Comments to Senate Bill No. 901

The mission of the Pennsylvania Association of Bond Lawyers ("PABL") is to: (i) provide a forum for the exchange of information and ideas in the field of public finance; and (ii) provide opportunities for the education of its members, legislators, regulators, and the judiciary regarding state and local government borrowings and other public finance matters. In furtherance of that mission, we offer comments on SB 901 (the "Bill").

The Pennsylvania Local Government Unit Debt Act (the "Act") was enacted by the Pennsylvania legislature in 1972 in compliance with Section 10 of Article IX of the Pennsylvania Constitution, which provides in pertinent part: "Subject only to the restrictions imposed by this section, the General Assembly shall prescribe the debt limits of all units of local government including municipalities and school districts." The Act, which has been amended, reenacted, and recodified since its original enactment, has been the exclusive method for borrowing by local government units in the Commonwealth of Pennsylvania (the "Commonwealth") since 1972 and has enabled the successful funding of thousands of municipal projects, many of which were mandated, that have benefited millions of residents of the Commonwealth during the past forty-one years.

We believe our comments raise significant issues, particularly constitutional issues, relating to the Bill's treatment of self-liquidating debt and the mandated surrender by local officials to the Department of Community and Economic Development (the "Department") of their autonomy for decision making in connection with matters that affect their constituencies, economically or otherwise. Additionally, the Bill establishes new restrictions on the incurrence of debt and introduces unprecedented administrative and procedural requirements that may impair or delay the required funding of municipal projects that are subject to contractual deadlines or regulatory mandates, or that may result in lost refunding opportunities and/or interest rate savings due to changing financial markets.

1. The amendment of the definition of "Self-Liquidating Debt" in Section 8002 of the Act.

The Bill proposes to amend the Act by adding to the definition of "Self-Liquidating Debt" the statement that "A debt for which payments have been made under a guaranty shall not be considered self-liquidating." PABL believes this concept is already contained in the Act and we are concerned that this statement could be read to eliminate the existing exclusions for debt that is partially self-liquidating or debt that may become self-liquidating.

The total debt of a local government unit is limited under the Act (53 Pa.C.S. §8022). The limit is a function of regularly recurring net revenues of the local government which are derived from taxes and fees. Pursuant to authority granted by the Pennsylvania Constitution, debt that is qualified as self-liquidating may be excluded in whole or in part by a local government unit from the amount of debt charged against its capacity to incur additional debt. Self-liquidating debt is debt supported by user revenues, as contrasted with general obligation debt that is payable from taxes and general revenues. It may be issued by a municipality authority or by the local government unit itself in the form of guaranteed revenue bonds.

897644.2

Section 10 of Article IX of the Constitution of the Commonwealth empowers the General Assembly to prescribe the debt limits for local government units as a percentage of total revenues over a specific period. This Section provides specifically that "The debt limit to be prescribed in every such case shall exclude all indebtedness (1) for any project to the extent that it is self-liquidating or self-supporting."

The most common instances of self-liquidating debt are public sewer and water system debt. It is relevant each time a local government unit desires to incur debt since the Act requires a demonstration that the amount of debt proposed to be issued taking together with other outstanding debt will not exceed its borrowing limit. If either the debt to be incurred or any outstanding debt qualifies as self-liquidating debt, in whole or in part, the percentage which is self-liquidating may be excluded from the total debt outstanding in determining whether the local government unit will remain within its debt limit. As a part of the sworn statement required to be given by officers of the local government unit, officers are also required to certify either that debt previously excluded as self-liquidating debt remains self-liquidating or, if there has been a change in the amount that is self-liquidating (53 Pa.C.S §8110(b)).

Presumably, if payments have been made under a guaranty there were insufficient rents, rates or other charges available to make the underlying payment when due. Under the Act as it exists such debt would not then be self-liquidating, at least to the extent of the shortfall in rents, rates or other charges from which the debt was expected to be paid. The law already requires that this change in circumstances be certified, under oath, to the Department if the local government unit seeks to incur other debt while these circumstances prevail.

