BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

Docket No. E-2, Sub 1262
Docket No. E-7, Sub 1243

In the Matter of		
Joint Petition of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC Issuance of Storm Recovery Financing Orders	))))	TESTIMONY OF BRIAN A. MAHER SENIOR ADVISOR, SABER PARTNERS, LLC

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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Direct Testimony of

Brian A. Maher Senior Advisor

Saber Partners, LLC

December 21, 2020

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INTRODUCTION

Q. PLEASE STATE YOUR NAME AND ADDRESS.

A. My name is Brian A. Maher. I live at 8787 Bay Colony Drive, Naples, Florida.

Q. WHAT IS YOUR POSITION WITH SABER PARTNERS LLC?

A. I am currently a Senior Advisor to Saber Partners, LLC (Saber Partners or Saber).

Q. WOULD YOU BRIEFLY PROVIDE AN OVERVIEW OF YOUR EDUCATION AND PROFESSIONAL EXPERIENCE?

A. I graduated from Dartmouth College in 1970 Magna Cum Laude with a degree in Romance Languages. In 1973, I received a Master's degree in International Relations with a concentration in International Business and Finance from The Fletcher School of Law and Diplomacy. That year I joined Exxon Corporation (now ExxonMobil Corporation) where I worked for over 33 years, principally in the financial area, until my retirement from the company in 2006. Through multiple assignments in the United States and overseas, I progressed to the senior management level, holding positions of Treasurer for all international operations and Assistant Treasurer of the corporation. For over ten years, part of my responsibilities included supervision of all of ExxonMobil's capital markets activities. During that period I managed billions of dollars of financings and presented annual corporate financing plans and periodic financing performance assessments to the ExxonMobil Management Committee, and at various times to the Board Finance Committee. In addition, during my career I served as president of the corporation's worldwide insurance operations and oversaw worldwide pension and benefits funds, including serving on the New York Stock Exchange Corporate Pension Advisory Committee.

Q. PLEASE STATE YOUR RELATIONSHIP WITH SABER PARTNERS.

A. Since 2006, I have been a senior advisor to Saber Partners where I have participated in several of Saber's financial advisory transactions.

Q. WHAT IS THE PURPOSE OF YOUR PRESENTATION TODAY?

A. The purpose of my testimony is to give my perspective on the proposed securitization financing. My main focus will be the appropriate relationship between (i) the North Carolina Utilities Commission (Commission) and the Public Staff and its independent experts and advisors, who I believe are best placed to be the main representatives of the ratepayers' economic interests, and (ii) the other key parties in the transaction, essentially Duke Energy Carolinas, LLC (DEC) and Duke Energy Progress, LLC (DEP and, together with DEC, the Companies), the Companies' advisors, and the investment banks that will likely underwrite the storm recovery bond issue.

RELATIONSHIP BETWEEN UNDERWRITERS, ISSUERS AND RATEPAYERS

Q. FROM YOUR EXPERIENCE, WHAT RELATIONSHIP DO YOU EXPECT BETWEEN BOND ISSUERS AND THE BANKS THAT SERVE AS UNDERWRITERS IN TYPICAL CORPORATE BOND ISSUANCE TRANSACTIONS?

A. As an employee or officer of ExxonMobil, I always expected to develop a cooperative and collegial relationship with the banks that underwrote the bonds to achieve the lowest overall costs possible for the financings. This required a lot of work on both sides. In traditional corporate bond transactions, the issuer bears the full economic burden of repaying the bonds. Banks that underwrite the bonds bear none of the economic burdens of repaying the bonds. Consequently, issuers of bonds and the banks that underwrite the bonds share some, but not all, of the same key objectives for the transaction. On the positive side, the banks very much want to be perceived as capable of executing an efficient, competitive transaction to earn repeat business as well as new business from other issuers that monitor the market. But issuers and banks are often on opposite sides of the table when it comes to (i) profits to be earned by the banks, (ii) the amount of effort and time the banks need to spend to achieve the best possible transaction, and (iii) the desire of the banks' investor clients to earn attractive returns. For these reasons, issuers should always play an active role in the transaction to make sure their own interests are maximized as opposed to remaining passive and depending too heavily on their banks for market information, investor outreach, or other aspects of the financing. It is essential to keep in mind at all times that the underwriting banks are sophisticated and operate in furtherance of their own financial interests. Issuers must do the same.

Q. WHAT RELATIONSHIP DO YOU EXPECT BETWEEN ISSUERS OF TRADITIONAL CORPORATE BONDS AND BANKS THAT SERVE AS FINANCIAL ADVISORS TO THOSE BOND ISSUERS?

A. I would expect their interests to be perfectly aligned. ExxonMobil employs an experienced staff of professionals with deep experience in issuing traditional corporate bonds. Consequently, ExxonMobil generally did not hire outside financial advisors in connection with its traditional bond issuance transactions. But when a financial transaction involved unusual features, ExxonMobil would sometimes hire an investment bank to serve as financial advisor for that transaction. In those transactions, I expected the interests of ExxonMobil's financial advisor to be perfectly aligned with the interests of ExxonMobil.

FIDUCIARY RELATIONSHIP – BEST INTERESTS OF RATEPAYERS MISSING

Q. DO YOU BELIEVE THERE IS A PARTICULAR CONCEPT ON WHICH THE COMMISSION SHOULD FOCUS WHEN ASSESSING THE RELATIONSHIP WITH BANKS THAT ACT AS EITHER UNDERWRITERS OR FINANCIAL ADVISORS?

A. Yes. It is often, but not exclusively, referred to as a "fiduciary relationship" or the "best interests" of the client relationship and not underwriters' or advisor's direct financial interest. There are very important differences in the working relationships between and among underwriters, advisors and the process that occurs that affect ratepayers' pocketbooks in any securitization bond offering. For example, the relationship between the Companies and Guggenheim Securities as structuring advisor might be separate from the relationship between the Companies and Guggenheim Securities under a separate, future underwriting agreement.

In fact, fiduciary duty and whether it is an important issue has been a focus of much discussion, debate and litigation. In an example I expand upon later, nearly 20 years ago, a lawsuit was filed against Goldman Sachs & Co. who was an underwriter on an initial public offering (IPO) for a company called EBC I, Inc., formerly known as eToys Inc. (eToys), that went bankrupt within two years. eToys' creditors alleged that the underwriters had manipulated the stock price for gains on the first day of trading. After the 2005 final appellate court decision in this aspect of the eToys litigation, it became universal practice for underwriting agreements to expressly disclaim any fiduciary relationship with the issuer of securities. See Hunton & Williams, "Client Update – When Does an Underwriter Owe a Fiduciary Duty to an Issuer," dated August 2005, attached to my testimony as Maher Exhibit 3.

Q. AS STRUCTURING ADVISORS TO THE COMPANIES, DO GUGGENHEIM SECURITIES AND ATKINS CAPITAL HAVE A FIDUCIARY RELATIONSHIP?

A. Apparently not. In responding to PS DR 2-2(g), Witness Heath states: "The engagement letters between DEC and DEP and Guggenheim Securities and Atkins Capital do not create any fiduciary relationships between the parties. This is common practice for advisory services engagements."

Q. WHAT ARE THE IMPORTANT ISSUES FOR THE COMMISSION TO KNOW ABOUT FIDUCIARY RELATIONSHIPS?

A. In broad terms, a service provider that has a fiduciary responsibility to its client commits to act in the client's best interests to the exclusion of any contrary interests. Where a fiduciary relationship exists, the client should be comfortable that the service provider is looking out for the client's best interests. As I will describe, that alone does not ensure the best result for a given financial transaction. Even where there is a fiduciary relationship, sophisticated clients should work actively with their service providers to ensure alignment is complete in all important aspects of the transaction. Where a fiduciary relationship does not exist, it is extremely important for the client to stay actively involved because the service provider could be subject to motivations in some way contrary to the best interests of the client.

There is much debate about when a “fiduciary relationship” arises between parties to commercial contracts. A 2006 speech by Lori A. Richards, Director, Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission (SEC), titled “Fiduciary Duty: Return to First Principles” described it this way:

> Many different types of professions owe a fiduciary duty to someone — for example, lawyers to their clients, trustees to beneficiaries, and corporate officers to shareholders. Fiduciary duty is the *first principle* of the investment adviser — because the duty comes not from the SEC or another regulator, but from common law. Some people think “fiduciary” is a vague word that’s hard to define, but it’s really not difficult to define or to understand. Fiduciary comes from the Latin word for “trust.” A fiduciary must act for the benefit of the person to whom he owes fiduciary duties, to the exclusion of any contrary interest.[1]

[1] Eighth Annual Investment Adviser Compliance Summit, Washington, D.C., February 27, 2006; https://www.sec.gov/news/speech/spch022706lar.htm.

The Securities Industry Markets Association (SIFMA), which is the broker-dealer's chief lobbying firm, defined on their website "fiduciary relationship" and "fiduciary duty" in this way as further described in Maher Exhibit 4:

> "A fiduciary relationship is generally viewed as the highest standard of customer care available under law. Fiduciary duty includes both a duty of care and a duty of loyalty. Collectively, and generally speaking, these duties require a fiduciary to act in the best interest of the customer, and to provide full and fair disclosure of material facts and conflicts of interest."

Q. HAVE THERE BEEN DEVELOPMENTS IN THIS AREA?

A. Yes. News reports on the financial markets have reported on initial public offerings in the stock market. Commissioners may be aware of stories where a stock is priced in a public offering, and then is immediately re-sold at a higher price, as in the case of eToys mentioned above. In 1999, eToys issued stock in an initial public offering. Goldman Sachs & Co. served as the lead managing underwriter for this initial public offering. The stock quadrupled when it began trading, but two years later eToys was in bankruptcy. Its creditors (including bondholders) filed a complaint in New York state court alleging

> "an advisory relationship that was independent of the underwriting agreement. Specifically, plaintiff alleges eToys was induced to and did repose confidence in Goldman Sachs' knowledge and expertise to advise it as to a fair IPO price and engage in honest dealings with eToys' best interest in mind. Essentially, according to the complaint, eToys hired Goldman Sachs to give it advice for the benefit of the company, and Goldman Sachs thereby had a fiduciary obligation to disclose any conflict of interest concerning the pricing of the IPO. Goldman Sachs breached this duty by allegedly concealing from eToys its divided loyalty arising from its profit-sharing arrangements with clients."[2]

The trial court and an intermediate appellate court declined to dismiss this aspect of the complaint, opining that the breach of fiduciary duty claim was correctly sustained upon allegations showing a preexisting relationship between eToys and Goldman Sachs that justified eToys' alleged trust in pricing the shares. In EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11 (N.Y. 2005), 799 N.Y.S.2d 170, 832 N.E.2d 26 (2005), the Court of Appeals of the State of New York also declined to dismiss this aspect of the complaint and remanded this aspect of the case to the lower courts for further proceedings, stating: "Accepting the complaint's allegations as true, as the Court must at this stage, plaintiff has sufficiently stated a claim for breach of fiduciary duty."

This led to express disclaimers of any fiduciary duty in underwriting agreements as well as in agreements for structuring advisory

[2] EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11 (N.Y. 2005), 799 N.Y.S.2d 170, 832 N.E.2d 26 (2005).

services. The practice of explicit disclosures disavowing any fiduciary relationship continues to this day.

Q. ARE YOU GIVING AN OPINION AS TO WHETHER THERE IS A LEGAL REQUIREMENT OF ANY PARTY IN THIS TRANSACTION TO HAVE A FIDUCIARY RELATIONSHIP?

A. No. I am discussing the important issues related to whether a fiduciary relationship exists and what the Commission should consider in deciding how to evaluate information it receives from different parties to the proposed transaction.

