



STATE OF KANSAS

Office of the Attorney General

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Attorney General

July 18, 1977

ATTORNEY GENERAL OPINION NO. 77- 241

Mr. Dwight D. Keen
Securities Commissioner
Office of the Securities Commissioner
4th Floor - State Office Building
Topeka, Kansas 66612

Re: Cities and Municipalities--Economic Development Revenue Bonds--Authority and Duties of Securities Commissioner

Synopsis: (1) Industrial revenue bond issues to qualify as exempt from Ch. 62, L. 1977 (Act), must comply with SEC Rule 146, and securities commissioner is without authority to promulgate regulations requiring municipalities to file notice of any reliance upon exemption from Act.

(2) An IRB notice is timely filed if originally complete and on file at least 30 days prior to issuance of bonds. Securities commissioner has authority to find IRB notice timely filed if it has been on file requisite 30 days even if it was filed before effective date of Act.

(3) The term "complete" as employed in the Act means that items of information and documents all as specifically delineated in Act are filed in commissioner's office without regard to substance or content.

(4) Commissioner has discretion to interpret provisions of the Act and may do so by issuing non-rule or non-regulation guidelines, but which are not binding and enforceable.

(5) Commissioner is not authorized to require evidence of compliance with Section 5 as a condition of his finding IRB notice to be complete and timely filed.

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Dear Mr. Keen:

You have raised several questions regarding enforcement and implementation of Chapter 62, Laws of 1977 (1977 Senate Bill 434, referred hereinafter as the "Act") First, you direct our attention to language in the Act exempting certain issues from the economic development revenue bond (also referred to as the industrial revenue bond -- IRB) notice filing requirements:

"(1) Except when the sale of revenue bonds issued under the authority of K.S.A. 12-1740 et seq., and amendments thereto, and authorized hereunder qualify as a private placement under current regulations of the federal securities and exchange commission"
[Emphasis added.]

You indicate that the federal "private placement" registration exemption derives from a combination of federal statutory provisions (15 U.S.C. § 77d(2) or Section 4(2) of the Securities Act of 1933) and the Federal Securities and Exchange Commission (SEC) Rule 146, and that issues complying with the latter raise the presumption that they also qualify for the statutory exemption. However, such qualification rests upon legal tests which lay beyond the specific language of SEC Rule 146. Thus, you ask whether an IRB issue can be considered exempt under the Act if it relies solely upon the statutory exemption and does not rely upon or comply with the requirements of SEC Rule 146.

The emphasized portion of the Act quoted *supra* states that the regulations of the Securities and Exchange Commission are controlling in determining which Kansas IRB issues shall be exempt from the requirements of the Act. Congress granted the Commission authority to promulgate rules, regulations and orders by 15 U.S.C. § 77sss (Section 319 of the Securities Act of 1933.) Presumably SEC Rule 146 is a legitimate exercise of this delegated power. On the other hand 15 U.S.C. § 77d(2) is clearly statutory. Without elaboration, suffice it to say that the substantive difference here between statute and regulation by definition alone is considerable. The legislature presumably intended to distinguish statutory and administrative eligibility for private placement. We must conclude that any IRB issue considered exempt from the Act must be judged so only on the basis that it complies with SEC Rule 146.

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You also inquire whether the securities commissioner has authority pursuant to Section 2 of the Act to issue regulations requiring municipalities to file notice of their reliance upon said exemption. Section 2 in pertinent part provides thus:

"The securities commissioner shall establish, by rules and regulations, *procedures for the filing of the required information and documents in the event that the information and documents originally filed are not found to be complete and timely filed* and such bonds may be issued upon compliance." [Emphasis added.]

The above provides in specific and unambiguous terms for what purpose the commissioner may establish rules and regulations; i.e., to establish procedures for filing documents and information supplemental thereto which are found necessary after the original filing. We find no authority either implied or otherwise in this language which would broaden the scope of this delegated power.

The Act also provides in part in Section 1 that

". . . at least thirty (30) days prior to the issuance of such bonds, the city shall file a notice with the Kansas securities commissioner of such proposed issuance. . . ."

And in section 2, the Act states in part:

"Revenue bonds for which notice is required to be filed pursuant to section 1 shall not be issued unless the securities commissioner shall find all information and documents required to be contained in such notice are complete and timely filed."

Second, in view of these provisions you ask when and under what circumstances is an IRB notice "timely filed" with the commissioner.

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The notice requirement by operation of law becomes a condition precedent to the issuance of IRBs falling within the purview of the Act. Unless and until the Act has been complied with the issuing municipality is without authority to issue its IRBs. And the obvious time element essential to this condition precedent as provided in the Act is thirty days. Thus, the securities commissioner must examine the information filed pursuant to the Act [Section 1(1)(h)] to determine whether the proposed issue will take place after expiration of the statutory time period. If the information is complete, he may make a finding accordingly. If the information filed is amended in a manner pursuant to Section 1(2), the thirty day period is still computed as of the date the original notice is filed. However, should the originally filed information be determined as incomplete per Section 2, then the timely filed requirement will be necessarily governed by whatever procedures the securities commissioner devises by rules and regulations as authorized in Section 2.