Despite some recent and widely reported cases, defaults of municipal obligations are fortunately very rare; particularly in Pennsylvania, given that our Commonwealth contains more issuers of municipal obligations than any other state or commonwealth other than Illinois. In the collective experience of PABL members, the risk covered by a municipal guaranty is the risk of a temporary shortfall in net revenues available to pay debt service rather than a permanent loss of the underlying revenue system. Municipality authority-owned water and sewer systems, for example, may experience unexpected losses (e.g., closure of a large commercial customer) or expenses (e.g., large pumping station failure) that may require implementation of user rate increases that will take several months to produce a sufficient assured revenue stream. The shortfall in amounts available for debt service are typically only a percentage of the amount due. Once user fees or other revenue or expense adjustments are made, the system will return to self-liquidating status.

While many user fee based projects are designed to be fully supported by user revenues, not all are. For example, there are many communities in which elected officials believe that public water and sewer systems enhance public health and safety and increase property values in the general service areas. As a matter of public policy they may elect to set user fees at levels that do not produce a fully self-liquidating system, deliberately subsidizing the utility system costs using general taxes and revenues on the theory that all the taxpayers benefit from the existence of these public utilities, not just the rate payers. Similarly, while some municipalities have fully self-liquidating public parking facilities, some communities desiring to provide public parking facilities may face demographic and geographic challenges that make it difficult to collect enough revenues, particularly in early years following construction of garages, to fully

self liquidate construction related debt. For example, competition from churches and other nonprofit organizations that may offer parking at below-market rates during certain days when their members do not need parking will adversely affect the revenues of a competing public parking facility. Redevelopment efforts, which often require years to attract sufficient residents and business to fully occupy public parking garages built as part of the infrastructure supporting redevelopment efforts, means that such garages will experience reduced revenues in the early years.

PABL believes it is important to clarify the proposed language to conform to the Constitutional requirement that local government units have the constitutional authority to determine lease rental debt to be self-liquidating. Properly enforced under existing law these provisions have been part of a well designed and functioning system for incurring and managing local government unit debt for over four decades. This includes debt that is partially self-liquidating either by design or circumstances. It is also important to recognize that while self-liquidating debt may lose this status for a period of time, in the vast majority of circumstances such status will be reestablished. PABL thus urges that this statement either be removed from the Bill as unnecessary since the Act already provides this in substance, or that the statement be amended by adding a further proviso that it applies only to the extent such debt had been previously qualified for exclusion and that such qualification status may be reestablished as facts and circumstances warrant in the manner already provided in the Act.

2. **The new definition of "Working capital" in Section 8002(c) of the Act.**

The Bill defines "Working capital," in relevant part, as "An amount which constitutes, under generally accepted accounting principles, the cost of the day-to-day operations of the project as well as a proper allowance for contingencies."

This definition appears in the Bill in only two instances: (i) in the definition of "Project Costs" by permitting inclusion of ". . . a reasonable initial working capital for operating the project and a proper allowance for contingencies…"; and, (ii) in the list of items the Department may require of the local government unit including, "If the local government unit intends that the debt to be issued provides that over 10% of the proceeds of the debt will be used for working capital, information satisfactory to the department that the financing is a sound financial transaction and is in the best long-term financial interest of the local government unit."[1] Assuming that the local government unit desires to finance such costs on a tax-exempt basis, the use of working capital by a local government unit in both of these instances would be limited under the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder (the "Code") except in narrowly defined circumstances, as discussed below.

The main thrust of the term "Working capital" in the Bill seems to be to prevent the issuer of the debt to finance the working capital of a guarantor. Such an arrangement is prohibited under the Code, and therefore, PABL believes, this portion of the definition of "Working capital" in the Bill is unnecessary and confusing.

---

[1] See Section 8102.1(a)(7) of the Bill.

Tax-exempt working capital financings fall into one of three categories: (i) de-minimus working capital expenditures (e.g. small amounts generally under 5% of the borrowing amount), (ii) extraordinary, non-recurring working capital (e.g. costs of litigation, settlements and judgments), and (iii) restricted working capital which is the more common tax-exempt financed category of working capital expenditures. Restricted working capital expenditures are generally used for operating expenses. This type of financing is used by those local government units in a deficit situation needing to borrow to bridge a short-term deficit, perhaps where a mismatch exists between incoming tax revenues (property taxes) and current operating expenses. Typically, tax anticipation notes and tax anticipation bonds (both addressed by the Act) are used for these financings; and such financings generally have a maturity of not more than 13 months from the date of the debt's issuance.

