

VOLUME NO. 41

OPINION NO. 4

CITIES AND TOWNS - Payment of commission for services performed in connection with offering and sale of revenue bonds;

REVENUE BONDS - Payment of commission for services performed in connection with offering and sale;

REVENUE BONDS - Sale at price below par value;  
MONTANA CODE ANNOTATED - Sections 7-7-4401 to 7-7-4435,  
7-7-4422, 7-7-4433, 7-7-4434;  
MONTANA LAWS OF 1983 - House Bill 716;  
UNITED STATES CODE - 15 U.S.C. § 78(a) to 78(jj).

HELD: A financial consultant may not receive a commission based on the value of bonds purchased by it for services performed in connection with the municipal revenue bond offering and sale to the extent the commission, when subtracted from the purchase price of the bonds, reduces the bonds' effective selling price below par value.

21 January 1985

Stuart C. MacKenzie  
City Attorney  
City of Chinook  
Chinook MT 59523

Dear Mr. MacKenzie:

You have requested my opinion concerning the following question:

May a city sell sewer revenue bonds to its financial consultant at a public sale if the consultant is the successful bidder and also pay the consultant a contractual fee for services performed in connection with the bond offering without violating section 7-7-4433(1), MCA, requiring sale of revenue bonds at no less than par value?

Your question arises from a situation in which the City of Chinook entered into a contract with an investment firm under which the investment firm was to serve as the financial consultant for a revenue bond offering. The services to be performed by the investment firm were varied and included, among others: (1) consultation with bond attorneys selected to oversee legal aspects of the issuance and sale; (2) provision for an opinion of bond counsel; (3) preparation of technical data such as maturity schedules, call features and the method/timing of the offering and sale; (4) attendance at meetings associated with the offering and sale; (5) coordination

of advertisements for the sale; and (6) provision for bond forms. The bonds are to be offered through public sale, and the consultant has expressly reserved the right to bid on the bonds. The consultant's compensation for services is determined under two separate fee schedules, both of which are based on the total dollar amount of the bonds sold, including the value of any bonds purchased by it. One schedule applies if the city chooses to use bond counsel of the fiscal agent's choosing (minimum fee \$9,000). A somewhat reduced fee (minimum \$7,500) applies if the city chooses its own bond counsel. The contract imposes a minimum fee if the amount of the issue is reduced or multiple sales are held. There is no obligation to pay a fee should the bonds for some reason remain unsold. I have assumed, for the purposes of this opinion, that the proposed commission is reasonably related to the value of the services rendered and that the services offered are necessary expenditures in the issuance of revenue bonds.

Issuance of the bonds is governed by the Municipal Revenue Bond Act of 1939, §§ 7-7-4401 to 4435, MCA. Under section 7-7-4422, MCA, a municipality may, in determining the cost of a bond issue, include all fiscal expenses such as consultant fees. Unless sold to the United States, the State, or any State agency, the sale must be public and bonds may not be sold at less than par value. §§ 7-7-4433, 7-7-4434, MCA. The statute does not contain any provisions specifically addressing whether a financial consultant may bid upon bonds as to which the consultant is performing services and upon whose sale the consultant's compensation is directly dependent. There is, as well, no Montana decisional authority relevant to this issue.

Whether a statute requiring municipal bonds, to be sold at no less than par value, is violated by payment of a commission in connection with the sale to a financial consultant who also becomes the purchaser, has been litigated in other jurisdictions. The universal result in those cases is that "the purchaser cannot be allowed a direct commission where the bonds are sold at par." 15 McQuillin, The Law of Municipal Corporations § 43.67 (3d ed. 1970). See also 2 Antieau, Municipal Corporation Law § 15.23 (1983); 64 C.J.S. Municipal Corporations § 1932(b) (1950); Annot., 91 A.L.R. 7, 56 (1934); Annot., 162 A.L.R. 396, 402 (1946); Koochiching

