Commentary on the

MODEL PLACEMENT AGENT ENGAGEMENT AGREEMENTS

(for Placements of Municipal Securities)

Use of This Agreement

This Model Placement Agent Engagement Agreement (the "Agreement") is intended for use by brokers, dealers, and municipal securities dealers acting as a placement agent (the "Placement Agent") to assist the issuer of the securities identified in the Agreement (the "Issuer") of municipal securities whether tax-exempt or taxable (the "Bonds"),[1] in placement of the Bonds with one or more purchasers. This Agreement addresses the agreement for services as placement agent between the Issuer and Placement Agent. It does not address the terms of purchase and sale of the Bonds between the Issuer and Purchasers. This Agreement does not apply in circumstances in which the Placement Agent will purchase the Bonds for resale.[2] This Agreement does not apply in circumstances in which the placement is of instruments or obligations that are not securities as defined in Securities Act Section 2(a)(1). This Agreement may also be used in circumstances in which doubt exists as to whether the instruments or obligations are securities, together with such additional policies and procedures adopted by the Placement Agent, as well as considerations offered in the publication *National Association of Bond Lawyers' Direct Purchases of State or Local Obligations by Commercial Banks and Other Financial Institutions*.[3]

Above all, this Agreement is intended to be used flexibly as a foundation for a contract between the Issuer and Placement Agent reflecting the facts and circumstances particular to the engagement.

Para. 1. **Engagement**. The Agreement should be executed prior to solicitation or other contact with a Purchaser. When preceded by an agreement intended to trigger the underwriter exclusion of the Municipal Advisor rule, for clarity, this Agreement should state that it supplements and amends the prior agreement. The model does not prescribe the tasks to be performed by the placement agent under the agreement. Such tasks may vary from engagement to engagement and negotiated between the Issuer and the Placement Agent before execution of the Agreement. Paragraph 1 is an appropriate place to describe the activities of the Placement

[1] That is, for securities as defined in Section 2(a)(1) of the Securities Act of 1933 (the "Securities Act") issued or guaranteed by the United States or any Territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories, including securities described as private activity bonds, whether or not qualified bonds as defined in Section 141 of the Internal Revenue Code of 1986.

[2] In such circumstances SIFMA's Model Bond Purchase Agreement may be useful.

[3] July, 2017, available at www.nabl.org.

Agent under the Agreement, which may range from, on the one hand, identification of prospective purchasers of the Bonds with subsequent negotiations through sale and closing exclusively between the Issuer and purchasers, accompanied by their respective counsel, to, on the other, the full range of activities within the underwriter exclusion.[4] Such activities may include providing assistance to the Issuer in preparing materials useful or necessary in the placement of the Bonds, ranging from a term sheet to a private placement memorandum. The activities performed by the Placement Agent may alter the representations provided in Paragraph 6. Additional activities may include assisting the Issuer in preparing for due diligence meetings with purchasers and negotiation of documentation for the transaction.

Para. 3. **Disclosure and Due Diligence**. Federal securities law require a broker dealer to have an adequate and reasonable basis for recommending a security to an investor. "He cannot recommend a security unless there is an adequate and reasonable basis for such recommendation. He must disclose facts which he knows and those which are reasonably ascertainable. By his recommendation he implies that a reasonable investigation has been made and that his recommendation rests on the conclusions based on such investigation."[5] "Due diligence" is a component of a reasonable basis. The facts and circumstances of the placement and the degree of involvement of the Placement Agent in the preparation of the Placement Materials may affect the requisite level of inquiry, but a placement agent may not simply use materials provided by an issuer without inquiry.[6] The level of investor sophistication does not affect the level of Placement Agent inquiry.[7] The level of inquiry must be sufficient to withstand a charge of negligence under Securities Act §17(a)(2) and (3) and MSRB Rule G-17. Negligence is measured by "reasonable prudence."[8] The Model provides for instances in which a placement

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[4] Registration of Municipal Advisors, 78 Fed. Reg. 67468 (Nov. 12, 2013), states: "Registered broker-dealers are subject to regulation under the Exchange Act, regardless of whether they act as principal or agent in a municipal securities offering. The Commission does not believe that the underwriter exclusion should be limited to a particular type of underwriting or particular type of offering. [n. 629 Whether or not a particular offering would be a distribution for purposes of Section 2(a)(11) of the Securities Act is a facts and circumstances determination. Whether there is a ''distribution'' does not affect the role of a registered broker-dealer in a municipal securities offering for purposes of this underwriter exclusion.] Therefore, if a registered broker-dealer, acting as a placement agent, performs municipal advisory activities that otherwise would be considered within the scope of the underwriting of a particular issuance of municipal securities as discussed above, the broker-dealer would not have to register as a municipal advisor."

