VOLUME NO. 42 OPINION NO. 25

BANKS AND BANKING - Appropriate institutions for deposit of county, school district, and protest fund moneys; CREDIT UNIONS - Appropriate institutions for deposit of county, school district, and protest fund moneys; PUBLIC FUNDS - Appropriate institutions for deposit of and permitted types of investment for county funds; SCHOOL DISTRICTS - Appropriate institutions for deposit of funds;

SECURITIES - Permitted types of investments for county moneys;
UNITED STATES - Treasury investment growth receipts as reflecting ownership in a direct obligation of; what constitutes an agency of;
CODE OF FEDERAL REGULATIONS - 12 C.F.R. § 611.400(a) (1987), 24 C.F.R. § 390.1 to 390.45 (1986);
MONTANA CODE ANNOTATED - Sections 7-6-201, 7-6-202, 7-6-206, 7-6-207, 7-6-213, 15-1-402, 17-6-103, 17-6-204, 20-9-212, 20-9-213, 32-1-105, 32-1-107, 32-1-108;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 60 (1986), 42 Op. Att'y Gen. No. 16 (1987);
UNITED STATES CODE - 12 U.S.C. §§ 1431, 1452, 1455, 1717, 1718, 1721, 1722, 1723, 1723a, 2002, 2012, 2013, 2055, 2072, 2073, 2079, 2122, 2124, 2134, 2153, 2155; 28 U.S.C. §§ 451, 1349.

HELD: 1. A county treasurer may utilize the services of an investment or brokerage firm to purchase securities of the kind specified in section 7-6-202, MCA.

2. A county treasurer may not invest in private mutual funds which contain only those kinds of securities specified in section 7-6-202, MCA.

3. Securities issued by the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Home Loan Bank Board, the Federal National Mortgage Association, and Farm Credit System banks are permissible investments under section 7-6-202, MCA. Mortgage-backed certificates issued by a private entity but guaranteed by the Government National Mortgage Association are not permissible investments under section 7-6-202, MCA. Treasury investment growth receipts represent investments in direct obligations of the United States government permissible under section 7-6-202, MCA.

4. The permissible alternatives for deposit or investment of county general fund moneys, protest fund moneys, and school district moneys differ and are governed, respectively, by sections 7-6-202 to 213, 15-1-402, and 20-9-213(4), MCA.

11 September 1987

James C. Nelson
Glacier County Attorney
Glacier County Courthouse
Cut Bank MT 59427

Dear Mr. Nelson:

You have requested my opinion concerning the following questions:

1. May a county treasurer utilize the services of an investment or brokerage firm to purchase securities of the kind specified in section 7-6-202, MCA?

2. May a county treasurer invest public money in private mutual funds which, in turn, contain only securities of the kind specified in section 7-6-202, MCA?

3. Are the following investments "securities issued by agencies of the United States" under section 7-6-202, MCA: (a) mortgage-backed certificates guaranteed by the Government National Mortgage Association; (b) mortgage-backed certificates issued by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation; (c) bonds or other securities issued by the Federal Home Loan Bank Board or the several banks of the Farm Credit System; and (e) treasury investment growth receipts?

4. Are there any differences in the kinds of investments which may be made by a county treasurer with respect to school district moneys, tax protest fund moneys, and general fund moneys?

A response to these questions requires analysis of state and federal statutory provisions, federal regulations, and related decisional authority.

I.

The deposit or investment of public money held by a county or city treasurer is largely governed by sections 7-6-201 to 213, MCA. Such moneys not necessary for

immediate use may be placed into savings or time deposits in banks, building and loan associations, or credit unions located in the involved county, city, or town. §§ 7-6-201(2), 7-6-206(1), 7-6-213, MCA. Repurchase agreements may be entered into, after a bidding process, with any financial institution licensed (a) to do business in the state, (b) to accept demand payments, and (c) to buy and sell securities (§ 7-6-213(5), MCA); such an agreement is defined in section 7-6-213(2), MCA, as "a contract that specifies the minimum and maximum of public money that the local governing body will invest under the contract in securities that the financial institution will sell to the local governing body and that the financial institution will repurchase on mutually agreeable terms." Financial institutions so qualifying include commercial banks, trust companies, and investment companies as defined in sections 32-1-105, 32-1-107, and 32-1-108, MCA. Public money not necessary for immediate use may also be invested "in direct obligations of the United States government and securities issued by agencies of the United States." § 7-6-202, MCA. Finally, such money may be placed into the state pooled investment fund established under section 17-6-204, MCA.