Therefore, should the local government unit desire to finance working capital on a tax-exempt basis, the Bill's expansion of the use of working capital to fund day-to-day operations of a project must fall within a permitted use under the Act and the Code. To that end, we note that the Act does not include such a borrowing under the definition of "projects." It is hard to envision a situation where a local government unit would be legally permitted to fund such costs on a tax-exempt basis for a start-up project under the Code.

The Bill additionally defines "Working capital," as follows: "Reimbursements under a guaranty or amounts to address budgetary deficits not related to the project shall not constitute reasonable working capital in connection with the incurring of debt under this subpart." The prohibition against using working capital in this instance, as set forth in the definition, is currently prohibited under the Code. No avenue is available to an issuer of tax-exempt debt, guaranteed by a governmental entity, to use the proceeds of the debt borrowing to reimburse the guarantor for its own budget deficits. As referenced earlier, as such an arrangement is limited under the Code, PABL believes this portion of the definition of "Working capital" in the Bill is unnecessary and confusing.

3. **The amendments made to Section 8005(c) of the Act, limiting guaranties to Federally or Commonwealth funded projects.**

The Bill proposes to remove from local government units the power to guaranty debt in connection with projects that the local government unit is authorized to own, acquire, subsidize, operate, or lease by limiting this power only to "debt incurred[2] in connection with a loan from the Federal (*sic)* Government, the Pennsylvania Infrastructure Investment Authority or any other instrumentality or agency of the Commonwealth for a water or sanitary sewer project."

This modification removes from local governments a powerful financial option that has been long and widely used to reduce the cost of financing lawful government projects for the benefit of millions of Pennsylvanian residents over four decades. Section 8005 of the Act has

[2] As a drafting note, we point out that the current draft of the Bill in this section refers to a guaranty of "municipal authority debt." The Act uses the defined term "Authority" to include municipality authorities as does the Municipality Authorities Act that authorizes and governs the type of authorities apparently referred to in this section. The Municipality Authorities Act defines "Municipal Authority" to mean "the body or board authorized by law to enact ordinances or adopt resolutions for the particular municipality"; obviously a very different meaning than is intended by the drafter here.

empowered local government units to use municipality and other authorities as alternatives to handling all governmental functions through the local government itself. The power to incur debt similar in form to "lease rental debt" as defined in the Act existed under prior law in Pennsylvania for decades preceding the passage of the Act. The reasons and advantages are myriad. Projects may be undertaken and managed by people in addition to the elected officials, thereby providing added expertise, stability of management, and often allowing for better customer service. This power is confined to projects which the local government unit could undertake itself. So the proposed limitation would mean only that such projects if undertaken by an authority would be denied the benefit of a valuable financial guaranty.

We note that the programs of the Pennsylvania Infrastructure Investment Authority and federal government that are exempted from this limitation are and always have been limited in the amount of financing assistance available and are targeted to projects for which credit is not available elsewhere at reasonable rates and terms. The majority of water and sanitary sewer financing projects undertaken in the Commonwealth do not qualify for assistance from these programs and many that do cannot be served by these programs for lack of available funding.

We also note that the General Assembly has recently conferred power on local governments and authorities to undertake storm water management projects for the benefit of Pennsylvania communities. Similarly, the Commonwealth has partnered with many local communities to encourage economic development and infrastructure improvements to better the lives of Pennsylvania residents. This provision, which would both limit and increase the cost of financing these projects seems at cross purposes with these Commonwealth policies.

The general economic downturn of the past several years has reduced funding at both the federal and Commonwealth levels for such programs. At the same time the marketplace for municipal debt following the financial crises of 2008/2009 has increased the credit requirements of lenders and investors, making the guaranty of the local government perhaps more valuable than ever in allowing lawful government projects access to capital and reducing the cost of such projects to Pennsylvania consumers. While the market requirements for guaranties have increased we also point out that defaults have been and remain rare and few guaranties are ever called upon.

