KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 1, 2023

To All Bond Counsel:

RE: Additional Requirements for Statutory Representations and Covenants, Standing Letters, and Public Work Descriptions

1. Statutory Representations and Covenants Preventing Prohibited Contracts

State law mandates that the Attorney General determine whether public securities and related proceedings comport with state law.[1] This review includes determining whether an issuer may execute certain public finance contracts and requires the application of statutes prohibiting governmental entities from contracting with companies that boycott Israel,[2] boycott energy companies,[3] discriminate against firearm entities,[4] or engage in business with Iran, Sudan, or foreign terrorist organizations.[5] Three of these statutes prohibit a governmental entity from entering into a contract[6] unless the contract contains written verification that the company does not boycott or discriminate and will not do so during the term of the contract.[7] The fourth prohibits an issuer from entering into a governmental contract[8] with a company listed by the Comptroller as a company engaged in business with Iran, Sudan, or a foreign terrorist organization.[9] Collectively, these laws contain the statutory representations and covenants[10] ensuring that governmental entities do not enter into prohibited contracts.

[1] Gov't Code, § 1202.003.
[2] Gov't Code, Chapter 2271.
[3] Gov't Code, Chapter 2276.
[4] Gov't Code, Chapter 2274.
[5] Gov't Code, Chapter 2252, subchapter F.
[6] For the following statutes, the contract is for the purchase of goods or services that has a value of at least $100,000 that is paid wholly or partly from public funds of the governmental entity. Gov't Code, §§ 2271.002(a)(2), 2274.002(a)(2), and 2276.002(a)(2).
[7] Gov't Code, §§ 2271.002, 2274.002, 2276.002 (we often refer to these three statutes collectively as the "state law verification requirements").
[8] For listed companies prohibited under chapter 2252, subchapter F, "governmental contract" includes a contract for services, including professional or consulting services subject to chapter 2254; however, there is no value threshold. *See* Gov't Code, § 2252.151(3).
[9] Gov't Code, § 2252.152.
[10] Throughout this letter, the phrase, "statutory representations and covenants" collectively means the verifications, representations and covenants required to be contained in covered contracts under §§ 2252.152, 2271.002, 2274.002, and 2276.002 of the Gov't Code.

Statutory limitations on governmental contracting powers may not be taken lightly. We believe that the legislature intended these laws to mean something and have real consequences for failing to comply with the statutory representations and covenants.[11] We also understand the concerns and frustration that issuers have when there is the possibility that an underwriter is determined to be a boycotter or discriminator after the underwriter has been selected and the purchase contract executed. To this end, we announce the following requirements to ensure that governmental entities are not parties to prohibited contracts while minimizing disruption to the municipal bond market. The following requirements for standing letters and contracts must be in place by December 1, 2023.

a. Statutory Representations and Covenants in Covered Contracts Must Survive Termination.

All statutory representations and covenants in covered[12] contracts must survive termination of the contract until the applicable statute of limitations runs for breach of contract. For contracts executed on or after December 1, 2023, the contract must contain language to the effect that "notwithstanding anything contained herein, the representations and covenants contained in [state applicable section references] shall survive termination of the agreement until the statute of limitations has run."

By requiring contracts to expressly provide that statutory representations and covenants survive termination, issuers will avoid disruptions to the market should a company become listed by the Comptroller[13] or otherwise determined by the Attorney General to be a boycotter or discriminator under the state verification laws. In such case, if a company is determined to be a boycotter or discriminator after the issuer has entered into the contract, the issuer can proceed to close on its bonds because the contract makes clear that the statutory representations and covenants survive termination, and the company is therefore liable for violating them. However, once a company is determined to be a boycotter or discriminator, the issuer is prohibited from entering into the contract after the date of determination with the affected company as long as the company continues to boycott or discriminate under the applicable laws.

Similarly, we have recently seen contract provisions that limit or remove a company's liability or that give the company special rights to terminate if the Attorney General or Comptroller determines the company is a boycotter or discriminator. Companies may not insulate themselves from liability for violating the statutory representations and covenants during the term of the contract. Such provisions are inconsistent with Texas law and the company's statutory obligation

[11] See also the Attorney General's *Advisory on Texas Law Prohibiting Contracts and Investments with Entities that Discriminate Against Firearm Entities or Boycott Energy Companies or Israel* (issued 10/18/23) at https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-issues-enforcement-guidance-state-laws-prohibiting-public-contracts.