Q. DO UNDERWRITERS HAVE A FIDUCIARY RELATIONSHIP WITH AN ISSUER OF SECURITIES?

A. In my experience, underwriters claim they have no fiduciary relationship to issuers. Underwriting agreements prepared by counsel for the underwriters now include a specific declaration that the underwriters have no fiduciary relationship with the issuer. Issuers frequently are asked to acknowledge this affirmatively in the underwriting agreement. For example, the Underwriting Agreement filed with the Securities and Exchange Commission for the 2016 Duke Energy Florida, LLC, securitization transaction states:

> 16. No Advisory or Fiduciary Relationship. Each of the Issuer and the Depositor acknowledges and agrees that (a) the purchase and sale of the Bonds pursuant to this Agreement, including the determination of the offering price of the Bonds and any related discounts and commissions, is an arm's-length commercial

> transaction between the Issuer and the Depositor, on the one hand, and the several Underwriters, on the other hand, (b) in connection with the offering and the process leading thereto, each Underwriter is and has been acting solely as a principal and is not the agent or fiduciary of either the Issuer or the Depositor, any of their subsidiaries or their respective members, directors, creditors, employees or any other party, (c) no Underwriter has assumed or will assume an advisory or fiduciary responsibility in favor of the Issuer or the Depositor with respect to the offering or the process leading thereto (irrespective of whether such Underwriter has advised or is currently advising the Issuer or the Depositor or any of its subsidiaries on other matters) and no Underwriter has any obligation to the Issuer or the Depositor with respect to the offering except the obligations expressly set forth in this Agreement, (d) the Underwriters and their respective affiliates may be engaged in a broad range of transactions that involve interests that differ from those of the Issuer or the Depositor, (e) any duties and obligations that the Underwriters may have to the Issuer or the Depositor shall be limited to those duties and obligations specifically stated herein and (f) the Underwriters have not provided any legal, accounting, regulatory or tax advice with respect to the offering and each of the Issuer and the Depositor has consulted its own respective legal, accounting, regulatory and tax advisors to the extent it deemed appropriate.[3]

IMPORTANCE OF FIDUCIARY-BEST INTERESTS OF RATEPAYER RELATIONSHIP

Q. WHY IS THIS IMPORTANT?

A. Bond underwriters will typically propose an offering process, including bond pricing, whereby the underwriters use their

[3] Duke Energy Florida Project Finance, LLC $1,294,290,000 Series A Senior Secured Bonds Underwriting Agreement, https://www.sec.gov/Archives/edgar/data/37637/000110465916128039/a16-2779_13ex1d1.htm.

"professional judgment" in establishing price guidance and change that price guidance "solely in their professional judgment." This is what the Companies' witness Atkins has testified. However, as clearly stated in the above excerpt from an underwriting agreement involving Morgan Stanley, the underwriters act for their own benefit and cannot always be counted on to act solely on behalf of the Issuer. Pricing is arguably the most important component of offering securities in the market. I believe this is a compelling reason why bond issuers need to be very active in the offering process: to protect their own interests.

Q. IS THIS LANGUAGE FOUND ONLY IN THE INVESTOR-OWNED RATEPAYER-BACKED BOND TRANSACTION YOU CITED?

A. No. I have reviewed a survey of all investor-owned utility securitization filings from 2004 to present. As noted above, beginning in 2005, a new section appeared in these agreements. Each form of underwriting agreement had the exact same or similar language. The survey is attached to my testimony as Maher Exhibit 1.

Q. IS THIS, OR SIMILAR LANGUAGE CONTAINED IN THE UNDERWRITING AGREEMENT BETWEEN THE COMPANIES AND THE UNDERWRITERS TO BE ENTERED IN THIS TRANSACTION?

A. Yes, it likely will be. In response to data request questions inquiring if underwriters of securities have a duty to the issuer of those securities and is it a fiduciary duty the Companies' witness Heath stated that the underwriters do not have a fiduciary duty to the issuer.

Q. DO FINANCIAL ADVISORS TO ISSUERS HAVE A FIDUCIARY RELATIONSHIP WITH THE ISSUER?

A. Not necessarily. One has to review the specific contract with the advisor and what the duties of the financial advisor are under state and federal laws. Many times, as a condition of hiring them, financial advisors require the issuer to waive any assertion of a fiduciary relationship. As mentioned above, in responding to PS DR 2-2(g), Witness Heath acknowledges that the engagement letters between the Companies and Guggenheim Securities and Atkins Capital do not create a fiduciary relationship between the parties.

Moreover, financial advisors often require full and complete indemnification from anything arising out of their advice. These indemnifications are often long legal documents. The basic rule in negotiating financial advisor contracts should be Caveat Emptor or "buyer beware."

Guggenheim's and Atkins Capital's Engagement Letters with the Companies include a two-page Appendix titled "Indemnification Provisions." It is very difficult for the layman to read, and its length and complexity underscore for the Commission how important a topic this is to the financial community. Among other things in the lengthy document, it states:

> Each of DEC and DEP hereby jointly and severally agrees to (a) indemnify and hold harmless Guggenheim Securities, to the fullest extent permitted by law, from and against any and all losses, claims, damages, obligations, penalties, judgments, awards and other liabilities (whether direct, joint and several or otherwise) as and when incurred by Guggenheim Securities (collectively, "Liabilities") and (b) fully reimburse Guggenheim Securities for any and all fees, costs, expenses and disbursements (in all such cases, whether legal or otherwise) as and when incurred by Guggenheim Securities (collectively, "Expenses"), including those of investigating, preparing for (including, without limitation, preparing, reviewing or furnishing documents), participating in, defending against or giving testimony with respect to any private, regulatory, self-regulatory or governmental requests, inquiries, investigations, actions, claims, interrogatories, subpoenas, suits, litigation, proceedings or injunctions, whether or not in connection with any threatened or actual litigation, arbitration or other dispute resolution process and whether or not Guggenheim Securities is a direct party thereto (collectively, "Actions"), in the case of each of the foregoing clauses (a) and (b) whether directly or indirectly caused by, relating to, based upon, arising out of or in connection with any of the following: (i) any advice or services requested of, or rendered or to be rendered by, Guggenheim Securities pursuant to the Agreement, (ii) any actions or inactions by Guggenheim Securities with respect to the Agreement, (iii) any transaction or financing in connection with or related to the Agreement or (iv) the determination and enforcement by Guggenheim Securities of its rights pursuant to the Agreement (including, without limitation, these Indemnification Provisions); provided, however, such indemnification agreement will not apply to any portion of any such Liability or Expense to the extent it is found in a final judgment by a court of

> competent jurisdiction (not subject to further appeal) to have resulted primarily and directly from the gross negligence or willful misconduct of Guggenheim Securities.

Q. DOES SABER PARTNERS HAVE A SIMILAR INDEMNIFICATION AGREEMENT WITH PUBLIC STAFF?

A. No, it does not.

Q. DOES SABER PARTNERS HAVE A FIDUCIARY DUTY TO NORTH CAROLINA RATEPAYERS?

A. Yes. As financial advisor to the Public Staff, Saber Partners considers itself as having a fiduciary duty to North Carolina ratepayers.

Q. IS THERE ANY DIFFERENCE IF THE FINANCIAL ADVISOR IS AN ADVISOR TO A STATE OR LOCAL GOVERNMENT OR NOT-FOR-PROFIT INSTITUTION INSTEAD OF AN INVESTOR-OWNED UTILITY OR ONE OF ITS SUBSIDIARIES?

A. Yes. As a result of the financial crisis of 2008, Congress enacted comprehensive financial reform commonly known as the Dodd-Frank Act. One of the requirements of the Dodd-Frank Act was to impose a federal fiduciary duty on all advisors to state and local governments and on not-for-profit institutions that issue bonds in the municipal bond market.

Q. DOES THIS REQUIREMENT APPLY TO THE CORPORATE BOND MARKET?

A. No, it is not a federal mandate in the corporate bond market. However, the fact that the subject of fiduciary responsibility has become a public policy issue highlights its importance for corporate issuers as well and should be a guide to the Commission in connection with securitized storm recovery bonds where the sponsoring utilities have no financial obligation to repay those bonds.

Q. WHO WOULD ISSUE THE SECURITIZATION BONDS PROPOSED BY THE COMPANIES?

A. The Companies each propose to form a wholly owned, special purpose entity (SPE) to issue storm recovery bonds.

Q. WILL EITHER THE COMPANIES OR THE SPECIAL PURPOSE ENTITY TO BE CREATED TO ISSUE THE BONDS HAVE THE SAME FINANCIAL INCENTIVES TO ACHIEVE THE LOWEST OVERALL COST OF FUNDS AS DO MORE TRADITIONAL ISSUERS OF CORPORATE DEBT SECURITIES?

A. No. The securitization transaction is different from normal corporate debt issues in which the issuer has a direct interest in minimizing the cost of the transaction in order to maximize economics for its shareholders. For traditional utility debt issues, as well, incentives exist to minimize the costs of the transaction. Here the Companies propose that the storm recovery bonds will be issued by SPEs. This is simply a mechanism to facilitate the transfer of funds from the ratepayers to the Companies, while the ratepayers alone will ultimately bear all transaction costs and all costs of repaying the storm recovery bonds. The Companies will receive net proceeds of the bonds to recover previously incurred costs. While I do not doubt that the Companies would desire that its ratepayers incur low storm recovery charges, the Companies' main motivation is to receive the debt proceeds in a timely, efficient manner. Therefore, the Companies do not share the same incentives to achieve the lowest overall cost of funds. This is really just a matter of common sense and human nature. If I were going to borrow money and someone else agreed to repay it for me, then I would not be as concerned about the interest rate and other terms of the loan as I would be if I were on the hook to repay the loan myself. Therefore, it is left to the Commission and the Public Staff to ensure that the ratepayers achieve the lowest overall cost of funds for the bonds and the lowest storm recovery charges consistent with market conditions at the time the bonds are priced. Under the Companies' current proposal, in my opinion, ratepayer interests would not be maximized at the negotiating table. In other jurisdictions, the independent financial advisor to the commission has the responsibility, along with the commission and the commission staff, to help make that happen. This is what I propose should happen here.

WAYS TO PROTECT RATEPAYERS INTERST BY MODIFYING THE COMPANIES' PROPOSAL

Q. CAN YOU EXPAND ON YOUR OPINION THAT RATEPAYER INTERESTS WOULD NOT BE MAXIMIZED UNDER THE COMPANIES' PROPOSAL?

A. I believe that the Companies' proposal would rely too heavily on the Companies, their advisors and the underwriters, none of which has a fiduciary responsibility to the Commission or the ratepayers in the proposed storm recovery bond transaction. As I said above, I do not doubt that the Companies have an interest in achieving low storm recovery charges for the ratepayer, but the Companies do not share the same incentives to achieve the lowest storm recovery charges.

Q. IN A BROAD SENSE, HOW CAN THE COMMISSION, THE PUBLIC STAFF AND THEIR INDEPENDENT FINANCIAL ADVISOR(S) SUCCESSFULLY ACHIEVE THE OBJECTIVE OF ENSURING THAT RATEPAYER INTERESTS ARE EFFECTIVELY MAXIMIZED WITH RESPECT TO THIS TRANSACTION?

A. The Commission, the Public Staff and their independent financial advisor(s) need to be fully involved in working in a cooperative way with the Companies and the Companies' advisor to achieve that objective. That will require optimal structuring of the storm recovery bond issue, which includes:

(a) ensuring that disclosure documents and marketing materials accurately reflect the superior credit and minimal risks of storm recovery bonds;

(b) selecting the bank(s) to be used as underwriters and defining the role the banks will play and fees the banks will earn;

(c) actively monitoring the market to choose the most advantageous timing of the transaction;

(d) developing independent pricing expectations;

(e) participating in execution of the transaction to ensure that the size of the investor population is maximized and that the investor population is thoroughly educated about the extremely high credit quality of the storm recovery bonds; and

(f) at the time of pricing of the bonds, ensuring that the Commission, the Public Staff and their financial advisor(s) monitor and provide input to the pricing process so that the lowest storm recovery charge is achieved.

As part of the process, the bookrunning underwriter(s) should commit, in writing, to achieving the lowest storm recovery bond charge for the ratepayers, and the bookrunning underwriter(s) should certify after pricing that they have done so. (For an example, see Public Staff witness Klein's Exhibit 4.)

There are many examples in the financial world where written certifications have become the standard. When a person is required to pledge something in writing, rather than just orally, and has to account for results later, that person is more likely to take that pledge seriously. Public Staff witness Sutherland's testimony provides a more granular description of the "Best Practices" that I believe should be employed to achieve a lowest storm recovery charge financing. His testimony, along with that of Public Staff witness Schoenblum, documents the savings that have been achieved in previous Ratepayer-Backed Bond transactions when an active and independent financial advisor has been involved and when that active and independent financial advisor has employed the above approach.

