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UPDATED RECOMMENDATIONS FOR COMPLIANCE WITH TEXAS H.B. 89, H.B. 1295, AND S.B. 252

The Municipal Advisory Council of Texas (MAC) is organized to promote efficient underwriting of municipal debt offerings in Texas, among other purposes. Consistent with its mission, MAC makes the following recommendations to Texas governmental issuers and underwriters for complying with the provisions of House Bill 89 and Senate Bill 252, enacted in the last regular session of the Texas legislature, and H.B. 1295, as enacted two sessions ago and subsequently amended.

Issue 1: H.B. 89 and S.B. 252, effective September 1, 2017, restrict bond purchase agreements (BPAs) between Texas governmental issuers and underwriters that engage in certain foreign business activities or appear on a list of entities that do so. The restrictions have added time, expense, and risk to affected underwritings.

Under Tex. Gov't Code §2270.002, as added by H.B. 89, Texas governmental issuers may not enter into a contract with a company for goods or services unless the contract contains a verification by the company that it does not boycott Israel (as defined by the code section) and will not boycott Israel during the term of the contract. Under Tex. Gov't Code §2252.152, as added by S.B. 252, Texas governmental issuers may not contract for services with a company included in any of three lists ("sanctioned company lists") compiled and maintained by the Texas Comptroller of Public Accounts on its website: (a) companies that engage in certain activities with the Government of Sudan or its instrumentalities or projects or that have been complicit in the Darfur genocide during any preceding 20-month period, (b) companies that engage in certain activities with the Government of Iran or its instrumentalities or projects, and (c) companies that contract with or supply or engage in certain other business activities with a foreign terrorist organization designated by the U.S. Secretary of State. For purposes of both sections, "company" is defined to include not only corporations, partnerships, and limited liability companies, but also their parents, wholly- or majority-owned subsidiaries, and other affiliates.

The Public Finance Division of the Office of Texas Attorney General (AG) has determined that a BPA (including one formed by an accepted bid in a competitive sale) is a contract for services, so must comply with these provisions. In addition, it has required compliance with the restrictions imposed by these two sections by any parent, subsidiary, or other affiliate of a contract party. Consequently, a BPA with a Texas governmental issuer must contain the H.B. 89 Israeli boycott verification, and the verification must extend to both the underwriters and their parents, subsidiaries, and other affiliates. Similarly, a Texas governmental issuer may not enter into a BPA with an underwriter if either the underwriter or its parent or any of its subsidiaries or other affiliates appears on a sanctioned company list. Because the identity of an underwriter's affiliates is generally unknown to an issuer, many issuers have asked underwriters to represent that neither they nor their parent, subsidiaries, and affiliates are a listed company. The representations and undertakings requested by issuers through their counsel have varied, requiring time and effort to resolve in negotiated sales and sometimes preventing bids in competitive sales. In a syndicated underwriting, the representative of the syndicate must make the Israeli boycott verification and (if required by the issuer) the sanctioned company list representation on behalf of syndicate members. Compliance with these requirements has required issue-by-issue communication among syndicate underwriting desks and counsel. The desks may not be well-informed about syndicate members' worldwide business

MUNICIPAL ADVISORY COUNCIL of TEXAS

P.O. Box 2177 • 78768-2177 • 600 West 8th Street, Austin, Texas 78701 • (512) 476-6947 • FAX (512) 476-6403

www.mactexas.com • mac@mactexas.com

practices, in which case additional internal communication is required to avoid ill-informed representations. Compliance with these restrictions to date has added avoidable time, expense, and risk to affected underwritings.

Issue 2: H.B. 1295 enacted Tex. Gov't Code §2252.908. Effective September 1, 2015, as interpreted by the AG, it initially prohibited Texas governmental issuers from entering into a BPA unless the underwriter submitted to the issuer a declared list of all persons who have a controlling interest in the underwriter or who actively participated in facilitating or negotiating the BPA, including intermediaries, advisors, and attorneys. Effective September 1, 2017, the section was amended to exempt BPAs with an underwriter that is a publicly traded company or a wholly owned subsidiary of a publicly traded company. To confirm that they may lawfully enter into a BPA, issuers have asked underwriters (including syndicate members) to represent in writing that they qualify for the exemption. Like compliance with H.B. 89, this practice has resulted in issue-by-issue communication among syndicate underwriting desks and counsel and avoidable added time and expense to affected underwritings.

