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The Growing Trend of Anti-Boycott Laws and the Effect on Public Finance - Is Arkansas Next?

In a nation seemingly becoming more polarized along political lines every day, not even the normally quiet and steady world of public finance remains untouched. Recently proposed and adopted anti-boycott type legislative initiatives in several states, and the emergence of environmental, social and governance (ESG) issues in the securities world, have begun to lead partisan political battles into the world of public finance. Arkansas has largely avoided these issues so far, but how long that status will last remains to be seen.

The trend of state-level legislation seeking to address hot-button political issues generally began several years ago with the promotion and adoption of legislation in numerous states which restricted the ability of states and political subdivisions to enter into contracts with companies (and in some cases, individuals) with policies deemed to be anti-Israel (known as the boycott, divestment and sanctions (BDS) movement). Arkansas is one of thirty-four (34) states which has enacted laws targeting the BDS movement (Ark. Code Ann. § 25-1-501, *et seq.*)¹.

While anti-BDS laws did not seem to have much effect on the public finance markets, the conceptual framework underlying anti-BDS laws is beginning to. Over the past year, several states have begun employing the anti-BDS model to address other hot-button political issues. In particular, the energy (fossil fuel) and firearms/ammunition industries have become a focus of these efforts.

For example, in the past year, Texas has passed legislation prohibiting contracts with companies that boycott or discriminate against the firearm and ammunition industries (Tex. Gov't Code Ann. § 2274.001 *et seq.*) and certain energy companies (Tex. Gov't Code Ann. § 2274.001 *et seq.*). These statutes have similar requirements and apply to contracts between governmental entities and companies with ten or more full-time employees. The legislation applies to contracts with a value of \$100,000 or more which are paid, in whole or in part, from public funds. Both statutes require that the companies seeking to enter contracts with the governmental entities provide written certifications regarding the companies' compliance with the statutes.

The Texas legislation has had real effects in the Texas public finance arena - particularly with respect to bond underwriters. Large national underwriting firms such as Morgan Stanley, Wells Fargo, JPMorgan Chase & Co., Bank of America Corp. and Goldman Sachs Group, Inc. have either been removed, withdrawn from, or forced to reduce (or in some cases, eliminate) their participation in Texas municipal bond transactions.

Texas is not the only state that has applied the anti-boycott model to various politically sensitive industries or issues. Alaska, Arizona, Idaho, Indiana, Kansas, Kentucky, Louisiana, Minnesota, Missouri, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, West Virginia and Wisconsin, have all introduced similar legislation addressing contentious issues. These proposals are at various different stages of the process in these states.

The imposition of anti-boycott type legislation will likely not be without cost in the public finance

markets. By limiting potential underwriting (or direct purchaser) options, bond issuers may see increased borrowing costs. While this potential effect may be somewhat muted in a state like Texas, which boasts the second-largest public finance market in the country, due to the sheer number of market participants in the state, smaller states with smaller public finance markets and fewer participants (such as Arkansas) could see bigger effects.

There are no pending anti-boycott type legislation proposals in Arkansas at this point. However, given the political landscape and the growing trend of such legislation around the country, it is not unreasonable to anticipate that similar proposals will be coming. Because of Arkansas's relatively small public finance market and the makeup and nature of the primary underwriter and banking firms active in the state, it is unclear exactly what effect any anti-boycott legislation will have. However, it is an important emerging national trend and is worth monitoring going forward.

¹The Arkansas anti-BDS law was challenged in federal court in the case of *Arkansas Times vs. Waldrip, et. al.* A federal district court ruled Arkansas's anti-BDS law violated the First Amendment to the U.S. Constitution. This decision was originally upheld by a three-judge panel of the United States Court of Appeals for the Eighth Circuit, but later overturned by the full Eighth Circuit in a decision handed down on June 22, 2022. The Arkansas Times has indicated that it intends to appeal the Eighth Circuit's decision to the U.S. Supreme Court.

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