Municipality authorities are not wholly independent of the local governments that create them. The Municipality Authorities Act reserves the power to the incorporating municipality to limit the purposes of an authority. Further, the Act allows the incorporating municipality at any time to assume the projects and property of an authority. These reserved powers provide local government units guarantying authority debt a large measure of control and protection. Of course, elected officials are human and poor judgment and inattention are risks of human endeavor. PABL believes that despite the rare instances in which local governments have had to pay under guaranties, the value the market confers on guaranteed revenue debt outweighs this risk and denying this benefit to the vast majority of local government units for the sake of avoiding this risk for a very few is unwarranted.

The Act was crafted as a procedural statute to implement the new debt limitations contained in the 1968 amendments to the Pennsylvania Constitution. If the General Assembly determines that the power of local governments to undertake particular types of projects should

be removed, PABL believes the proper legislative approach would be to remove those powers directly in applicable municipal codes to the extent permitted by the Constitution rather than to undermine that power by reducing the options for financing such projects. PABL urges the General Assembly to preserve the guaranty provisions of LGUDA without the proposed limitation.

4. **The amendments made to Section 8007 of the Act regarding reimbursements.**

The Bill limits the payment of costs of projects, as follows: "[C]osts incurred before the fiscal year immediately preceding the date the debt is incurred may not be included in the cost of a project. Reimbursements under a guaranty or amounts to address budgetary deficits not related to the project shall not constitute a cost of a project in connection with the incurring of debt under this subpart."

PABL believes that this formulaic limit on the reimbursement of costs based on fiscal years is unwarranted. Bonds are issued for capital projects, mostly construction, for which legitimate costs are incurred years before such bonds are issued. Additionally, the area of "reimbursement" has clear meaning within the Code in connection with the issuance of tax-exempt debt. Generally, a local government unit cannot reimburse itself for costs that were paid more than 60 days before a reimbursement resolution was adopted (or if no reimbursement resolution was adopted, then not more than 60 days before the debt was issued). The reimbursement resolution must describe the project with some detail and set forth a maximum amount of bonds expected to be issued. Finally, the bond proceeds must be allocated to a capital expenditure of the local government unit not more than three years from the date the reimbursed expenditure was paid.

The Code clearly provides time frames for reimbursement of prior capital expenditures that have proven to be workable and sets the nationwide standard for tax-exempt bond issuers and counsel. An example of the problem created by the proposed limitation in the Bill is as follows.

Township A (on a calendar year basis) starts planning to construct a public safety building in March. It engages an engineer to start plans and hires an environmental company to conduct a Phase I study. These are completed in October. Once the engineer completes the design, the Township then goes out to bid the project in November. Once the bids come back, the Township selects that lowest responsible bidder in December. Once the Township has a good idea of the cost of the public safety building it issues debt in late January/early February. In this example, the Township would not be able to finance all the good construction-related costs it incurred up to the issuance of the debt.

PABL believes that this limitation in the Bill would force local governments to plan, design, bid and award projects all within the same fiscal year. This modification to the Act does not take into account weather delays, force majeure, labor delays, etc.

The last sentence in the newly inserted Section 8007 regarding reimbursements under a guaranty of amounts to address budgetary deficits not related to the project has been addressed in our comments in point number 2 above. Additionally, we note that the Code prohibits the

reimbursement of working capital expenditures incurred prior to the issuance of debt except in the case of extraordinary, non-recurring expenditures (e.g. costs of litigation, settlements and judgments).

5. The new preliminary approval requirements as set forth in Section 8102.1 of the Act.

The new Section 8102.1 adds a preliminary approval requirement, which must be obtained by a local government unit prior to its issuance of general obligation bonds or notes or guaranteed revenue bonds or notes constituting nonelectoral debt or any agreement evidencing lease rental debt.

