SIFMA Model Memorandum to Underwriter’s Counsel

For New Issues of Municipal Securities

Dated September 26, 2018

**Memorandum**

**To**

**From Date**

**Direct line**

**Email**

**Re**

The Public Finance Group of [Underwriter] ("[Underwriter]") has engaged your firm (or your firm has been engaged on behalf of an underwriting syndicate[[1]](#footnote-1)) to represent [Underwriter] as underwriter's counsel in connection with the issuance of municipal bonds (“Bond Transaction”). If your firm has been engaged on behalf of an underwriting syndicate, then you represent the syndicate, and no one underwriter individually. The purpose of this memorandum is to set forth certain key points that [Underwriter] would like to highlight to its counsel with respect to document drafting and representation, in addition to the normal and customary role and duties of underwriter's counsel. Those duties include: (a) assisting in conducting the due diligence investigation and in satisfying its due diligence responsibilities, (b) drafting the bond purchase agreement between the bond issuer (the “Issuer”) [, the obligor and [Underwriter], (c) preparing or reviewing a continuing disclosure agreement that complies with the SEC’s Rule 15c2- 12, (d) upon request, reviewing the documentation for compliance with the SEC’s Municipal Advisor Registration Rule, and accompanying MSRB Rules (the “MA Rule” ), (e) upon request, preparing the agreement among underwriters, (f) in the absence of Issuer-selected disclosure counsel, drafting the preliminary official statement or other offering document (“preliminary offering document”) and final official statement or other offering document (“final offering document”) (the preliminary offering document, final offering document and any other offering materials prepared by the issuer or obligated person in connection with the Bond Transaction (the“ Offering Document”) and (g) delivering an opinion letter containing the applicable matters described below.

1. **Engagement Letters**

[ALT. 1: Any proposed engagement letter must comport with applicable state law, if any, and be reviewed and approved by the [Underwriter]’s Legal Department.]

[ALT. 2: [Underwriter] does not normally use an engagement letter to hire underwriter's counsel and [does not want to receive such a letter from counsel unless requested by the Underwriter]. Any proposed engagement letter, however, must be reviewed and approved by the [Underwriter]’s Legal Department.]

2. **Conflict Waivers**

It is critical that you are able to represent us zealously. Conflict waivers may be given only by a member of the [Underwriter] Legal Department, not Public Finance bankers. Conflict waiver requests, if any, should be sent to the senior Public Finance banker to forward to the Legal Department. You should identify the conflict with specificity and confirm that your representation of the other client would not have an adverse effect on your independent professional judgment on behalf of [Underwriter]. Where applicable, you should also indicate the name of the internal [Underwriter] lawyer working on the potentially conflicting matter. For conflict waiver purposes, any [Underwriter] entity that is [describe policy on related entities needing conflict waivers, or provide a list of related parties separately] by [Underwriter] should be taken into account. For example, representation of a party adverse to a related party of the Underwriter should be taken into account when representing [Underwriter]. Underwriter will not waive future or undefined conflicts.

3. **Corporate Names**

"[Underwriter]" is the name of the broker-dealer affiliate of [Parent] and is the party to any bond purchase agreement or remarketing agreement. "[Underwriter dba]" is the marketing name for the cover of Official Statements. Please consult the [Underwriter] banker to obtain the correct logo. ["[Bank affiliate]" is the name of the banking affiliate that provides letters of credit and standby bond purchase agreements.]

4. **G-17 Letter**

The [Underwriter] bankers will take the primary responsibility for preparing any disclosures required by MSRB Rule G-17; however, as underwriter's counsel, you should review the letter and assist in its preparation as required. [If requested, you should review any disclosure related to a "complex municipal financing" and advise the [Underwriter] bankers if it does [or does not] adequately and accurately reflect the specifics of the transaction.][[2]](#footnote-2)

Certain disclosures in the letter may also be relevant to preparation of the Official Statement. Disclosure of conflicts regarding material issues is critical. Underwriter’s counsel should get copies of the MSRB Rule G-17 letters; you should actively assist the [Underwriter] bankers in securing copies of all G-17 letters submitted by other members of the underwriting syndicate.

