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UPDATED RECOMMENDATIONS FOR COMPLIANCE WITH TEXAS BPA VERIFICATION AND REPRESENTATION REQUIREMENTS

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 and based on recommendations of task forces appointed by MAC in 2019, 2021, and 2023, MAC makes the following updated recommendations to Texas governmental issuers and underwriters for complying with the provisions of previously enacted Sections 2252.152, 2252.908, and 2271.002, Tex. Gov't Code, and of Section 2274.002, Tex. Gov't Code, as enacted by Senate Bill 19 in the 87th regular session of the Texas legislature, and Section 2276.002, Tex. Gov't Code, as enacted by Senate Bill 13 in the 87th regular session of the Texas legislature and recodified in the 88th regular session of the Texas legislature. Except as otherwise noted, the provisions apply only to state agencies and political subdivisions, not to their corporate instrumentalities.

Issue 1: Sections 2252.152 and 2271.002 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, as explained in the following paragraphs.

Under Section 2271.002, Texas governmental issuers may not enter into a contract for goods or services with a company (other than a sole proprietorship) with 10 or more full-time employees if the contract has a value of \$100,000 or more that is to be paid wholly or partly from public funds of the issuer, unless the contract contains a verification by the company that it does not boycott Israel (as defined by Tex. Gov't Code §808.001) and will not boycott Israel during the term of the contract.

Under Section 2252.152, 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 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.

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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 and, therefore, 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 Section 2271.002 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.

Before the initial 2019 version of these recommendations, the representations and undertakings requested by issuers through their counsel 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. Before the initial 2019 version of these recommendations, compliance with these requirements required issue-by-issue communication among syndicate underwriting desks and counsel. Some desks may not have been well-informed about syndicate members' worldwide business practices, in which case additional internal communication was required to avoid ill-informed representations. Before the initial 2019 version of these recommendations, compliance with these restrictions added avoidable time, expense, and risk to affected underwritings.

Issue 2: Section 2252.908, as interpreted by the AG's Public Finance Division, 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, if they do not supply a declaration of controlling persons. Like compliance with Section 2271.002, before the initial 2019 version of these recommendations this practice resulted in issue-by-issue communication among syndicate underwriting desks and counsel and avoidable added time and expense to affected underwritings.

Issue 3: Sections 2274.002 and 2276.002 restrict BPAs entered into between Texas governmental issuers and underwriters on or after September 1, 2021, unless the underwriters verify that they do not and will not take certain actions that discriminate against fossil-fuel based energy companies, companies that manufacture, distribute, or sell firearms, firearm accessories, or ammunition, sport shooting ranges, or non-profit trade associations that include such firearm-related companies, as explained in the following paragraphs.

Under Section 2276.002, as added by Senate Bill 13 and subsequently recodified, Texas governmental issuers may not enter into a contract for goods or services with a company (other than a sole proprietorship) with 10 or more full-time employees if the contract has a value of \$100,000 or more that is to be paid wholly or partly from public funds of the issuer, unless (a) the contract contains a verification by the company that it does not "boycott energy companies" and will not boycott energy companies during the term of the contract or (b) the issuer determines the restriction is inconsistent with the issuer's constitutional or statutory duties related to the issuance, incurrence, or management of debt obligations or the deposit, custody, management, borrowing, or investment of funds. For these purposes, "*boycott energy company*" means taking one or more of the following actions without an ordinary business purpose: 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 with a company because the company either (i) engages in the exploration, production, utilization, transportation, sale, or manufacturing of fossil fuel-based energy and does not commit or pledge to meet environmental standards beyond applicable federal and state law or (ii) does business with such a company. The task force

considers ordinary business purposes to include, without limitation, managing credit, regulatory, litigation, compliance, reputational and/or operational risks, but cautions that its views are not incorporated into and therefore do not qualify the verifications made and authorized by standing letters in the form recommended below. The task force initially recommended that Senate Bill 13 verifications include a statement of an underwriter's understanding of ordinary business purpose. However, the AG's Public Finance Division informed the task force that it would not approve securities sold under BPAs that include such a statement of understanding, since it believed the statement could be read to impliedly qualify verifications, so the task force withdrew its recommendation to include a statement of understanding.

