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Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 20, 1993

To All Bond Counsel:

Re: 1. Requirements for Attorney General Approval of Certificates of Participation

2. Refunding of Hospital District Revenue Bonds with General Obligation Bonds

3. Filing Requirements

4. Response to Legal Questions

1. Certificates of Participation

As most of you are probably aware, we have in the past approved certificates of participation in conjunction with the approval of lease purchase agreements. We have, however, limited the involvement of the governmental entity (the "lessee") in these transactions, on the theory that the lessee is not, and cannot legally be, the issuer of the certificates. Questions have also arisen in the past regarding which entities can engage in lease purchase financings, and under what circumstances. The purpose of this letter is to review our position in this area, particularly in light of the requirements of the Securities and Exchange Commission Rule 15c2-12 (the "Rule").

Presently, our position is that, in a legally authorized lease purchase financing, the lessee may undertake the following actions with respect to certificates of participation: 1) the lessee may acknowledge that the lease agreement is to be participated, 2) the lessee may agree to make payment to the party designated by the lessor, such as a trustee, and 3) the lessee may provide a certificate to the effect that it has reviewed only the information pertaining to itself, and that such information does not contain erroneous information, or fail to contain information which should be disclosed. Until the advent of the Rule this seemed to be sufficient for counsel to be satisfied that federal securities law requirements in this area had been met.

Our interpretation of the Rule, and of the "no-action" letter from the Securities and Exchange Commission to First Continental Financial Corporation dated June 1, 1990, is that the lessee must "deem final" the official statement, and contract with the underwriter for sufficient copies of the official statement, though this may be done through the use of a representative who may take such action on behalf of the lessee. This requirement raises additional questions under state law. It appears to us that there are only two statutes (other than those statutes specifically addressing certificates of participation) which can be interpreted to authorize by implication the lessee to take such action or designate a representative to take such action. These would be the Public Property Finance Act and Subchapter F of Chapter 351 of the Local Government Code. Additionally, Attorney General Opinion JM-697 would provide the necessary basis for a county to designate a representative to take such action for county jail financings qualifying under that opinion. Statutes which specifically authorize certificates of participation would, by necessary implication, authorize the lessee to take such action directly, without the need of an intermediary representative. Thus, our tentative position is that, other than statutes which specifically authorize certificates of participation, these are the only two statutes (relating to local governments - this letter does not address state agencies) which can be used for such purposes by lessees which are not home rule cities. Home rule cities probably could find such authority in their charters, if such contained broad grants of powers, and counties may avail themselves of JM-697 for county jails.

An additional area of concern, relating to certificates of participation, is the power of entities to enter into lease purchase financing in the first place. We think that, in most cases, specific authority to enter into lease purchase financings is necessary to do this type of transaction. That is, the separate power to lease and the power to purchase do not result in the power to do a lease purchase financing. Such power may, however, authorize the lease purchase of an existing facility which a governmental entity might otherwise lease or purchase. For example, if an entity is interested in leasing an existing facility, and the owner is willing to sell the facility on a lease-purchase basis, it seems to us that it is a too restrictive interpretation to say the entity could not enter into that type of an agreement. However, it appears to us to be a different situation when a developer offers to build a new building, obtaining the financing by participating the lease purchase agreement. This would be the case even if the federal securities laws could be satisfied without the issuer being involved in circulation of an official statement. With the advent of the Rule, it would seem to us any certificated lease purchase financing would require specific authority (or be within the categories indicated

above: Public Property Finance Act, Subchapter F of Chapter 351, JM-697 or homerule city).

The intermediate case lease purchase financing, whereby the lease purchase agreement is not certificated, but rather is assigned totally to a single purchaser, probably is not substantially different from the certificated scenario. However, there may be situations which we have not considered which might be distinguishable. One does not have the problem of complying with the Rule, of course, nor would such a transaction have to be submitted to the Attorney General for approval.

Please also note, as a procedural matter, that it would be most helpful to contact the Public Finance Section prior to submitting a participation transaction. We have formulated some positions that will affect the documentation. For example, it is our position that, unless specifically authorized by statute, the governmental entity is not to be a party to a trust indenture.

Any comments, information or argument you might wish to supply to us on this matter would be welcome.

2. Hospital Districts

We will not approve the refunding of hospital district revenue bonds with general obligation bonds without the benefit of higher authority. There are numerous, complex and constitutional issues which arise in these financings, including interpreting the language of special acts and the timing of enaction of various statutes. However, depending on the circumstances, if a district wishes to proceed with a validation action, we will not necessarily take a position in opposition to the proposed financing, and may take a basically neutral position, letting the court make the appropriate determination. Another option, of course, is for a district to obtain a formal Attorney General Opinion on the matter. A formal Attorney General Opinion would be precedent setting for the Public Finance Section. A specific validation action has, of course, no precedental value.

3. Filing Requirements

Please be reminded that (i) executed versions of documents submitted in unexecuted form and outstanding requirements for final approval are to be submitted at least three working days and (ii) initial bond or bonds at least five working days, prior to the date of closing or the date approval is requested. Do not expect to get the approving opinion on the day the outstanding items and/or the initial bond(s) are submitted. (Please refer again to the All Bond

Counsel Letter dated June 4, 1992.) Additionally, it would be helpful if bond counsel would indicate the proposed closing date at the time a transcript is initially filed or as soon as such information is known.

4. Response to Legal Questions

For other than routine questions or those involving past practices of this office, we request that questions regarding legal interpretations or constructions or novel financings be submitted in writing, together with a summary of the legal authority and reasoning supporting the position advocated. Given the volume and complexity of transcripts we continue to receive and the other projects and questions with which we are involved, it has been and is difficult for us to keep track of the questions asked or to undertake lengthy research. (With respect to the latter, we not only do not have the resources, but it is not appropriately our role to undertake such research.) Also, please keep in mind that there will be one less attorney in the Public Finance Section for some time.

Finally, thanks to all of you for your considerable help in what has been a truly fascinating experience. Friday, January 22 will be my last official day, though I do not plan to be in the office after Wednesday, January 20. I will take up my duties at the Bond Review Board on Monday, January 25. Sheela Rai will be the acting chief of the Section as of that date. I urge your continuing support of the Public Finance Section and the fine people there, and of Sheela, in whose ability to be an exemplary Chief of the Public Finance Section I have absolute confidence. Again, thank you.

Sincerely,

Jim Thomassen
Assistant Attorney General
Chief, Public Finance Section

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