ACHIEVING THE LOWEST COST TO RATEPAYERS

Q. HOW IS IT REALLY POSSIBLE TO KNOW IN ABSOLUTE TERMS THAT THE LOWEST STORM RECOVERY BOND CHARGE TRANSACTION HAS BEEN ACHIEVED?

A. When issuers or regulators ask underwriters for such a certificate or certification as referenced above, they are really asking underwriters to confirm in writing that all actions the underwriters believe would minimize the overall cost of the financing have in fact been taken. In practice, that confirming certificate should be supported by corroborating data, such as how the actual pricing compared to the expectations developed by the underwriters, as well as expectations developed independently by the issuer(s), how actual pricing compared to secondary market pricing of other similar securities at the time of pricing, and how successful the iterative price talk process was in lowering the interest rate to the optimal point of balancing investor demand with the supply of storm recovery bonds being offered.

Q. SHOULD THE LOWEST STORM RECOVERY CHARGE STANDARD APPLY TO ALL COSTS ASSOCIATED WITH THE TRANSACTION?

A. Yes. However, in considering how the lowest storm recovery charge standard should be applied, there is a difference between buying services and agreeing to pay interest. Services should not be determined solely on the basis of a dollar cost, but also the quality of the services, with the goal of obtaining the best overall value. In contrast, when an issuer borrows money there is no reason to agree to pay more interest (in present value terms) than is absolutely necessary. It is only logical that this should be the decision-making standard for pricing a borrowing. Without such a standard, a bond issuer might save a lot of time and effort by just accepting whatever interest rate the underwriters and investors want.

ALL AAA-RATED SECURITIES DO NOT PRICE ALIKE

Q. IF THE STORM RECOVERY BONDS ARE RATED "AAA," DOES THAT NOT ENSURE THAT THE LOWEST OVERALL COSTS AND THE LOWEST STORM RECOVERY CHARGES WILL BE ACHIEVED?

A. Unfortunately not. In my many years overseeing ExxonMobil's capital markets activities, I learned that bond issues could almost always be done at lower rates than the best market preliminary indications given by the banks. This was true despite the fact that ExxonMobil was a well-known and coveted "AAA"-rated debt issuer. Active involvement by ExxonMobil to create competition among the banks and to demand the best execution consistently added value.

It is also true that all "AAA" debt is not viewed alike by investors in the debt capital markets. For example, when I worked at ExxonMobil, "AAA"-rated ExxonMobil or Federal Agency credits would command better pricing than most "AAA"-rated structured debt securities which were backed solely by a pool of intangible contract rights such as mortgages or credit card receivables.

Q. ARE THE STORM RECOVERY BONDS PROPOSED TO BE ISSUED IN THIS CASE LIKELY TO PERFORM STRONGLY IN THE "AAA" MARKET?

A. Yes. In my view, the proposed bonds are likely to achieve a very strong "AAA" performance because they will be backed by a state regulatory guarantee to irrevocably provide for the timely payment of principal and interest from the revenues of an essential service (i.e., electricity). However, even though there is a fairly long history of this type of utility securitization transaction, the features of these proposed storm recovery bonds are sufficiently complex that I believe an intensive investor education effort and an aggressive marketing process are warranted to ensure that the bonds achieve the tight pricing they deserve.

Q. ARE THERE ANY EXAMPLES OF WAYS AN ISSUER COULD ASSIST IN CAPTURING THE FULL VALUE OF THE SECURITIES TO BE OFFERED HERE?

A. Yes. The SEC registration statements pursuant to which a number of prior Ratepayer-Backed Bonds have been offered have provided detail about the unusual and superior credit quality of the securities. The SEC materials are the primary way of informing investors of the benefits and risks of the securities in a fair and balanced manner. For example, the final prospectuses included in SEC registration statements for investor-owned utility securitized bonds issued in

2007 and 2009 for the benefit of Monongahela Power Company and for The Potomac Edison Company include the following language:

> Credit Risk: PSC-Guaranteed True-Up Mechanism and State Pledge Will Limit Credit Risk. In the Financing Act, the State of West Virginia pledges to and agrees with the bondholders, any assignee and any financing parties that the state will not take or permit any action that impairs the value of environmental control property or, except as part of the true-up process, reduce, alter or impair environmental control charges that are imposed, collected and remitted for the benefit of the bondholders, any assignee, and any financing parties, until any principal, interest and redemption premium in respect of environmental control bonds, all financing costs and all amounts to be paid to an assignee or financing party under an ancillary agreement are paid or performed in full.[4]

The broad-based nature of the true-up mechanism and the State Pledge serve to effectively eliminate, for all practical purposes and circumstances, any credit risk to the payment of the bonds (i.e., that sufficient funds will be available and paid to discharge the principal and interest of each issue of bonds when due).

The kind of language used in the above example is stronger than that which has been used in some other securitizations and can be helpful to achieve the financial benefits of the superior credit characteristics of the proposed storm recovery bonds.

[4] https://www.sec.gov/Archives/edgar/data/1384732/000095012007000242/mp-prospectus.htm (at page 26); https://www.sec.gov/Archives/edgar/data/1384731/000095012007000244/pe-prospectus.htm (at page 26); https://www.sec.gov/Archives/edgar/data/1384732/000119312509255754/d424b1.htm (at page 27); https://www.sec.gov/Archives/edgar/data/1384731/000119312509255755/d424b1.htm (at page 28).

Q. WAS THIS DISCLOSURE LANGUAGE CONCERNING THE "CREDIT RISK" OF RATEPAYER-BACKED BONDS DEVELOPED THROUGH A COLLABORATIVE AND COLLEGIAL PROCESS WITH THE UTILITY?

A. Yes. Saber's records have been shared with me concerning this disclosure language. I have reviewed those records and have found they indicate that this "credit risk" language was developed for an earlier Ratepayer-Backed Bond in Texas for Oncor/TXU where Saber served as the independent financial advisor to the Public Utility Commission of Texas in a similar capacity that we propose here. Saber's records show that this disclosure language was proposed by Hunton & Williams, legal counsel to the investor-owned utility in collaboration and discussion with the independent advisor so as to best inform investors of the unique credit qualities of that utility securitization. (See Maher Exhibit 2)

NEED FOR INDEPENDENT EXPERTISE SUPPORTING DESIGNATED COMMISSIONER INVOLVEMENT IN BOND TEAM

Q. WOULD THE PROPOSED BOND TEAM PLAY THE ROLE YOU ARE ADVOCATING SO THAT RATEPAYERS ARE ASSURED THE LOWEST STORM RECOVERY CHARGE?

A. That should be the case. However, it all depends on who is on the Bond Team and how the role of the Bond Team is defined and executed. I believe that the Bond Team should consist of the

Companies, the Companies' advisor (provided such advisor is not one of the banks acting as underwriter for the transaction), the Commission, either directly or through a designated staff member(s), the Public Staff, and the independent advisors and counsel.

I believe it is very important for the lead Commission representative to be closely involved in the project. There are many complexities and this is probably not the type of work that Commissioners undertake on a regular basis. At ExxonMobil our CEO was well versed in every aspect of the business, and when briefed on complex financial matters, could rapidly come up to speed and make informed decisions. In the case of securitization financing, the Commission's lead decision-maker might value more ongoing involvement with Public Staff and their professional advisors to be comfortable that his/her decisions are in the best interests of the ratepayer. It is important that the Bond Team operate independently and entirely in the interest of the ratepayers and not include any of the underwriting banks due to their inherent conflict of interest discussed above. All members of the Bond Team should have a fiduciary relationship with either the Companies, the Commission, or the Public Staff. Decisions of the Bond Team should be a shared responsibility of its members, with the Commission's representatives in a position to make the final decision on a timely basis, often in real time, in the event of any disagreements among Bond Team members. The Bond Team should rigorously follow the market and provide strong input to the underwriters with regard to bond structure, timing of the issue, the education of target investors and the pricing process. After the storm recovery bonds are sold, the Bond Team should follow the trading of the bonds in the secondary market and thoroughly evaluate the execution of the transaction to be comfortable that the best results were in fact obtained for ratepayers, and to learn any lessons for future storm recovery bond issues.

Q. IS IT CLEAR AT THIS POINT IN THE PROCESS HOW THE STORM RECOVERY BOND ISSUE SHOULD BE STRUCTURED?

A. Not at this point. We know that the storm recovery bonds will be sold some time in 2021. However, many important details will be determined as the sale date approaches and the market continues to develop. For example, the Companies' financial advisors propose Guggenheim / Atkins to offer both DEC bonds and DEP bonds to investors jointly through an offering of combined storm recovery bonds called "SRB Securities" issued by a grantor trust owned by Duke Energy Corporation. This is such a novel structure that out of the 66 Ratepayer-Backed Bond offerings since 1997, only two transactions used this structure. It must be carefully evaluated.

In addition, the exact timing of the bond issue should be flexible and responsive to market conditions. There also should be flexibility in deciding whether to offer and sell all the authorized bonds at the same time, as a single series, or to offer and sell the authorized bonds at different times, as more than one series. Another example is the possible desire for flexibility in breaking a series of bonds into different segments, often referred to as tranches, designed to appeal to different investor bases at the time of sale; e.g., 10-15 year and 2-5 year weighted average life tranches or longer maturities.

The pandemic has created unusual market conditions. While benchmark US Treasury rates have fallen to unprecedented lows, the credit spread above these low rates required by investors has been volatile. There are large disparities among credits. The current evolving conditions are not "normal market conditions" that have modest changes over time.

Q. DO YOU HAVE AN OPINION AS TO WHETHER THE STORM RECOVERY BOND ISSUE SHOULD BE EXECUTED ON A COMPETITIVE OR NEGOTIATED BASIS?

A. Yes, although I think a final decision should be made closer to the time that the bonds could be offered for sale to investors. Regarding the role the underwriters will play, this transaction probably is not ideal for a rigid competitive approach where the issue date is set in advance and the qualifying banks bid on pricing close to that date. This is because, in addition to wanting to remain flexible on timing of the issue, a longer marketing period is warranted to effectively sell the credit to investors. A negotiated approach appears preferable, where a highly competitive process is used to select one or more highly qualified banks to lead the transaction. In a negotiated sale, there are a variety of techniques that can be used to induce the selected underwriters to compete on final pricing. In the end, if the marketing of the bonds is effective, I believe there should be a lot of strong orders from a broad cross section of institutional and retail investors, both from the U.S. domestic and international markets, seeking safety and security to purchase storm recovery bonds from the selected underwriters. Then it is crucial that the market price talk (the indications made to investors about what the possible interest rate will be before actual pricing) be conducted in a manner so that demand and supply are matched at the lowest interest rate possible. As I have said previously, these are areas where a well-informed, aggressive Bond Team can add significant value.