See also: Section 7– Official Statement

5. **Bond Purchase Agreement**

It is expected that you draft and assist [Underwriter] bankers in negotiating the Bond Purchase Agreement (the “BPA”). The BPA should be based on the Underwriter’s standard form, SIFMA Model BPA (available on the SIFMA website), or, if the Issuer has an existing form of BPA, you should review it against the SIFMA Model BPA and discuss the addition or deletion of appropriate provisions with the [Underwriter] bankers. If [Underwriter] has entered into a prior BPA with the Issuer which will serve as the basis for the new BPA, initial drafts should be redlined against the prior BPA to speed review by [Underwriter] bankers and the Legal Department. Substantive differences from the SIFMA Model BPA or the inclusion of otherwise "off-market" provisions should be discussed with the [Underwriter] bankers for further discussion with the Legal Department. An initial draft of the BPA should be sent to the [Underwriter] banker and the Legal Department for review and comment prior to circulating to the entire working group.

Particular points to highlight for review include:

* No Fiduciary Role - The BPA should include a statement that the underwriting

relationship is not a fiduciary role, as set forth in the SIFMA Model BPA and disclosures required pursuant to MSRB Rule G-17.

* Representations of the Issuer/Obligor - The BPA should include a representation of the

Issuer/Obligor with respect to compliance with prior continuing disclosure undertakings for the previous five years. (Due diligence document requests should include a request for prior continuing disclosure undertakings and related filings.)

* Representations of [Underwriter] - Representations of the [Underwriter], if any,

should be limited and not go beyond those in the SIFMA Model BPA.

* negative assurance – Unless otherwise agreed, [Underwriter] must obtain negative assurance on both the preliminary offering document and the final offering document from both Underwriter's counsel and counsel for the Issuer/Obligor. If counsel for the Issuer/Obligor has a concern with delivering the requested opinion, let the Legal Department know immediately.
* Termination Provisions - Subject to prior course of dealing between the Issuer and

[Underwriter], the BPA should include all the termination provisions in the SIFMA Model

BPA.

* Indemnification - [Underwriter] best practice is to seek indemnification from governmental Issuers where possible and to require indemnification from conduit Obligors with respect to the disclosure document. [Underwriter] will not indemnify the Issuer/Obligor other than with respect to information under the heading "Underwriting". Any significant departure from this must be discussed with the [Underwriter] bankers and the Legal Department], including information on whether the Issuer/Obligor is legally precluded from providing indemnification and expenses][[3]](#footnote-3).

6. **Agreement Among Underwriters**

In general, [Underwriter] will use the [electronic Master Agreement Among Underwriters] [2018 SIFMA Master Agreement Among Underwriters (“MAAU)]. You should work with the [Underwriter] bankers to [ensure other syndicate members have signed on to the 2018 SIFMA MAAU], ascertain any other AAU requirements and consider whether any addenda to the Master are required to address, for example, representations of the Underwriters in the BPA.

7. **Official Statement**

Responsibility for preparing the preliminary and final official statement should be discussed at the outset of the transaction. For many transactions, and unless otherwise agreed, underwriter's counsel will be expected to prepare the preliminary and final official statement; however, in other transactions, the Issuer may request bond counsel or disclosure counsel to prepare those documents. In that event, [Underwriter] expects its underwriter's counsel to review the document with the same critical eye as if it were preparing the document. If there is an issue where reasonable minds can differ regarding a potential disclosure, [Underwriter] Legal Department should be contacted before the transaction proceeds. Additionally, [Underwriter] Legal Department should be contacted in all situations regarding amending or stickering the preliminary official statement or final official statement, whether or not investors’ rescission rights may be triggered. In addition to

customary securities law issues concerning disclosure, please be aware of the following particular points:

[Multiple Roles of [Underwriter] Affiliates - In addition to its role as underwriter, [Underwriter]

may also be providing a letter of credit, a liquidity facility or a swap, and may be acting in other

existing roles such as remarketing agent for outstanding variable rate demand bonds, or auction

broker-dealer for outstanding auction rate bonds. Discuss with the [Underwriter] banker any

situations in which any [Underwriter] entity will be receiving proceeds of the bonds being

underwritten and disclose as appropriate. For example, if a new bond issue will refund variable

rate demand bonds or auction rate bonds, and [Underwriter] owns any of those bonds for its

own account (whether as remarketing agent, auction broker- dealer or liquidity bank),

disclosure similar to the following language should be included in the Official Statement under

the heading "Underwriting" or other appropriate place. Similar disclosure should be included if

[Underwriter] will receive a loan repayment, swap termination payment or purchase of bank

bonds from the proceeds of the new bond issue:

"[Underwriter], [[one of] the underwriters] of the Bonds, serves as the [remarketing

agent/auction broker-dealer] for the [Prior Bonds] and [currently/as of , 20 \_\_]

owns [$ /a substantial portion/substantially all] of the

[Prior Bonds] that will be [refunded/purchased] with the proceeds of the Bonds."

Third-Party Distribution Agreement - [Underwriter] has entered into negotiated dealer agreements with [Distributor] and [Distributor] with respect to the third-party distribution of certain securities offerings. Confirm with the [Underwriter] banker whether either or both of these agreements will be utilized for a particular bond issue. If so, the following language must be included in the POS and OS:

[To be included under the heading "UNDERWRITING"] [Underwriter] ("[Underwriter]"), [[one of] the Underwriters] of the Bonds, has entered into negotiated dealer agreements (each, a "Dealer Agreement") with each of [Distributor] ("[Distributor 1]") and [Distributor] ("[Distributor 2]") for the third-party distribution of certain securities offerings at the original issue prices. Pursuant to each Dealer Agreement, each of [Distributor 1] and [Distributor 2] will purchase Bonds from [Underwriter] at the original issue price less a negotiated portion of the take-down applicable to any Bonds that such firm sells.]

Variable Rate Demand Bond Disclosure - The Official Statement for all variable rate demand bond offerings should include market standard disclosure on the characteristics of variable rate demand bonds. You can obtain the current form of such disclosure from the [Underwriter] bankers. However, this form should not be considered "information supplied by the underwriter", as much of the information summarizes certain provisions of the indenture and remarketing agreement that will need to be tailored to the specifics of the transaction. To the extent the Official Statement simply describes the mechanics of the rate setting and remarketing process as required by the documents, that description should not be considered material provided by the underwriter/remarketing agent. Accordingly, this section should not be excluded from the "accurate summary" opinion of bond counsel.

Continuing Disclosure – A description of any material failure to comply with continuing disclosure obligations within the preceding five years must be included in the preliminary offering document and final official statement. Consider including a description of action taken by the Issuer/Obligor designed to assure future compliance.

8. **Due Diligence**

Underwriter's counsel should assist [Underwriter] bankers in the fulfillment of their due diligence obligations through appropriate[[4]](#footnote-4) due diligence investigations and providing negative assurance. Underwriter's counsel should work with the bankers to arrange direct due diligence meetings with the Issuer/Obligor and assure that any co-managers are given an opportunity to participate. See also: Section 7. Official Statement – Continuing Disclosure.