You also ask in this regard whether IRB notices filed in the commissioner's office prior to the date the Act became effective (publication in the statute book - July 1, 1977) may be judged timely filed prior to July 30, 1977. The securities commissioner clearly has an affirmative duty to find all IRB notices filed with his office to be complete and timely filed, and he must do so upon the material supplied to him. We find no language in the Act which prohibits filing of the IRB notice prior to July 1, 1977. Accordingly, if the commissioner after July 1, 1977, determines that a particular IRB notice then before him is complete and timely filed he is empowered by the Act to make such finding irrespective of the original IRB notice filing date. And, to promulgate rules and regulations to cover this eventuality, the securities commissioner pursuant to Section 2 is empowered thereunder to deal only with establishing procedures to handle notices which were not originally complete when filed

Third, you question what is meant by the legislature in employing in Section 2 the term "complete" where the commissioner is directed to find that "all information and documents required to be contained in such notice are complete - and timely filed." A close examination of Section 1 will reveal that an IRB notice must contain two categories of material: (1) "information," i.e., name of the city proposing to issue the bonds, the lessee, the guarantor (if any), the paying or fiscal agent, the underwriter, all attorneys retained to render an opinion on the issue, the estimated total cost of the project, the face amount of the bond issue and the proposed date of issuance of such bonds; and (2) "documents,"

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i.e., a copy of the proposed ordinance authorizing the issuance of the bonds, a copy of the lease to be executed by the city for the project, a copy of the guaranty instrument (if any), a reasonably detailed list of the use of bond proceeds, and a copy of the preliminary official statement to be used when offering the bonds for sale. Out of the possible fourteen separate items delineated by the legislature to be included in the notice only one appears to require an exercise of discretion on the part of the securities commissioner: a reasonably detailed list of the use of bond proceeds. The remaining elements of the notice are clearly and precisely identified.

At this point we also note that the essential design of the Act is to affect only the filing of a notice with the securities commissioner that an IRB issue is imminent. Nothing in the language of the Act manifests an intent to empower the commissioner to examine the notice for anything but its completeness and timeliness. Nothing is provided either specifically or impliedly to indicate that the Act anticipates a substantive examination of a particular issue's compliance with the law such as is incumbent upon this office with regard to the issuance of other municipal bonds pursuant to the general bond law (K.S.A. 10-108). Again, had the legislature intended to provide such an important review it could have easily so provided.

It is apparent then from the specific itemization of what an IRB notice must contain and the manifest limitations of the commissioner's powers that the term "complete" must ultimately refer to the composition of the notice. Thus, to answer your specific questions, "complete" as employed throughout the Act means simply that the itemized information and documents, as discussed *supra*, are to be filed in the office of the securities commissioner without regard to the substance or content of said information and documents. We hasten to point out that this conclusion by no means is to infer that the Commissioner, in the event he discovers that the information and documents of a particular notice fail to comply with either the economic development revenue bond act (K.S.A. 12-740, *et seq.*) or other provisions of Kansas law, should not notify the appropriate authorities immediately.

Fourth, anticipating the above conclusion with regard to the term "complete" you ask whether the commissioner may promulgate guidelines to establish minimum standards of content for all filing documents and information. The several terms used in Section 1 to identify the necessary information and documents to be included in an IRB notice are nowhere defined in the Act. You question which of these terms could be amplified by administrative

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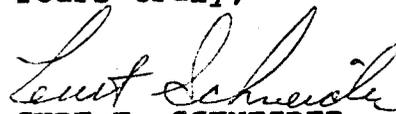
guidelines adopted other than as rules or regulations pursuant to K.S.A. 77-415 *et seq.*, as amended. While it may be helpful to those dealing with the Act to offer such guidelines, they would not be binding and enforceable, and would be purely advisory in nature.

Last, you inquire whether the commissioner pursuant to Section 2, in determining the completeness or incompleteness of an IRB notice should require documentation of the issuing municipality's compliance with Section 5 of the Act, which provides in part:

"no bonds shall be issued under the provisions of this act . . . without such city having first notified the board of county commissioners of the county in which such building or buildings or site or sites are located."

As pointed out above, the commissioner has no duty under the Act to substantively examine the material contained in the notice, and since compliance with Section 5 has no bearing on the items contained in the notice it is the opinion of this office that the commissioner may not require evidence of compliance with Section 5 as a condition for his finding per Section 2 that the notice is complete and timely filed.

Yours truly,


CURT T. SCHNEIDER
Attorney General

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