

Association for Governmental Leasing & Finance

In-House Lawyers' Panel: "The Final Lap"

Spring 2016 Conference
Charlotte, North Carolina



36TH ANNUAL CONFERENCE

May 4-6, 2016 | Omni Charlotte Hotel



PANELISTS

Curt Loub, *KS State Bank*

Beth Gilbert, *Dell Financial Services*

Maryann Santos, *Capital One Public Funding*



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THE UNIQUE ROLE OF IN-HOUSE COUNSEL

- Balancing internal relationships
- Balancing legal vs. business
 - Example: CA and IL lenders license laws
- Interactions with outside counsel



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DOCUMENTATION ISSUES

- Structure (importance of muni lease forms)
- Negotiating documents
- Authorizing resolutions
- Problematic clauses (non-substitution and indemnification)



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DOCUMENTATION ISSUES, cont.

- IRS Form 8038-G preparation
- Managed Service Deals



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NON-APPROPRIATION AND DEFAULT

- How to deal with threatened non-appropriation
- Role of in-house counsel when things go wrong



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LOAN VS. SECURITY



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MSRB 2016-12

- Purpose - Reminder to Firms of Obligation in Direct Placements
 - Due diligence must be performed to determine if it's a Security
 - Nature of a firm's role in the transaction
 - Broker-dealer
 - Municipal advisor
 - Applicability of the federal securities laws and the rules and regulations
 - MSRB
 - FINRA



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Threshold question: “Is it a Security?”

Reves v. Ernst & Young, Inc.

- Factors
 - The reasons the parties entered into the transaction;
 - Plan of Distribution;
 - Expectations of the investing public; and
 - If the note is subject to other regulation



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MSRB 2016-12

- Focus of FINRA/MSRB - Documentation
 - Does the documentation contain language consistent with bond offerings?
 - references to “purchasers” or “sellers”;
 - the debt instruments were to be sold in separate denominations;
 - the purchasers made representations regarding their knowledge and experience in investments and willingness to take on risk; and
 - the debt instruments could have been resold.



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Accountant's Perspective

How should the Bonds be presented on the statement of financial position ?

Accounting Standards Codification (“ASC”) Topic 320, Investments

- A “security” is a participation, or other interest in property or in an entity of the issuer or an obligation of the issuer that has all of the following characteristics:
 - 1) Issued to bearer or registered form;
 - 2) One of a class or series or by its terms is divisible
 - 3) It is of a type commonly dealt in on securities exchanges or markets or, when represented by an instrument, is commonly recognized in any area in which it is issued or dealt in as a medium for investment.



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Accountant's Perspective

- To determine whether a debt instrument is commonly recognized in any area in which it is issued or dealt in as a medium for investment, accountants consider the following factors:
 - No rating agency may assign a specific rating to the obligation;
 - Issued in physical, certificated form, registered in the name of the purchaser and cannot be held in book-entry form or registered with DTC;
 - The obligation must not be issued pursuant to any type of offering document;
 - Transfer restrictions
 - Higher authorized denominations to avoid “offering concerns” arising from the private placement exemption requiring authorized denominations of at least \$100,000);
 - No references to being an “investment security” for purposes of UCC Article 8
 - Not assigned a CUSIP number by Standard & Poor’s CUSIP Service;
 - Not placed or offered by a broker-dealer in the capacity of an underwriter or a placement agent (the purchaser must directly fund the obligation).



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Other Accountant's Perspective

- To determine whether a debt instrument is commonly recognized in any area in which it is issued or dealt in as a medium for investment, certain accountants may consider the Reves factors:
 - Seller's purpose;
 - Plan of distribution;
 - Reasonable expectations of the investing public; and
 - Whether the debt instrument is subject to another regulatory scheme



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Impact on Municipal Leasing

- SEC states that “the provision of advice and recommendations by vendors (or any other person including, for example, lease financing companies affiliated with vendors) to the municipal entity client regarding specific financing options for the purchase of products could, depending on the facts and circumstances, be a municipal advisory activity.”



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Industry Reaction

Bid Requirements

- The bidder include a statement on the bid form that **no municipal financial products or municipal securities have been included in the proposal.**
- Problematic for the direct placement bidder who is only allowed to provide a response to the RFP and CANNOT advise the issuer in any way which it would do by providing issuer with this legal conclusion.

Municipal Advisors advise their client to not sign the IRMA representation letter.

- Municipal Advisors take the position you don't need the IRMA rep letter because of the bank exemption; however, the bank exemption is very limited and the lender must proceed with great caution.
- Prevents the free flow of information.



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New Political Subdivision Rules



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New Political Subdivision Rules

- Federal gov't determining what was historically in the control of the state and locality.
- Treasury Regulation currently defines a political subdivision simply as any division of any state and local governmental unit which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unit.
 - Sovereign power
 - eminent domain
 - police power
 - taxing power



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New Political Subdivision Rules

- Likely that the IRS and Treasury will interpret who meets the definition of a political subdivision more narrowly than has been the case to date.
 - Public purpose and that the entity actually serve that purpose in a manner that provides a significant public benefit **no more than incidental benefit to private persons.**
 - Governmentally Controlled



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LEGAL OPINIONS

- What opinions?
 - Validity and enforceability
 - Tax
 - No litigation
 - Other (compliance with public bidding)
- When to seek?
 - Size thresholds
 - Political subdivision questions
- From whom?
 - lessee general counsel vs. bond counsel



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QUESTIONS