Q. PLEASE SUMMARIZE YOUR TESTIMONY.

A. The proposed storm recovery bonds should achieve a “AAA” rating and perform well in the market. **But superior performance is not automatic since all “AAA” bonds do not trade alike.** The key takeaway should be that, while factors such as underwriters’ professional opinions are valuable, underwriters do not have any fiduciary responsibility to the ratepayer. Similarly, the Companies’ primary responsibility is to their own shareholders. Therefore, the Commission, the Public Staff and their independent financial advisor(s) are in the primary position of having to look out for the ratepayers' best interests. It is critical that they play an active role in all aspects of the transaction. They must be willing to invest all the time necessary in the structuring and take an aggressive stance during the marketing process to capture the lowest cost of financing and the lowest storm recovery charges for the ratepayers. This should involve full participation in the transaction with the Companies and the bond underwriters and, if required, timely decision making by the Commission to resolve any potential financing issues in the ratepayers' best interests.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

SABER PARTNERS, LLC

Survey of Ratepayer-Backed Bond Underwriter Agreements

Investor-Owned Ratepayer-Backed Bond Securitization Transactions 2004-PRESENT	Underwriters	As a result of eToys litigation: Language from Underwriting Agreement on File with SEC Explicitly Stating that the Underwriters Have No Fiduciary Duty (Best Interests) to the Issuer and Therefore to Ratepayers in a Ratepayer-Backed Bond Public Offering SOURCE: SEC Filings
AEP Texas Restoration Funding LLC (9/11/2019)	Goldman Sachs & Co., LLC, Citigroup Global Markets Inc., Loop Capital Markets LLC, Samuel A. Ramirez & Company, Inc.	"**Absence of Fiduciary Relationship**. Each of the Issuer and AEP Texas acknowledges and agrees that the Underwriters are acting solely in the capacity of an arm's length contractual counterparty to the Issuer and AEP Texas with respect to the offering of the Bonds contemplated hereby (including in connection with determining the terms of the offering) and not as a financial advisor or a fiduciary to, or an agent of, the Issuer or AEP Texas. Additionally, none of the Underwriters is advising the Issuer or AEP Texas as to any legal, tax, investment, accounting or regulatory matters in any jurisdiction. The Issuer and AEP Texas shall consult with their own advisors concerning such matters and shall be responsible for making their own independent investigation and appraisal of the transactions contemplated hereby, and the Underwriters shall have no responsibility or liability to the Issuer or AEP Texas with respect thereto. Any review by the Underwriters of the Issuer or AEP Texas, the transactions contemplated hereby or other matters relating to such transactions will be performed solely for the benefit of the Underwriters and shall not be on behalf of the Issuer or AEP Texas."
PSNH Funding LLC 3 (5/1/2018)	Goldman Sachs & Co. LLC, Citigroup Global Markets Inc. Barclays Capital Inc. Merrill Lynch, Pierce, Fenner & Smith Inc.	"**Absence of Fiduciary Relationship**. Each of the Issuer and PSNH acknowledges and agrees that the Underwriters are acting solely in the capacity of an arm's length contractual counterparty to the Issuer and PSNH with respect to the offering of the Bonds contemplated hereby (including in connection with determining the terms of the offering) and not as an advisor, a fiduciary to, or an agent of, the Issuer or PSNH irrespective of whether one or more of the Underwriters have advised or are advising PSNH and/or the Issuer on other matters. Additionally, none of the Underwriters is advising the Issuer or PSNH as to any legal, tax, investment, accounting or regulatory matters in any jurisdiction. The Issuer and PSNH shall consult with their own advisors concerning such matters and shall be responsible for making their own independent investigation and appraisal of the transactions contemplated hereby, and the Underwriters shall have no responsibility or liability to the Issuer or PSNH with respect thereto. Any review by the Underwriters of the Issuer or PSNH, the transactions contemplated hereby or other matters relating to such transactions will be performed solely for the benefit of the Underwriters and shall not be on behalf of the Issuer or PSNH."

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Duke Energy Florida Project Finance LLC (6/15/2016)	RBC Capital Markets, LLC, Guggenheim Securities, LLC, Drexel Hamilton, LLC, Jefferies Inc. Mitsubishi UFJ Securities (USA), Inc., Samuel A. Ramirez & Company, Inc., SMBC Nikko Securities America, Inc., The Williams Capital Group, L.P.	"**No Advisory or Fiduciary Relationship**. Each of the Issuer and the Depositor acknowledges and agrees that (a) the purchase and sale of the Bonds pursuant to this Agreement, including the determination of the offering price of the Bonds and any related discounts and commissions, is an arm's-length commercial transaction between the Issuer and the Depositor, on the one hand, and the several Underwriters, on the other hand, (b) in connection with the offering and the process leading thereto, each Underwriter is and has been acting solely as a principal and is not the agent or fiduciary of either the Issuer or the Depositor, any of their subsidiaries or their respective members, directors, creditors, employees or any other party, (c) no Underwriter has assumed or will assume an advisory or fiduciary responsibility in favor of the Issuer or the Depositor with respect to the offering or the process leading thereto (irrespective of whether such Underwriter has advised or is currently advising the Issuer or the Depositor or any of its subsidiaries on other matters) and no Underwriter has any obligation to the Issuer or the Depositor with respect to the offering except the obligations expressly set forth in this Agreement, (d) the Underwriters and their respective affiliates may be engaged in a broad range of transactions that involve interests that differ from those of the Issuer or the Depositor, (e) any duties and obligations that the Underwriters may have to the Issuer or the Depositor shall be limited to those duties and obligations specifically stated herein and (f) the Underwriters have not provided any legal, accounting, regulatory or tax advice with respect to the offering and each of the Issuer and the Depositor has consulted its own respective legal, accounting, regulatory and tax advisors to the extent it deemed appropriate."

Entergy New Orleans Storm Recovery Funding I (7/14/15)	Citigroup	"**Absence of Fiduciary Relationship.** Each of the Issuer and ENO acknowledges and agrees that the Issuer and ENO, respectively, each have arm's length business relationships with the Underwriters and their affiliates, that create no fiduciary duty on the part of the Underwriters and their affiliates, in connection with all aspects of the transactions contemplated by this Underwriting Agreement, and each such party expressly disclaims any fiduciary relationship. Nothing in this Section is intended to modify in any way the Underwriters' obligations expressly set forth in the Underwriting Agreement. Notwithstanding any other provision of this Underwriting Agreement, immediately upon commencement of discussions with respect to the transactions contemplated hereby, the Issuer and ENO (and each employee, representative or other agent of the Issuer or ENO, as the case may be) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of the transactions contemplated by this Agreement and all materials of any kind (including opinions or other tax analyses) that are provided to the Issuer or ENO relating to such tax treatment and tax structure. For purposes of the foregoing, the term "tax treatment" is the purported or claimed federal, state or local income tax treatment of the sale of the Storm Recovery Property, the collection of the Storm Recovery Charges or the payment on the Bonds, and the term "tax structure" includes any fact that may be relevant to understanding the purported or claimed federal, state or local income tax treatment of the transactions contemplated hereby."
Consumers 2014 Securitization Funding LLC (7/14/2014)	Citigroup/ Goldman Sachs/ PNC Capital Markets LLC	"**Absence of Fiduciary Relationship.** Each of the Issuer and Consumers acknowledges and agrees that the Underwriters are acting solely in the capacity of an arm's length contractual counterparty to the Issuer and Consumers with respect to the offering of the Bonds contemplated hereby (including in connection with determining the terms of the offering) and not as a financial advisor or a fiduciary to, or an agent of, the Issuer or Consumers. Additionally, none of the Underwriters is advising the Issuer or Consumers as to any legal, tax, investment, accounting or regulatory matters in any jurisdiction. The Issuer and Consumers shall consult with their own advisors concerning such matters and shall be responsible for making their own independent investigation and appraisal of the transactions contemplated hereby, and the Underwriters shall have no responsibility or liability to the Issuer or Consumers with respect thereto. Any review by the Underwriters of the Issuer or Consumers, the transactions contemplated hereby or other matters relating to such transactions will be performed solely for the benefit of the Underwriters and shall not be on behalf of the Issuer or Consumers."

Appalachian Consumer Rate Relief Funding LLC (11/6/2013)	Royal Bank of Scotland/ Morgan Stanley/ PNC Capital Markets LLC/ Wells Fargo Securities, LLC/ Bank of America Merrill Lynch	"**Absence of Fiduciary Relationship**. Each of the Issuer and APCo acknowledges and agrees that the Underwriters are acting solely in the capacity of an arm's length contractual counterparty to the Issuer and APCo with respect to the offering of the Bonds contemplated hereby (including in connection with determining the terms of the offering) and not as a financial advisor or a fiduciary to, or an agent of, the Issuer or APCo. Additionally, none of the Underwriters is advising the Issuer or APCo as to any legal, tax, investment, accounting or regulatory matters in any jurisdiction. The Issuer and APCo shall consult with their own advisors concerning such matters and shall be responsible for making their own independent investigation and appraisal of the transactions contemplated hereby, and the Underwriters shall have no responsibility or liability to the Issuer or APCo with respect thereto. Any review by the Underwriters of the Issuer or APCo, the transactions contemplated hereby or other matters relating to such transactions will be performed solely for the benefit of the Underwriters and shall not be on behalf of the Issuer or APCo."

Ohio Phase-In-Recovery Funding LLC (7/23/2013)	Citigroup/ Royal Bank of Canada/ PNC Capital Markets LLC/ Royal Bank of Scotland Securities Inc./ Wells Fargo Securities, LLC	"**Absence of Fiduciary Relationship.** Each of the Issuer and OPCo acknowledges and agrees that the Underwriters are acting solely in the capacity of an arm's length contractual counterparty to the Issuer and OPCo with respect to the offering of the Bonds contemplated hereby (including in connection with determining the terms of the offering) and not as a financial advisor or a fiduciary to, or an agent of, the Issuer or OPCo. Additionally, none of the Underwriters is advising the Issuer or OPCo as to any legal, tax, investment, accounting or regulatory matters in any jurisdiction. The Issuer and OPCo shall consult with their own advisors concerning such matters and shall be responsible for making their own independent investigation and appraisal of the transactions contemplated hereby, and the Underwriters shall have no responsibility or liability to the Issuer or OPCo with respect thereto. Any review by the Underwriters of the Issuer or OPCo, the transactions contemplated hereby or other matters relating to such transactions will be performed solely for the benefit of the Underwriters and shall not be on behalf of the Issuer or OPCo."
FirstEnergy Ohio PIRB Special Purpose Trust (6/12/2013)	Citigroup/ CAS/ Goldman Sachs/ Barclays Capital Inc./ Royal Bank of Scotland Securities Inc./ Bank of America Merrill Lynch	"**Absence of Fiduciary Relationship.** The Bond Issuers and the Sponsors acknowledge and agree that: (a) the Representatives have been retained solely to act as underwriters in connection with the sale of Certificates and that no fiduciary, advisory or agency relationship between the Issuing Entity, the Bond Issuers, the Sponsors and the Representatives have been created in respect of any of the transactions contemplated by this Underwriting Agreement, irrespective of whether the Representatives have advised or are advising the Sponsors on other matters; (b) the price of the Certificates set forth in the final term sheet attached as Annex A to Schedule II hereto was established by the Bond Issuers and the Sponsors following discussions and arms-length negotiations with the Representatives and the Bond Issuers and the Sponsors are capable of evaluating and understanding and understand and accept the terms, risks and conditions of the transactions contemplated by this Underwriting Agreement; (c) the Bond Issuers and the Sponsors have been advised that the Representatives and their affiliates are engaged in a broad range of transactions which may involve interests that differ from those of the Bond Issuers and the Sponsors and that the Representatives have no obligation to disclose such interests and transactions to the Bond Issuers or the Sponsors by virtue of any fiduciary, advisory or agency relationship; and (d) the Issuing Entity, the Bond Issuers and the Sponsors waive, to the fullest extent permitted by law, any claims it may have against the Representatives for breach of fiduciary duty or alleged breach of fiduciary duty and agrees that the Representatives shall have no liability (whether direct or indirect) to the Issuing Entity, the Bond Issuers or the Sponsors in respect of such a fiduciary duty claim or to any person asserting a fiduciary duty claim on behalf of or in right of the Issuing Entity, the Bond Issuers and the Sponsors including stockholders, employees or creditors of the Issuing Entity, the Bond Issuers and the Sponsors."