[12] By "covered contract", we mean a contract as defined in the specific statute at issue. *See* Gov't Code, §§ 2252.151(3), 2271.002, 2274.002, 2276.002.

[13] Although not binding on this Office, a determination by the Comptroller that a company is a boycotter under chapters 808 or 809 will be given great weight and this Office will likely reach the same conclusion and rely on the Comptroller's determination until we have finalized our review.

not to discriminate or boycott during the term of the contract. When we have seen such provisions, we have required their removal, and they may not be included in contracts going forward.

b. Statutory Representations and Covenants in Contracts and Standing Letters May Not be Qualified; New Standing Letters Required.

Statutory representations and covenants in covered contracts and standing letters may no longer be conditioned with the phrase, "to the extent the Agreement constitutes a contract for goods or services for which a written verification is required" or similar language to that effect. Neither may they be made "to the extent such section does not contravene applicable Texas or federal law". We would not require the statutory representations and covenants if we did not view the contract as being governed by the applicable statutes. Qualifying the contract verification in this manner gives the false impression that the contract is not covered and that the company is not bound to the statutorily imposed representations and covenants.[14]

Attached is a revised form of standing letter that we will accept which tracks the statutory language without qualification and reflects current statutory citations. This form of standing letter must be on file with our office by the later of December 1st or the date by which an issuer seeks our approving opinion, meaning that all current standing letters on file with this Office expire at the close of business on November 30, 2023. We will no longer accept standing letters in the form provided to the Municipal Advisory Council.

As indicated in our letter of October 17, 2023, for a company that has not previously submitted a standing letter to this office, the company must additionally verify when submitting its standing letter whether it or any affiliate is a Net Zero Alliance Member. If a company or its affiliate is a Net Zero Alliance Member, they will automatically go under review. During the time period we are reviewing Net Zero membership, if we discover that a company with a current standing letter or its affiliate is a Net Zero Alliance Member, such company will be placed under review as well. If a company has a name similar to a Net Zero Alliance Member but is not an affiliate of such member, we will accept a certificate accompanying the standing letter confirming it is not an affiliate of any member of any Net Zero Alliance.[15]

c. Issuers Must Provide Bring-down Certification when Bond Transcript Contains a Contract with a Company Currently under Review.

When an issuer submits a bond transcript containing a covered contract with a company currently under review by this Office for being a potential discriminator or boycotter, the issuer must provide a bring-down certification from the company shortly before closing confirming that we can continue to rely on their standing letter and the statutory representations and covenants contained in the applicable contract. As of the date of this letter, this Office is reviewing the

[14] If there is a rare occasion where the language is not applicable and the contracting party is unwilling or unable to make the verifications, we will work with bond counsel to confirm the contract is not applicable to any of the applicable chapters of the government code and allow the verifications to be removed, but these rare exceptions should not determine the rule.

[15] The certificate should use the term for affiliate as provided in the form of standing letter.

following entities[16] as either a Net Zero Alliance Member or an affiliate of one that has submitted a standing letter:

Bank of America
Barclay PLC
Barclays Capital Inc.
DNT Asset Trust
J.P. Morgan Asset Management
J.P. Morgan Chase
J.P. Morgan Securities LLC
Morgan Stanley
RBC Capital Markets, LLC
Royal Bank of Canada
State Street Bank and Trust Company
State Street Global Advisors
TD Bank Group
TD Bank, N.A.
TD Securities
Wells Fargo Bank, N.A.
Wells Fargo & Company
Wells Fargo Municipal Capital Strategies, LLC

d. Paying Agent Agreements, Escrow Agreements, and Similar Agreements

We are reevaluating whether the paying agent agreements, escrow agreements, and similar agreements that we have historically not required to be considered a covered contract is the correct interpretation. Between now and the end of 2023, we will not require any additional changes. However, beginning January 1, 2024, subject to our providing additional guidance, if any such agreement does not contain the statutory representations and covenants or the contracting party with the governmental entity does not have a proper standing letter on file with this Office, the contract in question will need to contain language to the effect that "the [contracting party] represents, warrants and covenants that the value of this contract is less than $100,000, and if it is legally determined that the value of this contract is equal to or greater than $100,000, this contract is void, the [contracting party] is required to return all monies or assets it received under this contract to the [governmental entity] and the [governmental entity] shall have no liability hereunder; The [contracting party's] representations, warranties and covenants hereunder shall survive the termination of the contract."

