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February 3, 1986

ATTORNEY GENERAL OPINION NO. 86- 9

The Honorable Fletcher Bell
Commissioner of Insurance
Kansas Insurance Department
420 SW 9th
Topeka, Kansas 66612-1678

Re: Insurance -- Miscellaneous Provisions --
Apportionment of Risk; Property Damage Liability
Insurance; Governing Board and Plan

Synopsis: Pursuant to K.S.A. 40-2101 et seq., the Kansas All-Industry Placement Facility is created to insure the availability of property insurance for residential, business and other properties which meet reasonable standards of insurability but for which insurance cannot be obtained through the regular insurance market. A governing board is established by K.S.A. 40-2102(e), the members of which are appointed by the commissioner of insurance to oversee operation of the facility and to review and prescribe operating rules on at least an annual basis. One such rule, K.A.R. 1984 Supp. 40-3-33, provides that payment of premiums for insurance offered by a "servicing insurer" designated by the facility is made directly to the servicing insurer, not through the facility. Accordingly, the governing board of the facility is not responsible for filing a Form 1099-MISC with the Internal Revenue Service for commissions paid to individual insurance agents by the servicing insurer. Cited herein: K.S.A. 40-2102; K.A.R. 1984 Supp. 40-3-33; 26 U.S.C. §6041A.

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Dear Commissioner Bell:

You have requested our opinion whether the governing board of the Kansas All-Industry Placement Facility is required to file 1099-MISC forms with the Internal Revenue Service for commissions paid to agents who participate in the FAIR plan administered by the facility. Upon consideration of your question, it is our opinion that while the board is a governmental agency, as that term is used in the Internal Revenue Code, current regulations do not provide for disbursement of commissions by the facility. Rather, a "servicing insurer" designated by the facility handles the payment of such commissions, and so is responsible for the filing of such forms.

We have previously been of the opinion that a similar governing board appointed by the commissioner of insurance to act at his behalf in overseeing a plan created by statute was a governmental entity. Attorney General Opinion No. 85-21. K.S.A. 40-2102 provides that a plan shall be submitted to the commissioner of insurance for the equitable apportionment of insurance coverage of those applicants "who are in good faith entitled to, but who are unable to procure through ordinary methods, such insurance." In furtherance of this goal, the statute in part requires that such plan shall provide:

"(d) a method whereby applicants for insurance, insureds and insurers may have a hearing on grievances and the right of appeal to the commissioner;

"(e) for every plan or plans, there shall be a governing board to be appointed by the commissioner of insurance which shall meet at least annually to review and prescribe operating rules . . .

"The commissioner shall review the plan as soon as reasonably possible after filing in order to determine whether it meets the requirements set forth in (a), (c) and (d) above. As soon as reasonably possible after the plan has been filed the commissioner shall in writing approve or disapprove the same." (Emphasis added.)

26 U.S.C. §6041A is an amendment to the Internal Revenue Code which was made by §312 of the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982, and was intended to assist the commissioner of revenue in ascertaining whether a taxpayer has reported his or her true income. To further that purpose, §6041A provides that:

"(a) RETURNS REGARDING REMUNERATION FOR SERVICES. If

"(1) any service-recipient engaged in a trade or business pays in the course of such trade or business during any calendar year remuneration to any person for services performed by such person, and

"(2) the aggregate of such remuneration paid to such person during such calendar year is \$600 or more, then the service-recipient shall make a return, according to the forms or regulations prescribed by the Secretary, setting forth the aggregate amount of such payments and the name and address of the recipient of such payments. For purposes of the preceding sentence, the term 'service-recipient' means the person for whom the service is performed.

. . . .

"(d) APPLICATIONS TO GOVERNMENTAL UNITS.

"(1) Treated as Persons. The term 'person' includes any governmental unit (and any agency or instrumentality thereof).

"(2) Special Rules. In the case of any payment by a governmental entity or any agency or instrumentality thereof

"(A) subsection (a) shall be applied without regard to the trade or business requirement contained therein, and

(B) any return under this section shall be made by the officer or employee having control of the payment or appropriately

designated for the purpose of making such return." (Emphasis added.)

The proper method of filing the above-described information requires completion of I.R.S. Form 1099-MISC.

In light of the requirements of the Internal Revenue Code, it is clear that if the board paid commissions to individual agents, such would be required to be reported on a Form 1099-MISC. However, an examination of the administrative rule and regulation which governs the facility, K.A.R. 1984 Supp. 40-3-33, indicates that in fact the facility does not handle the payment of commissions to individual agents. Section VII, paragraph 2 of the regulation, which sets out the elements of the FAIR plan, indicates that:

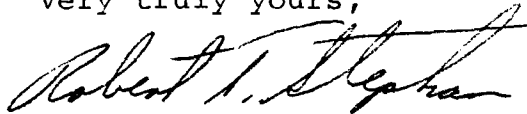
"If the risk is acceptable to the facility, the facility shall notify the applicant and the licensed producer designated by the applicant, of the name of the servicing insurer and the premium to be charged. The servicing insurer, upon receipt of the premium, shall within three (3) business days issue the policy to be effective at twelve o'clock noon of the date of the receipt of the premium, unless a later effective date is specified. The policy shall be forwarded to the applicant with a copy to the licensed producer. The servicing insurer shall pay the commission to the license producer designated by the applicant." (Emphasis added.)

Accordingly, it is the servicing insurer (who we understand from you staff is the Trinity Universal company), which is responsible for the disbursement of commissions to the agent designated by the applicant. In that the facility has no knowledge of the amount of money paid to each "licensed producer" (i.e. agent), as a practical matter it would be unable to provide the information required by Form 1099-MISC. Further, if the servicing insurer makes the compensation payment to the licensed producer's agency, rather than the agent directly, then such compensation need not be reported if the agency is a corporation. Payments of compensation are expressly exempt, with exceptions not here relevant, if made to corporations. I.R.S. Publication 1194, Vol. 1, page 193 (December 1985). We assume this is because

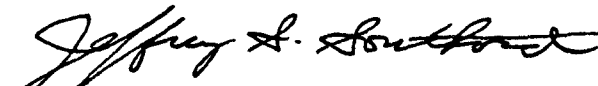
the corporation itself would be responsible for filing of the 1099-MISC form.

In conclusion, pursuant to K.S.A. 40-2101 et seq., the Kansas All-Industry Placement Facility is created to insure the availability of property insurance for residential, business and other properties which meet reasonable standards of insurability but for which insurance cannot be obtained through the regular insurance market. A governing board is established by K.S.A. 40-2102(e), the members of which are appointed by the commissioner of insurance to oversee operation of the facility and to review and prescribe operating rules on at least an annual basis. One such rule, K.A.R. 1984 Supp. 40-3-33, provides that payment of premiums for insurance offered by a "servicing insurer" designated by the facility is made directly to the servicing insurer, not through the facility. Accordingly, the governing board of the facility is not responsible for filing a Form 1099-MISC with the Internal Revenue Service for commissions paid to individual insurance agents by the servicing insurer.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Deputy Attorney General