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THE GENERAL ASSEMBLY OF PENNSYLVANIA

SENATE BILL

No. 903 Session of 2013

INTRODUCED BY FOLMER, TEPLITZ, EICHELBERGER, BLAKE, BOSCOLA, BROWNE, YUDICHAK, WOZNIAK AND SOLOBAY, JUNE 7, 2013

REFERRED TO LOCAL GOVERNMENT, JUNE 7, 2013

AN ACT

Amending Title 53 (Municipalities Generally) of the Pennsylvania Consolidated Statutes, further providing for the prohibition of interest rate management agreements for authorities; providing for the offense of knowingly participating in an ultra vires act of an authority and for the offense of knowingly filing materially false or misleading reports or certifications for an authority; further providing for definitions; providing for the prohibition of interest rate management agreements for local government units; further providing for scope of unfunded debt and for treatment of costs upon refunding; and repealing provisions relating to interest rate risk and interest rate cost management for local government units.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 5607(e) of Title 53 of the Pennsylvania Consolidated Statutes is amended by adding a paragraph to read:

§ 5607. Purposes and powers.

* * *

(e) Prohibition.--

* * *

<u>(4) No authority may enter into an interest rate management agreement, including a swap, interest rate cap,</u>

collar, corridor, ceiling and floor agreement, forward agreement and float agreement.

* * *

Section 2. Title 53 is amended by adding sections to read:

§ 5624. Knowingly participating in an ultra vires act of an authority.

(a) General rule.--Any officer or any member of the governing body of any authority or any member of a law firm or a financial advisor firm who assists or provides advice to an authority and who knowingly participates in an ultra vires act of an authority commits a misdemeanor of the second degree and shall, upon conviction, be sentenced to pay a fine of not more than $5,000 or to imprisonment for not more than two years, or both.

(b) Prohibition.--A law firm or financial advisor firm which has had a member convicted under subsection (a) shall be prohibited for two years from assisting an authority with or providing advice to an authority for any activity under this chapter.

(c) Definition.--An act is an "ultra vires act" when the municipal authority is without authority to perform the act or when the act is not explicitly prohibited, but is in excess of the powers granted to the municipal authority.

§ 5625. Knowingly filing materially false or misleading reports or certifications for an authority.

(a) General rule.--Any officer or any member of the governing body of any authority who knowingly files a materially false or misleading report or certification with the Secretary of the Commonwealth commits a misdemeanor of the second degree and shall, upon conviction, be sentenced to pay a fine of not

more than $5,000 or to imprisonment for not more than two years, or both.

(b) Aiding or abetting.--Any officer or any member of the governing body of any authority or any member of a law firm or a financial advisor firm who assists or provides advice to an authority and who aids or abets in the commission of the offense under subsection (a) commits a misdemeanor of the second degree and shall, upon conviction, be sentenced to pay a fine of not more than $5,000 or to imprisonment for not more than two years, or both.

(c) Prohibition.--A law firm or financial advisor firm which has had a member convicted under subsection (b) shall be prohibited for two years from assisting an authority with or providing advice to an authority for any activity under this chapter.

Section 3. The definition of "debt" in subsection (a) and the definitions of "independent financial advisor," "interest rate management plan" and "qualified interest rate management agreement" in subsection (c) of section 8002 of Title 53 are amended to read:

§ 8002. Definitions.

(a) Classification of debt.--With respect to classifications of debt and subject to additional definitions contained in subsequent provisions of this subpart which are applicable to specific provisions of this subpart, the following words and phrases when used in this subpart shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Debt." The amount of all obligations for the payment of money incurred by the local government unit, whether due and

payable in all events, or only upon the performances of work, possession of property as lessee, rendering of services by others or other contingency, except the following:

(1) Current obligations for the full payment of which current revenues have been appropriated, including tax anticipation notes, and current payments for the funding of pension plans.

(2) Obligations under contracts for supplies, services and pensions allocable to current operating expenses of future years in which the supplies are to be expended or furnished, the services rendered or the pensions paid.

(3) Rentals or payments payable in future years under leases, guaranties, subsidy contracts or other forms of agreement not evidencing the acquisition of capital assets. This exception shall not apply to rentals or payments under any instruments which would constitute lease rental debt but for the fact that the lessor or obligee is not an entity described in section 8004(a)(1) (relating to when lease or other agreement evidences acquisition of capital asset).