Under Section 2274.002, as added by Senate Bill 19, Texas governmental issuers may not enter into a contract for goods or services with a company (other than a sole proprietorship) with 10 or more full-time employees if the contract has a value of \$100,000 or more that is to be paid wholly or partly from public funds of the issuer, unless (a) the contract contains a verification by the company that it does not have a practice, policy, guidance, or directive that "discriminates against," and it will not discriminate during the term of the contract against, a "firearm entity" or "firearm trade association," (b) the contract is with a sole-source provider, (c) the issuer does not receive any bids from a company that is able to provide the required written verification, or (d) under certain conditions, the contract relates to notes issued by the Comptroller of Public Accounts to manage expected state cash flow deficiencies. For these purposes, "*discriminate against*" an entity means to refuse to engage in the trade of any goods or services, or to refrain from continuing or terminate an existing business relationship, with the entity based solely on its status as a firearm entity or firearm trade association, but does not include any such action taken (a) to comply with federal, state, or local law, policy, or regulations or a directive by a regulatory agency or (b) for any traditional business reason that is specific to the customer or potential customer and not based solely on an entity's or association's status as a firearm entity or firearm trade association. For purposes of Section 2274.002, (i) "*firearm entity*" means a manufacturer, distributor, wholesaler, supplier, or retailer of firearms, firearm accessories, or ammunition or a sport shooting range, and (ii) "*firearm trade association*" means a non-profit, tax-exempt entity that has two or more firearm entities as members, as described in more detail in the verification recommended below.

As the 2021 task force read Senate Bill 19, a policy not to do business with any firearm manufacturer would preclude the required verification, but a customer qualification policy that takes into account customer-specific facts (e.g., the types of firearms manufactured and/or to whom they are sold) and is based on traditional business reasons would not preclude the required verification. The task force initially recommended that Senate Bill 19 verifications include a statement of the underwriter's understanding to that effect. However, the AG's Public Finance Division informed the task force that it would not approve securities sold under BPAs that include such a statement of understanding, since it believed the statement could be read to impliedly qualify verifications. In addition, the AG's Public Finance Division informed the task force that, in its view, "Senate Bill 19 precludes a blanket policy based on a class of firearm entities based on the type of weapons sold or age of the customer served, even if such policy is allegedly derived from traditional business reasons previously observed in similar customers." Consequently, the task force withdrew its recommendation to include a statement of understanding. The task forces consider traditional business reasons to include, without limitation, managing credit, regulatory, litigation, compliance, reputational and/or operational risks, but cautions that its views are not incorporated into and therefore do not qualify verifications made and authorized by standing letters in the form recommended below.

Under both sections, "*company*" is defined consistently with its use in the Section 2271.002 Israel boycott provision, so has been construed by the AG's Public Finance Division consistently with his construction of its use in that provision.

November 2023 ABC Letters: In both the initial 2019 version and the 2021 update of these recommendations, the respective task forces recommended that verifications be qualified as being effective only to the extent (a) the BPA constitutes a contract for goods or services for which a written verification is required by statute and (b) the statute does not contravene applicable Federal or Texas law. In a November 1, 2023, letter addressed to "All Bond Counsel" (ABC), the Chief of the AG's Public Finance Division stated that such qualifications to statutorily required verifications would no longer be accepted in BPAs entered into on or after December 1, 2023, subsequently deferred by a November 16, 2023 ABC letter to December 16, 2023. The November 1, 2023 ABC letter also states that legal actions for breaches of verifications during the term of a BPA must survive until barred by the applicable statutes of limitations, such damages may not be contractually liquidated or otherwise limited, and contracts may not include special provisions permitting termination to avoid or due to breach of a verification.

At the AG's request, the 2021 update of these recommendations requested that underwriters address their standing letters to the AG in addition to prospective syndicate representatives so that the AG could rely on them in approving bonds. The November 1, 2023 ABC letter, however, states that the AG will no longer rely on standing letters posted to MAC's website and instead will require receipt of a standing letter addressed to the AG in the form attached as Exhibit A to the ABC letter, effective for sales of public securities and letters submitted on or after December 16, 2023. The Public Finance Division subsequently confirmed that the letter may be in the form attached to these recommendations as Exhibit A.

The AG had announced in an October 17, 2023 ABC letter that the AG is reviewing whether it will continue to accept "boycott energy company" verifications from companies that are members of the Net Zero Banking Alliance, Net Zero Insurance Alliance, Net Zero Asset Owner Alliance, or Net Zero Asset Managers (a "Net Zero Alliance"). The November 1, 2023 ABC letter states that, until the review is completed, a company must verify when submitting its standing letter to the AG whether it or any affiliate is a member of a Net Zero Alliance, unless it was previously identified as a member in the November 1, 2023 ABC letter, and that issuers must submit a bring-down certification from underwriters so identified or acknowledged shortly before closing confirming that the AG can continue to rely on their standing letter and the statutory representations and verifications contained in the applicable contract.