AEP Texas Central Transition Funding III (3/7/2012)	Morgan Stanley/ Barclays/ Citigroup/ Goldman Sachs/ Samuel A. Ramirez & Company, Inc./ Royal Bank of Scotland Securities Inc./ Wells Fargo Securities, LLC	"**Absence of Fiduciary Relationship.** Each of the Issuer and TCC acknowledges and agrees that the Underwriters are acting solely in the capacity of an arm's length contractual counterparty to the Issuer and TCC with respect to the offering of the Bonds contemplated hereby (including in connection with determining the terms of the offering) and not as a financial advisor or a fiduciary to, or an agent of, the Issuer or TCC. Additionally, none of the Underwriters is advising the Issuer or TCC as to any legal, tax, investment, accounting or regulatory matters in any jurisdiction. The Issuer and TCC shall consult with their own advisors concerning such matters and shall be responsible for making their own independent investigation and appraisal of the transactions contemplated hereby, and the Underwriters shall have no responsibility or liability to the Issuer or TCC with respect thereto. Any review by the Underwriters of the Issuer or TCC, the transactions contemplated hereby or other matters relating to such transactions will be performed solely for the benefit of the Underwriters and shall not be on behalf of the Issuer or TCC."
CenterPoint Energy Transition Bond Co. IV (1/11/2012)	Goldman Sachs/ Citigroup/Morgan Stanley/ Bank of America Merrill Lynch/ Barclays Capital/ J.P. Morgan/ Loop Capital Markets/ Royal Bank of Scotland	"**Absence of Fiduciary Relationship.** Each of the Issuer and the Company acknowledges and agrees that: (a) the Underwriters have been retained solely to act as underwriters in connection with the sale of the Bonds and that no fiduciary, advisory or agency relationship between the Underwriters, on one hand, and the Company and/or the Issuer, on the other hand, has been created in respect of any of the transactions contemplated by this Underwriting Agreement irrespective of whether one or more of the Underwriters have advised or are advising the Company and/or the Issuer on other matters; (b) the price of the Bonds was established by the Issuer and the Company following discussions and arms-length negotiations with the Underwriters, among others and the Issuer and the Company have each consulted their own legal and financial advisors to the extent it deemed appropriate; (c) it has been advised that the Underwriters and their affiliates are engaged in a broad range of transactions which may involve interests that differ from those of the Issuer and Company and that the Underwriters have no obligation to disclose such interests and transactions to the Issuer or the Company by virtue of any fiduciary, advisory or agency relationship; and (d) it waives, to the fullest extent permitted by law, any claims it may have against the Underwriters for breach of fiduciary duty or alleged breach of fiduciary duty and agrees that the Underwriters shall have no liability (whether direct or indirect) to the Issuer or the Company in respect of such fiduciary duty claim or to any person asserting a fiduciary duty claim on behalf of or in right of the Issuer or the Company including stockholders, employees or creditors of the Issuer and/or the Company."

Survey of Ratepayer-Backed Bond Underwriter Agreements

Entergy Louisiana Investment Recovery Funding I, LLC (9/15/2011)	Morgan Stanley/ Citigroup/ Morgan Keegan & Company, Inc./ Stephens Inc.	"**Absence of Fiduciary Relationship.** Each of the Issuer and ELL acknowledges and agrees that the Issuer and ELL, respectively, each have arm's length business relationships with the Underwriters and their affiliates, that create no fiduciary duty on the part of the Underwriters and their affiliates, in connection with all aspects of the transactions contemplated by this Underwriting Agreement, and each such party expressly disclaims any fiduciary relationship. Nothing in this Section is intended to modify in any way the Underwriters' obligations expressly set forth in the Underwriting Agreement. Notwithstanding any other provision of this Underwriting Agreement, immediately upon commencement of discussions with respect to the transactions contemplated hereby, the Issuer and ELL (and each employee, representative or other agent of the Issuer or ELL, as the case may be) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of the transactions contemplated by this Agreement and all materials of any kind (including opinions or other tax analyses) that are provided to the Issuer or ELL relating to such tax treatment and tax structure. For purposes of the foregoing, the term "tax treatment" is the purported or claimed federal, state or local income tax treatment of the sale of the Investment Recovery Property, the collection of the Investment Recovery Charges or the payment on the Bonds, and the term "tax structure" includes any fact that may be relevant to understanding the purported or claimed federal, state or local income tax treatment of the transactions contemplated hereby."
Entergy Arkansas Restoration Funding LLC (8/11/2010)	Morgan Stanley	"**Absence of Fiduciary Relationship.** Each of the Issuer and EAI acknowledges and agrees that the Issuer and EAI, respectively, each have arm's length business relationships with Morgan Stanley & Co. Incorporated and Stephens Inc., and their respective affiliates, that create no fiduciary duty on the part of Morgan Stanley & Co. Incorporated and Stephens Inc., and their respective affiliates, in connection with all aspects of the transactions contemplated by this Underwriting Agreement, and each such party expressly disclaims any fiduciary relationship. Nothing in this Section is intended to modify in any way the Underwriters' obligations expressly set forth in the Underwriting Agreement. Notwithstanding any other provision of this Underwriting Agreement, immediately upon commencement of discussions with respect to the transactions contemplated hereby, the Issuer and EAI (and each employee, representative or other agent of the Issuer or EAI, as the case may be) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of the transactions contemplated by this Agreement and all materials of any kind (including opinions or other tax analyses) that are provided to the Issuer or EAI relating to such tax treatment and tax structure. For purposes of the foregoing, the term "tax treatment" is the purported or claimed federal, state or local income tax treatment of the sale of the storm recovery property, the collection of the storm recovery charges or the payment on the Bonds, and the term "tax structure" includes any fact that may be relevant to understanding the purported or claimed federal, state or local income tax treatment of the transactions contemplated hereby."

MP Environmental Funding LLC (12/16/2009)	Jefferies/ Williams	"**Absence of Fiduciary Relationship.** The Issuer and Mon Power each acknowledge and agree that the Underwriters are acting solely in the capacity of an arm's length contractual counterparty to the Issuer and Mon Power with respect to the offering of the Bonds contemplated hereby (including in connection with determining the terms of the offering) and not as a financial advisor or a fiduciary to, or an agent of, the Issuer or Mon Power. Additionally, none of the Underwriters is advising the Issuer or Mon Power as to any legal, tax, investment, accounting or regulatory matters in any jurisdiction. The Issuer and Mon Power shall consult with their own advisors concerning such matters and shall be responsible for making their own independent investigation and appraisal of the transactions contemplated hereby, and the Underwriters shall have no responsibility or liability to the Issuer or Mon Power with respect thereto. Any review by the Underwriters of the Issuer or Mon Power, the transactions contemplated hereby or other matters relating to such transactions will be performed solely for the benefit of the Underwriters and shall not be on behalf of the Issuer or Mon Power."
PE Environmental Funding LLC (12/16/2009)	Jefferies/ Williams	"**Absence of Fiduciary Relationship.** The Issuer and Potomac Edison each acknowledge and agree that the Underwriters are acting solely in the capacity of an arm's length contractual counterparty to the Issuer and Potomac Edison with respect to the offering of the Bonds contemplated hereby (including in connection with determining the terms of the offering) and not as a financial advisor or a fiduciary to, or an agent of, the Issuer or Potomac Edison. Additionally, none of the Underwriters is advising the Issuer or Potomac Edison as to any legal, tax, investment, accounting or regulatory matters in any jurisdiction. The Issuer and Potomac Edison shall consult with their own advisors concerning such matters and shall be responsible for making their own independent investigation and appraisal of the transactions contemplated hereby, and the Underwriters shall have no responsibility or liability to the Issuer or Potomac Edison with respect thereto. Any review by the Underwriters of the Issuer or Potomac Edison, the transactions contemplated hereby or other matters relating to such transactions will be performed solely for the benefit of the Underwriters and shall not be on behalf of the Issuer or Potomac Edison."

CenterPoint Energy Restoration Bond (11/18/2009)	Goldman Sachs/ Citigroup	"**Absence of Fiduciary Relationship**. Each of the Issuer and the Company acknowledges and agrees that: (a) the Underwriters have been retained solely to act as underwriters in connection with the sale of the Bonds and that no fiduciary, advisory or agency relationship between the Underwriters, on one hand, and the Company and/or the Issuer, on the other hand, has been created in respect of any of the transactions contemplated by this Underwriting Agreement irrespective of whether one or more of the Underwriters have advised or are advising the Company and/or the Issuer on other matters; (b) the price of the Bonds was established by the Issuer and the Company following discussions and arms-length negotiations with the Underwriters, among others and the Issuer and the Company have each consulted their own legal and financial advisors to the extent it deemed appropriate; (c) it has been advised that the Underwriters and their affiliates are engaged in a broad range of transactions which may involve interests that differ from those of the Issuer and Company and that the Underwriters have no obligation to disclose such interests and transactions to the Issuer or the Company by virtue of any fiduciary, advisory or agency relationship; and (d) it waives, to the fullest extent permitted by law, any claims it may have against the Underwriters for breach of fiduciary duty or alleged breach of fiduciary duty and agrees that the Underwriters shall have no liability (whether direct or indirect) to the Issuer or the Company in respect of such fiduciary duty claim or to any person asserting a fiduciary duty claim on behalf of or in right of the Issuer or the Company including stockholders, employees or creditors of the Issuer and/or the Company."

Entergy Texas Restoration Funding (10/29/09)	Morgan Stanley/ Citigroup	"**Absence of Fiduciary Relationship.** Each of the Issuer and ETI acknowledges and agrees that the Issuer and ETI, respectively, each have arm's length business relationships with Morgan Stanley & Co. Incorporated, Citigroup Global Markets Inc., Goldman, Sachs & Co., Royal Bank of Scotland Securities Inc. and Loop Capital Markets, LLC, and their respective affiliates, that create no fiduciary duty on the part of Morgan Stanley & Co. Incorporated, Citigroup Group Global Markets Inc., Goldman, Sachs & Co., Royal Bank of Scotland Securities Inc. and Loop Capital Markets, LLC, and their respective affiliates, in connection with all aspects of the transactions contemplated by this Underwriting Agreement, and each such party expressly disclaims any fiduciary relationship. Nothing in this Section is intended to modify in any way the Underwriters' obligations expressly set forth in the Underwriting Agreement. Notwithstanding any other provision of this Underwriting Agreement, immediately upon commencement of discussions with respect to the transactions contemplated hereby, the Issuer and ETI (and each employee, representative or other agent of the Issuer or ETI , as the case may be) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of the transactions contemplated by this Agreement and all materials of any kind (including opinions or other tax analyses) that are provided to the Issuer or ETI relating to such tax treatment and tax structure. For purposes of the foregoing, the term "tax treatment" is the purported or claimed federal, state or local income tax treatment of the sale of the transition property, the collection of the transition charges or the payment on the Bonds, and the term "tax structure" includes any fact that may be relevant to understanding the purported or claimed federal, state or local income tax treatment of the transactions contemplated hereby"

Cleco Katrina/Rita Hurricane Recovery Funding LLC 2008 (2/28/2008)	Credit Suisse First Boston	"**Absence of Fiduciary Relationship.** Each of the Issuer and CPL acknowledges and agrees that the Issuer and CPL, respectively, each have arm's length business relationships with Credit Suisse Securities (USA) LLC, Wachovia Capital Markets, LLC and DEPFA First Albany Securities LLC, and their respective affiliates that create no fiduciary duty on the part of Credit Suisse Securities (USA) LLC, Wachovia Capital Markets, LLC and DEPFA First Albany Securities LLC, and their respective affiliates in connection with all aspects of the transactions contemplated by this Underwriting Agreement, and each such party expressly disclaims any fiduciary relationship. Nothing in this Section is intended to modify in any way the Underwriters' obligations expressly set forth in the Underwriting Agreement. Notwithstanding any other provision of this Underwriting Agreement, immediately upon commencement of discussions with respect to the transactions contemplated hereby, the Issuer and CPL (and each employee, representative or other agent of the Issuer or CPL, as the case may be) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of the transactions contemplated by this Agreement and all materials of any kind (including opinions or other tax analyses) that are provided to the Issuer or CPL relating to such tax treatment and tax structure. For purposes of the foregoing, the term "tax treatment" is the purported or claimed federal, state or local income tax treatment of the sale of the storm recovery property, the collection of the storm recovery charges or the payment on the Bonds, and the term "tax structure" includes any fact that may be relevant to understanding the purported or claimed federal, state or local income tax treatment of the transactions contemplated hereby."

CenterPoint Energy Transition Bond Company III (1/29/2008)	Citigroup	"**Absence of Fiduciary Relationship.** Each of the Issuer and the Company acknowledges and agrees that: (a) the Underwriters have been retained solely to act as underwriters in connection with the sale of the Bonds and that no fiduciary, advisory or agency relationship between the Underwriters, on one hand, and the Company and/or the Issuer, on the other hand, has been created in respect of any of the transactions contemplated by this Underwriting Agreement, irrespective of whether the Underwriters have advised or are advising the Company and/or the Issuer on other matters; (b) the price of the Bonds was established by the Issuer and the Company following discussions and arms-length negotiations with the Underwriters, among others; (c) it has been advised that the Underwriters and their affiliates are engaged in a broad range of transactions which may involve interests that differ from those of the Issuer and Company and that the Underwriters have no obligation to disclose such interests and transactions to the Issuer or the Company by virtue of any fiduciary, advisory or agency relationship; and (d) it waives, to the fullest extent permitted by law, any claims it may have against the Underwriters for breach of fiduciary duty or alleged breach of fiduciary duty and agrees that the Underwriters shall have no liability (whether direct or indirect) to the Issuer or the Company in respect of such fiduciary duty claim or to any person asserting a fiduciary duty claim on behalf of or in right of the Issuer or the Company including stockholders, employees or creditors of the Issuer and/or the Company."