(4) Interest or assumed taxes payable on bonds or notes which interest or taxes are not yet overdue.

[(5) Obligations incurred and payments, including periodic scheduled payments and termination payments, payable pursuant to a qualified interest rate management agreement.]

* * *

(c) Other definitions.--Subject to additional definitions contained in subsequent provisions of this subpart which are applicable to specific provisions of this subpart, the following words and phrases when used in this subpart shall have the meanings given to them in this section unless the context

clearly indicates otherwise:

* * *

["Independent financial advisor." A person or entity experienced in the financial aspects and risks of interest rate management agreements who is retained by a local government unit to advise the local government unit with respect to a qualified interest rate management agreement. The independent financial advisor may not be the other party or an affiliate or agent of the other party on a qualified interest rate management agreement with respect to which the independent financial advisor is advising a local government unit. For purposes of sections 8281(b)(2) and (e)(5) (relating to qualified interest rate management agreements), the independent financial advisor may be retained by a public authority.

"Interest rate management plan." A written plan prepared or reviewed by an independent financial advisor with respect to a qualified interest rate management agreement, which includes:

(1) A schedule listing the amount of debt outstanding for each outstanding debt issue of the local government unit and the expected annual debt service on that debt. In the case of variable rate debt, the schedule shall set forth the estimated annual debt service thereon and annual debt service on the debt calculated at the maximum rate specified for the variable rate debt.

(2) A schedule listing the notional amounts outstanding of each previously executed qualified interest rate management agreement which is then in effect.

(3) A schedule listing all consulting, advisory, brokerage or similar fees, paid or payable by the local government unit in connection with the qualified interest

rate management agreement, and a schedule of any finder's fees, consulting fees or brokerage fees, paid or payable by the other party in connection with the qualified interest rate management agreement.

(4) A schedule listing the estimated and maximum periodic scheduled payments to be paid by the local government unit and to be received by the local government unit from the other party in each year during the term of the qualified interest rate management agreement.

(5) An analysis of the interest rate risk, basis risk, termination risk, credit risk, market-access risk and other risks of entering into the qualified interest rate management agreement. This paragraph includes schedules of the estimated and maximum scheduled periodic payments which would be due under the qualified interest rate management agreement.

(6) An analysis of the interest rate risk, basis risk, termination risk, credit risk, market-access risk and other risks to the local government unit of the net payments due for all debt outstanding and all qualified interest rate management agreements of the local government unit. This paragraph includes schedules of the estimated and maximum net payments of total debt service and scheduled, periodic, net payments, which would be due under all of the qualified interest rate management agreements.

(7) The local government unit's plan to monitor interest rate risk, basis risk, termination risk, credit risk, market-access risk and other risks. This paragraph includes the valuation of the market or termination value of all outstanding qualified interest rate management agreements.]

* * *

["Qualified interest rate management agreement." An agreement, including a confirmation evidencing a transaction effected under a master agreement, entered into by a local government unit in accordance with and fulfilling the requirements of section 8281 (relating to qualified interest rate management agreements), which agreement in the judgment of the local government unit is designed to manage interest rate risk or interest cost of the local government unit on any debt a local government unit is authorized to incur under this subpart, including, but not limited to, swaps, interest rate caps, collars, corridors, ceiling and floor agreements, forward agreements, float agreements and other similar arrangements which in the judgment of the local government unit will assist the local government unit in managing the interest rate risk or interest cost of the local government unit.]

* * *

Section 4. Title 53 is amended by adding a section to read:

<u>§ 8010. Interest rate management agreements prohibited.</u>

<u>All local government units are prohibited from entering into interest rate management agreements, including swaps, interest rate caps, collars, corridors, ceiling and floor agreements, forward agreements and float agreements.</u>

Section 5. Sections 8129 and 8242(a) of Title 53 are amended to read:

§ 8129. Scope of unfunded debt.

For the purpose of this subchapter, "unfunded debt" means obligations of the same or one or more prior years incurred for current expenses, including tax anticipation notes [and payments, including termination payments, required to be made under qualified interest rate management agreements,] due and

owing or judgments against the local government unit entered by a court after adversary proceedings[, including a judgment under section 8283(b)(2)(i) (relating to remedies),] for the payment of either of which category the taxes and other revenues remaining to be collected in the fiscal year and funds on hand will not be sufficient without a curtailment of municipal services to an extent endangering the health or safety of the public or proper public education, and the local government unit either may not legally levy a sufficient tax for the balance of the fiscal year, or a sufficient tax, if legally leviable, would not be in the public interest. Unfunded debt does not, however, include debt incurred under this subpart or obligations in respect of a project or part of a project as incurred in respect of the cost of a project.