The evidence required to be provided to the Department by the local government unit to obtain such preliminary approval includes, by way of example, the following subjective requirements (emphasis added):

- Information "*satisfactory to the department*" that the local government unit has submitted a "*current*" audited financial statement;
- Information demonstrating *the type and amount of financial security* proposed to insure the completion of the project;
- Information "*satisfactory to the department*" that the local government unit is up to date on all of its municipal securities disclosures;
- Information "*satisfactory to the department*" that the proposed debt is self-liquidating, if applicable;
- Information "*satisfactory to the department*" that, where applicable, the existing debt continues to be treated as subsidized or self-liquidating;
- If the local government unit wishes to issue refunding debt, information "*satisfactory to the department*" that the refunding is a "*sound financial transaction and is in the best long-term financial interest of the local government unit*;"
- If the local government unit intends that the debt to be issued provides that over 10% of the proceeds will be used for working capital, information "*satisfactory to the department*" that the financing is a "*sound financial transaction and is in the best long-term financial interest of the local government unit.*"

The preliminary approval conditions contained in Section 8102.1(a) provide subjective, rather than objective, standards to be applied by appointed employees to overrule elected officials. No guidance is provided to a local government unit as to (i) what constitutes information "satisfactory to the department," (ii) what constitutes a "current" audited financial statement; (iii) how to demonstrate the type and amount of financial security proposed or determine the intent of the term "financial security"; (iv) how to demonstrate that it is "up to date" on all of its disclosure obligations,[3] or (v) how to demonstrate to the Department that a

[3] PABL questions the applicability of a municipal securities requirement to the preliminary approval process to be undertaken by a local government unit in connection with its ability to incur debt. Disclosure obligations are imposed pursuant to United States Securities and Exchange Commission Rule 15c2-12 under the circumstances defined therein. We note that adequate disclosure is an issue for consideration by the underwriter in determining its ability to market bonds of a local government unit. Further, a municipal securities requirement would not be applicable if the debt to be incurred is privately placed with a bank or other lending institution.

financing or refunding is a "sound financial transaction and is in the best long-term financial interest of the local government unit." Although Section 8102.1(a) provides that the Department may prescribe the form of certificate, pursuant to which the local government unit must present the required information, no such certificate is included in Section 8102.1(a). The general lack of specificity, and the subjective nature of these preliminary approval requirements, constitute a significant departure from the Act, which sets forth with specificity those requirements which must be satisfied by a local government unit prior to the incurrence of debt.

Section 8102.1(b) provides the Department with the right to request additional information which the Department deems necessary to "*avoid an unsound financial transaction or a financial transaction which is not in the best long-term financial interest of the local government unit*." PABL notes three primary concerns relative to this subparagraph of the Section. First, PABL is concerned that the subjective standard contained in Section 8102.1(b) unconstitutionally transfers to the Department, from the duly elected governing body of the local government unit, the ultimate decision-making ability relative to a local government unit's decision to incur debt to undertake permitted projects under the Act. Second, this standard, coupled with the subjective standards in Section 8102.1(a), would require the Department to employ or retain finance professionals (as well as, potentially, engineers, architects and others) qualified to make the determinations referenced therein. Notwithstanding the retention of trained finance professionals by the Department, we are concerned that no Department professional would be in an adequate position to determine whether a financial transaction for any local government unit is "unsound" or "not in the best long-term financial interest of the local government unit." As noted earlier, the Commonwealth contains more issuers of municipal obligations than any other state or commonwealth other than Illinois. It would be difficult for any Department professional to have an appreciation of the "best long-term financial interest" of each of them. Third, given the subjective nature of the standards contained in Section 8102.1(a) coupled with the determinations required to be made by the Department in Section 8102.1(b), it seems likely that the Department will be required to request additional information from each local government unit submitting a preliminary approval request so that it will be in a position to make the determinations required by it under this Section.

