# THE ATTORNEY GENERAL OF TEXAS

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ATTORNEY GENERAL

December 13, 1988

To All Bond Counsel:

The following are a number of additional positions taken by the Public Finance Section and clarifications to previous positions, none of which have been formally disseminated to the bond community. Except where noted, these are in effect at this time. However, your comments on any matters mentioned herein are, as always, welcomed. (All references to statutes are to Texas Revised Civil Statutes Annotated, unless otherwise noted.)

1. We will no longer accept CATS, TIGRS, Treasury Receipts or similar instruments as being direct obligations of the United States, or obligations unconditionally guaranteed by the United States, for placing in an escrow securing the payment of bonds being refunded pursuant to Article 717k.

2. Defeasance provisions for traditional financings must require deposit of direct obligations of the United States or obligations unconditionally guaranteed by the United States. A provision differing from this which requires a bond counsel opinion to the effect that such provision complies with state law in effect at the time of deposit of the obligation is acceptable.

3. We are now requesting that bonds and notes, other than commercial paper notes, issued pursuant to Article 717q be submitted to the Attorney General and registered by the Comptroller, pursuant to Section 3.003(c) of Article 717k-8. It appears to us that the intent of the peculiar approval provisions in Article 717q was only to cover the problems of continued reapproval of commercial paper. We would continue to approve the proceedings, as well as the bonds, as provided by Article 717q. Our primary motivation for this is to be able to give the transcripts to the Comptroller, rather than to have to keep them in our office. Also, the Comptroller is interested in having a complete record of bonds issued in the state, which is not now the case. If this causes complications in a particular situation we will be happy to work with you to resolve the matter.

4. Publication of notices of intention to issue certificates of obligation (as well as publication of notices for revenue bonds required by Section 11 of Article 2368a) must be authorized by

appropriate action of the governing body prior to publication. This may be done through an order, ordinance or resolution, or such action by the governing body may be shown by minute entry, if the entry sets out the information required to be in the notice. I believe this is a long-standing position, but one which seems to have eroded over time. This requirement will again be enforced for certificates of obligation or bonds sold after your receipt of this letter.

5. Except as set out in this paragraph, governing law provisions in financing documents for traditional financings shall be that of Texas, including trust indentures and letter of credit and reimbursement agreements. An acceptable modification to letter of credit and reimbursement agreements is to provide that the rights, duties and obligations of the credit bank shall be interpreted and construed according to the laws of the bank's state of domicile. Remarketing agreements may be under the laws of the state where the agreement will be performed, except to the extent the issuer has duties or obligations under the agreement.

6. For financings by non-profit corporations, the governing law provisions for letter of credit and reimbursement agreements may be that of the state of domicile of the bank, but the rights, duties and obligations of the issuer must be governed by the laws of Texas. Of course, if the issuer is not a party to the agreement, Texas law need not govern. Remarketing agreement requirements are analogous. The trust indenture in these financings must be governed by Texas law, but the rights, duties and obligations of the trustee may be interpreted and construed according to the laws of the trustee's state of domicile. Loan agreements and the like would generally be governed by Texas law.

7. Standards for trustees, paying agent/registrars and other parties to documents to which the issuer is a party must, for traditional financings, be based on negligence rather than gross negligence. We take the position that it is against public policy for a governmental entity to relieve or indemnify a private party from or for the consequences of that party's negligence. With respect to conduit financings, a gross negligence standard is acceptable, <u>if</u> it is merely a pass-through to the true obligor and the issuer is completely protected, say, because the extent of its liability is the trust estate. Also, all indemnity provisions in traditional financings must be "to the extent permitted by law".

8. If a meeting is posted as an emergency under the Open Meetings Act, the emergency or urgent public necessity shall be clearly identified. It would appear to be extremely difficult to meet the requirements of the statute by a recitation to the effect that the issuer needs to begin work on the project soon. An extra several days to begin a project which takes months to construct does not constitute an imminent threat to public health and safety or a reasonably unforeseeable situation requiring immediate action. Nor

do "contingent" or "just in case" or other boilerplate recitations of emergency or urgent public necessity fulfill the requirements of the statute for an emergency meeting. If these types of recitations are used even though 72 hours notice was given, evidence of the time of posting must be provided. We are not trying to make your lives more difficult than necessary and will try to be reasonable, but emergency meetings on a routine basis and other obvious abuses of the notice requirements are not acceptable. Please see JM-985 for further clarification of the meaning of emergency in the Open Meetings Act.

9. Please be reminded that for advance refunding transactions instructions of redemption must be provided to, and receipt thereof acknowledged by, the paying agent for the refunded bonds. Alternatively, when the paying agent is the same for all series of refunded bonds, an executed escrow agreement which includes instructions for redemption will suffice (assuming, of course, that the paying agent and escrow agent are the same).