Accordingly, the task force no longer recommends that the standing letter to prospective syndicate representatives be addressed to the AG; it has conformed recommended verifications to those that will be accepted by the AG; and it has recommended that underwriters submit standing letters to syndicate representatives through MAC in modified form to authorize them to act on behalf of syndicate members while avoiding duplication.

MAC Recommendations: Consistent with its mission, in 2019, 2021, and 2023 MAC recruited volunteer task forces 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 forces, MAC makes the following updated recommendations to Texas governmental issuers and underwriters for BPAs executed on or after December 16, 2023:

1. **Standing Verification Letters:** Underwriters should submit (a) a standing verification letter to the Texas AG in the form attached hereto as Exhibit A and (b) a standing verification letter to syndicate representatives through MAC in the form attached hereto as Exhibit B, as described in 5 below. Underwriters should revoke the letters whenever a representation made in the letters is inaccurate.
2. **Statutory Contractual Representations and Verifications:** Underwriters should make and issuers should accept Section 2252.152 (sanctioned company), Section 2271.002 (boycott Israel), Section 2274.002 (boycott energy companies), and Section 2276.002 (discrimination against firearm entities) verifications and, when applicable, Section 2252.908 (publicly traded company) representations in BPAs in the form attached hereto as Exhibit C.

3. **Term of BPAs:** To clarify "term of this [Agreement]" as used in the verifications, BPAs should expressly state that, except for surviving representations, warranties, and indemnities of the parties, the term of a BPA terminates upon expiration of the underwriting period or, if earlier, exercise of a termination right (which may not be based on an existing or incipient breach of a verification).
4. **Liquidated/Limitations on Damages:** Provisions disclaiming, liquidating, or limiting damages for breach should be qualified to except breaches of the statutory verifications.
5. **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.
6. **Repository for Standing Underwriter Verifications and Representations:** To enable underwriting syndicate representatives to make required verifications and 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 verifications and representations of each type or, if not, those that it includes, and (d) links to the letters, including amendments. Each posting of a standing letter on the MAC website will lapse unless the letter is verified to MAC at least annually. MAC intends to send reminders to verify standing letters before postings lapse. MAC also intends to email prompt notification of the lapse or withdrawal of a standing letter to the email address associated with the logged in user 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 one or more required verifications and representations on behalf of syndicate members. See "Website Terms of Use," Sections 8 and 9, mactexas.com/Home/Disclaimer/TermsOfUse.

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, and the Public Finance Division's review of transcripts and approval of securities can be streamlined, 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 following task force members for helping to forge its 2019 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. Pumbo, 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.

MAC thanks the following task force members for helping to forge its updated 2021 recommendations: Christine Walsh, Managing Director & Associate General Counsel, Bank of America Corp.; Meenah Kim, Senior Vice President and Municipals General Counsel, Jefferies LLC; Alan Trager, Executive Director and Assistant General Counsel, J.P. Morgan Securities LLC; Amy Kim, Managing Director, Morgan Stanley & Co. Incorporated; Andrew Pratt, Director, Transaction Review Group, RBC Capital Markets, LLC; Dylan Holland, Senior Counsel, Wells Fargo Securities; Barron F. Wallace, Partner, Bracewell LLP; Jerry V. Kyle, Jr., Partner, Orrick, Herrington & Sutcliffe LLP; Hasan (Mack) Mack, Partner, McCall, Parkhurst & Horton L.L.P.; Cheryl K. Rosenberg, Senior Counsel, Haynes and Boone, LLP; and Fredric A. (Rick) Weber (facilitator), Of Counsel, Norton Rose Fulbright US LLP.

MAC thanks the following task force members for helping to forge its updated 2023 recommendations: Meenah Kim, Senior Vice President and Municipals General Counsel, Jefferies LLC; Alan Trager, Executive Director and Assistant General Counsel, J.P. Morgan Securities LLC; Brad Carso, Managing Director, Morgan Stanley & Co. Incorporated; David Hodapp, Director, Transaction Review Group, RBC Capital Markets, LLC; Margaret C. (Peg) Henry, Head of Municipal Securities Group Legal, Stifel Financial Corp.; Gerald K. Mayfield, Assistant General Counsel, Executive Director, Wells Fargo Securities; Jonathan Frels, Partner, Bracewell LLP; Jerry V. Kyle, Jr., Partner, Orrick, Herrington & Sutcliffe LLP; Cheryl K. Rosenberg, Senior Counsel, Haynes and Boone, LLP; James Hernandez, Of Counsel, Greenberg Traurig 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.