MAC Recommendations: Consistent with its mission, MAC recruited a volunteer task force of Texas bond counsel and underwriter representatives to evaluate whether and, if so, how compliance with these requirements can be made more efficient and reliable. Based on the advice of the task force, MAC makes the following recommendations to Texas governmental issuers and underwriters:

1. ***Standardized H.B. 89 (No Boycott of Israel) Verifications:*** Underwriters should make and issuers should accept H.B. 89 verifications in the following form:

"[The Underwriter/Each of the Underwriters] hereby verifies that it and its parent company, wholly- or majority-owned subsidiaries, and other affiliates, if any, do not boycott Israel and, to the extent this [Agreement] is a contract for goods or services, will not boycott Israel during the term of this [Agreement]. The foregoing verification is made solely to comply with Section 2270.002, Texas Government Code, and to the extent such Section does not contravene applicable Federal law. As used in the foregoing verification, 'boycott Israel' means refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory, but does not include an action made for ordinary business purposes. [The Underwriter/Each of the Underwriters] understands 'affiliate' to mean an entity that controls, is controlled by, or is under common control with the Underwriter and exists to make a profit."

To clarify the term of the verification, BPAs should expressly terminate upon expiration of the underwriting period, except for surviving representations, warranties, and indemnities of the parties.

2. ***S.B. 252 (Sanctioned Company) Representations:*** Whenever issuers require underwriter representations on this subject, underwriters should make and issuers should accept representations in the following form:

"[The Underwriter/each of the Underwriters] represents that neither it nor any of its parent company, wholly- or majority-owned subsidiaries, and other affiliates is a company identified on a list prepared and maintained by the Texas Comptroller of Public Accounts under Section 2252.153 or Section 2270.0201, Texas Government Code, and posted on any of the following pages of such officer's internet website: <https://comptroller.texas.gov/purchasing/docs/sudan-list.pdf>, <https://comptroller.texas.gov/purchasing/docs/iran-list.pdf>, or <https://comptroller.texas.gov/purchasing/docs/fto-list.pdf>. The foregoing representation is made solely to comply with Section 2252.152, Texas Government Code, and to the extent such Section does not contravene applicable Federal law and excludes [the/each] Underwriter and each of its parent company, wholly- or majority-owned subsidiaries, and other affiliates, if any, that the United States government has affirmatively declared to be excluded from its federal sanctions regime relating to Sudan or Iran or any federal sanctions regime relating to a foreign terrorist organization. [The Underwriter/each of the Underwriters] understands "affiliate" to mean any entity that controls, is controlled by, or is under common control with the Underwriter and exists to make a profit."

3. ***Standardized H.B. 1295 (Publicly Traded Company) Representations:*** When they qualify for the publicly traded company exemption from H.B. 1295, underwriters should make and issuers should accept underwriter representations in the following form:

"[The Underwriter/each of the Underwriters] represents that it is a publicly traded business entity or a wholly owned direct or indirect subsidiary of a publicly traded business entity."

4. **Importance of Uniformity:** Deviations in the verifications and representations should be avoided, both (a) to avoid unnecessary negotiation of verifications and representations on an issue-by-issue basis and (b) to enable standing underwriting syndicate member representations to syndicate representatives to support the verifications and representations, as recommended below.
5. **Repository for Standing Underwriter Representations:** To enable underwriting syndicate representatives to make H.B. 89 verifications and H.B. 1295 and S.B. 252 representations in BPAs on behalf of syndicate members without undue transaction-by-transaction expense, MAC will act as an online repository for standing verification and representation letters in standard form from prospective syndicate members in favor of syndicate representatives. MAC will do so on a page of its website that (a) lists alphabetically the prospective syndicate members that have submitted letters, (b) specifies the original or most recent replacement or updated verification dates and whether any letter has lapsed or been withdrawn, (c) indicates whether the letter includes H.B. 89 verifications, H.B. 1295 representations, and/or S.B. 252 representations, and (d) links to the letters, including amendments. Each letter will lapse unless verified at least annually. MAC will send reminders to verify standing letters before they lapse. MAC will also send prompt electronic notification of the lapse or withdrawal of a standing letter to each person who has previously viewed the letter on MAC's website. To minimize underwriting transaction expense, syndicate representatives may rely on standing letters that have not lapsed or been withdrawn when signing BPAs or bids that include an H.B. 89 verification and/or H.B. 1295 and/or S.B. 252 representation on behalf of syndicate members.
6. **Standing Representation Letters:** MAC recommends that all municipal securities dealers that wish to participate in syndicates to underwrite offerings of municipal securities by Texas governmental issuers execute and submit to MAC, for the benefit of syndicate representatives, a standing representation/authorization letter in the following form:

"Representatives of Underwriting Syndicates for Texas Municipal Securities Offerings
c/o Municipal Advisory Council of Texas
P.O. Box 2177
600 West 8th Street
Austin, TX 78701

"Ladies and Gentlemen:

"The undersigned company (the "*Company*") is interested in becoming a member of syndicates formed from time to time to underwrite offerings of securities issued by Texas state agencies and political subdivisions, including boards, commissions, departments, offices, and other agencies in the executive branch of Texas state government, including state institutions of higher education, and municipalities, counties, public school districts, and special-purpose districts and authorities of the State of Texas.

