



BEST PRACTICE

Issuer's Role in Selection of Underwriter's Counsel (1998 and 2009) (DEBT)

Background. Underwriter's counsel is employed to represent the underwriter in the offering of bonds. The duties of such counsel include drafting bond purchase agreements, and may include drafting official statements and coordinating disclosure documents. Such counsel also assists the underwriter in meeting its legal responsibilities generally in the issuance and sale of the bonds. While underwriter's counsel represents the underwriter, in some cases issuers have assumed a direct role in selecting or approving underwriter's counsel. Among the reasons cited by issuers for being involved in the selection or approval of underwriter's counsel are the issuer's (1) need for assurance that underwriter's counsel is qualified and experienced and will give the highest priority to the transaction, (2) need for assurance that underwriter's counsel understands the issuer's finances and operations, disclosure practices, and other pertinent information, and will help promote full and complete disclosure, (3) desire to control the costs of the underwriter's counsel, which are typically paid directly or indirectly by the issuer, (4) desire to avoid the use of firms where conflicts of interest or pending regulatory enforcement may exist, and (5) compliance with state and local legal or policy requirements.

Recommendation. The Government Finance Officers Association (GFOA) recommends that issuers minimize their involvement in the selection of underwriter's counsel. The GFOA believes that issuers have a legitimate but limited role in the engagement of underwriter's counsel. Specifically, the role of the issuer should be to ensure that underwriter's counsel is competent, has no conflicts of interest, and that costs are reasonable. GFOA recognizes that (1) the underwriter has a reasonable need to rely on such counsel's competence and confidential advice and (2) the potential for conflicts of interest exists if an issuer designates a firm to serve as underwriter's counsel. The issuer, to protect its interests, should have policies and procedures that will facilitate limited involvement, including any or all of the following:

The issuer may draw up a list of general criteria and qualifications to be used by the underwriter and other professionals in the selection of counsel.

Working with the underwriter, the issuer can prepare a list of acceptable firms and leave the final selection to the underwriter

The issuer may ask to review the qualifications of a firm proposed by the underwriter and provide feedback on the selection including retaining the ability to exercise a veto due to concerns relating to cost, qualifications, or conflicts of interest.

Firms should be evaluated based on:

- their general knowledge and experience with disclosure requirements,
- their understanding of and, if applicable, past performance with the issuer, expertise with the securities being offered,
- their ability to complete the transaction in an orderly manner, and
- the absence of any conflicts of interest that might jeopardize the ability of the firm to carry out its responsibilities.

Governmental issuers should also have a role in negotiating with the underwriter the cost of services performed by underwriter's counsel by reviewing the scope of legal services to be provided and obtaining a fixed, not-to-exceed, hourly rate, or other appropriate fee arrangement that takes into account the complexity of the transaction and the scope of counsel's work.

The underwriter bears the ultimate responsibility for the adequacy of its own counsel. Any undue influence by an issuer, however, that calls into question the qualifications or independence of underwriter's counsel may create risk to the issuer and to the underwriter because of the increased potential of inadequate disclosure in the offering of the issuer's bonds and a reduced ability of the issuer to claim reliance on the expertise of its financing team.

References

- *Conflicts Arising from Multiple Representation*, Henry A. Kelly, American Law Institute - American Bar Association, October 17, 1991.
- *A Guide for Selecting Financial Advisors and Underwriters: Writing RFPs and Evaluating Proposals*, Patricia A. Tigue, GFOA, 1997.
- "Model Engagement Letters," National Association of Bond Lawyers, 1998.
- "The Selection and Evaluation of Bond Counsel," National Association of Bond Lawyers, 1998.
- GFOA Best Practice, "Selecting Bond Counsel," 2008.
- GFOA Best Practice, "Selecting Underwriters for Negotiated Sale," 2008.
- GFOA Best Practice, "Selecting Financial Advisors," 2009.
- *Disclosure Roles of Counsel in State and Local Government Securities Offerings*, Section of Urban, State and Local Government Law, American Bar Association, 2009.

Approved by the GFOA's Executive Board, October, 2009.