Continuing Disclosure Due Diligence

The SEC included interpretive guidance in its 2010 Release amending Rule 15c2-12 1 that addressed the importance of underwriters conducting due diligence regarding an issuer’s or obligated person ’s past compliance with its continuing disclosure undertakings (“Continuing Disclosure Due Diligence”). As the SEC noted, “Municipal security holders’ access to meaningful information promotes informed investment decision-making about whether to buy, sell, or hold municipal securities and better protection against misrepresentation and fraud. “In other words, information that tends to establish that an issuer or obligated person will not be likely to materially comply with its continuing disclosure undertakings constitutes important information to investors and, thus, is material. Therefore, what an Offering Document says or does not say about the issuer ’s or obligated person ’s past continuing disclosure compliance can constitute a key representation or a material omission and the underwriter needs to have a reasonable basis for believing[[5]](#footnote-5) ) that the offering statement accurately portrays the past continuing disclosure compliance of the issuer or obligated person and the likelihood of future compliance. In its interpretive guidance, the SEC stated that underwriters may not merely rely on representations from the issuer or obligated person but must conduct an affirmative investigation into its past compliance with its continuing disclosure undertakings.

[ALT. 1:[[6]](#footnote-6) In addition to customary disclosure concerning the continuing disclosure undertaking, it is [Underwriter]’s policy that its Counsel conduct reasonable diligence regarding whether in the prior five years the Issuer/Obligor has complied in all material respects with any prior continuing disclosure obligations. Counsel and the Underwriter should agree on who should do the due diligence. Due diligence should include a review of prior continuing disclosure undertakings and EMMA with respect to the timeliness of filing annual financial statements, as well as any operating and statistical data to be updated annually, and a review of the occurrence of any notice events that require disclosure. Underwriter's counsel should actively assist the [Underwriter] bankers in identifying, addressing and correcting any continuing disclosure failures directly with the Issuer/Obligor. A suggested set of due diligence questions regarding continuing disclosure compliance is set forth in Appendix A. Providing [Underwriter] with documentation of the answers to any questions is critical to the engagement.]

[ALT. 2: It is [Underwriter]’s policy that the Banking Team, using the services of [Vendor] or other approved provider, conduct an appropriate affirmative investigation of the continuing disclosure compliance for the five-year period preceding the Bond Transaction of the person obligated to provide disclosure under the new continuing disclosure undertaking, and disclose in any Offering Document any instances in which such person has failed to comply with an undertaking in any material respect during the last 5 years.

We expect that you, as Underwriter ’s Counsel, assist the Banking Team by:

(a) assisting the banker in determining which person’s past compliance should be

reviewed by [Vendor] and (b) reviewing the report prepared by [Vendor] of that person’s continuing disclosure compliance.

If the banker has not already done so, please request that they obtain a user name and password for you so that you may review [Vendor]’s detailed findings.

After reviewing the [Vendor] report, [Underwriter] expects you to assist the banker in determining what, if any, non-compliance during the five-year period is material and should be disclosed in the offering document as required by Rule 15c2-12. If you disagree with [Vendor]’s findings, we expect that you will have a discussion with [Vendor] to resolve any differences. The [Vendor] system will contain [Underwriter]’s record of its continuing disclosure due diligence, and it is important that it is correct.

While [Vendor] will review whether notices of rating changes on the bonds were timely filed, it cannot know whether other events that are required to be filed by Rule 15c2-12 have occurred. As part of the due diligence process, we expect you to provide the issuer/obligor with a list of those events and to inquire whether any of them has occurred within the preceding five years.]

See also: Section 20. Closing Documents – Opinion of Underwriter’s Counsel

9. **Continuing Disclosure Agreement**

As underwriter's counsel, you should prepare or review the Continuing Disclosure Agreement, with particular attention to the financial and operating data included in the Official Statement to be updated on an annual basis in accordance with SEC Rule 15c2-12.

10. **Remarketing Agreement**

For variable rate transactions for which [Underwriter] will serve as remarketing agent, you should obtain the current form of [Underwriter] Remarketing Agreement from the [Underwriter] banker. Although bond counsel may draft the Remarketing Agreement, underwriter's counsel should review the agreement to conform as closely as possible to the current [Underwriter] form. Underwriter’s counsel should consider whether a remarketing of an outstanding issue constitutes a “primary offering”, and if so, that 15c2-12 has been complied with.