December 1, 2023

Exhibit A—Form of Standing Representation Letter to Attorney General

Exhibit B—Form of Standing Representation Letter to Syndicate Representatives

Exhibit C—Form of Contractual Representations and Verifications

Exhibit B
Form of Standing Representation Letter to Syndicate Representatives

[Date]

Representatives of Underwriting Syndicates for Texas Municipal Securities Offerings
c/o Municipal Advisory Council of Texas
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 governmental entities of the State of Texas that are subject to sections 2252.152, 2271.002, 2274.002, and/or 2276.002 of the Texas Government Code, as amended, and represents to and authorizes representatives of such syndicates (the "*Representative*") as follows.

Attached is a standing representation letter (the "*Standing AG Letter*") from the Company to the Office of the Attorney General of Texas. The Company hereby verifies that the Company has neither modified nor revoked the Standing AG 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, unless checked here as inapplicable:
☐ inapplicable.

Representatives are authorized to make the foregoing representation, unless inapplicable, and the contractual verifications recommended by the Municipal Advisory Council of Texas ("*MAC*") in its Updated Recommendations for Compliance with Texas BPA Verification and Representation Requirements (December 1, 2023), (the "*Recommendations*") 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, so long as the Company has not withdrawn or failed to verify the continued effectiveness of this letter on MAC's website or notified the Representatives in writing that this letter is no longer true or effective.

The Company represents that the text of this letter conforms to the form of standing representation and authorization letter recommended by MAC in the *Recommendations*.

Sincerely,

[NAME OF DEALER] *Wintrust Investments*

By: 
[name and title of executing officer]

Thomas Kiernan

Attachment—Standing Representation Letter to Office of Attorney General

Exhibit C

Form of Contractual Representations and Verifications

Section [X]. Verifications of Statutory Representations and Covenants. [The Underwriter/Each of the Underwriters] makes the following representations and covenants pursuant to Chapters 2252, 2271, 2274, and 2276, Texas Government Code, as heretofore amended (the "Government Code"), in entering into this [Agreement]. As used in such verifications, "affiliate" means an entity that controls, is controlled by, or is under common control with the Underwriter within the meaning of SEC Rule 405, 17 C.F.R. § 230.405, and exists to make a profit. Liability for breach of any such verification during the term of this [Agreement] shall survive until barred by the applicable statute of limitations, and shall not be liquidated or otherwise limited by any provision of this [Agreement], notwithstanding anything in this [Agreement] to the contrary.

[A]. Not a Sanctioned Company. [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, Government Code. The foregoing representation 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.

[B]. No Boycott of Israel. [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 will not boycott Israel during the term of this [Agreement]. As used in the foregoing verification, "boycott Israel" has the meaning provided in Section 2271.001, Government Code.

[C]. No Discrimination Against Firearm Entities. [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 have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association and will not discriminate against a firearm entity or firearm trade association during the term of this [Agreement]. As used in the foregoing verification, "discriminate against a firearm entity or firearm trade association" has the meaning provided in Section 2274.001(3), Government Code.

[D]. No Boycott of Energy Companies. [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 energy companies and will not boycott energy companies during the term of this [Agreement]. As used in the foregoing verification, "boycott energy companies" has the meaning provided in Section 2276.001(1), Government Code.

Form of Standing Representation Letter to Syndicate Representatives

[Date]

Representatives of Underwriting Syndicates for Texas Municipal Securities Offerings
c/o Municipal Advisory Council of Texas
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 governmental entities of the State of Texas that are subject to sections 2252.152, 2271.002, 2274.002, and/or 2276.002 of the Texas Government Code, as amended, and represents to and authorizes representatives of such syndicates (the "*Representative*") as follows.

Attached is a standing representation letter (the "*Standing AG Letter*") from the Company to the Office of the Attorney General of Texas. The Company hereby verifies that the Company has neither modified nor revoked the Standing AG 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, unless checked here as inapplicable:
☐ inapplicable.

Representatives are authorized to make the foregoing representation, unless inapplicable, and the contractual verifications recommended by the Municipal Advisory Council of Texas ("*MAC*") in its Updated Recommendations for Compliance with Texas BPA Verification and Representation Requirements (December 1, 2023), (the "*Recommendations*") 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, so long as the Company has not withdrawn or failed to verify the continued effectiveness of this letter on MAC's website or notified the Representatives in writing that this letter is no longer true or effective.

The Company represents that the text of this letter conforms to the form of standing representation and authorization letter recommended by MAC in the *Recommendations*.

Sincerely,

[NAME OF DEALER]

Wintrust Investments

By:

[name and title of executing officer]

Thomas Kiernan

Attachment—Standing Representation Letter to Office of Attorney General