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ATTORNEY GENERAL OPINION NO. 88- 86

Harland E. Priddle
Secretary
Department of Commerce
400 S.W. 8th, 5th Floor
Topeka, Kansas 66603-3957

Re: State Departments; Commissions and Authorities--
Department of Commerce--Kansas Partnership Fund;
Rules and Regulations to Implement the Act

Synopsis: Section 2(b) of 1988 Senate Bill No. 574 provides that the Secretary of Commerce "shall develop criteria for the review and analysis of loan applications under this section." As the criteria to be developed appear to fall within the definition of a rule or regulation, as set forth in K.S.A. 77-415(4), they must be adopted and filed in accordance with the provisions of K.S.A. 77-415 et seq. Cited herein: K.S.A. 77-415; 1988 Senate Bill No. 574.

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Dear Mr. Priddle:

You request our opinion concerning 1988 Senate Bill No. 574. Specifically, you ask whether you may, under section 2 of the act, adopt internal agency criteria for the review and analysis of loan applications, or whether the criteria must be adopted and filed as a regulation under the provisions of K.S.A. 77-415 et seq.

1988 Senate Bill No. 574 establishes a loan program under which the Secretary of Commerce is to enter into loan agreements with Kansas cities and counties to provide financing for public infrastructure improvement projects. Section 2(b) of the law provides that the Secretary of Commerce shall review and analyze all applications for loans and "shall develop criteria for the review and analysis of loan applications under this section." Section 2(e) of the law authorizes the Secretary of Commerce to adopt rules and regulations deemed necessary for the proper administration of sections one through three of the act.

In regard to the applicability of K.S.A. 77-415 et seq. to the adoption of loan evaluation criteria, K.S.A. 77-415 prescribes that "every rule and regulation adopted by a state agency to govern its enforcement or administration of legislation shall be adopted by the state agency and filed as a rule and regulation as provided in this act." The term "rule and regulation" is defined in subsection (4) of the aforesaid statute as follows:

"'Rule and regulation,' 'rule,' 'regulation' and words of like effect mean a standard, statement of policy or general order, including amendments or revocations thereof, of general application and having the effect of law, issued or adopted by a state agency to implement or interpret legislation enforced or administered by such state agency or to govern the organization or procedure of such state agency . . . a rule and regulation as herein defined shall not include any rule and regulation which: (a) relates to the internal management or organization of the agency and does not effect private rights or interest."

The above-quoted definition was interpreted in Attorney General Opinion No. 82-119. Specifically, in that opinion we discussed the applicability of the rule and regulation filing act to policy manuals:

"Therefore, in order for a particular plan, policy bulletin or policy manual to be regarded as a 'regulation,' and thereby subject to the filing act, it must be

determined if such plan, policy bulletin or policy manual is:

- "1. a standard, statement of policy or general order;
- "2. of general application;
- "3. intended to have the force and effect of law; and
- "4. issued or adopted by a state agency either to implement or interpret legislation enforced or administered by such state agency or to govern the agency's organization or procedure.

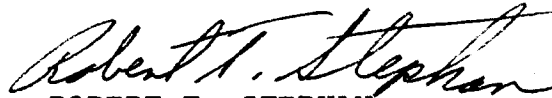
"The foregoing enumerates the criteria provided in K.S.A. 1981 Supp. 77-415(4) (as amended) to define 'regulation.' From a review of these criteria, it is apparent that a determination of whether a particular document of a state agency is to be regarded as a 'regulation' is a question of fact; it requires a comparison of such document with these criteria. It also is apparent that the denomination of the document by the agency or the statute authorizing its promulgation is not the significant consideration. Whether the document is styled as a policy manual or as a regulation is not determinative of its status under the filing act. It is to be regarded as a 'regulation' under that act only if it satisfies the definitional criteria set forth above."

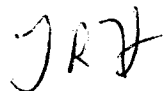
It would appear that criteria for the review and analysis of loan applications under Senate Bill No. 574 would have the attributes of a rule and regulation, as discussed in the above-quoted opinion. Additionally, although the criteria may relate to internal management of the agency, subsection (4)(a) of K.S.A. 77-415 is not applicable for the reason that adoption of the subject criteria clearly affects private interests.

In summary, section 2(b) of 1988 Senate Bill No. 574 provides that the Secretary of Commerce "shall develop criteria for the

review and analysis of loan applications under this section." As the criteria to be developed appear to fall within the definition of a rule or regulation, as set forth in K.S.A. 77-415(4), they must be adopted and filed in accordance with the provisions of K.S.A. 77-415 et seq.

Very truly yours,


ROBERT T. STEPHAN
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RTS:JLM:TRH:jm