11. **Blue Sky**

If [Underwriter] requires a Blue Sky survey to confirm that the bonds may be offered in all jurisdictions, then on a timely basis, consult with the [Underwriter] banker with respect to any jurisdictions subject to offering limitations and any required filings that you will make.

12. **Investor Presentations**

If an investor presentation is being given, Underwriter’s Counsel should review the presentation to ensure that any material information therein is from or derived from the preliminary official statement.

13. **Issue Price**

For all issues sold on or after June 7, 2017, [Underwriter] uses the SIFMA Model Issue Price Documents[[7]](#footnote-7) and the NABL Model Issue Price Certificates, with one exception. If [Underwriter] is the senior manager and the decision is made to apply the hold-the-price rule, the NABL certificate must be modified to provide that any representation by [Underwriter] that the hold-the-price rule has in fact been complied with will be based on written representations from the co-managers that they have complied.[[8]](#footnote-8) The [Underwriter] banker can provide you with the edited form of the NABL certificate. The [Underwriter] banker must obtain the agreement of the [Underwriter] underwriter in order to apply the hold-the-price rule. That agreement must be obtained prior to pricing. If bond counsel feels obliged to modify the SIFMA or NABL form documents, you must consult with [Underwriter] in-house counsel on whether their modifications are acceptable, and they should be provided with blacklined versions. The agreed upon issue price certificate must be attached to the bond purchase agreement.

Both the [Underwriter] banker and the [Underwriter] underwriter must sign the issue price certificate. No references to Treasury Regulations for definitions are permitted.

14. **Municipal Advisor Rule**

When serving as an underwriter in connection with any Bond Transaction, [Underwriter] needs to ensure that it is not acting as a “municipal advisor.” We expect that you as Underwriter’s Counsel are aware of the basis on which the Public Finance bankers are operating and inform the Public Finance bankers and [Underwriter] Legal Department if you have any concerns regarding [Underwriter] acting in an inconsistent manner with that exemption or exclusion from the Municipal Advisor Rule . If the Public Finance banker is operating under the underwriter exclusion under the Rule, we expect that you continue to pay attention to the interactions between [Underwriter] and the Issuer or Obligor person to assist the Banking Team in not providing any advice outside of the scope of underwriting (e.g., advice on the investment of bond proceeds).

15. [**Global Financial Crimes Compliance**

If requested, Underwriter’s counsel should assist [Underwriter] bankers in the fulfillment of their obligations with respect to global financial crimes compliance through certain due diligence investigations and, in certain cases, the inclusion of representations in the BPA. Please consult with the [Underwriter] Public Finance bankers to obtain the appropriate list of diligence procedures and questions.]

16. [**FinCEN Customer Due Diligence Requirements**

If requested, Underwriter’s counsel should assist bankers to comply with rules adopted by the Financial Crime Enforcement Network within the U.S. Department of the Treasury which require financial institutions to identify and verify the identity of key individuals (i.e., “beneficial owners”) who own and/or control legal entity customers of the financial institutions and to obtain a certification from the legal entity customers as to their beneficial owners. The beneficial ownership requirement applies at the time each new account is opened. For these purposes, an account is defined to include a formal relationship with a broker-dealer or lender established to effect transactions in securities or for the extension of credit. A representative from [Underwriter]’s internal “Know Your Customer” team or the banking team may contact each potentially in-scope client to obtain the relevant information, but [Underwriter] may ask its outside counsel to assist in the process. For further information, please see the following SIFMA resource: <https://www.sifma.org/resources/general/beneficial-owners-of-legal-entity-customers-memo-and-forms/>

Note that there is an exclusion from the legal entity customer definition that includes: “Any entity established under the laws of the United States, of any State, or of any political subdivision of any

State, or under an interstate compact between two or more States, that exercises governmental authority on behalf of the United States or of any such State or political subdivision.”]