§ 8242. Treatment of costs upon refunding.

(a) General rule.--In any refunding, a principal amount of refunding bonds or notes or obligations evidencing lease rental debt equal to the sum of the following:

(1) the call premium payable on the bonds, notes or obligations being refunded;

(2) the discount allowed on the sale of the refunding bonds, notes or obligations;

[(2.1) any funds borrowed in order to pay any termination payment required to be paid under a qualified interest rate management agreement in which the notional amount is identified as corresponding to all or any portion of the bond or note being refunded;]

(3) any funds borrowed to pay interest on bonds, notes or obligations being refunded; and

(4) the costs of issue and sale of the refunding bonds,

notes or obligations;

may be considered as interest on the refunding bonds, notes or obligations and may be separately stated in all reporting of debt and in all computation of debt limits and, if so considered and reported by the local government unit, shall not be considered as electoral, nonelectoral or lease rental debt. In subsequent debt statements, any such separately stated principal amount of bonds, notes or obligations shall be reported as being amortized in the same proportion as the series of which they are a part.

* * *

Section 6. Subchapter F of Chapter 82 of Title 53 is repealed:

[SUBCHAPTER F

INTEREST RATE RISK AND INTEREST COST MANAGEMENT

§ 8281. Qualified interest rate management agreements.

(a) General rule.--

(1) Except as set forth in paragraph (4), notwithstanding any other law to the contrary, a local government unit may negotiate and enter into qualified interest rate management agreements consistent with the provisions of this subchapter.

(2) The local government unit must authorize and award by resolution each qualified interest rate management agreement or any confirmation of a transaction. The resolution is subject to section 8003(a) and (b) (relating to advertisement and effectiveness of ordinances) but may be valid and effective for all purposes immediately upon adoption or as otherwise provided in the resolution.

(3) A local government unit has the power to contract

for insurance covering the risks of nonpayment of amounts due under qualified interest rate management agreements.

(4) The authority granted in this subchapter shall not apply to any local government unit which has been declared distressed by the Department of Community and Economic Development.

(b) Requirements for resolution.--The resolution authorizing and awarding a qualified interest rate management agreement or authorizing a transaction under the agreement must include in the resolution or as an appendix to the resolution all of the following:

(1) A copy of the qualified interest rate management agreement or confirmation of the transaction under the qualified interest rate management agreement in substantially the form to be executed pursuant to the resolution.

(2) The interest rate management plan meeting the requirements under this subpart:

(i) adopted by the local government unit; or

(ii) if the local government unit is incurring indebtedness under this chapter which has or will be issued to a public authority that has entered into or will enter into an interest rate management agreement meeting the requirements of a qualified interest rate management agreement under this subpart, adopted by that public authority.

(3) A statement of the manner of the award of the qualified interest rate management agreement under subsection (e).

(c) Contents of qualified interest rate management agreements.--In addition to other provisions approved by the

local government unit, a qualified interest rate management agreement must contain all of the following:

(1) The covenant of the local government unit to make payments required by the qualified interest rate management agreement and the covenants authorized by section 8282 (relating to covenant to pay amounts due under qualified interest rate management agreements).

(2) The notional amount of the qualified interest rate management agreement and the principal amount of bonds or notes or lease rental debt, or portions of the notional or principal amounts, issued or to be issued by the local government unit under this subpart or guaranteed by the local government unit under this subpart, to which the agreement relates.

(3) The term of any qualified interest rate management agreement, which must not exceed the latest maturity date of the bonds or notes referenced in the qualified interest rate management agreement.

(4) A provision requiring the termination of the agreement if all debt to which the qualified interest rate management agreement relates is no longer outstanding.

(5) The maximum annual interest rate which the local government unit may pay thereunder.

(6) A provision that the maximum net payments by fiscal year of a local government unit shall not exceed the maximum interest rate specified in the qualified interest rate management agreement for:

(i) periodic scheduled payments, not including any termination payments, due under the qualified interest rate management agreement; and

(ii) the interest on the bonds or notes to which the qualified interest rate management agreement relates.

