



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 83- 88

Merle R. Bolton  
Commissioner of Education  
State Department of Education  
120 East 10th Street  
Topeka, Kansas 66612

Re: Cities and Municipalities -- Investment of Public  
Monies -- Active Versus Idle Funds; Deposits in  
Interest-Bearing Demand Accounts

Banks and Banking -- Banking Code; Deposit of  
Public Moneys -- Active Versus Idle Funds; Deposits  
in Interest-Bearing Demand Accounts

Synopsis: K.S.A. 12-1675, as amended, sets forth the ways  
in which certain governing bodies, including  
school districts and community colleges, may in-  
vest moneys which are not immediately required for  
the purposes for which they were collected or re-  
ceived. Such "idle funds" may only be invested  
in the five ways set out at subsection (b). Active  
funds, being those which the governing body makes  
immediate and regular use, are not subject to the  
restrictions of K.S.A. 12-1675, as amended. Per-  
missible accounts for active funds include check-  
ing accounts, demand deposit accounts, negotiable  
order of withdrawal (NOW) accounts, savings ac-  
counts, and money market deposit accounts, all of  
which have no minimum maturity and allow with-  
drawals on demand with no penalty. Cited herein:  
K.S.A. 9-701, as amended by 1983 Senate Bill No.  
64, K.S.A. 9-1401 and K.S.A. 12-1675, both as  
amended by 1983 House Bill No. 2439 and 1983 Sub-  
stitute for House Bill No. 2139, P.L. 97-320, 12  
U.S.C.A. §3503, 12 C.F.R. §1204.122.

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Dear Mr. Bolton:

As Commissioner of Education for the State of Kansas, you request our opinion on a question concerning the permissible ways in which school districts and community colleges may deposit moneys which are currently being drawn upon. Specifically, you inquire whether such entities may place public funds in the money market deposit accounts created as a result of Public Law 97-320, which was passed by the United States Congress last year. Popularly known as the Garn-St.Germain Act, one section of the law amends 12 U.S.C.A. §3503 so as to mandate the creation of money market deposit accounts which have no minimum maturity and which allow up to six preauthorized transfers to other accounts each month. In view of existing Kansas statutes following the 1983 legislative session, you wish to know if such accounts represent a new option for school districts and community colleges.

As you note in your letter, this office has recognized for several years the difference between the investment of moneys by a governing body which are not immediately needed under K.S.A. 12-1675, as amended, and the deposit of funds in accounts which are drawn upon on a regular basis to meet immediate needs. In Attorney General Opinion No. 75-448, a city planned to use a savings account in connection with a non-interest bearing checking account. Although enough money would be kept in the checking account to meet the minimum balance requirements of the bank, anything over that would automatically be transferred to the savings account, and would accordingly draw interest. When demands were made on the checking account, funds would be automatically transferred back from the savings account. Although the opinion concluded that this arrangement was clearly done for the purpose of generating income from the city's funds, K.S.A. 12-1675 was found not applicable, in that no idle funds were involved, i.e., money "not immediately required for the purposes for which [it was] collected or received." Attorney General Opinion No. 76-212, written in response to an inquiry from you, broadened the scope of the earlier opinion to include school districts and community colleges.

We note that, in addition to money market deposit accounts, neither checking or savings accounts are listed as permissible investments by K.S.A. 12-1675, as amended. The five methods to which a governing body is limited by that statute include: the governing body's own temporary notes; time deposit, open accounts or certificates of deposit; time certificates of deposit; repurchase agreements; and United States treasury bills or notes. Although the statute was amended twice during the 1983 legislative session (House

Bill No. 2439, Substitute for House Bill No. 2139), this list remains essentially the same, despite certain qualifications as to when and where certain of the investments can be made.

In our opinion, a clear distinction exists between the methods of investment set out in the above statute and a checking or savings account set up in an authorized institution pursuant to K.S.A. 9-1401, also as amended by the aforementioned 1983 House Bills. As was previously concluded by this office, the period for which the funds are unavailable for use determines whether they are active or idle. Each of the investment methods contained in K.S.A. 12-1675(b), as amended, has features which limit accessibility to the funds placed therein. Temporary notes, repurchase agreements and treasury bills and notes all have fixed periods for which the funds must be invested. Depending on the instrument, this period can range from one day to over six months. Time deposit, open accounts and time certificates of deposit, as defined by K.S.A. 9-701, as amended by 1983 Senate Bill No. 64, also provide that, should withdrawal be made prior to maturity, an interest penalty will be imposed.

In obvious contrast are savings accounts and checking accounts, demand deposit accounts and negotiable order of withdrawal (NOW) accounts. These latter, the so-called NOW and Super NOW accounts, earn interest, yet are payable in full without penalty, and have no minimum maturity date. A governing body thus has constant and immediate access to money in such accounts, a fact which has been seen as significant by judicial decisions and legal authorities. Andrew v. Union Savings Bank & Trust Co., 270 N.W. 466, Jones v. O'Brien, 235 N.W. 655 (S.D. 1931), Owen v. Anderson, 186 S.E. 864 (Ga. 1936), 63 Am.Jur.2d, Public Funds §10, p. 404 (1972). In each of these cases, demand accounts were found to be deposits, rather than investments, under the particular statute or statutes at issue.

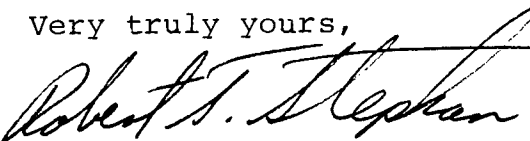
Various features of the money market deposit account support characterization of it as a deposit for active funds. Section 327 of the Garn-St.Germain Act amended Section 204 of the Depository Institutions Deregulation Act of 1980 (12 U.S.C. §3503) to authorize the creation of a new class of accounts that were to be directly equivalent to and competitive with money market mutual funds. In that no minimum maturity would be required, there are no penalties for early withdrawal. Further, up to six automatic or third-party transfers could be made each month. As more fully set out at 12 C.F.R. §1204.122, the administrative regulations set a minimum balance of \$2,500 for the payment of money market rates, and establish no limits on either the interest which may be paid (if the balance is over \$2,500) or the number of

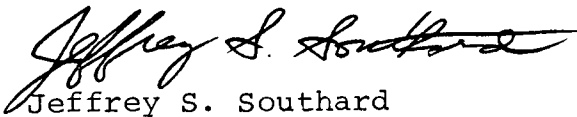
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transfers which may be made in person. Although a financial institution offering the account can require notice of up to 7 days for a withdrawal, this is optional and is the same limit as already exists for savings accounts and NOW accounts. Accordingly, it is our opinion that a money market deposit account should be considered an appropriate deposit of active funds and not as an investment of idle funds under K.S.A. 12-1675, as amended.

In conclusion, K.S.A. 12-1675, as amended, sets forth the ways in which certain governing bodies, including school districts and community colleges, may invest moneys which are not immediately required for the purposes for which they were collected or received. Such "idle funds" may only be invested in the five ways set out at subsection (b). Active funds, being those which the governing body makes immediate and regular use, are not subject to the restrictions of K.S.A. 12-1675, as amended. Permissible accounts for active funds include checking accounts, demand deposit accounts, negotiable order of withdrawal (NOW) accounts, savings accounts, and money market deposit accounts, all of which have no minimum maturity and allow withdrawals on demand with no penalty.

Very truly yours,

  
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RTS:BJS:JSS:hle