17. **[Underwriter] Does Not Pay Costs of Issuance on Behalf of Issuers**

In general, [Underwriter] does not pay costs of issuance on behalf of its clients, [other than fees and expenses of underwriter’s counsel]. In the infrequent case that [Underwriter] is paying other closing costs or costs of issuance, such costs must be clearly delineated in the Bond Purchase Agreement, with explicit direction of the issuer to pay them on the issuer’s behalf. Please consult Public Finance Legal for any questions on payment of closing costs by [Underwriter].

18. [**Asset-Backed Securities**

SEC Rule 15Ga-1: The SEC has adopted a variety of rules related to municipal asset-backed securities. Please consider whether the issuer or underwriter is subject to any such rules or the underlying statutes apply to the transaction (e.g., housing and/or student loan transactions). One such rule, SEC Rule 15Ga-1, requires securitizers of asset-backed securities to report fulfilled and unfulfilled requests to repurchase or replace assets underlying their asset-backed securities. Underwriter’s counsel should consider whether Rule 15Ga-1 may be applicable to the transaction and whether certain basic diligence questions regarding compliance with this Rule are appropriate. For example, the following questions may be appropriate:

* Is [Client] aware of SEC Rule 15Ga-1? Who is responsible for filing under SEC Rule 15Ga-1? Have those filings been made to EMMA? Have the filings on Form 15G-ABS been timely? If not, please explain the nature of any such failures and whether any changes to your policies and procedures with respect thereto are envisioned.
* Has there been a material amount of repurchases of [Client] [loans from any mortgage-backed securities pools] [assets] pledged to the repayment of any bonds (or other securities) for any reason? If so, please explain the nature of such repurchase(s). [In your estimation, what percentage of repurchase requests result in repurchases?]

19. **SEC Rule 15Ga-2 and 17g-10:**

If a determination has been made that the securities in question are asset-backed securities, underwriter’s counsel should consider whether Rule 15Ga-2 or Securities Exchange Act Section 15E(s)(4) is applicable to the transaction and whether Rule 17g-10 and any related rules are applicable with respect to any due diligence prepared in connection with the transaction prior to and after close. We would expect underwriter’s counsel to consider whether the securities are asset-backed securities and the applicability of any related rules or laws, as well as begin discussions with [Underwriter] bankers and internal legal counsel as soon as possible to timely address any issues on the transaction.]

20. **Closing Documents**

Underwriter's counsel should review all closing documents and opinions to ascertain that all closing documents specified by the Bond Purchase Agreement are delivered and that the closing documents conform to the requirements of the Bond Purchase Agreement. Particular document issues which should be addressed include:

10b-5 Assurance of Issuer's/Obligor's Counsel - [Underwriter] generally requires 10b-5 assurance from both Issuer's/Obligor's counsel (whether bond counsel, Issuer's counsel or disclosure counsel) as well as underwriter's counsel. If any issues arise as to the delivery of 10b-5 assurance from the Issuer's/Obligor's counsel, Underwriter’s Counsel should discuss the issue with the [Underwriter] banker for further discussion with the Legal Department. We feel that an independent review by underwriters’ counsel is best practice.