[5] *Hanly v. SEC*, 415 F.2d 589, 597 (2d Cir. 1969), *affirming Richard J. Buck & Co.*. 43 S.E.C. 998 (1968). *See also SEC v. Dain Rauscher, Inc.* 254 F.3d. 852, 857-858 (9th Cir. 2001) (citing both *Hanly* and the SEC 1988 release proposing Rule 15c2-12 and interpreting the legal obligation of underwriters of municipal securities): "Ough was a securities professional. A securities professional has an obligation to investigate the securities he or she offers to customers. See *Hanly v. SEC*, 415 F.2d 589, 595-96 (2d Cir. 1969) (holding that brokers and salesmen are under a duty to investigate and must analyze sales literature and must not blindly accept recommendations made). Ough had a duty to make an investigation that would provide him with a reasonable basis for a belief that the key representations in the statements provided to investors were truthful and complete. *See Municipal Securities Disclosure*, Exchange Act Release No. 34-26100, 41 SEC Docket 1131 (Sept. 22, 1988),1988 WL 240748, *20."

[6] *See Everest Securities, Inc. v. SEC* 116 F. 3d 1235, 1239 (8th Cir. 1997) "reliance on others does not excuse [placement agents'] own lack of investigation. *See Sorrell v. SEC,* 679 F.2d 1323, 1327 (9th Cir. 1982) (broker's reliance on attorney's advice did not excuse lack of investigation); *Hanly v. SEC,* 415 F.2d 589, 597 (2d Cir. 1969) ("A salesman may not rely blindly upon the issuer for information concerning a company.").'

[7] "[Placement Agent's] argument that it had less responsibility to the investors because they were sophisticated and experienced is likewise unavailing. *Cf. Hanly,* 415 F.2d at 596 (the fact that investors may have been sophisticated and knowledgeable did not warrant a less stringent standard of investigation). *Id*, 1240.

[8] *See Dain Rauscher, supra*, n. 3, at 856.

memorandum provided and subsequent references to the Placement Memorandum as well as in which a range of materials is provided and described in the Agreement with subsequent references to the "Information Package." The Placement Memorandum or Information Package, together with the draft Resolution and other legal documents to be used in connection with the Placement is defined term "Placement Materials" is deliberately flexible to allow the facts and circumstances of the engagement to be reflected in the Agreement. The document or documents that will constitute the Placement Materials should be identified in Paragraph 3 or listed on an exhibit identified as such and referenced in Paragraph 3.

Para. 4. **Representations, Warranties, and Agreements of the Issuer**. The criminal and civil consequences for any person offering to sell or solicitation of an offer to purchase a security in violation of Securities Act Section 5, underscore the significance to an issuer and its placement agent of a legal opinion regarding exemption from registration. Similarly, validity, enforceability, and tax exemption, fundamental legal characteristics of the security being offered, are of significance to the issuer and its placement agent under the antifraud provisions. These concerns are addressed by the requirements of Paragraph 4(i)(1) (i). Receipt of a reliance letter from bond counsel assisting a placement agent in formation of a reasonable basis in making a recommendation when placing the bonds and formation of a defense or demonstrating reasonable care under the antifraud provisions appropriately addresses the key points of validity, enforceability and tax status.[9] When counsel has participated in preparation of the placement or offering memorandum, receipt of a negative assurance letter is likewise appropriate.[10] To the extent the document or documents constituting the Placement Materials has changed, the changes should be reflected in the Issuer certificate described in Paragraph 4(i)(2)(iii). In circumstances where the parties agree to use a Preliminary Placement Memorandum in soliciting investors and delivery of a final Placement Memorandum, this should be made clear in Paragraph 3 as well as in the relevant sections of Paragraph 4.

Para. 6. **Regulatory Disclosure**. *Regulation of Municipal Advisors Frequently Asked Questions*[11] F.A.Q. 5.1 provides:

> The staff would view as consistent with the underwriter exclusion, an engagement by a municipal entity or obligated person of a broker-dealer to serve as an underwriter on a particular issuance of municipal securities if it were evidenced by an agreement, engagement letter, or letter of intent (an "engagement letter") with the following features: (a) the governing body or any duly authorized official of the municipal entity responsible for municipal finance has executed, approved, or acknowledged the engagement letter in writing; (b) the engagement letter clearly

[9] As signaled by the phrasing of Paragraph 4(i)(1)(iii) Exhibit A may be replaced by such other form of reliance letter as is acceptable to the Placement Agent.