(7) The source of payment of the payment obligations of the local government unit, which must be either general revenues or revenues specifically identified in the agreement.

(8) A provision addressing the actions to be taken if the credit rating of the other party changes.

(9) A provision that periodic scheduled payments due under the qualified interest rate management agreement and debt service due on the related bonds or notes or payments due under the related instrument evidencing lease rental debt or guaranty of the local government unit shall be senior in right and priority of payment to termination payments due under the qualified interest rate management agreement.

(d) Other provisions of the qualified interest rate management agreement.--The qualified interest rate management agreement may include:

(1) A covenant to include any termination payment or similar payment for a qualified interest rate management agreement in its current budget at any time during a fiscal year or in a budget adopted in a future fiscal year.

(2) A provision that the following shall be equally and ratably payable and secured under the applicable covenants authorized in section 8282:

(i) Periodic scheduled payments due under the qualified interest rate management agreement; and

(ii) Any of the following to which the agreement relates:

(A) the debt service due on the bonds or notes;

(B) payment under an instrument evidencing lease rental debt; or

(C) payment under a guaranty of the local government unit.

(3) A provision that the qualified interest rate management agreement may be terminated at the option of the local government unit without cause but that the qualified interest rate management agreement may not be terminated at the option of the other party to the qualified interest rate management agreement without cause.

(e) Award of qualified interest rate management agreements.--

(1) The local government unit shall establish a process for selecting other parties before entering into a qualified interest rate management agreement.

(2) The local government unit shall establish qualifications for other parties before entering into a qualified interest rate management agreement. The qualifications shall include a rating for the other party of at least the third highest rating category from a nationally recognized rating agency.

(3) A qualified interest rate management agreement must be awarded by public sale, private sale by negotiation or private sale by invitation.

(4) The local government unit shall select the qualified interest rate management agreement which the local government unit determines is in its best financial interest. The qualified interest rate management agreement selected must contain financial terms and conditions which in the opinion of the independent financial advisor to the local government

unit are fair and reasonable to the local government unit as of the date of award.

(5) The local government unit may satisfy the requirements of paragraph (4) by obtaining a finding from an independent financial advisor to the public authority that the financial terms and conditions of the agreement are fair and reasonable to the public authority as of the date of the award if all of the following apply:

(i) The local government unit is incurring indebtedness under this chapter which has or will be issued to a public authority.

(ii) In connection with the incurring of debt under subparagraph (i), the local government unit will become obligated for all or a portion of the public authority's costs under an interest rate management agreement.

§ 8282. Covenant to pay amounts due under qualified interest rate management agreements.

(a) Contents.--The local government unit shall include in a qualified interest rate management agreement a covenant that the local government unit shall do the following:

(1) Include the periodic scheduled amounts payable in respect of the qualified interest rate management agreement for each fiscal year in its budget for that fiscal year.

(2) Appropriate those amounts from its general or specially pledged revenues for the payment of amounts due under the qualified interest rate management agreement.

(b) Pledge.--

(1) Except as set forth in paragraph (2), the local government unit may pledge its full faith, credit and taxing power for the budgeting, appropriation and payment of

1 periodic scheduled payments due under a qualified interest
2 rate management agreement.
3 (2) A local government unit may not make a pledge under
4 paragraph (1) if the payment obligations of the local
5 government unit under the qualified interest rate management
6 agreement are limited as to payment to specified revenues of
7 the local government unit.
8 (c) Security interest.--If the periodic scheduled payment
9 obligations of the local government unit are specified in the
10 qualified interest rate management agreement to be made from
11 specified revenues of the local government unit, the local
12 government unit may include in the qualified interest rate
13 management agreement a covenant granting a security interest in
14 those revenues to secure its periodic scheduled payment
15 obligations under the agreement. The security interest shall be
16 perfected under section 8147 (relating to pledge of revenues).
17 § 8283. Remedies.
18 (a) Failure to budget amounts due under a qualified interest
19 rate management agreement.--
20 (1) This subsection applies if a local government unit
21 fails or refuses to budget for any fiscal year a periodic
22 scheduled payment:
23 (i) due in that year pursuant to the provisions of a
24 qualified interest rate management agreement; and
25 (ii) payable from the general revenues of the local
26 government unit.
27 (2) If a local government unit commits a failure or
28 refusal under paragraph (1), the following apply:
29 (i) The other party to the interest rate management
30 agreement may bring an enforcement action in a court of

common pleas.