Section 8102.1(c) provides that upon the Department's review of the filing made by the local government unit under Section 8102.1(a), and its receipt of any additional information requested under 8102.1(b), the Department shall determine whether it will issue its preliminary approval of debt. An appeal opportunity is provided should a local government unit receive a preliminary disapproval. This subsection also provides that the Department shall have 60 days after receipt of the information set forth in Section 8102.1(a) to issue a preliminary approval or disapproval. Following the receipt of preliminary approval, the local government unit will be required to undertake the approval process currently included in the Act. The timing component of any financing considered by a local government unit is a critical one. A local government unit, with the assistance of its appointed professionals, must consider the interest rate environment, together with the timing of the project to be financed with bond or note proceeds (that is, when the money is required by the local government unit to accomplish the desired project), when undertaking its decision to borrow money. Additionally, it must consider the timing associated with any statutorily-required approval process. The undertaking of the preliminary approval process, together with the undertaking by the local government unit of the

current approval process under the Act, significantly increases the approval process component of a municipal financing. The longer approval process will impair or delay the required funding of projects, if the interest rate environment changes during the approval process. In addition, refunding opportunities may be lost.

We also note that the provisions of new Section 8102.1 will most likely result in increased costs to the local government unit, as the local government unit works to assemble the information required to satisfy the conditions of Section 8102.1(a). Such work may require a local government unit to partner with its finance professionals to assist it in assembling the materials required by it to satisfy such requirements, resulting in increased costs.

Finally, after having undertaken the preliminary approval process and the current approval process under the Act, Section 8102.1(e) limits the time period in which the local government unit may incur the debt, once approved. As mentioned above, the interest rate environment may change during the lengthy approval process discussed above, or the approved project may be delayed for any number of reasons outside of the control of the local government unit. Additionally, the local government unit has most likely incurred meaningful costs in connection with such approval process. PABL questions the appropriateness of imposing such a limitation on the ability of a local government unit to incur the debt, once approved. The result may force a local government unit to determine whether to undertake the approval process again – resulting in additional delay – or to abandon an approved project all together. This limitation seems to have no public purpose.

6. Limitation on the financing of costs of issuance, as set forth in Section 8111(a)(9).

Section 8111(a)(9) of the Bill provides the following: "Not more than 2% of debt proceeds may be distributed for the cost of issuing the debt". Under the Code, and in connection with the issuance of tax-exempt debt, costs of issuance may include, but are not limited to, filing fees (including those fees required under the Act), the costs of advertisement of legal notices (including the two legal notices required under the Act), paying agent or trustee fees, bond counsel fees, solicitor fees, underwriter's counsel fees, financial advisor fees, rating agency fees, printing fees, bank fees, underwriter's discount, and the fees of other professionals, including engineers and accountants. Further, under the Code, government issuers are not subject to a limitation on the amount of costs of issuance financed by tax-exempt debt.

While the 2% limitation may appear reasonable in a larger financing, many financings undertaken by a local government unit are smaller. By way of example, if a local government unit determines to finance a new money project by issuing a bond or note in the aggregate principal amount of $700,000 that is purchased by a bank, the 2% limitation on costs of issuance equals $14,000. Taking into consideration the amendments to the filing fee provisions of the Act as set forth in the Bill, the filing fee for a $700,000 issuance equals $271.88. For purposes of this example, the estimated costs of undertaking the publication of two legal notices equals $650. After deducting these two Act-related costs, approximately $13,000 remains available to the local government unit to be applied to all other costs of issuance.

This limitation imposes a burden on a local government unit should it desire to undertake a financing which may otherwise result in savings to it or be important or beneficial to the local government unit.

7. New Sections 8212 and 8272 of the Act, regarding the regulation of the practice of law.

Sections 8212 and 8272 of the Act raise concerns regarding the constitutionality of the Bill under Article V, Section 10 of the Pennsylvania Constitution, which vests the Pennsylvania Supreme Court with the exclusive jurisdiction to regulate the practice of law in Pennsylvania. Article V, Section 10 provides in part:

> The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law ….

Pa. Const. Art. V, § 10(c).

PABL notes that both of these proposed amendments regulate the practice of law, and therefore are unconstitutional. See, e.g., Wajert v. State Ethics Comm'n, 420 A.2d 439 (Pa. 1980) (State Ethics Act's one-year prohibition on ability of common pleas court judge to represent clients before court following judge's resignation "constitutes an infringement on the Supreme Court's inherent and exclusive power to govern the conduct of those privileged to practice law in this Commonwealth").