The investment limitations under section 7-6-202, MCA, are directed only to the types of securities which may be purchased. There is no express or implied limitation on the involved treasurer's ability to utilize the services of an investment company for the purpose of buying those securities. Indeed, use of an investment company to purchase securities is clearly incidental to the exercise of the specific grant of authority in section 7-6-202, MCA, and no policy or statutory ground exists to foreclose that use. I note, however, that a treasurer may not use an investment company for the purpose of making demand or time deposits since, as stated above, that form of transaction is restricted to banks, savings and loan associations, and credit unions.

II.

The second question must be answered negatively. Even though the mutual fund may be limited in its holdings to investments in which the treasurer could directly invest under section 7-6-202, MCA, the actual security being purchased is an interest in an investment company. E.g., United States v. National Association of Securities Dealers, 422 U.S. 694, 697-98 (1975); see generally T. Hazen, The Law of Securities Regulation § 17.5 (1985) (discussing federal regulation of distribution and pricing of investment company shares).

No statutory provision extends to a county or city treasurer the authority to make that form of investment, and there is no basis for inferring such power.

III.

The term "agency of the United States" as used in section 7-6-202, MCA, is not defined. However, section 17-6-103(3), MCA, does designate various entities as "agencies of the United States" in connection with identifying securities which may be used to secure the deposit of public funds by the State Treasurer:

> The following kinds of securities may be pledged or guarantees may be issued to secure deposits of public funds:
>
> ....
>
> (3) securities issued or fully guaranteed by the following agencies of the United States or their successors, whether or not guaranteed by the United States:
>
> (a) commodity credit corporation;
> (b) federal intermediate credit banks;
> (c) federal land bank;
> (d) bank for cooperatives;
> (e) federal home loan banks;
> (f) federal national mortgage association;
> (g) government national mortgage association;
> (h) small business administration;
> (i) federal housing administration; and
> (j) federal home loan mortgage corporation[.]

County treasurers are also authorized to require security for deposits of public money under certain circumstances, and such security must consist either of those instruments specified in section 17-6-103, MCA, or cashier's checks issued to the depository institution by a federal reserve bank. § 7-6-207(1), MCA. Consequently, if the Legislature intended the term "agencies of the United States" in sections 7-6-202 and 17-6-103(3), MCA, to be applied identically, securities issued by the entities listed in your third question would be deemed appropriate forms of investment under section 7-6-202, MCA.

Nonetheless, a somewhat different conclusion as to the meaning of the term "agencies of the United States" is supported by an analysis of federal statutes, regulations, and decisional authority. 28 U.S.C. § 451

defines the term "agency," as used in Title 28 of the United States Code, to include "any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense." 28 U.S.C. § 1349 further states that federal "district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock." As a general matter, these provisions require an analysis of the involved entity's function, operation, management and, as to corporate entities, ownership status. See Rauscher Pierce Refsnes, Inc. v. Federal Deposit Insurance Company, 789 F.2d 313, 314 (5th Cir. 1986); Acron Investments v. Federal Savings & Loan Insurance Corporation, 363 F.2d 236, 239-40 (9th Cir.), cert. denied, 385 U.S. 970 (1966).