Entergy Gulf States Reconstruction Funding I, LLC (6/22/2007)	Citigroup	"**Absence of Fiduciary Relationship.** Each of the Issuer and EGSI acknowledges and agrees that the Issuer and EGSI, respectively, each have arm's length business relationships with Morgan Stanley & Co. Incorporated, First Albany Capital Inc., Loop Capital Markets, LLC and M.R. Beal & Company, and their respective affiliates that create no fiduciary duty on the part of Morgan Stanley & Co. Incorporated, First Albany Capital Inc., Loop Capital Markets, LLC and M.R. Beal & Company, and their respective affiliates in connection with all aspects of the transactions contemplated by this Underwriting Agreement, and each such party expressly disclaims any fiduciary relationship. Nothing in this Section is intended to modify in any way the Underwriters' obligations expressly set forth in the Underwriting Agreement. Notwithstanding any other provision of this Underwriting Agreement, immediately upon commencement of discussions with respect to the transactions contemplated hereby, the Issuer and EGSI (and each employee, representative or other agent of the Issuer or EGSI , as the case may be) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of the transactions contemplated by this Agreement and all materials of any kind (including opinions or other tax analyses) that are provided to the Issuer or EGSI relating to such tax treatment and tax structure. For purposes of the foregoing, the term "tax treatment" is the purported or claimed federal, state or local income tax treatment of the sale of the transition property, the collection of the transition charges or the payment on the Bonds, and the term "tax structure" includes any fact that may be relevant to understanding the purported or claimed federal, state or local income tax treatment of the transactions contemplated hereby."
RSB BondCo LLC (BG&E sponsor) (6/22/2007)	Barclays /Citigroup/ Royal Bank of Scotland/ Morgan Stanley	"**Absence of Fiduciary Relationship.** Each of the Issuer and BGE acknowledges and agrees that the Underwriters are acting solely in the capacity of an arm's length contractual counterparty to the Issuer and BGE with respect to the offering of the Bonds contemplated hereby (including in connection with determining the terms of the offering) and not as a financial advisor or a fiduciary to, or an agent of, the Issuer or BGE. Additionally, none of the Underwriters is advising the Issuer or BGE as to any legal, tax, investment, accounting or regulatory matters in any jurisdiction. The Issuer and BGE shall consult with their own advisors concerning such matters and shall be responsible for making their own independent investigation and appraisal of the transactions contemplated hereby, and the Underwriters shall have no responsibility or liability to the Issuer or BGE with respect thereto. Any review by the Underwriters of the Issuer or BGE, the transactions contemplated hereby or other matters relating to such transactions will be performed solely for the benefit of the Underwriters and shall not be on behalf of the Issuer or BGE.

FPL Recovery Funding LLC (5/15/07)	Wachovia	"**Absence of Fiduciary Relationship.** The Issuer and FPL each acknowledge and agree that the Purchasers are acting solely in the capacity of an arm's length contractual counterparty to the Issuer and FPL with respect to the offering of the Bonds contemplated hereby (including in connection with determining the terms of the offering) and not as a financial advisor or a fiduciary to, or an agent of, the Issuer or FPL in connection with the offering of the Bonds as contemplated hereby. Additionally, none of the Purchasers is advising the Issuer or FPL as to any legal, tax, investment, accounting or regulatory matters in any jurisdiction. Any review by the Purchasers of the Issuer or FPL, the transactions contemplated hereby or othermatters relating to such transactions will be performed solely for the benefit of the Purchasers and shall not be on behalf of the Issuer or FPL."
MP Environmental Funding LLC (4/3/2007)	First Albany Corp/ Loop Capital Markets/ Bear Stearns	"**Absence of Fiduciary Relationship.** The Issuer, MP Renaissance and Mon Power each acknowledge and agree that the Underwriters are acting solely in the capacity of an arm's length contractual counterparty to the Issuer, MP Renaissance and Mon Power with respect to the offering of the Bonds contemplated hereby (including in connection with determining the terms of the offering) and not as a financial advisor or a fiduciary to, or an agent of, the Issuer, MP Renaissance or Mon Power. Additionally, none of the Underwriters is advising the Issuer, MP Renaissance or Mon Power as to any legal, tax, investment, accounting or regulatory matters in any jurisdiction. The Issuer, MP Renaissance and Mon Power shall consult with their own advisors concerning such matters and shall be responsible for making their own independent investigation and appraisal of the transactions contemplated hereby, and the Underwriters shall have no responsibility or liability to the Issuer, MP Renaissance or Mon Power with respect thereto. Any review by the Underwriters of the Issuer, MP Renaissance or Mon Power, the transactions contemplated hereby or other matters relating to such transactions will be performed solely for the benefit of the Underwriters and shall not be on behalf of the Issuer or Mon Power."

PE Environmental Funding, LLC (4/3/2007)	First Albany Corp/ Loop Capital Markets/ Bear Stearns	"**Absence of Fiduciary Relationship.** The Issuer, PE Renaissance and Potomac Edison each acknowledge and agree that the Underwriters are acting solely in the capacity of an arm's length contractual counterparty to the Issuer, PE Renaissance and Potomac Edison with respect to the offering of the Bonds contemplated hereby (including in connection with determining the terms of the offering) and not as a financial advisor or a fiduciary to, or an agent of, the Issuer, PE Renaissance or Potomac Edison. Additionally, none of the Underwriters is advising the Issuer, PE Renaissance or Potomac Edison as to any legal, tax, investment, accounting or regulatory matters in any jurisdiction. The Issuer, PE Renaissance and Potomac Edison shall consult with their own advisors concerning such matters and shall be responsible for making their own independent investigation and appraisal of the transactions contemplated hereby, and the Underwriters shall have no responsibility or liability to the Issuer, PE Renaissance or Potomac Edison with respect thereto. Any review by the Underwriters of the Issuer, PE Renaissance or Potomac Edison, the transactions contemplated hereby or other matters relating to such transactions will be performed solely for the benefit of the Underwriters and shall not be on behalf of the Issuer or Potomac Edison."
AEP Texas Central Transition Funding II (10/4/2006)	Credit Suisse Securities (USA) LLC, J.P. Morgan Securities Inc., Greenwich Capital Markets Inc., Bear Stearns & Co., Firs Albany Capital Inc., Loop Capital Markets, LLC, ABI AMRO Incorporated, M.R Beal & Company, Samuel A. Ramire & Co., Inc., Siebert Brandford Shank & Co., LLC.	"**Absence of Fiduciary Relationship**. Each of the Issuer and TCC acknowledges and agrees that the Underwriters are acting solely in the capacity of an arm's length contractual counterparty to the Issuer and TCC with respect to the offering of the Bonds contemplated hereby (including in connection with determining the terms of the offering) and not as a financial advisor or a fiduciary to, or an agent of, the Issuer or TCC. Additionally, none of the Underwriters is advising the Issuer or TCC as to any legal, tax, investment, accounting or regulatory matters in any jurisdiction. The Issuer and TCC shall consult with their own advisors concerning such matters and shall be responsible for making their own independent investigation and appraisal of the transactions contemplated hereby, and the Underwriters shall have no responsibility or liability to the Issuer or TCC with respect thereto. Any review by the Underwriters of the Issuer or TCC, the transactions contemplated hereby or other matters relating to such transactions will be performed solely for the benefit of the Underwriters and shall not be on behalf of the Issuer or TCC."

Survey of Ratepayer-Backed Bond Underwriter Agreements

JCP&L Transition Funding II (8/4/2006)	Goldman, Sachs & Co., Morgan Stanley, Citigroup, The Williams Capital Group, L.P	"**Absence of Fiduciary Relationship.** The Companies acknowledge and agree that: (a) the Underwriters have been retained solely to act as underwriters in connection with the sale of the Bonds and that no fiduciary, advisory or agency relationship between the Companies and any Underwriter has been created in respect of any of the transactions contemplated by this Agreement, irrespective of whether any such Underwriter has advised or is advising the Companies on other matters; (b) the price of the Bonds set forth in the Final Term Sheet was established by the Companies following discussions and arms-length negotiations with the Underwriters and the Companies are capable of evaluating and understanding and understand and accept the terms, risks and conditions of the transactions contemplated by this Agreement; (c) the Companies have been advised that the Underwriters and their affiliates are engaged in a broad range of transactions which may involve interests that differ from those of the Companies and that the Underwriters have no obligation to disclose such interests and transactions to the Companies by virtue of any fiduciary, advisory or agency relationship; and (d) the Companies waive, to the fullest extent permitted by law, any claims they may have against the Underwriters for breach of fiduciary duty or alleged breach of fiduciary duty and agree that the Underwriters shall have no liability (whether direct or indirect) to the Companies in respect of such a fiduciary duty claim or to any person asserting a fiduciary duty claim on behalf of or in right of the Companies, including stockholders, employees or creditors of the Companies."
CenterPoint Energy Series A (12/9/2005)	Lehman Brothers Inc., Credit Suisse First Boston LLC, Greenwich Capital Markets, Inc., Barclays Capital Inc., Deutsche Bank Securities Inc., Goldman, Sachs & Co., First Albany Capital Inc., Loop Capital Markets, LLC, M.R Beal & Company, Siebert Brandford Shank & Co., LLC. Samuel A. Ramirez & Co., Inc., SunTrust Capital Markets, Inc.	"**Absence of Fiduciary Relationship.** Each of the Issuer and the Company acknowledges and agrees that: (a) the Underwriters have been retained solely to act as underwriters in connection with the sale of the Bonds and that no fiduciary, advisory or agency relationship between the Underwriters, on one hand, and the Company and/or the Issuer, on the other hand, has been created in respect of any of the transactions contemplated by this Underwriting Agreement, irrespective of whether the Underwriters have advised or are advising the Company and/or the Issuer on other matters; (b) the price of the Bonds was established by the Issuer and the Company following discussions and arms-length negotiations with the Underwriters, among others; (c) it has been advised that the Underwriters and their affiliates are engaged in a broad range of transactions which may involve interests that differ from those of the Issuer and Company and that the Underwriters have no obligation to disclose such interests and transactions to the Issuer or the Company by virtue of any fiduciary, advisory or agency relationship; and (d) it waives, to the fullest extent permitted by law, any claims it may have against the Underwriters for breach of fiduciary duty or alleged breach of fiduciary duty and agrees that the Underwriters shall have no liability (whether direct or indirect) to the Issuer or the Company in respect of such fiduciary duty claim or to any person asserting a fiduciary duty claim on behalf of or in right of the Issuer or the Company including stockholders, employees or creditors of the Issuer and/or the Company."

Survey of Ratepayer-Backed Bond Underwriter Agreements

PG&E Energy Recovery Funding LLC Series 2005-2 (11/3/2005)	Morgan Stanley & Co., Inc., Goldman Sachs & Co., Banc of America Securities LLC, PNC Capital Markets, Inc., Pryor, McClendon Counts & Co., Inc	*Final Underwriting Agreement Not Available*
PSE&G 2005-1 (9/9/2005)	Credit Suisse First Boston, Barclays Capital Inc., M.R. Beal & Company	"**Absence of Fiduciary Relationship.** The Company acknowledges and agrees that: (a) The Representative has been retained solely to act as underwriter in connection with the sale of the Transition Bonds and that no fiduciary, advisory or agency relationship between the Company has been created in respect of any of the transactions contemplated by this Underwriting Agreement, irrespective of whether the Representative has advised or is advising the Company on other matters; (b) the price of the Transition Bonds was established by the Company following discussions and arms-length negotiations with the Representative and the Company is capable of evaluating and understanding and understands and accepts the terms, risks and conditions of the transaction contemplated by this Underwriting Agreement; (c) has been advised that the Representative and its affiliates are engaged in a broad range of transactions which may involve interests that differ from those of the Company and that the Representative has no obligation to disclose such interests and transactions to the Company by virtue of any fiduciary, advisory or agency relationship; and (d) it waives, to the fullest extent permitted by law, any claims it may have against the Representative for breach of fiduciary duty or alleged breach of fiduciary duty and agrees that the Representative shall have no liability (whether direct or indirect) to the Company in respect of such fiduciary duty claim or to any person asserting a investment quality of the Transition Bonds or makes it impractical or inadvisable to market the Transition Bonds, (ii) trading in the Company's Common Stock shall have been suspended by the Commission or the New York Stock Exchange or trading in securities generally on the New York Stock Exchange shall have been suspended or limited or minimum prices shall have been established on such Exchange, (iii) a banking moratorium shall have been declared either by federal, State of New York or State of New Jersey authorities or (iv) there shall have occurred any outbreak or escalation of hostilities, declaration by the United States of a national emergency or war or other calamity or crisis the effect of which on financial markets is such as to make it, in the judgment of the Representative, impracticable or inadvisable to proceed with the offering or delivery of the Transition Bonds as contemplated by the Final Prospectus (exclusive of any supplement thereto)."