(ii) After a hearing held upon notice to the local government unit as the court may direct, if the court finds a failure or refusal under paragraph (1), the court may, by order of mandamus, require the treasurer of the local government unit to pay to the other party out of the first tax money or other available revenue or money thereafter received in the fiscal year by the treasurer the periodic scheduled payments due pursuant to the provisions of the qualified interest rate management agreement. The order shall be subject to section 8281(c)(8) (relating qualified interest rate management agreements).

(iii) Any priority on incoming tax money accorded to a separate sinking fund for tax anticipation notes under the authority of section 8125 (relating to security for tax anticipation notes and sinking fund) shall not be affected by an order under subparagraph (ii) until the sum on deposit in each sinking fund equals the money which should have been budgeted or appropriated for each series.

(b) Failure to pay amounts due under a qualified interest rate management agreement.--

(1) This subsection applies if:

(i) a local government unit fails to pay any amount due under a qualified interest rate management agreement when it becomes due and payable; and

(ii) the failure continues for 30 days.

(2) If there is a failure under paragraph (1), the other party to the qualified interest rate management agreement may

bring an action in a court of common pleas to recover the amount due. This paragraph is subject to:

(i) the priorities under sections 8125 and 8281(c)(8); and

(ii) any limitations upon rights of action properly provided in the qualified interest rate management agreement.

(3) The judgment recovered under paragraph (2) shall:

(i) have an appropriate priority upon the money next coming into the treasury of the local government unit; and

(ii) be a judgment upon which funding bonds may be issued pursuant to Ch. 81 Subch. B (relating to tax anticipation notes and funding debt).

(c) Failure to pay by school districts.--

(1) This subsection applies if a board of directors of a school district fails to pay or to provide for the payment of periodic scheduled payments, not including any termination payments, due pursuant to the provisions of a qualified interest rate management agreement.

(2) A party to a qualified interest rate management agreement must notify the Secretary of Education of a failure under paragraph (1).

(3) Upon notice under paragraph (2), the following apply:

(i) The secretary shall notify the Department of Community and Economic Development and the offending board of school directors.

(ii) If the secretary finds that the amount due and payable by the school district has not been paid, the

secretary shall withhold out of any State appropriation due the school district an amount equal to the amount due pursuant to the qualified interest rate management agreement and shall pay over the amount so withheld to the party to the qualified interest rate management agreement to whom the amount is due.

§ 8284. Notice and retention of records.

(a) Notice.--

(1) The local government unit shall file with the Department of Community and Economic Development certified copies of a resolution authorizing a qualified interest rate management agreement, including any appendix to the resolution, 15 days following adoption.

(2) If the maximum net payments by fiscal year for periodic scheduled payments of the local government unit, not including any termination payments, and interest on the bonds or notes to which the qualified interest rate management agreement relates exceed the amount of interest approved in proceedings of the local government unit with respect to such bonds or notes filed with and approved by the department, the local government unit shall adopt an amendment to the ordinance or resolution authorizing such bonds or notes reflecting such increase. The amendment shall be advertised and effective as provided in section 8003 (relating to advertisement and effectiveness of ordinances) and filed with the department. No approval by the department or filing fee by the local government unit shall be required for any filing under this subsection.

(b) Records.--The department shall keep copies of all documents filed with the department under this section as long

as a qualified interest rate management agreement is in effect. Documents filed with the department under this section are public records available for examination by any citizen of this Commonwealth; any party to the qualified interest rate management agreement; or any bondholder or noteholder, including holders of tax anticipation notes, of the local government unit filing any document pursuant to this section.

§ 8285. Financial reporting.

A local government unit which has entered into a qualified interest rate management agreement shall include in its annual financial statements information with respect to each qualified interest rate management agreement it has authorized or entered into, including any information required pursuant to any statement issued by the Governmental Accounting Standards Board.]

Section 7. The amendment, addition or repeal of 53 Pa.C.S. §§ 5607(e), 8002(a) and (c), 8010, 8129, 8242(a), 8281, 8282, 8283, 8284 and 8285 shall not apply to qualified interest rate management agreements in effect prior to the effective date of this section.

Section 8. This act shall take effect in 60 days.