10. We narrowly interpret JM-697, regarding the lease-purchase of jails, and will not extend its effect beyond the subject covered therein, i.e., county jails.

11. School bus acquisition under the Public Property Finance Act must be through the State Purchasing and General Services Commission, and we will require a certification to that effect. The only exception is for a true lease (with option to purchase) under §21.182 of the Education Code.

12. In future submissions of contractual obligations issued pursuant to the Public Property Finance Act, we request that the security for the obligations include the proceeds on hand in the escrow fund. This is being done by some, but not all, issuers. It seems to us that these funds are held for the benefit of the holders of the obligations until used to purchase equipment. Also, (i) official board action must be required for the substitution of property from that listed in the transcript, and (ii) the proposed acquisition date of the property must be listed, which date must be prior to the first interest payment date.

13. A question has been raised regarding whether the word "year" in Section 3.003(a)(1)(A) of Article 717k-8 refers to the calendar year or the fiscal year of the issuer. If "year" were interpreted to mean calendar year, school districts, for example, which issued notes in the fall of a calendar year, to be paid from tax revenues primarily to be received after the first of January of the following calendar year, would be under the requirements of Article 717k-8 for Attorney General approval. As we think it was the intent of the legislature to exempt from review these types of obligations, it is our intention to define year to mean fiscal year, pursuant to the authority to define terms granted to the Attorney

General in Section 3.01(b) of Article 717k-8. Accordingly, such financings need not be submitted to this office.

14. As there is presently some limitation on the use of interest earnings on bond proceeds (see,in particular, JM-545) and there is a pending opinion request on the use of such earnings, bond authorizations must contain provisions to account for such earnings and for their use. As you know, our present position is to interpret JM-545 to require that interest earnings on bond proceeds be placed in the interest and sinking fund, except that, until the project is completed, they may, at the issuer's option, be used for construction costs of the authorized project or projects. (There are certain exceptions to this requirement, such as the use of surplus funds by Article XVI, Section 59 districts with the approval of the Texas Water Commission, and certain conduit financings.) More complicated transactions may call for a more complicated flow of funds, but some bond authorizations make no mention of interest earnings on proceeds at all. Please change your documents to account for interest earnings on bond proceeds for bond sales taking place subsequent to your receipt of this letter. If any change in our position is required when the pending opinion comes out we will so advise.

15. We have received questions regarding Attorney General approval of amendments to documents, particularly with respect to conduit financings. It seems to us in most instances that if the amendments are within the scope of those contemplated by the documents, Attorney General approval is probably not necessary. However, those amendments which materially change the nature of the transaction may constitute a "state law reissuance" and thus be required to be submitted. We would encourage bond counsel to contact us to discuss these cases when they occur. An additional consideration is whether the financing was one originally approved by the Attorney General. For these financings we think that, at a minimum, the amendments should be submitted to us for placement in the transcript on file with the Comptroller.

16. There remains some question as to the legal effect of the preamble or recitals in an ordinance or other document. We believe that incorporation of the recitals as a finding of the authorizing entity is the preferred approach. In particular, statements that no petition for referendum has been received and as to the amount of savings for a refunding must be a specific finding of the issuer or be incorporated as a finding. These statements can, of course, be placed in the general certificate or a separate certificate, or, for debt service savings, be shown in the verification report. If there is legal authority on this matter we would appreciate being so apprised.

17. For transcripts submitted following your receipt of this letter, please include a copy of the paying agent/registrar agreement. Such agreement need not be executed, but must be in

final form. Paying agent/registrar agreements are presently included in many of the transcripts we receive, and sometimes certain of their provisions are not acceptable to us. Since we have been requiring changes in those instances, it seems appropriate that all paying agent/registrar agreements be subject to the same scrutiny.

Regarding comments of general import received on my previous letter to All Bond Counsel, dated November 2, 1987 (time certainly does fly) the following is my response.

1. Some bond counsel apparently think that anything that does not affect the validity of a bond is not within the scope of our review. Our position is that we are also looking to legality, and thus request changes to provisions we believe are not in accordance with law, or which are not accurate, even if leaving them unchanged would probably not affect the validity of the bond (see Articles 4398 and 717k-8, Section 3.002(b)). With respect to our requirement to be provided commitment letters for insured bonds, for example, we believe that if bonds bear a legend saying they are insured, we have some duty to determine that those representations are accurate. Even if such bonds were not insured they probably would still be valid with an insurance legend on them, but we do not think it would be appropriate for us to put an approving opinion on such bonds. Other requirements, such as citing the authority for the issuance of the bonds, are primarily for our convenience, but we still feel justified in having such a requirement, which can substantially increase our efficiency in reviewing transcripts.

