

## **Opinion No. 60-219**

December 8, 1960

**BY:** OPINION of HILTON A. DICKSON, JR., Attorney General

**TO:** Honorable T. E. Lusk State Senator Carlsbad, New Mexico

### **QUESTION**

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1. Can the State Investment Council purchase municipal industrial revenue bonds with funds of the State Permanent Fund, if payment of the bonds is guaranteed by the corporation that is lessee of the project?
2. Is there any method by which municipal industrial revenue bonds can qualify as legal investments of the State Investment Council?

#### **CONCLUSIONS**

1. No.
2. No, under existing law.

### **OPINION**

#### **{\*638} ANALYSIS**

Attorney General's Opinion No. 60-204, October 27, 1960, ruled that the State Investment Council had no power to purchase ordinary municipal industrial revenue bonds with funds of the State Permanent Fund. It was pointed out that the bonds in question were neither municipal bonds nor corporate bonds of a type that the Investment Council is authorized to purchase; this for the reason that the bonds do not represent the obligation of either a municipality or a corporation. We did not express an opinion on whether the pledge of the corporation's credit to the payment of the bonds would make them legal investments for the Investment Council. Obviously, the pledge of such corporate credit does not convert these bonds into municipal obligations, and we need not deal with the question whether such bonds may be purchased as obligations of a municipality or other political subdivision. The question presented is whether the pledge of corporate credit to the payment of municipal industrial revenue bonds converts them, in legal effect, into corporate bonds of a type that the Legislature authorized the State Investment Council to purchase.

Section 11-2-8.12, N.M.S.A., 1953 Compilation (P.S.), contains the standards for corporate securities that the Investment Council may purchase. Subsection (E) thereof provides, in part:

"Bonds, notes, debentures, cartrust certificates, preferred stock, or common stock of any corporation organized and operating within the United States: . . ."

If we take the standard definition of a "bond" from such sources as **Webster's New International Dictionary** (2d Ed. 1955), and **{\*639} Words and Phrases**, Vol. 9A, page 381, we find that a "bond" is nothing more than a corporate debt, a promise in writing to pay money. It is easily demonstrated that a corporate guarantee of municipal industrial revenue bonds is such a corporate obligation, and hence a corporate bond within the commonly accepted meaning of the word "bond". Since the State Investment Council is authorized to purchase "bonds", we might hold on the basis of this reasoning that the bonds in question could be purchased with State Permanent Funds. But a question of such great importance should not be resolved on the basis of definitions worked out by various authorities who were not faced with the precise question that we must answer. This is especially true when there are factors in the industrial revenue bonding act itself that persuade us that the Legislature did not intend these bonds to be legal investments of the State Investment Council.

Section 14-41-34, N.M.S.A., 1953 Compilation (P.S.), contains this statement:

"Such bonds may be executed and delivered at any time and from time to time, may be in such form and denominations, may be of such tenor, may be in registered or bearer form either as to principal or interest or both, may be payable in such installments and at such time or times not exceeding thirty (30) years from their date, may be payable at such place or places, may bear interest at such rate or rates payable at such place or places and evidenced in such manner, and **may contain such provisions not inconsistent herewith, all as shall be provided in the ordinance and proceedings of the governing body whereunder the bonds shall be authorized to be issued.**"

We have already seen that the the State Investment Council cannot purchase municipal industrial revenue bonds as obligations of a municipality. Attorney General's Opinion No. 60-204, October 27, 1960. If the State Investment Council is to have power to purchase industrial revenue bonds, those bonds must somehow qualify as corporate bonds. It remains to be seen whether they can so qualify, and, if so, whether that qualification makes them legal investments for the State Investment Council.

Section 14-41-34, supra, permits industrial revenue bonds to contain provisions not inconsistent with the industrial revenue bonding act. We are of opinion that the quoted section does not permit the insertion of a corporate guarantee into the bonds, because that guarantee is inconsistent with the provisions of the act. Section 14-41-41, N.M.S.A., 1953 Compilation (P.S.), provides that industrial revenue bonds shall be tax exempt. No exemption is stated for corporate bonds. If we hold that the insertion of a corporate guarantee into the bonds converts them into corporate bonds, as we must hold in order

to qualify them for purchase by the State Investment Council, then we must hold that the tax exemption stated in § 14-41-41, supra, no longer applies, for that exemption does not extend to corporate bonds. We cannot find any intention of the Legislature to allow municipalities to issue non-tax-exempt bonds, and the insertion of any guarantee into the bonds that would make them non-tax-exempt is inconsistent with the provisions of the industrial revenue bonding act. Moreover, the act does not grant power to municipalities to issue corporate bonds. Again, if we hold that the insertion of a corporate guarantee into the bonds converts them into corporate bonds, we find that municipalities have no power to issue such bonds. It is our opinion that industrial revenue bonds guaranteed by a corporation, where the guarantee is inserted into the body of the bonds, cannot exist under the industrial revenue bonding act, and that municipalities have no power to issue such bonds. It necessarily follows that the State {\*640} Investment Council cannot purchase them.

Now, the corporate guarantee of industrial revenue bonds must be stated either in the body of the bonds or in some separate instrument. Let us suppose that the corporation desiring to guarantee the bonds issues a separate certificate pledging its credit to the payment of the bonds, and that these separate certificates are issued to purchaser or prospective purchasers of the bonds. Let us further assume that these separate certificates are themselves legal investments of the State Investment Council. If such a transaction occurs, there is no corporate guarantee within the bonds themselves, and they retain their status as industrial revenue bonds. But that answers the question. Industrial revenue bonds, as such, cannot be purchased by the State Investment Council, for they are neither municipal nor corporate obligations. And even if we held that the State Investment Council has power to purchase separate corporate certificates guaranteeing payment of the bonds, we are of the opinion that the State Investment Council could not then purchase the bonds themselves, the underlying obligation.

To summarize, we find these factors that lead us to advise that municipal industrial revenue bonds are not legal investments for the State Investment Council: Firstly, the insertion of a corporate guarantee into the bonds is inconsistent with the provisions of the act that allow a tax exemption for the bonds. To overcome this factor would probably require an amendment of Section 14-41-41, supra, to allow the tax exemption only to the extent that the bond payments are made from funds of the municipality, that is, funds received as lease payments, and not from funds paid directly by the corporation. Secondly, municipalities are not given power to issue corporate bonds, that is, bonds containing a corporate guarantee. An amendment to § 14-41-35, N.M.S.A., 1953 Compilation (P.S.), to allow the bonds to contain such an additional security would appear to be necessary to insure municipalities such a power. Thirdly, there is no authority for the State Investment Council to purchase municipal industrial revenue bonds as such. Section 14-41-40, N.M.S.A., 1953 Compilation (P.S.), expressly grants such power to savings banks and insurance companies organized under the laws of this State. If this section were amended to expressly include the State Investment Council, then the problem would be solved without amending § 14-41-41, supra, or § 14-41-35, supra, to permit the insertion of a corporate guarantee, for if the State Investment Council were given power to purchase municipal industrial revenue bonds as such,

there would be no need of a corporate guarantee to convert the bonds into corporate bonds.

But we see no way to resolve these problems under our present laws. Therefore, we are of opinion that the State Investment Council cannot purchase municipal industrial revenue bonds whose payment has been guaranteed by the corporation that is lessee of the project, and we are of the further opinion that, under existing laws, there is no method by which municipal industrial revenue bonds may qualify as legal investments of the State Investment Council.

By: Norman S. Thayer

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