[16] In our letter dated October 17, 2023, we had included Fidelity Capital Markets and Fidelity Investments as being under review because Fidelity International (FIL) is a Net Zero Alliance Member and we have a standing letter from Fidelity Capital Markets and Fidelity Investments. However, we received a certificate from FMR LLC confirming that Fidelity Capital Markets and Fidelity Investments (each part of FMR LLC) are not affiliates of Fidelity International. Therefore, these entities have been removed from the list.

2. For Certificates of Obligation and Anticipation Notes, Issuers Must Describe Purposes with Enough Specificity to Confirm that the Purposes Constitute Public Works as Statutorily Defined by House Bill 4082.

House Bill 4082 amended Section 271.043, Local Government Code to define the term "public work."[17] This definition is incorporated by reference in Section 1431.001, Government Code.[18] Therefore, for anticipation notes and certificates of obligation, issuers must specifically describe the public work sought to be financed in order to ensure that the project meets the statutory definition. Section 271.043(7-a) defines "public work" to mean those purposes expressly stated in subsection (A) or (B). It then provides in subsection (C) what the term "public work" does not include. In sum, the description of purpose must be specific enough for us to determine that the improvements fall within the purposes delineated in subsection (A) or (B) and are not otherwise excluded by subsection (C).[19]

Terms such as "public works facility," even in reference to an issuer's public works department, are ambiguous. Planned improvements to an issuer's public works department should be described specifically and track the language of the applicable public improvement specified in Section 271.043(7-a)(A)(i-xii). For example, the purposes of "construction of a public works department administrative office" or "improvements to a wastewater treatment plant" are acceptable.

Section 271.043(7-a)(A)(vii) lists several examples of public safety facilities that qualify as a public work.[20] Because the list is preceded by the word "including," the list is not exhaustive.[21] For us to determine whether public safety facilities are of a like kind and quality to those enumerated in this list, the description of purpose must go beyond generic terms such as "public safety facility."

Section 271.043(7-a)(A)(xii), Local Government Code only permits construction of "a park or recreation facility *that is generally accessible to the public and is part of the municipal or county park system*."[22] Therefore, if the proceeds will be used to fund construction of a park or recreational facility, the issuer must certify that all park or recreational facilities to be funded by the proceeds of the certificates or notes will be generally accessible to the public and part of the municipal or county park system.

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[17] Local Gov't Code § 271.043(7-a) (as added by Act of May 23, 2023, 88th Leg., R.S., H.B. 4082, section 2).
[18] Gov't Code § 1431.001(6) (as added by H.B. 4082, at section 1).
[19] This position is consistent with our All Bond Counsel Letter, dated February 11, 1999, at ¶ 1, in which we said that the description of the purpose must be "reasonably complete" to enable us "to determine from the authorizing document whether the use of the proceeds comports with state law[.]"
[20] Local Gov't Code § 271.043(7-a)(A)(vii) ("a public safety facility, including a police station, fire station, emergency shelter, jail, or juvenile detention facility;").
[21] *See* Gov't Code § 311.005(13) (""Includes" and "including" are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded.").
[22] Local Gov't Code § 271.043(7-a)(A)(xii) (emphasis added).

Section 271.043(7-a)(B), Local Government Code defines a public work to mean "the rehabilitation, expansion, reconstruction, or maintenance of an existing stadium, arena, civic center, convention center, or coliseum that is owned and operated by the municipality or county or by an entity created to act on behalf of the municipality or county."[23] If a description of purpose includes improvements authorized by subsection (B), we first require certification confirming that the existing facility is owned and operated by the issuer or by an entity created to act on behalf of the issuer. Second, the issuer must certify that none of the purposes to be funded by the proceeds of the obligations include a facility for which more than 50 percent of the average annual usage is or is intended to be for professional or semi-professional sports. Lastly, depending upon the facts of the case, we may require additional certifications confirming that the project does not fall within one of the other exclusions contained in subsection (C). For example, if the project involves reconstruction, we may require additional information to confirm that the project does not rise to the level of new facility prohibited by subsection (C)(ii). In other circumstances, certification confirming that the project does not include a hotel may be appropriate.