As to most of the entities listed in the third question, the determination of agency status under 28 U.S.C. § 451 is relatively straightforward. The Government National Mortgage Association (GNMA) has been recognized as a "wholly owned government corporation within the Department of Housing and Urban Development" (Rockford Life Insurance Company v. Illinois Department of Revenue, 55 U.S.L.W. 4747, 4747-48 (June 8, 1987)) and an agency of the United States under 28 U.S.C. § 451 (Government National Mortgage Association v. Terry, 608 F.2d 614, 617-20 (5th Cir. 1979)). See 12 U.S.C. §§ 1717(a)(2)(A), 1723(a). Unlike GNMA, the Federal National Mortgage Association (FNMA) is a corporation which, although established pursuant to federal statute, is privately owned. 12 U.S.C. §§ 1717(a)(2)(B), 1718, 1723(b), 1723a(d)(2); see Roberts v. Cameron-Brown Company, 556 F.2d 356, 359 (9th Cir. 1977); Northrip v. Federal National Mortgage Association, 527 F.2d 23, 32 (6th Cir. 1975); Farmers & Traders State Bank v. Johnson, 121 Ill. App. 3d 43, 76 Ill. Dec. 565, 458 N.E.2d 1365, 1369 (1984). FNMA is therefore not an agency of the United States for federal jurisdiction purposes. The Federal Home Loan Bank Board (FHLBB) and the Federal Home Loan Mortgage Corporation (FHLMC) are indisputably federal agencies. See 12 U.S.C. § 1437(b) (expressly deeming FHLBB an independent agency within the executive branch); 12 U.S.C. § 1452(e) (expressly deeming FHLMC an agency under 28 U.S.C. §§ 1345 and 1442). Because GNMA, FHLMC, and FHLBB are "agencies of the United States" under any interpretation of that term, securities issued by them pursuant to 12 U.S.C.

§§ 1431(b), 1455(a), and 1721(b) are proper investments under section 7-6-202, MCA.

The Farm Credit System includes, inter alia, federal land banks, federal intermediate banks, and federal banks for cooperatives. See 12 U.S.C. § 2002; 12 C.F.R. § 611.400(a) (1987); see generally 11 N. Harl, Agricultural Law § 100.03 (1986) (describing the operation of the several Farm Credit System banking institutions). Each of these entities "is an instrumentality of the United States, created to carry out the congressional policy and objectives of the [Farm Credit] Act." 12 C.F.R. § 611.400(a); see Memphis Bank & Trust Company v. Garner, 457 U.S. 392, 395 n.4 (1983). All Farm Credit System banks are authorized to issue bonds or other securities, and all such obligations are "deemed to be instrumentalities of the Government of the United States" whose principal and interest are generally exempt from federal, state, and local taxation. 12 U.S.C. §§ 2012(10), 2055, 2072(10), 2079, 2122(10), 2134, 2153(b). Despite the largely tax-exempt status of such securities, they are not guaranteed by the United States, and the issuing banks are discrete corporate entities whose capital stock is privately held. 12 U.S.C. §§ 2013(b), 2073(b), 2124(c), 2155(d); see H.R. Rep. No. 425, 99th Cong., 1st Sess. 5, reprinted in 1985 U.S. Code Cong. & Ad. News 2587, 2591. The Farm Credit System banks are thus, as stated in Federal Land Bank of Columbia v. Cotton, 410 F. Supp. 169, 171 (N.D. Ga. 1975), with reference to a federal land bank, "obviously meant to be ... private, rather than governmental, corporation[s] which would merely be subject to various federal regulations." They are consequently not agencies of the United States within the meaning of 28 U.S.C. § 451.

While the issue is close, I conclude that the term "agencies of the United States" in sections 7-6-202 and 17-6-103(3), MCA, should be applied similarly. First, section 17-6-103, MCA, was initially enacted by 1975 Mont. L. ch. 298, § 4, and the Legislature was presumably aware of its provisions when section 7-6-202, MCA, was amended by 1985 Mont. L. ch. 620, § 1, to add the words "and securities issued by agencies of the United States." It is thus reasonable, under accepted canons of statutory construction, to conclude that these sections should be read harmoniously. See 42 Op. Att'y Gen. No. 16 (1987) (the definition of the term "subdivision" in the Subdivision and Platting Act should be deemed applicable to the use of such term in a related statutory provision). Second, irrespective of the technical status of the FNMA and the Farm Credit System banks as agencies of the United States for

federal jurisdiction purposes, the Legislature obviously viewed them as federal instrumentalities when section 17-6-103, MCA, was adopted in 1975, and the nature of these entities has not materially changed thereafter. In this latter regard, it must be emphasized that FNMA assumed its present form in 1968 (Pub. L. No. 90-448, § 801, 82 Stat. 476, 536; H.R. Rep. No. 1585, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 2873, 2943-44) and that all Farm Credit System banks had become privately owned by the same year. It appears probable, therefore, that the Legislature utilized the term "agencies of the United States" without precise regard to whether the involved entity was within the executive branch of the federal government or otherwise federally owned, and, at least to the extent a particular entity is listed in section 17-6-103(3), MCA, it should be deemed a federal agency under section 7-6-202, MCA.

