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ATTORNEY GENERAL OPINION NO. 87- 98

Eugene Barrett
Commissioner
Banking Department
700 Jackson, Suite 300
Topeka, Kansas 66603-3714

Re: Banks and Banking -- Banking Code; Deposit of
Public Moneys -- Securities for Deposits of Public
Funds

Synopsis: Mutual funds may not be used as securities for the
deposit of state and municipal funds. Cited
herein: K.S.A. 1986 Supp. 9-1101; 9-1402;
75-4201; K.A.R. 17-11-2; 15 U.S.C. § 80a-1 et
seq.

* * *

Dear Commissioner Barrett:

As former General Counsel for the Banking Department of the
State of Kansas, Rita D'Agostino requested our opinion
regarding the pledging of mutual funds for the deposit of
public moneys. Specifically, she is concerned with the
permissibility of the use of shares of mutual funds as
securities for the deposit of state and municipal funds, said
shares consisting of underlying pledgeable securities as
allowed by K.S.A. 1986 Supp. 9-1402(d) and 75-4201(p).

K.S.A. 1986 Supp. 9-1402 regulates deposit of local moneys,
stating:

"(a) Before any deposit of public moneys or funds shall be made by any municipal corporation or quasi-municipal corporation of the state of Kansas with any state or national bank, trust company, state or federally chartered savings and loan association or federally chartered savings bank, such municipal or quasi-municipal corporation shall obtain security for such deposit in one of the following manners prescribed by this section.

"(b) Such bank, trust company, state or federally chartered savings and loan association or federally chartered savings bank may give to the municipal corporation or quasi-municipal corporation a personal bond in double the amount which may be on deposit at any given time.

"(c) Such bank, trust company, state or federally chartered savings and loan association or federally chartered savings bank may give a corporate surety bond of some surety corporation authorized to do business in this state, which bond shall be in an amount equal to the public moneys or funds on deposit at any given time and such bond shall be conditioned that such deposit shall be paid promptly on the order of the municipal corporation or quasi-municipal corporation making such deposits.

"(d) Any state or national bank, trust company, state or federally chartered savings and loan association or federally chartered savings bank may deposit, maintain, pledge and assign for the benefit of the governing body of the municipal corporation or quasi-municipal corporation in the manner provided in this act, securities the market value of which is equal to 100% of the total deposits at any given time, and such securities shall consist of:

"(1) Direct obligations of, or obligations that are insured as to principal and interest by, the United States of America or any agency thereof and obligations and securities of United States sponsored corporations which under federal law may be accepted as security for public funds;

"(2) bonds of any municipal corporation or quasi-municipal corporation of the state of Kansas which have been refunded in advance of their maturity and are fully secured as to payment of principal and interest thereon by deposit in trust, under escrow agreement with a bank, of direct obligations of, or obligations the principal of and the interest on which are unconditionally guaranteed by, the United States of America;

"(3) bonds of the state of Kansas;

"(4) general obligation bonds of any municipal corporation or quasi-municipal corporation of the state of Kansas;

"(5) revenue bonds of any municipal corporation or quasi-municipal corporation of the state of Kansas if approved by the state bank commissioner in the case of banks and by the savings and loan commissioner in the case of savings and loan associations or federally chartered savings banks;

"(6) temporary notes of any municipal corporation or quasi-municipal corporation of the state of Kansas which are general obligations of the municipal or quasi-municipal corporation issuing the same;

"(7) warrants of any municipal corporation or quasi-municipal corporation of the state of Kansas the issuance of which is authorized by the state board of tax

appeals and which are payable from the proceeds of a mandatory tax levy;

"(8) bonds of either a Kansas not-for-profit corporation or of a local housing authority that are rated at least Aa by Moody's Investors Service or AA by Standard & Poor's Corp.;

"(9) bonds issued pursuant to K.S.A. 12-1740 et seq., and amendments thereto, that are rated at least MIG-1 or Aa by Moody's Investors Service or AA by Standard & Poor's Corp.; or

"(10) notes of a Kansas not-for-profit corporation that are issued to provide only the interim funds for a mortgage loan that is insured by the federal housing administration.

(e) No state or national bank, trust company, state or federally chartered savings and loan association or federally chartered savings bank may deposit and maintain for the benefit of the governing body of a municipal or quasi-municipal corporation of the state of Kansas, any securities which consist of:

"(1) Bonds secured by revenues of a utility which has been in operation for less than three years; or

"(2) bonds issued under K.S.A. 12-1740 et seq., and amendments thereto, unless such bonds have been refunded in advance of their maturity as provided in subsection (d) or such bonds are rated at least Aa by Moody's Investors Service or AA by Standard and Poor's Corp.

"(f) Whenever a bond is authorized to be pledged as a security under this section, such bond shall be accepted as a security if (1) in the case of a certified bond, it is assigned, delivered or pledged to the holder of the deposit for security; (2) in

the case of an uncertificated bond, registration of a pledge of the bond is authorized by the system and the pledge of the uncertificated bond is registered; or (3) in a form approved by the attorney general, which assures the availability of the bond proceeds pledged as a security for public deposits.

"(g) Any expense incurred in connection with granting approval of revenue bonds shall be paid by the applicant for approval." (Emphasis added).

For the purposes of this opinion, the definition of what constitutes an acceptable security for state moneys in K.S.A. 1986 Supp. 75-4201 is comparable to the regulation of local moneys in K.S.A. 1986 Supp. 9-1402. For this reason, this opinion will apply to the provisions of K.S.A. 1986 Supp. 75-4201 et seq., as well as those of K.S.A. 1986 Supp. 9-1402.

Mutual funds, the assets of which are invested solely in the securities listed above, are not found in either statutory listing. It is our opinion that K.S.A. 1986 Supp. 9-1402 and 75-4201 are restrictive "safe harbors" and allow for only the securities that are listed therein to be used to insure the deposits of public moneys. ["Before any deposit of public moneys or funds shall be made . . . (,) such . . . corporation shall obtain security for such deposit in one of the following manners prescribed by this section," K.S.A. 1986 Supp. 9-1402 (emphasis added); "'Securities' means any one or more of the following," K.S.A. 1986 Supp. 75-4201 (emphasis added).] Though the fund is insured as required by K.S.A. 1986 Supp. 9-1402(d), it appears that the investors in the fund (including the governmental entity) do not receive a direct guarantee on the underlying securities. We are therefore reluctant to opine that mutual fund shares are as safe as a direct interest in the securities listed in the statutes.

Expressio unius est exclusio alterius, the expression of one thing is the exclusion of another, is a well settled rule of statutory construction which we find applicable in this case. See, e.g., Board of County Commissioners v. Greenhow, 241 Kan. 119 (1987). Had the legislature wished to extend the list to include mutual funds, it could easily have done so.

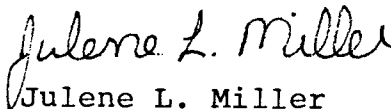
Since mutual funds are not specifically listed in either statute, it is our opinion that mutual funds may not be used as securities for the deposit of state and municipal funds, whether or not the mutual funds consist of the above-mentioned underlying allowable securities. The intent of these statutes is to protect the moneys of Kansas. In light of this intent, all readings of these statutes must be done in the most strict and literal form, with any ambiguity to be read for fiscal integrity and against a loosening of these statutory safeguards.

In conclusion, mutual funds may not be used as securities for the deposit of state and municipal funds.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Julene L. Miller
Deputy Attorney General

RTS:JLM:TRL:bas