



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 19, 2017

To All Bond Counsel:

RE: Proposed Voter Affidavit and Eligible Escrow Securities for Refunding Bonds

The purpose of this letter is to: (1) propose a voter affidavit as required by House Bill 2358; and (2) identify which types of investment securities are eligible for refunding bonds under chapter 1207 of the Government Code.

1. Proposed Voter Affidavit. During the 85th regular session, the legislature passed House Bill 2358, which adds section 49.1025 to the Texas Water Code and becomes effective on January 1, 2018. Section 49.1025 requires an election officer for a water district confirmation and any other jointly held election to provide the voter a form of affidavit to be completed. Tex. Water Code § 49.1025(c). The voter affidavit must include certain statements, including confirmation that the voter is not a developer of property in the district and has not received monetary consideration from the developer for his or her vote in the election. § 49.1025(f), (g).

Section 49.1025 requires the Office of the Attorney General to prescribe the form of the voter affidavit. Attached as Exhibit A is a proposed form of voter affidavit for your consideration. Please provide any comments you have to this affidavit within thirty days of the date of this letter.

2. Qualifying Escrow Securities. With respect to federal securities, there are two main categories:

(1) direct noncallable obligations of the United States, including obligations that are unconditionally guaranteed by the United States; and

(2) noncallable obligations of an agency or instrumentality of the United States, including obligations that are unconditionally guaranteed or insured by the agency or instrumentality and that, on the date the governing body of the issuer adopts or approves the proceedings authorizing the issuance of refunding bonds, are rated as to investment quality by a nationally recognized investment rating firm not less than AAA or its equivalent.

TEX. GOV'T CODE § 1207.062(b)(1),(2) (emphasis added). Subsection (b)(1) regards direct obligations of the United States. Subsection (b)(2) regards obligations of an agency or instrumentality of the United States. Each subsection also includes an expansive clause preceded by the word "including", defined by the Code Construction Act as a term of "enlargement and not of limitation or exclusive enumeration". TEX. GOV'T CODE § 311.005(13).

When read in this context, each category denotes two types: a direct obligation of the issuing entity specified in each category, or an obligation that is not directly issued by that entity but the entity unconditionally guarantees the obligation as if it were its own obligation. Therefore, a security would fall under subsection (b)(1) if the United States directly issued that obligation or if the United States unconditionally guaranteed the obligation of another entity. Likewise, provided the rating requirement is met, a security would fall under subsection (b)(2) if a federal agency or instrumentality issued the obligation, or if the federal agency or instrumentality unconditionally guaranteed or insured the obligation of another entity. The only situation in which an obligation of a federal instrumentality or agency would not require a “AAA” rating is if the United States unconditionally guaranteed the obligation issued by the agency or federal instrumentality.

Because section 1207.062 does not expressly define what entities are considered to be federal agencies or instrumentalities, we receive many questions about whether a particular security qualifies as an escrow security. Whether an entity is treated as an agency or instrumentality of the United States depends upon the context in which the determination is made.¹ The context here involves how the security issued by the entity is treated under federal law. Therefore, we have relied heavily on how the federal enabling legislation describes that security and the issuer of the security. With this narrow focus in mind, attached as Exhibit B is a chart of federal securities we will accept to fund an escrow under chapter 1207. For those we construe to be obligations of federal agencies or instrumentalities (or obligations unconditionally guaranteed or insured by those entities), the chart indicates that evidence of a rating of AAA or its equivalent must be submitted.

As federal agencies and instrumentalities are subject to changes in law with respect to structure, funding, or guarantee, the issuer is responsible for confirming that at the time of funding its escrow there have been no changes in law that would cause the security to no longer qualify under section 1207.062. Moreover, nothing in this letter should be construed as taking a position on the fiscal appropriateness of any investment security. Rather, we are merely stating which securities we believe section 1207.062 authorizes for investments in an escrow deposit for escrow securities subscribed as of the date of this letter.

