as the municipality's lawyer — you should be appropriately compensated.

(7.) Post-issuance compliance is more important than ever; make sure your client is prepared to undertake its post-issuance responsibilities. After a bond issue closes, there are requirements under the tax code and under the securities laws that continue to apply to the bonds.

On the tax side, there are regulations governing the investment and spending of bond proceeds and the use of the bond- financed facilities. On the securities law side, there are requirements to make annual financial disclosures and special-event disclosures with the Municipal Securities Rulemaking Board. Both the Internal Revenue Service and the Securities and Exchange Commission strongly encourage issuers to adopt and follow written post-issuance compliance policies.

Before the bond issue closes, you should work closely with bond counsel and the financial advisor to help the issuer develop these policies. After closing, you should work with your municipal client to make sure it takes these policies seriously and follows them.

(8.) Final thoughts. When you are working on a financing, it may often have the feel of a non-adversarial proceeding, but the stakes for your client are very high. The success of the financing is often integral to your client's economic well-being.

Approach the financing with part of your brain in an accommodating "let's get the deal done" frame of mind. But you should also approach it in part as you would a piece of litigation for your municipality: be a little skeptical, ask questions, and above all pay attention to your gut. If something bothers you, don't worry about your lack of expertise in public finance; do what you always do — diligently look out for your client.-

Good luck on your bond issues!

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