Section 271.043(7-a)(C) excludes three categories of facilities from the definition of a public work.[24] If a description of purpose includes park or recreation facilities, it must be specific enough to foreclose the possibility that such facilities could be excluded by Section 271.043(7-a)(C)(i–ii). For example, "construction of trails" or "purchase and installation of park benches" are acceptable without addition of the certifications in the following paragraph.

Whenever a description of purpose uses generic terms such as "park and recreation facilities" or "parks," we require certification confirming that none of the purposes to be funded by the proceeds include (i) a facility for which more than 50 percent of the average annual usage is or is intended to be for professional or semi-professional sports or (ii) a new stadium, arena, civic center, convention center, or coliseum that is or is intended to be leased by a single for-profit tenant for more than 180 days in a single calendar year. Depending upon the facts, we may also require additional certifications describing in more detail how the facility will be used.

[23] Local Gov't Code § 271.043(7-a)(B).
[24] Local Gov't Code § 271.043(7-a)(C) provides that a public work "(C) does not include: (i) a facility for which more than 50 percent of the average annual usage is or is intended to be for a professional or semi-professional sports; (ii) a new stadium, arena, civic center, convention center, or coliseum that is or is intended to be leased by a single for-profit tenant for more than 180 days in a single calendar year; or (iii) a hotel."

We have provided this letter pursuant to our authority under section 402.044 of the Government Code, which requires that we advise the proper legal authorities regarding the issuance of bonds that by law require the Attorney General's approval. However, please note that this letter does not dictate how a court may rule in a legal proceeding.

Sincerely,

Leslie Brock

Leslie Brock
Assistant Attorney General
Chief, Public Finance Division

Exhibit A
Form of Standing Letter

[Date]

Via email: PFDSupport@oag.texas.gov

Office of the Attorney General of Texas:

For all contracts for goods or services submitted with the record of public security proceedings, the undersigned company, for purposes of sections 2252.152, 2271.002, 2274.002, and 2276.002, Texas Government Code, as amended, hereby verifies that the company and any parent company, wholly owned subsidiary, majority-owned subsidiary, and affiliate:

1) Do not boycott energy companies and will not boycott energy companies during the term of such contracts. "Boycott energy company" has the meaning provided in section 809.001 of the Texas Government Code.

2) Do not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association will not discriminate against a firearm entity or firearm trade association during the term of such contracts. "Discriminate against a firearm entity or firearm trade association" has the meaning provided in section 2274.001(3) of the Texas Government Code. "Firearm entity" and "firearm trade association" have the meanings provided in section 2274.001(6) and (7) of the Texas Government Code.

3) Do not boycott Israel and will not boycott Israel during the term of such contracts. "Boycott Israel" has the meaning provided in section 808.001 of the Texas Government Code.

4) Unless affirmatively declared by the United States government to be excluded from its federal sanctions regime relating to Sudan, its federal sanctions regime relating to Iran, or any federal sanctions regime relating to a foreign terrorist organization, are not identified on a list prepared and maintained by the Texas Comptroller of Public Accounts under section 2252.153 or section 2270.0201 of the Texas Government Code.

"Affiliate" means any entity that controls, is controlled by, or is under common control with the company within the meaning of SEC Rule 405, 17. C.F.R. § 230.405 and exists to make a profit.

The undersigned understands that the Office of the Attorney General of Texas may rely on and is receiving the information in this letter in its review and approval of public securities under Texas law. Should a change occur that renders this letter ineffective, the company shall notify the Public Finance Division immediately by email to PFDSupport@oag.texas.gov, with the phrase "Ineffective Standing Letter" in the subject heading.

[Name of Company]

By: /s/ [state name and title of qualifying officer]