Survey of Ratepayer-Backed Bond Underwriter Agreements

Massachusetts RRB Special Purpose Trust 2005-1 (2/15/2005)	Goldman, Sachs & Co., Lehman Brothers Inc.	NO LANGUAGE
PG&E Energy Recovery Funding LLC Series 2005-1 (2/3/2005)	Morgan Stanley Citigroup Lehman Brothers ABN AMRO Barclays Capital BNP Paribas Deutsche Bank Securities M.R. Beal & Co.	NO LANGUAGE
Rockland Electric Company Transition Funding LLC (7/28/2004)	Citigroup, Goldman, Sachs & Co.	NO LANGUAGE
Oncor (TXU) 2004-1	Merrill Lynch, Pierce, Fenner & Smith Inc., Wachovia Capital Markets, LLC, Banc of America Securities LLC, Bear, Stearns & Co Inc., Credit Suisse First Boston LLC, M.R. Beal & Company	NO LANGUAGE

Maher Exhibit 2
DOCKET NO. E-2, Sub 1262
DOCKET NO. E-7, Sub 1243

X-Original-To: jfichera@saberpartners.com
Delivered-To: jfichera@saberpartners.com
Subject: RE:
Date: Tue, 30 Mar 2004 11:32:31 -0500
X-MS-Has-Attach:
X-MS-TNEF-Correlator:
Thread-Topic: RE:
Thread-Index: AcQV2bmgmi5AIm9dQ0Cp+i5yE/oUiAAmq+IQ
From: "Churaman, Mahendra" <mchuraman@thelenreid.com>
To: "Joseph Fichera" <jfichera@saberpartners.com>
X-OriginalArrivalTime: 30 Mar 2004 16:32:31.0699 (UTC) FILETIME=[9949E230:01C41674]

Does the following work for you?

"The broad-based nature of the true-up mechanism and the State Pledge serve to effectively eliminate, for all practical purposes and circumstances, any credit risk associated with the transition bonds."

-----Original Message-----
From: Joseph Fichera [mailto:jfichera@saberpartners.com]
Sent: Monday, March 29, 2004 5:04 PM
To: Churaman, Mahendra
Subject: Re:

Hmmmm. I think I like it but for the "reasonably forseeable".

Let me think and tinker but it is a lot better than I expected.
Progress. Praise the Lord.

-----Original Message-----
From: "Churaman, Mahendra" <mchuraman@thelenreid.com>
Date: Mon, 29 Mar 2004 16:52:22
To:<jfichera@saberpartners.com>
Subject: FW:

What do you think of Neil's proposed language?

-----Original Message-----
From: Miller, Shannon [mailto:smiller@hunton.com] On Behalf Of Anderson, Neil
Sent: Monday, March 29, 2004 3:47 PM
To: Churaman, Mahendra; Ronnie Puckett (E-mail)
Subject:

Ronnie and Mahendra - What do you think of this? Mahendra, if it is okay with you, Steve and Ronnie, you can forward it on.

The broad-based nature of the true-up mechanism and the

State Pledge serve to effectively eliminate, for all practical purposes and in all reasonably foreseeable circumstances, credit risks associated with the transition bonds.

Shannon Miller
Professional Assistant to Neil Anderson
Hunton & Williams LLP
214.979.8247

HUNTON & WILLIAMS

CLIENT UPDATE

August 2005

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Does an Underwriter Owe a Fiduciary Duty to an Issuer?

A recent decision[1] by New York's highest court serves as a warning to underwriters and their counsel of the continuing fallout from the "dot-com" bust of the late 1990s. The decision states that the lead managing underwriter in a firm commitment underwriting may owe a fiduciary duty to the issuer to disclose conflicts of interest in connection with the pricing of securities. The court based its decision not to dismiss the breach of fiduciary duty complaint on the allegation that the underwriter assumed an additional "advisory relationship that was independent of the underwriting agreement."

The plaintiff was the unsecured creditors committee of the now defunct eToys, Inc., an internet-retailer specializing in children's products, that conducted an initial public offering in May 1999. eToys filed for bankruptcy in March 2001. The defendant, Goldman, Sachs & Co., was the IPO's lead managing underwriter. Shares in eToys traded up from the offering price of $20 to a first day closing price of $77. In its breach of fiduciary duty claim, the plaintiff alleged that "eToys relied on Goldman Sachs for its expertise as to pricing, and that Goldman Sachs gave advice to eToys without disclosing that it had a conflict of interest." Specifically, the complaint alleged that Goldman Sachs intentionally underpriced the IPO and then allocated shares from the offering to customers who allegedly "were obligated to kick back to Goldman a portion of any profits that they made" from reselling the shares.

The court found that, even while an underwriting agreement did not in and of itself create a fiduciary duty, a breach of fiduciary duty claim may survive for pleading purposes where the plaintiff alleges that the underwriter had an advisory relationship with the issuer. The court found that such a relationship may have existed because the complaint alleged an advisory relationship that was independent of the underwriting agreement. The court reasoned that an underwriter, as an advisor, is required to disclose to an issuer

[1] http://www.courts.state.ny.us/ctapps/decisions/jun05/61opn05.pdf

"any material conflicts of interest that render the advice suspect." As the court stated, the "plaintiff alleges eToys was induced to and did repose confidence in Goldman Sachs' knowledge and expertise to advise it as to a fair IPO price and engage in honest dealings with eToys' best interest in mind." Based on this analysis, the court determined that the complaint adequately alleged that Goldman Sachs breached its fiduciary duty to eToys by failing to disclose an alleged conflict of interest stemming from "its profit-sharing arrangements with its clients."

The court's finding is troubling because the mere allegation by a plaintiff that the relationship involved something greater than just an underwriting relationship may now be enough to sustain a lawsuit. It is too early to understand the ramifications of this decision, but we believe the court, by finding such a fiduciary relationship, misread the role of lead underwriters in modern public offerings. In the ordinary course of raising capital for clients, lead underwriters almost always advise clients on the market conditions for the offering and the price of the offering. As the dissent stated, the consequences of this decision "wars with [the court's] precedent and potentially conflicts with a highly complex regulatory framework designed to safeguard investors."

As a result of this decision, we recommend that underwriters:

→ update their form underwriting agreements to include provisions disclaiming any type of fiduciary relationship with the issuer and making the issuer aware that there is no such type of relationship; and

→ adopt internal procedures to make the limited nature of the relationship expressly clear to the issuer.

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Invested in America

Fiduciary Standard Resource Center

Overview

A fiduciary relationship is generally viewed as the highest standard of customer care available under law.

Fiduciary duty includes both a duty of care and a duty of loyalty. Collectively, and generally speaking, these duties require a fiduciary to act in the best interest of the customer, and to provide full and fair disclosure of material facts and conflicts of interest.

Today, financial advisers and broker-dealers are regulated by different laws. The current system, established in the 1940s, leaves states free to develop their own often conflicting definitions of fiduciary standards. This can confuse investors and lead to inconsistent definitions and interpretations under existing state law.

As part of its comprehensive financial regulatory proposal in 2009, the Obama Administration proposed to standardize the care that investors receive from financial professionals, whether financial advisers or broker-dealers at the federal level.

Under the Dodd-Frank Act, Congress directed the Securities and Exchange Commission (SEC) to study the need for establishing a new, uniform, federal fiduciary standard of care for brokers and investment advisers providing personalized investment advice. The Act further authorized the SEC to establish such a standard if it saw fit.

Separate from and conflicting with the definition of fiduciary being contemplated under Dodd-Frank, the Department of Labor (DOL) has proposed a wholesale revision to its regulation that redefines what it means to be a fiduciary under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code.

See SIFMA's resource center on the DOL Fiduciary Standard ›

Position

Since early 2009, SIFMA has consistently advocated for the establishment of a new uniform fiduciary standard, and not application of the Advisers Act fiduciary standard to broker-dealers.

The new standard envisioned by SIFMA would: put retail customers' interests first; provide adequate flexibility to preserve and enhance customer choice of and access to financial products and services, and capital formation; provide for conflicts management; apply only to, and be tailored for, those services and activities that involve providing personalized investment advice about securities to retail customers; and not subject financial professionals to other fiduciary obligations (for example, the Advisers Act fiduciary standard, or other statutory standards).

SIFMA, through our member committees and otherwise, continues to engage policymakers and regulators with comprehensive empirical and legal analysis to help inform the process. We are hopeful that our substantive engagement and input will positively impact any rulemaking or other actions on this issue.

U.S. Securities and Exchange Commission

Speech by SEC Staff:
Fiduciary Duty: Return to First Principles

by

Lori A. Richards

Director, Office of Compliance Inspections and Examinations
U.S. Securities and Exchange Commission

Eighth Annual Investment Adviser Compliance Summit
Washington, D.C.
February 27, 2006

Good morning. I am pleased to be here, as you consider practical methods to address the range of compliance issues that you face. Nothing could be more important to us at SEC than helping to ensure that advisers prevent, detect and correct compliance problems. I want to thank David Tittsworth and Hugh Kennedy for inviting me to speak with you today.

As we look at the compliance environment today, there are some facts worth noting. First, there are a significant number of newly-registered investment advisers. In fact, there are approximately 10,000 advisers registered with the SEC. About 2,000 of these firms, or 20% of the total, have just registered in the last year. These firms vary — they may be recently formed, have simply grown to exceed the 25$ million assets under management threshold, or have been operational for some time, but are registering with the SEC now because of the Commission's new rules requiring the registration of hedge fund advisers. As new registrants, these firms may be new to the Investment Advisers Act of 1940.

A second fact worth noting is that all advisory firms, whatever their size, type or history in the business, owe their advisory clients a fiduciary duty. Many firms are acutely aware of their fiduciary obligation and ensure that it informs, educates and guides their dealings and decisions. But, one only has to look at our enforcement actions and deficiencies found in exams to draw the conclusion that the application of fiduciary duty is not as embedded in many firms' cultures as it could be. In fact, I'm far from certain that all advisory firms understand their fiduciary obligations, and how they apply in the context of their own operations. Some advisers have seemed to be aware of the fiduciary duty in kind of an ethereal way — "I know it's out there but I don't really know what it is." Others have looked at fiduciary duty as strictly a compliance or legal function — not fully appreciating its significance to *all* employees of the firm. Either view is dangerous.

Fiduciary Duty

Understanding "fiduciary duty" is critical, because it is at the core of being a good investment adviser. In a very practical sense, if an adviser and the adviser's employees understand the meaning of fiduciary duty and incorporate this understanding into daily business operations and decision-making, clients should be well served, and the firm should avoid violations and scandal. Indeed, I believe that, even if advisory staff are not aware of specific legal requirements, if their decisions large and small and everyday are motivated and informed by *doing what's right by the client*, in all likelihood, the decision will be right under the securities laws.

This is why, as an examiner, I care about advisers' fiduciary duties. I think that knowledge and familiarity with one's fiduciary duty can help firms *avoid* compliance violations. And, avoidance of violations is in everyone's best interests — yours, your clients and our markets. As examiners, we prefer to find highly compliant firms with strong compliance controls that prevent violations. To demonstrate this point, I wanted to share with you some of the most common deficiencies that we find in our examinations of investment advisers, each of which have fiduciary implications.