Irrespective of GNMA's status as an agency of the United States, privately issued mortgage-backed certificates guaranteed by it pursuant to 12 U.S.C. § 1721(g)(1) are inappropriate for investment under section 7-6-202, MCA. The issuer of such certificates is not GNMA but, rather, "a private party, generally a financial institution, that possesses a pool of federally-guaranteed mortgages." Rockford Life Insurance Company v. Illinois Department of Revenue, 55 U.S.L.W. at 4748; see New York Guardian Mortgagee Corporation v. Cleland, 473 F. Supp. 409, 411 (S.D.N.Y. 1979); Montgomery Ward Life Insurance Company v. Illinois, 89 Ill. App. 3d 292, 44 Ill. Dec. 607, 411 N.E.2d 973, 977 (1980). Since section 7-6-202, MCA, requires the involved security to be issued by an agency of the United States, such mortgage-backed guaranteed instruments fall outside the provision's scope.

Treasury investment growth receipts (TIGRs) are a form of investment in United States Treasury bonds offered by a particular investment firm; other such firms offer similar investments under different names. TIGRs evidence the holder's ownership of future interest and principal payments on specific United States Treasury obligations which, in the absence of payment default by the United States, are held in a special custody account by an independent trust company in certificate or book-entry form with the Federal Reserve Bank of New York. The holder otherwise has all rights and privileges ordinarily attendant to ownership of the bond. Should default occur, the holder has recourse only against the United States as the obligor on the bond. TIGRs, or like instruments, accordingly represent investments in

direct obligations of the United States government permissible under 7-6-202, MCA.

IV.

The final question is partially answered by 41 Op. Att'y Gen. No. 60 (1986), in which I held that funds in protest accounts established under section 15-1-402, MCA, were not "public money" subject to the deposit and investment provisions of sections 7-6-202 to 213, MCA. I further stated that such protested funds could only be deposited into interest-bearing accounts of local banks or savings and loan associations (§ 15-1-402(6), MCA) or into the state unified investment program (§ 15-1-402(7), MCA). Therefore, the investments alternatives permitted under 7-6-202, MCA, for "public money" in the possession of the county treasurer as part of the general fund are inapplicable to county or municipal taxes paid under protest pursuant to section 15-1-402, MCA.

Under section 20-9-212(10), MCA, a county treasurer is required to "invest the money of any [school] district as directed by the trustees of the district within 3 working days of such direction." The investment or deposit discretion of the trustees is limited by section 20-9-213(4), MCA, to (a) direct obligations of the United States government, payable within 180 days from the time of investment; (b) savings or time deposits in a state or national bank, building or loan association, savings and loan association, or credit union insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration and located in the same county as the school district or, in some instances, an adjacent county; and (c) the state unified investment program. The various differences between such investment or deposit alternatives and those in sections 7-6-201 to 213, MCA, are clear and need not be detailed.

THEREFORE, IT IS MY OPINION:

1. A county treasurer may utilize the services of an investment or brokerage firm to purchase securities of the kind specified in section 7-6-202, MCA.

2. A county treasurer may not invest in private mutual funds which contain only those kinds of securities specified in section 7-6-202, MCA.

3. Securities issued by the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Home Loan Bank Board, the Federal National Mortgage Association, and Farm Credit System banks are permissible investments under section 7-6-202, MCA. Mortgage-backed certificates issued by a private entity but guaranteed by the Government National Mortgage Association are not permissible investments under section 7-6-202, MCA. Treasury investment growth receipts represent investments in direct obligations of the United States government permissible under section 7-6-202, MCA.

4. The permissible alternatives for deposit or investment of county general fund moneys, protest fund moneys, and school district moneys differ and are governed, respectively, by sections 7-6-202 to 213, 15-1-402, and 20-9-213(4), MCA.

Very truly yours,

MIKE GREELY
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