[10] "In an unregistered offering conducted pursuant to an exemption from the registration requirements of the Securities Act, negative assurance serves its purpose when it helps the financial intermediaries assisting the company in the sale of its securities establish a defense under Rule 10b-5 of the Securities Exchange Act." *Glazer and Fitzgibbon on Legal Opinions*, § 18.3 To Whom Should Negative Assurance Be Given? pp. 402-403 (2017 Cum. Supp). The receipt of negative assurance may also be helpful in connection with demonstrating reasonable care under Securities Act Section 17(a)(2). The predicate phrase in this sentence is "when counsel has participated in the preparation of…"

[11] Securities and Exchange Commission Office of Municipal Securities, *available at:* https://www.sec.gov/info/municipal/mun-advisors-faqs.shtml#section5

relates to providing underwriting services; (c) the engagement letter clearly states the role of the broker-dealer in the transaction; (d) the engagement letter relates to a particular issuance of municipal securities that the municipal entity or obligated person anticipates issuing and is not a general engagement for underwriting services that does not relate to any particular transaction; and (e) the engagement letter or a separate writing done at or before the time of the engagement provides all disclosures that are required to be made by underwriters by the time of an engagement under MSRB Rule G-17, including disclosures about the role of the underwriter, the underwriter's compensation, and actual or potential material conflicts of interest (excluding only those permitted to be disclosed after the time of engagement under MSRB Rule G-17).

The introductory paragraphs and Paragraph 1, Engagement, together with Paragraph 6 of the Agreement are intended to meet elements (a) through (d). The text in brackets in Paragraph 6 is intended to meet element (e), if not otherwise provided.

Para 10. **Indemnification and Contribution**. The paragraph is based upon SIFMA Bond Purchase Agreement General Provisions and Conditions Section 11, Indemnification and Contribution. (SIFMA Model BPA)[12] Unlike the SIFMA Model BPA, which contemplates an Official Statement with a section captioned "Underwriting" (or similar caption), for which the Underwriter indemnifies the Issuer and related officials, the Placement Materials are provided by the Issuer. In the event the Placement Agent provides or prepares materials with respect to which the Placement Agent is to indemnify the Issuer, the text of SIFMA Model BPA Section 11 may be used.

Form of Investor Letter

Investor letters serve two significant functions in the placement of securities: verification of the elements of exemption for a transaction and negating reliance of the investor on the placement agent by acknowledging its burden of inquiry. Reliance is not an element in SEC enforcement actions under the antifraud provisions.

For purposes of exemption of a broker-dealer in a placement of bonds under Rule 15c2-12, acknowledgement of the requisite minimum authorized denomination of $100,000 may be provided in the first sentence. Representation 3 addresses the requirement of 15c2-12(d)(1)(i)(B), not purchasing for more than one account or with a view to distribution. Representations 2 and 5 address the sophistication requirement of 15c2-12(d)(1)(i)(A). If the Issuer and Placement Agent intend to utilize the limited offering exemption of Exchange Act Rule 15c2-12(d)(1), but offers are not to be limited to "qualified institutional buyer" or "accredited investor" of Representation 2, Rule 15c2-12(d)(1)(i)(A) requires each investor "has such knowledge and experience in financial and business matters that it is capable of evaluating the merits and risks of the prospective investment," a qualification addressed by the last sentence of paragraph 5. [13]

[12] *Available at:* https://www.sifma.org/wp-content/uploads/2017/08/Municipal-Securities_Model-Bond-Purchase-Agreement-General-Provisions-and-Conditions.pdf.

[13] *See* 54 FR 28799, 28809 (July 10, 1989): Consistent with current practice, the Commission believes that an underwriter will satisfy its obligation under paragraph (c)(1) if it obtains a statement indicating that the investor has

Issuers may wish to restrict resales of the Bonds by the Purchasers following the Placement by use of a "traveling letter" and may modify the Form of Investor Letter accordingly.

purchased the securities with investment intent. Furthermore, as suggested by the American Bar Association, in order to maintain the integrity of the 35 person limit, the Rule requires that each of the purchasers acquire securities for only one account. Finally, the Rule requires that the underwriter make a subjective determination that each investor have the knowledge and experience required to evaluate the merits and risks of the prospective investment.