Opinion of Underwriter's Counsel - The opinion of underwriter's counsel should address: (i) no registration of bonds required under the Securities Act and no qualification of the bond indenture required under the Trust Indenture Act; (ii) negative assurance with respect to the preliminary official statement as of its date and of the date of the Bond Purchase Agreement, and with respect to the final official statement both as of its date and as of the date of closing (subject only to standard exclusions; which would NOT include the “Continuing Disclosure” section); and (iii) if the bonds are not exempt from Rule 15c2-12, the Continuing Disclosure Agreement satisfies the requirements of Rule 15c2-12(b)(5). [Underwriter] requires the negative assurance from underwriter's counsel, even if the Issuer has engaged Disclosure Counsel or Issuer’s Counsel for the transaction. Any non-standard exclusion from the negative assurance should be discussed with the [Underwriter] banker and the Legal Department. We have seen recent draft opinions from certain firms representing us as Underwriter’s Counsel that have included language stating that such firm has not been requested to review, nor have they reviewed, any records or contracts of the issuer or borrower. This is generally not an acceptable qualification; we expect our counsel to fully and completely assist the Public Finance bankers to conduct appropriate diligence on each transaction, including a review of relevant records and contracts of the issuer or borrower. [Please note that in-house counsel at [Underwriter] will need to review a draft of the Opinion of Underwriter’s Counsel prior to the mailing of the Preliminary Official Statement.]

Tax Certifications - Underwriter's counsel should carefully review any tax certifications requested by bond counsel to assure that the certifications are necessary and appropriate. For example, certifications should not include (1) certifications of facts that are elements of the transaction and not solely within the knowledge of the underwriter, and (2) statements that calculations are made in accordance with cited provisions of the Internal Revenue Code, but rather in accordance with specific instructions of bond counsel. Underwriter’s counsel ensure that the form of issue price certificate is attached to the bond purchase agreement.

G-34 Documentation - For variable rate transactions, work with [Underwriter] bankers to obtain appropriately redacted copies of documents required to be filed pursuant to MSRB Rule G-34.

Perfection of Security Interest – At a minimum, there should a be a clear understanding as to which party is responsible for perfection of the security interest in any collateral.

21. **Invoices**

[Insert specific invoicing and payment instructions here.]

\* \* \*

This memorandum is not intended to limit your current standard of practice to the issues listed herein. Instead, this memorandum is to be read and used in conjunction with your current standard of practice which is traditionally given in your capacity as Underwriter ’s Counsel.

If you have any questions about your role as underwriter's counsel for [Underwriter], please contact the primary [Underwriter] banker for the transaction or any of the following members of the Legal Department:

[Legal Department contacts]

We appreciate your representation of [Underwriter] and your assistance in complying with the matters described in this memorandum.

**APPENDIX A**

1. Are you familiar with SEC Rule 15c2-12 and the Issuer's responsibilities under its continuing disclosure undertakings pursuant to the Rule, including the obligation to file annual financial information (and notices of failure to file such information in a timely manner) and notices of listed events?
2. Who with your entity has the primary responsibility of ensuring compliance with prior and current continuing disclosure undertakings?
3. Do you handle the required filings internally or do you outsource this function?
4. If you outsource any part of the continuing disclosure function, who is the disclosure agent that serves this function?
5. Regardless of whether you outsource any of the continuing disclosure functions, do you have policies and procedures in place to confirm that the filings are made in the time periods required?
6. As applicable, in connection with prior security offerings subject to Rule 15c2-12, have any of the following 16 events occurred in the past five years with respect to the Issuer and/or another "obligated person", and if so was notice of such event timely posted on EMMA (or its predecessors the State Information Depository and/or the Nationally Recognized Municipal Securities Information Repositories?):
   * 1. principal and interest payment delinquencies;
     2. non-payment related defaults, if material;
     3. unscheduled draws on debt service reserves reflecting financial difficulties;
     4. unscheduled draws on credit enhancements reflecting financial difficulties;
     5. substitution of credit or liquidity providers, or their failure to perform;
     6. adverse tax opinions, the issuance by the Internal Revenue Service of proposed or final determinations of taxability, Notices of Proposed Issue (IRS Form 5701- TEB), or other material notices or determinations with respect to the tax status of the security, or other material events affecting the tax status of the security;
     7. modifications to rights of security holders, if material;
     8. bond calls, if material, and tender offers;
     9. defeasances;
     10. release, substitution, or sale of property securing repayment of the security, if material
     11. rating changes;
     12. bankruptcy, insolvency, receivership, or similar event of the Issuer or another obligated person;
     13. the consummation of a merger, consolidation, or acquisition involving the Issuer or another obligated person or the sale of all or substantially all of its assets, other than in the ordinary course of business, the entry into a definitive agreement to undertake such an action or the termination of a definitive agreement relating to any such actions, other than pursuant to its terms, if material;
     14. appointment of a successor or additional trustee or the change of name of a trustee, if material;
     15. incurrence of a financial obligation of the obligated person, if material, or

agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the obligated person, any of which affect security holders, if material; and

* + 1. default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation of the obligated person, any of which reflect financial difficulties.

1. Was each filing timely, and did each filing contain all information required by each of the Issuer's continuing disclosure undertakings?
2. To the extent the Issuer has not substantially complied with its prior undertakings, what are the procedures now in place to ensure compliance going forward?
3. Did the Issuer/Obligor enter into a settlement agreement with the SEC pursuant to the SEC’s MCDC Initiative? Did the Issuer self- report any transactions pursuant to the SEC's MCDC Initiative?
4. To the extent that the Issuer failed to file annual financial information in the past five years in violation of its continuing disclosure undertakings under the Rule, did the Issuer file a notice of failure to file such information in a timely manner?
5. Have all filings pursuant to continuing disclosure undertakings under the Rule in the past five years been linked to all appropriate CUSIP numbers?

1. When acting as lead or managing underwriter, [Underwriter] requests that you as underwriter’s counsel inform the [Underwriter] prior to contacting any other syndicate members. [↑](#footnote-ref-1)
2. Discretionary. [↑](#footnote-ref-2)
3. Governmental issuers are commonly precluded from providing indemnification, and, if so, this clause should be removed. For transactions with non-governmental obligors, leave this clause intact. [↑](#footnote-ref-3)
4. The type of appropriate due diligence will vary according to the nature of the financing (e.g., general obligation bond v. revenue bond). In any event, due diligence is more than a meeting or phone call conducted shortly before a preliminary official statement is posted. Among the types of inquiries that should be made as part of due diligence are the following, all of which are designed to test the accuracy of key representations in the information provided by issuers/obligated persons as well as conduct a reasonable search for material information that has not been disclosed by such parties, including: (1) internet searches regarding potential financial improprieties and potential conflicts of interest; (2) review of minutes of governing bodies; (3) review of rating agency presentations; (4) review of budgets v. performance; (5) examinations of audits (including management letters) and unaudited stub period financial statements; (6) litigation searches; and (7) review of financing documents. Additional items of diligence that may be relevant are addressed in Disclosure Roles of Counsel in State and Local Government Securities Offerings, ABA-NABL (2009). [↑](#footnote-ref-4)
5. Securities and Exchange Commission Release No. 34-62184A; File No. S7-15-09, Amendment to Municipal Securities Disclosure (May 2010). [↑](#footnote-ref-5)
6. With respect to Alternative 1 and 2 in this section, it is critical to discuss in advance with the [Underwriter] Legal Department, if there is one, else the Public Finance banker, the expectations and parameters of the investigation by underwriter’s counsel. [↑](#footnote-ref-6)
7. The SIFMA Model Issue Price Documents were originally released on May 2, 2017. On May 5, 2018, a revised set of SIFMA Model Issue Price Documents (Version 2.0) was released. Both sets of documents can be found at: www.sifma.org/issuepricedocs. [↑](#footnote-ref-7)
8. The SIFMA Model Issue Price Documents state that unless otherwise advised by a co-manager or other participating broker dealer in a third-party distribution agreement or selling group agreement, the lead manager shall assume that any co-manager and broker dealer participants in a third-party distribution agreement or selling group agreement have complied with the requirements for establishing issue price of the securities. [↑](#footnote-ref-8)