2. With regard to the requirement that the amount of debt service saving be shown for refundings where such is the consideration for the refunding, I offer the following clarification. We agree that "consideration" might not be the appropriate term, and that rather we are looking for a showing that the refunding has a public purpose. We still believe that the appropriate way to show this is by providing us the actual amount of saving (if this is the purpose for doing the refunding). We would assume that the issuer would want to know this also and thus the information should be available. Again, we do not do this to second guess an issuer as to the amount of saving, but to ascertain that the issuer has focused on the reasons for the refunding.

3. With regard to our requirement for an appropriation certificate in certain circumstances, we would concede that our choice of January 2 of the second succeeding year, rather than November 1 or November 15 of the immediately following year was somewhat arbitrary. (This is in relation to instances where bonds are delivered after the annual tax levy of the issuer, generally in September.) However, since it does not seem to have caused any particular hardship, we will continue to follow the January 2 guideline. Further, we agree that the annual tax levy may not provide for debt service for indebtedness which is not outstanding

at the time of the levy (no anticipatory levy). Additionally, please note that the requirement of an appropriation certificate includes the requirement to certify that such funds are on hand and legally available or to specify the source from which such funds will become legally available.

4. Regarding our request for more specificity in the description of the purpose for which the bonds are being issued, we have modified this position somewhat. For bonds issued pursuant to authorization by an election, the purpose clause should be no broader than the proposition stated in the order calling the election. Thus, for school bonds, the statutory purpose may be recited, if that was the authorized proposition. For other types of obligations sufficient information must be provided for us to determine that the purpose for which the proceeds will be used is within the statutory authorization. For example, a statement that the use of proceeds from a certificate of obligation is to construct a public work is insufficient. That is the statutory language, but not all public works can be constructed by all issuers of certificates of obligation, and we require sufficient information to determine the certificates are being issued for an authorized purpose. (Similarly, notices of intention to issue certificates of obligation must have a more specific description of the purpose than merely the statutory language; they should give members of the public a fair idea of the actual project.)

As you are aware, substantial personnel changes - primarily an increase in the number of lawyers - have taken place in the Public Finance Section. Besides myself, Leroy Grawunder, Carol Polumbo, Teryl Whitfield and Sheela Rai, we have just added Jose Villarreal. While this is a substantial increase in staffing, several factors keep us busy well beyond what is sometimes thought of as a "standard state employee work week". Among these are our new authority, as of November 1 of last year, to review all conduit financings by on-behalf-of corporations. As many of you are aware, these take substantially more time to review. Also, we act as general counsel and issuer's counsel for the Public Finance Authority, and general counsel to the Bond Review Board. We have also recently spent significant time with litigation matters. Finally, we seem to be involved in a number of special projects and to have substantial discussions with many of you regarding problematic or innovative financings, including lease-purchase transactions.

We are pleased to work with the bond community to obtain needed financing for governmental entities in Texas, and try, consistent with the law, to be responsive to those needs. I am very pleased with the work of the attorneys of the Section who are now on board, and know Jose will continue the high standards we have attempted to set.

However, because of the increased workload and number of attorneys in the Section, I feel some restructuring is desirable.

Thus, Leroy Grawunder has been appointed Assistant Chief of the Section. Leroy already has many responsibilities, including primary responsibility for representing the Public Finance Authority and for coordinating litigation. At this time I am also putting Leroy in charge of all matters relating to road districts, water districts and other utility districts. Please contact him directly should financings in those areas need discussion prior to submission. While Leroy will, of course, continue to discuss issues with me as he determines to be appropriate, he will have full authority to resolve all matters concerning these areas.

I would urge you to continue to use Leroy and Carol as your primary contacts in areas which you may have previously discussed with them or with which you know they have been involved. Likewise, please continue to visit directly with Terri and Sheela (and soon, with Jose) regarding issues you have discussed previously with them.

As a final note, while our attorney staffing has increased, our secretarial staffing has not. While Jean Hamil continues her substantial duties, Nancy Bullock has moved on to another position in the Attorney General's Office. Her position is being ably filled by Susan Colvin, and we additionally have a limited amount of clerical help from the division receptionist. We are able to manage with this staffing pattern, I believe, because the attorneys make substantial use of personal computers, drastically reducing the word processing burden on the secretaries.

To repeat, your comments on any of the matters contained in this letter, or any other matters, are welcome.

Sincerely,

Jim Thomassen
Assistant Attorney General
Chief, Public Finance Section

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