But first, I'd like to look more closely at the concept of fiduciary duty. Many different types of professions owe a fiduciary duty to someone — for example, lawyers to their clients, trustees to beneficiaries, and corporate officers to shareholders. Fiduciary duty is the *first principle* of the investment adviser — because the duty comes not from the SEC or another regulator, but from common law. Some people think "fiduciary" is a vague word that's hard to define, but it's really not difficult to define or to understand. Fiduciary comes from the Latin word for "trust." A fiduciary must act for the benefit of the person to whom he owes fiduciary duties, to the exclusion of any contrary interest.[1]

Now, some might wonder why the concept of fiduciary duty came to be applied to advisers. The Investment Advisers Act does not call an adviser a fiduciary. In fact, that word does not appear in the Act. But, the Supreme Court recognized congressional intent and held that the Advisers Act: *"reflects a congressional recognition of the delicate fiduciary nature of an investment advisory relationship, as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser - consciously or unconsciously - to render advice which was not disinterested."*[2] And, the Court said that: investment advisers are fiduciaries with *"an affirmative duty of 'utmost good faith and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' … clients."*[3]

I would suggest that an adviser, as that trustworthy fiduciary, has five major responsibilities when it comes to clients. They are:

1. to put clients' interests first;
2. to act with utmost good faith;
3. to provide full and fair disclosure of all material facts;
4. not to mislead clients; and
5. to expose all conflicts of interest to clients.

These responsibilities overlap in many ways. If an adviser is putting clients' interests first, then the adviser will not mislead clients. And, if the adviser is not misleading clients, then it is providing full and fair disclosure, including disclosure of any conflicts of interest.

How do the responsibilities of a fiduciary translate into an adviser's obligations to clients each and every day? This is a key question. Probably no statute or set of rules could contemplate the variety of factual situations and decisions that an advisory firm faces. Can you imagine the number of rules and releases and regulations that this would require? Instead, the Advisers Act incorporates an adviser's fiduciary duty under Section 206, and envisions that, in whatever factual scenario, the adviser will act in the best interests of his clients.

This is a simple statement to make, but one that is more difficult to apply. In thinking about compliance with your fiduciary obligation as an adviser, start by thinking about the areas where there is a conflict of interest — between one's own interests, the interests of the firm, and/or the interests of advisory clients. These are the areas in which compliance with fiduciary obligations are likely to be most challenging. The Compliance Rule envisions this analysis, and the Commission suggested in the release adopting the rule that advisers conduct a risk assessment to identify areas of conflicts of interest.[4]

This is not a one-time effort — the nature of an adviser's relationship with its clients is full of conflicts, and those conflicts change when an adviser's business changes. Addressing and disclosing conflicts of interest is an ongoing process. While some conflicts of interest stand out, others can be very subtle, so an adviser must look, with more than a casual glance, at every aspect of its business, and its relationship with clients, and carefully consider whether it has a conflict of interest. Importantly, at this stage, the question is not whether the adviser acts appropriately in the conflicted situation, but merely whether the conflict itself exists.

The next step, of course, is to disclose material conflicts of interest in a "full and fair" manner and to ensure your clients understand any material conflicts of interest before taking action. Because you are a fiduciary, you should not allow your client to enter the advisory relationship without a clear understanding of all material conflicts.

As I said, and in keeping with the theme of this conference — to provide practical and not just theoretical information on compliance issues — I wanted today to describe the top 5 deficiencies that we find in our exams. It's my hope also that this information may be helpful to newly-registered advisers who are seeking to better understand common compliance pitfalls, conflicts of interest and fiduciary duties. Last year, we examined over 1,500 investment advisers. In those exams, the most common deficiencies were the following:

- **Deficient disclosure** — I'll spend more time talking about disclosure in a minute.

- **Deficiencies in portfolio management** — Problems in this area included inadequate controls to ensure that investments for clients are consistent with their mandates, risk tolerance and goals, and to ensure that required records are kept. Fiduciary duty is implicated in this area because advisers have a duty to ensure that they are managing their clients' money in a manner that is consistent with the clients' direction.

- **Deficiencies with respect to advisory employees' personal trading** — Problems in this area included a lack of controls, a lack of required codes of ethics, and failure to implement stated procedures to monitor employees' personal trades to prevent employees from placing their own interests above those of their clients, by for example, front-running clients' trades, trading on non-public information, taking investment opportunities for themselves over clients — to ensure that the fiduciary is acting with the loyalty and "utmost good faith" envisioned by the Supreme Court.

- **Deficiencies in performance calculations** — Problems in this area included overstated performance results, comparing results to inappropriate indices, failing to disclose material information about how the performance results were calculated, using prohibited testimonials, and advertising past results in a misleading manner. In this area, a fiduciary must calculate and set forth its past performance in an honest way, and must provide information that is not misleading.

- **Deficiencies in brokerage arrangements and execution** — Deficiencies in this area included poor or no controls to ensure that the adviser obtains "best execution," and secretly using clients' money to pay for client referrals, and for other goods and services that benefit the adviser. Simply stated, because brokerage money belongs to the client and not to the adviser, the adviser has a fiduciary duty to ensure that it is used appropriately and that the client is aware of how his/her money will be and is being spent by the adviser.

Inadequate Disclosure

Inadequate disclosure has been on the "top 5" list of most frequent deficiencies for some time. And, as it is the most frequently-found deficiency, it's an area that clearly deserves more attention by advisory firms. As such, I'd like to spend some time this morning talking about disclosure and the adviser's fiduciary duty.

Approximately half of the deficiencies that we find in this area relate to inaccurate, incomplete, and even misleading information in Forms ADV, and half include problematic disclosure of business practices and fees charged to clients. Whether you use Form ADV or other disclosure techniques, you should take care to ensure that you are in fact providing full, accurate and complete disclosure, and written in a comprehensible language, designed to be understood by your clients.

So what should you *not* do? Let me illustrate with a few examples from recent examinations.

- Clients were not informed of the real method used to calculate the adviser's fee. Fees appeared to be lower than they were in fact.

- An adviser failed to disclose that he recommends securities to clients in which he has a proprietary interest.

- An adviser failed to disclose the risks to clients that existed by having their assets invested in private investments.
- An adviser failed to disclose that clients with directed brokerage arrangements may not achieve best execution.
- An adviser does not accurately describe the types of products and services it obtains with clients' soft dollars.
- Clients whose assets were invested in mutual funds were not told that they pay both a direct management fee to their adviser and an indirect management fee to the adviser of their mutual funds.
- An adviser stated that it did not have custody of client assets when in fact it did.
- An adviser did not disclose that it receives economic benefit from a non-client in connection with giving advice to clients.
- An adviser did not disclose that even if clients direct that their securities transactions be executed through a certain broker-dealer, the adviser did not actually execute most transactions through that firm.
- An adviser had not amended its ADV for several years although the rules require that it be amended at least annually and more frequently if required, information was therefore out-of-date.
- An adviser incorrectly stated that it did not have discretion to direct trades to specific broker-dealers, when in fact it did.
- Clients were provided with incorrect information about the adviser's review of their accounts, and the frequency of those reviews.

Some of the disclosure deficiencies that we find seem to come from inattention — the failure of the adviser to make sure its Form ADV reflects its current business operations. To my mind, this type of problem stems from lax controls and perhaps from an underfunded infrastructure. Other disclosure deficiencies, however, occur because the adviser either failed to identify a conflict of interest or, having spotted it, chose not to disclose it. In the former case, some advisers appear not to be giving adequate thought to what constitutes a conflict of interest. Importantly, all material conflicts of interest must be disclosed, even if the adviser has taken steps to mitigate those conflicts to ensure that it acts appropriately. And, whether intentional, inattentive or inept, the result is the same — advisory clients are not being provided with accurate information about the adviser.

Disclosure is at the heart of our securities regulatory framework, and as you would assume, it is also at the heart of our examination process. At the start of every exam, SEC examiners review the information that the adviser disseminates about its business, which includes Form ADV, parts I and II. They look at this information to see how an adviser describes its business as well as any business practices that pose potential conflicts of interest between the adviser and its clients. Throughout the exam, the examiners will continue seeking information about how an adviser's business works and what services are provided to clients. When discrepancies or omissions between the firm's written disclosures and its actual practice are identified, this will trigger heightened scrutiny by the exam staff. As a fiduciary, it is fundamental that what you tell your clients is, in fact, how you conduct your business.

How does an adviser guard against disclosure problems? As you know, the Compliance Rule requires an adviser to adopt and implement policies and procedures to prevent violations, including disclosure violations. To implement this, some firms conduct a periodic in-depth review of the adviser's ADV, along with all other written materials provided to clients and to the public — and then, they compare these disclosures against the firm's actual business operations. The review is conducted by a group of knowledgeable employees who represent all aspects of the firm — from compliance to portfolio management to trading desk to business operations. This is important, because disclosures must reflect actual practice, and who better to know the nature of the firm's actual practices than those who are actually doing it. This practice also helps keep disclosures "real," and not simply aspirational or marketing literature. Then, any required changes to disclosures are made promptly. Some firms also perform this same sort of review of client portfolios to ensure that portfolio transactions are consistent with disclosures to and instructions from the client.

Whatever compliance technique is used, because disclosure is so important in ensuring that advisers meet their fiduciary obligations, I would hope that all advisers spend a considerable amount of time ensuring that they have provided accurate, full and fair information to clients.

Now, and particularly for newly-registered advisers, some "tips" on SEC examinations:

- It warrants saying that the SEC conducts examinations as part of its statutory mandate to protect investors. We conduct exams to help ensure that investors are being treated fairly and that firms operate consistently with the securities laws. Understanding our purpose — and that we're not out to "get you" — may help advisory staff understand the exam process better. Probably no one will ever *like* being examined, but the process is important for the protection of investors. And, it can help firms to identify and take steps to fix smaller problems before they can escalate!

- The best way to "prepare for an exam" is not really to prepare for an exam at all — it is to have a strong compliance infrastructure that is used effectively to prevent, detect and correct problems every day.

- A critical part of our examination process includes gaining an understanding of the firm's compliance history: 1) to evaluate the firm's compliance with the "Compliance Rule," which requires effective compliance programs to prevent, detect and correct violations; and 2) to determine the strengths and weaknesses of the firm's compliance controls to aid examiners' determination of areas to focus on in the examination. Areas where compliance controls are strong will receive relatively less scrutiny than areas that appear to be weak. To understand this, we ask the firm about any material compliance issues that the firm has faced during the examination period. Because in the past we had encountered situations where firms were less than candid in providing this information, we asked that a senior employee of the firm provide this information in writing. With CCOs at all firms now, we will seek this information from the firm during the examination process.

- While our work on-site will be visible to you, our work off-site will not be. Our exam teams do quite a lot of analysis and other exam work after they return to SEC offices. This includes communicating with relevant SEC staff about any novel facts or interpretive issues to ensure that our findings appropriately reflect the Commission's legal interpretations. In these cases, our deficiency letters reflect the input of relevant legal staff. If you disagree with a deficiency letter, of course, say so in your response!

- Finally, and in the same vein, we urge firms to communicate openly and honestly with exam staff about the firm's operations, its compliance program and any issues or concerns they have about the exam process. We find that most issues, from document production to deficiencies found, can be understood with some honest dialogue. There are lots of opportunities for this at every stage of the exam process, and certainly at the exit interview. If you have questions or concerns, we urge you to talk with the exam staff about them. And, we also have an *ExamHotline* for you to express concerns, anonymously or not. The phone number is: 202-551-3926, or ExamHotline@sec.gov.

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In closing, and returning to *first principles* again — if an adviser incorporates the qualities of a fiduciary as I've discussed here today, and puts the clients' interests first, the adviser will indeed be someone its clients can trust.

Thank you for your time and attention.

Endnotes

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[1] "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928) (Cardozo, B).

[2] *S.E.C. v. Capital Gains Research Bureau*, 375 U.S. 180 (1963).

[3] *Id.*

[4] See 68 FR 74714, 74716 (Dec. 24, 2003), http://www.sec.gov/rules/final/ia-2204.htm.

http://www.sec.gov/news/speech/spch022706lar.htm
