

**VOLUME NO. 44**

**OPINION NO. 22**

**BANKS AND BANKING** - Appropriate institutions and investments for deposit of public money by local governing bodies;

**COUNTIES** - Permitted types of investments for county money;

**PUBLIC FUNDS** - Appropriate institutions and investments for deposit of public money by local governing bodies;

**SECURITIES** - Permitted types of investments for county money;

**MONTANA CODE ANNOTATED** - Sections 7-6-202, 7-6-202(2);

**OPINIONS OF THE ATTORNEY GENERAL** - 42 Op. Att'y Gen. No. 25 (1987);

**UNITED STATES CODE** - 15 U.S.C. §§ 80a-1 to 80a-64.

HELD: Pursuant to section 7-6-202, MCA, a local government may not invest public money in a mutual fund that invests in securities guaranteed, but not issued, by agencies of the United States.

December 20, 1991

John C. McKeon  
Phillips County Attorney  
P.O. Box 1279  
Malta MT 59538

Dear Mr. McKeon:

You have requested my opinion concerning the following question:

May public funds be invested pursuant to section 7-6-202(2), MCA, in an open-end investment company, or mutual fund, that invests primarily in mortgage-backed securities issued or guaranteed by agencies of the United States and where the fund's custodian takes delivery of the collateral?

You indicate that the Phillips County Treasurer has made investments in the Franklin Adjustable United States Government Securities Fund. The prospectus of this fund indicates that it is organized by the Franklin Investors Securities Trust which is an open-end management investment company, or mutual fund, and the fund is registered under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80a-64. The prospectus and correspondence from the Franklin Trust indicate that the Adjustable United States Government Securities Fund invests in securities "issued or fully guaranteed" by the Government National Mortgage Association (GNMA), the Federal National Mortgage Association (FNMA), the Federal Home Loan Mortgage Corporation (FHLMC) and the Small Business Administration. For purposes of this opinion and based upon the prospectus and "Fund Summary" of the Franklin Adjustable United States Government Securities Fund, I have assumed that while Franklin's portfolio may be comprised entirely of federally-guaranteed instruments, some of those instruments are privately-issued securities that are neither direct obligations of the United States government nor securities issued by agencies of the United States. You question the propriety of the investment of Phillips County in this particular mutual fund in light of the statutory language of section 7-6-202, MCA.

My response to your question requires an examination of the relevant statute, its legislative history, and a prior opinion of this office.

Section 7-6-202, MCA, places limitations upon the types of securities which may be purchased by a local government with public money not necessary for immediate public use. This statute was the focus of a 1987 Attorney General's

Opinion which interpreted in some detail specific limitations placed upon the investment authority of local governments. 42 Op. Att'y Gen. No. 25 at 99 (1987). Although this opinion was partially overruled by the 1989 Legislature's amendment of section 7-6-202, MCA, it controls the resolution of your present inquiry.

In 1987, at the time of the former opinion request, section 7-6-202, MCA, stated in full:

**Investment of public money in direct obligations of the United States.** Said local governing body is hereby authorized to invest such public money not necessary for immediate use by such county, city, or town in direct obligations of the United States government and securities issued by agencies of the United States.

In 42 Op. Att'y Gen. No. 25, Attorney General Mike Greely addressed several questions concerning investment limitations, two of which are relevant to the present analysis. First, the Attorney General determined that the statute's express authorization to invest in "direct obligations" and "securities issued by agencies" of the United States precluded a county treasurer from investing in mutual funds. While a mutual fund may be limited in its holdings to investments in which the treasurer could directly invest under section 7-6-202, MCA (1987), the actual security purchased is an interest in an investment company. *Id.* Second, Attorney General Greely recognized that mortgage-backed certificates, although guaranteed by agencies of the United States, such as GNMA, are issued by a private party, generally a financial institution that possesses a pool of mortgages. Consequently, it was held that these certificates are not securities issued by agencies of the United States and thus were not permissible investments under section 7-6-202, MCA (1987).

The holding of the 1987 opinion concerning investment in mutual funds was affected when the 1989 Legislature amended section 7-6-202, MCA, to permit the investment of public money in certain mutual funds. House Bill 431 amended the statute to read as follows:

**7-6-202. Investment of public money in direct obligations of the United States.** (1) A local governing body may invest public money not necessary for immediate use by the county, city, or town in direct obligations of the United States government and securities issued by agencies of the United States.

(2) The local governing body may invest in these obligations either directly or in the form of securities of or other interests in an open-end or closed-end management type investment company or investment trust registered under the Investment

Company Act of 1940 (15 U.S.C. 80a-1 through 80a-64), as amended, if:

- (a) the portfolio of the investment company or investment trust is limited to United States government obligations and repurchase agreements fully collateralized by United States government obligations; and
- (b) the investment company or investment trust takes delivery of the collateral for any repurchase agreement, either directly or through an authorized custodian.

The intent that can be gleaned from the legislative history accompanying House Bill 431 is best summarized by the following passages from an exhibit submitted by a codrafter of the bill:

This legislation has two goals, to clarify the law and to allow an entity to invest indirectly in government obligations through a mutual fund where an entity is now authorized by state law to invest directly in government obligations.

....

This bill extends to entities, the flexibility in investing monies to obtain the same security and return as obtainable by an investment in Government securities, avoiding inconveniences which exist in the purchase of Government securities.

Minutes, Senate Business and Industry Committee Hearing, Mar. 3, 1989, Exhibit 1 at 1-2. This and other references in the legislative history to the prior statutory investment authority of local governments lead me to conclude that the intent was to permit indirect investment, through mutual funds, in those obligations of the federal government previously authorized: direct obligations of the United States government and securities issued by agencies of the United States. Thus, the purchase of securities of a mutual fund with a portfolio consisting exclusively of direct obligations of the United States government and securities issued by agencies of the United States, including those obtained through repurchase agreements that are fully collateralized by United States government obligations, is contemplated by section 7-6-202, MCA.

Based upon the foregoing, I conclude that pursuant to section 7-6-202, MCA, a local government may invest public money in a mutual fund that invests, or obtains through repurchase agreements fully collateralized by the United States government, direct obligations of the United States and securities issued by agencies of the United States. A local government may not, however, invest public money in a mutual fund that invests in government obligations or securities that are guaranteed, but not issued, by agencies of the United States.

**THEREFORE, IT IS MY OPINION:**

Pursuant to section 7-6-202, MCA, a local government may not invest public money in a mutual fund that invests in securities guaranteed, but not issued, by agencies of the United States.

Sincerely,

MARC RACICOT  
Attorney General