County v. Elder, 145 Minn. 77, 176 N.W. 195, 196 (1920) ("[a] commission paid to a buyer is plainly a sale at a discount"); Currie v. Frazier, 48 N.D. 600, 186 N.W. 244, 246 (1921) (when commission must be subtracted, sale at less than par value results); Duff v. Knott County, 328 Ky. 71, 36 S.W.2d 870 (1931); Lucas v. City of Nampa, 41 Idaho 35, 238 P. 288 (1925); Board of Drainage Commissioners v. Arnold, 156 Ga. 733, 120 S.E. 310 (1923); Bay City v. Lumbermen's State Bank, 193 Mich. 533, 160 N.W. 425 (1916); Bayha v. Public Utility District No. 1, 2 Wash. 2d 85, 97 P.2d 614, 629 (1939) (dictum).

Most recently, in Hayes v. Sanitary and Improvement District No. 194, 196 Neb. 653, 244 N.W.2d 505, 512 (1976), the Nebraska court held that payment of a commission for financial consultant services to the purchaser of a bond issue at a private sale was improper, observing that "[u]nder statutes requiring bonds to be sold at not less than par, fees and commissions paid to a purchaser have generally been held to constitute, in substance and effect, a discounted violation of the law." (Citations omitted.)

While, with the exception of Hayes, the decisions finding a violation of the proscription against sales below par are not current, their reasoning remains sound. Payment of a commission to a financial consultant based upon the value of bonds sold to the consultant is uniformly held to constitute in substance a discount of the bonds' purchase price, which reduces the purchase price and may make the sale one in violation of the statutes prohibiting a sale below par. Unquestionably, when the purchase price of municipal revenue bonds is reduced below par value, section 7-7-4433(1), MCA, is violated. Although this construction of section 7-7-4433(1), MCA, may appear technical since the commission fees have been presumed reasonable for the purposes of this opinion, the weight of decisional authority from other states and the need to minimize the opportunity for abuse of the par value requirement militates strongly against unconditioned permission for a financial consultant to recover commissions predicated upon its purchases. The potential for abuse can be seen clearly where, as in this contract, no fee need be paid if the bonds are not sold, but the consultant retains a right to purchase and, in effect, to guarantee himself a fee.

My opinion, in this regard, is further strengthened by the fact that the 1983 Legislature expressly rejected a provision in House Bill 716 which would have permitted the sale of a variety of bonds at 97% of par value, or at a discount. The purpose of that rejected provision was to permit brokers to take a commission and still sell the bonds at the value required by statute.

A financial consultant, accordingly, may not receive a commission as to revenue bonds which it purchases to the extent the commission, after subtraction from the bonds' purchase price, reduces the value received by the municipality for the bonds below their par value. A financial consultant may, however, receive a commission if reasonably related to the value of its services, which is calculated upon the value of the bonds purchased by others. The consultant may also receive a commission calculated upon the value of bonds purchased by it to the extent the commission, after subtraction from the bonds' purchase price, does not reduce below par the value received by the municipality.

Finally, I note that the Municipal Securities Rulemaking Board has promulgated regulations establishing ethical standards and disclosure requirements under the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78(a) to 78(jj), as to the purchase of municipal securities by financial advisors under the circumstances involved here. See Rule G-23 of the Municipal Securities Rulemaking Board, reprinted in Municipal Securities Rulemaking Board Manual (CCH) ¶ 3611. The disclosure requirements applicable to a public sale appear to have been met in this case. The Municipal Securities Rulemaking Board's regulations expressly do not supersede any more restrictive provision of state law applicable to the purchase of municipal bonds by financial consultants. The rule addresses itself to ethical conflicts of interest within the profession. It does not direct itself in any way to the provision of state law prohibiting a sale below par and can, therefore, have no bearing on that question.

THEREFORE, IT IS MY OPINION:

A financial consultant may not receive a commission based on the value of bonds purchased by it for services performed in connection with the municipal revenue bond offering and sale to the extent the

commission, when subtracted from the purchase price of the bonds, reduces the bonds' effective selling price below par value.

Very truly yours,

MIKE GREELY  
Attorney General