[Include if applicable:] "To induce you to accept participation by the Company in any such syndicate that you form during the term of this letter, the Company hereby verifies that the Company and its parent company, wholly- and majority-owned subsidiaries, and other affiliates, if any, presently do not, and at the time the Company accepts participation in any such syndicate will not, either boycott Israel or (unless affirmatively declared by the United States government to be excluded from its federal sanctions regime relating to Sudan or Iran or any federal sanctions regime relating to a foreign terrorist organization) appear on a list of scrutinized companies prepared and maintained by the Texas Comptroller of Public Accounts under Section 2252.153 or Section 2270.0201, Texas Government Code, and posted on any of the following pages of such officer's internet website: <https://comptroller.texas.gov/purchasing/docs/sudan-list.pdf>, <https://comptroller.texas.gov/purchasing/docs/iran-list.pdf>, or <https://comptroller.texas.gov/purchasing/docs/fto-list.pdf>.

[Include if applicable:] "To induce you to accept participation by the Company in any such syndicate that you form during the term of this letter, the Company hereby represents that it is a publicly traded business entity or a wholly owned direct or indirect subsidiary of a publicly traded business entity.

"You are authorized to make the foregoing verification and representation on behalf of the Company in any bid for or contract to buy securities for which any such syndicate in which the Company participates is formed, in favor of the issuer of such securities, and to verify therein that neither the Company nor any of its parent company, wholly- or majority-owned subsidiaries, and other affiliates, if any, will boycott Israel during the term of any such contract, but

solely (a) to comply with Sections 2270.002, 2252.152, and 2252.908, Texas Government Code, (b) to the extent such Sections do not contravene applicable Federal law, and (c) before this letter has lapsed because the Company has withdrawn or failed to verify the continued effectiveness of this letter on the website of the Municipal Advisory Council of Texas to which the Company has uploaded this letter and the Company has notified you in writing that this letter is no longer effective.

"As used in the foregoing verification, 'boycott Israel' means refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory, but does not include an action made for ordinary business purposes. The Company understands 'affiliate' to mean any entity that controls, is controlled by, or is under common control with the Company and exists to make a profit.

"The Company represents that the text of this letter conforms to the form of standing representation letter recommended by the Municipal Advisory Council of Texas in its *Updated Recommendations for Compliance with Texas H.B. 89, H.B. 1295, and S.B. 252*, [https://mactexas.com/open/link/download/?source=NewsItemPage&urlkey=HB-89-Project-Announcement_pdf].

"Sincerely,

"[NAME OF DEALER]

"By:"

Expected Benefits: If issuers and underwriters accept MAC's updated recommendations, they can be expected to reap the following benefits:

1. **Efficiency:** Issue-by-issue contract negotiation and checking for syndicate member compliance and commitments can be avoided, reducing the time and expense required to complete offerings.
2. **Reliability:** Syndicate member verifications would more likely be vetted by persons in their organizations who know the facts, so inaccurate representations (and resulting potential adverse publicity and BPA unenforceability) would be less likely to occur.
3. **Pricing:** Because syndicate compliance would be less time-consuming and more predictable, fewer potential syndicates would choose not to bid in competitive offerings by Texas governmental issuers, so issuers may obtain more competitive pricing in competitive sales.

Task Force Members: MAC thanks the task force members for helping to forge these recommendations: Brian S. Hellberg, Director, Policy and Procedure, Municipal Finance, RBC Capital Markets, LLC; Rebecca S. Lawrence, Associate General Counsel, Piper Jaffray & Co.; Chris Melton, SVP, Compliance, FTN Financial; Eric Gervais, General Counsel, George K. Baum & Company; Gerald Mayfield, Senior Counsel, Wells Fargo Law Department; Brian Wittneben, General Counsel, Hilltop Securities, Inc.; Jerry V. Kyle, Jr., Partner, Orrick, Herrington & Sutcliffe LLP; Carol D. Polumbo, Partner, McCall, Parkhurst & Horton L.L.P.; Barron Wallace, Partner, Bracewell LLP; and Fredric A. (Rick) Weber (facilitator), Of Counsel, Norton Rose Fulbright US LLP.

Further Information: For further information about these recommendations, please contact Laura Slaughter, Executive Director, Municipal Advisory Council of Texas, laura@mactexas.com, 512-476-6947.

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