8. Treatment of costs upon refunding, and the deletion of Section 8242(a)(2.1).

Section 8242(a)(2.1) of the Act currently allows a local government unit to use proceeds of a refunding issue to pay termination payments required under a qualified interest rate management agreement (the "Termination Provision"). The Bill removes the Termination Provision from the Act. Termination fees are financed only when the refunding saves the municipality money because the refunding is less expensive than continuing a qualified interest rate management agreement. No public purpose is served by eliminating the Termination Provision.

Removing the Termination Provision from the Act would put a local government unit which has existing qualified interest rate management agreements in a position where it would be unable to use proceeds of a refunding issue to terminate a qualified interest rate management agreement. A local government unit with existing qualified interest rate management agreements relied on Section 8242(a)(2.1) of the Act when making the determination to enter into such agreements. By taking away the right to terminate with bond proceeds, a local government unit would be unable to take advantage of lower interest rates for refinancing

purposes. Removing the Termination Provision would also take away a right that exists in Treasury Regulation 1.148-4(h)(3), which permits issuers of tax-exempt debt to use proceeds of such debt to terminate qualified interest rate management agreements. By removing the Termination Provision, the General Assembly would also put a local government unit at a disadvantage compared to its counterparts in other states, where a local government unit may have the ability to refinance existing debt by using proceeds of a refunding issue to terminate qualified interest rate management agreements.

9. The new provisions of Sections 8272 and 8273 of the Act.

Proposed Section 8272 sets forth criminal and monetary sanctions for those who "knowingly participate in an ultra vires act" of a local government unit. The Section applies to any officer or member of the governing body of a local government unit and also applies to any "member" of a law firm or a financial advisor firm who assists the local government unit.[4]

Section 8272 defines an "ultra vires act" as an act done "when the local government unit is without authority to perform the act" or "when the act is *not explicitly prohibited, but is in excess of the authority granted* to the local government unit." PABL is concerned that this provision lacks clarity and introduces criminal law provisions into a procedural act. We note that Section 8272 does not identify the party charged with undertaking the determination of whether an ultra vires act has been committed; and, the definition does not describe the nature of the "act" referenced therein. The definition does not reference the Act. Further, the phrase "*not explicitly prohibited, but is in excess of the authority granted*" is vague and provides no guidance to those potentially subject to its provisions.

As it relates to those individuals who may be subject to Section 8272, we question whether the phrase "any officer or member of the governing body" includes those individuals who are employed by the local government unit and support the governing body. Section 8272(a) also uses the phrase "any member of a law firm or a financial advisor firm." We question whether the term "member" as used in this phrase is intended to address only those individuals who have an ownership interest in the law firm or financial advisor firm, or whether it is intended to have a broader meaning.

Section 8272(b) sets forth a two-year prohibition from assisting a local government unit with or providing advice to a local government unit for any activity under the Act, if convicted under Section 8272(a). No mechanism is provided for determining how or by whom a "member" will be "convicted" under Section 8272, and no mechanism is set forth regarding the enforcement of this provision, once a conviction occurs.

PABL raises similar concerns regarding Section 8273. Section 8273(a) prohibits any officer or any member of the governing body of a local government unit, or any member of a law firm or financial advisor firm, from knowingly filing materially false and misleading certifications or statements. If such a filing occurs, the offender can be convicted of a misdemeanor for which he or she may be fined up to $5,000, and imprisoned for up to two (2) years. Section 8273(b) provides that any officer or any member of the governing body of any

[4] See comment number 7, regarding the regulation of the practice of law.

local government unit or any member of a law firm or financial advisor firm who is found to have assisted in the act described in Section 8273(a) is subject to the same monetary fine and imprisonment. And, Section 8273(c) sets forth a two-year prohibition from assisting a local government unit with or providing advice to a local government unit for any activity under the Act, if convicted under Section 8273(b).

As raised in connection with Section 8272, Section 8273 does not describe who is charged with making the determinations which may result in criminal sanctions or imprisonment, and no procedure is provided. We also raise the same questions relative to the scope of those individuals subject to the prohibitions set forth in Section 8273.

These criminal provisions are unprecedented in this procedural law and have no place in the regulation of local government unit debt by the Department. We suggest that the Attorney General be consulted about whether existing criminal statutes are sufficient to address the fact situations which give rise to these proposed amendments.