You will note that securities issued by the Federal Home Loan Bank (FHLB) are included on the attached chart. Governor Abbott signed into law H.B. 2928, amending section 2256.009(a) of the Government Code to include the FHLB as a United States instrumentality. Accordingly, we will continue to accept FHLB securities as escrow securities under section 1207.062, provided that the rating requirement has been met.

Sincerely,

Leslie Brock
Assistant Attorney General
Chief, Public Finance Division

¹ See Op. Tex. Att’y Gen. No. KP-0128 (2017).

7. On the date of this election, I had not been found by final judgment of a court to be totally mentally incapacitated or partially mentally incapacitated without the right to vote, in accordance with Texas Election Code, Section 11.002(a)(3).
8. On the date of this election, I had not been convicted of a felony or, if so convicted, had been fully discharged, pardoned, or otherwise released from the resulting disability to vote in accordance with Texas Election Code, Section 11.002(a)(4).
9. I am not a developer of property in the District, related within the third degree of affinity or consanguinity to a developer of property in the District, or an employee of a developer of property in the District. I have not received monetary consideration from a developer of property in the District for my vote in this election.
10. I understand that under Section 49.052(d) of the Texas Water Code “developer of property in the district” means any person who owns land located within the District, and who has divided or proposes to divide the land into two or more parts for the purpose of laying out any subdivision or any tract of land or any addition to any town or city, or for laying out suburban lots or building lots, or any lots, streets, alleys, or parks or other portions intended for public use, or the use of purchasers or owners of lots fronting thereon or adjacent thereto.
11. I understand that a person who makes a false statement under oath commits a Class A misdemeanor under Texas Penal Code, Section 37.02.

By signing this affidavit, I swear, on the ____ day of _____, 20____, that the above information and statements are true.

Signature of Affiant

Before me, the undersigned authority, on this day personally appeared _____,
Name of Affiant
known to me through _____ to be the person whose name is
Description of Identity Card or Other Document
subscribed to the foregoing instrument and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of _____, 20____.

[NOTARY SEAL]

Notary Public, State of Texas

Exhibit B

Issuer or Guarantor of Security ¹	Rating Letter of AAA or its Equivalent Required ³	Applicable Federal Statute Regarding the Guaranty or Security
U.S. Treasury Securities (Bonds, Notes, and Bills), including State and Local Government Series (SLGS)	No	31 U.S.C. §§ 3102-3104, 3112(a), 3121
Agency for International Development (AID)	Yes	22 U.S.C. §§ 2181, 2182, 2183(d), 2186
Federal Farm Credit Banks (FFCB)	Yes	12 U.S.C. §§ 2011 and 2023.
Federal Home Loan Bank (FHLB)	Yes	12 U.S.C. § 1431; see also 85(R) H.B. No. 2928 amending Texas Gov't Code § 2256.009(a)(1) (codifying FHLB as a U.S. instrumentality).
Federal Home Loan Mortgage Corporation (FHLMC)	Yes	12 U.S.C. § 1455
Federal National Mortgage Association (FNMA)	Yes	12 U.S.C. § 1719
Government National Mortgage Association (GNMA)	Yes	12 U.S.C. § 1721
Housing and Urban Development (HUD)	No.	42 U.S.C. § 5308
Private Export Funding Corporation ² (PEFCO) – <u>Interest Component Only</u>	Yes	12 U.S.C. §§ 635(a)(1), 635e (interest guaranteed by the Export-Import Bank of the U.S. (Eximbank))
Resolution Funding Corporation ² (REFCORP) -- <u>Interest Component Only</u>	No	12 U.S.C. § 1441b(f)(2)(E) (Treasury back-up for interest component)
Tennessee Valley Authority (TVA)	Yes	16 U.S.C. § 831n

Notes:

1. The escrow security may not be subject to early redemption at any time.
2. For this particular security, the principal component does not qualify.
3. Evidence of the qualifying rating may be shown by providing the screen shot of the security with the final rating designation. If a particular component is stripped from an underlying security, the issuer will need to provide a screen shot for both the strip component, and the underlying security from which the component was stripped.