

Opinion 07-04

September 10, 2007

OPINION OF: GARY K. KING Attorney General

BY: Martha A. Daly, Assistant Attorney General

TO: The Honorable Al Park, New Mexico State Representative, 1840 Dakota NE,
Albuquerque, NM 87110

QUESTION:

Does a 2007 amendment to the Governmental Conduct Act that limits contributions to state officers and employees by businesses that provide financial services apply to lawyers who perform bond work for the state?

CONCLUSION:

No. The amendment does not apply to attorneys who provide legal services, described herein, to the State in connection with its bond offerings.

FACTS:

The 2007 legislature amended the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 through 18 (1967, as amended through 2007) (hereinafter "the Act"), to add this new provision:

A business that contracts with a state agency to provide financial services involving the investment of public money or issuance of bonds for public projects shall not knowingly contribute anything of value to a public officer or employee of that state agency who has authority over the investment of public money or issuance of bonds, the revenue of which is used for public projects in the state.

2007 N.M. Laws, Ch. 362, § 11(A). Section 11(B) of the amendment prohibits the same officers and employees from accepting any such contribution.

ANALYSIS:

We understand the question concerning the applicability of the prohibition in subsection A to lawyers who do bond work with the State to include both those who act as "bond counsel" on bond offerings of the State as well as those who perform services as "disclosure counsel" on those offerings. A law firm providing services as bond counsel issues an opinion for the benefit of bondholders

which usually addresses (1) whether the bonds are valid and binding obligations of the issuer; (2) the source of payment or security for the bonds; and (3) whether and to what extent interest on the bonds is excluded from gross income of the owner for federal income tax purposes and exempt from taxes, if any, imposed by the state of the issuer.

David A. Franklin, Esq. and James J. Prendergast, Esq., Glossary of Public Finance Terminology (1992). In so doing, the firm conducts due diligence on matters related to that opinion, and provides advice and assistance to the issuing entity on those and related issues.

A law firm acting as disclosure counsel typically is responsible for preparing various documents for dissemination to potential investors, rating agencies, and others containing detailed information about the security being offered, the issuing agency and the security pledged for payment of the issue. In so doing, that firm also conducts and manages all due diligence relating to the information so provided, and also provides a legal opinion to provide assurance to the investors as to the accuracy and timeliness of the information provided. The firm may also be responsible for preparation of documents necessary to meet the issuer's continuing disclosure obligations, and may provide advice and counsel to the issuer as to current developments relating to disclosure issues.

Section 11(A)'s applicability to firms performing the activities described above depends on whether those activities are "financial services" as to bond issues for public projects. The Act does not contain a definition of "financial services." Nor were we able to locate a definition in either New Mexico statutes or case law from our courts. Further search of other states' and federal court opinions produced no meaningful definitions, other than one court opinion that relies on a standard dictionary definition to determine the meaning of "financial services" under the sponsors-of-terrorism exception to the federal Foreign Sovereign Immunities Act. See Rux v. Republic of Sudan, 461 F.3d 461, 471 (4th Cir. 2006) (citing Webster's Ninth New Collegiate Dictionary definitions to define the phrase to mean "providing a service relating to finance or financiers"). As applied there and equally applicable here, principles of statutory construction require that, in the absence of a legislatively supplied definition or other indication of contrary intent, the plain meaning of the words as they appear in the statute control. See Plains Electric Generating and Transmission Cooperative, Inc. v. New Mexico Public Utility Commission, 126 N.M. 152, 156, 967 P.2d. 827 (1998).

The operative term "financial" has been generally defined, consistent with the definition applied in the Rux case, as "relating to finance or financiers." Webster's Third International Dictionary 851 (Unabridged ed. 1986). The most applicable definition of "finance" is:

[as a noun] the obtaining of funds or capital...the system that includes the circulation of money, the granting of credit, the making of investments, and the provision of banking services...

[as a verb] to provide with necessary funds to achieve a desired end...to sell on credit...to secure needed funds or capital.

Id. These definitions reflect the general use of the term "financial services" in discussions of the financial services industry. That industry has been described as including depository institutions (such as banks, savings and loans and credit unions), insurance companies, securities firms and investment banks, mutual funds and finance companies. See Anthony Saunders, Financial Institutions Management: A Modern Perspective (3rd ed. 2000). Products sold by the financial services industry in the United States in 1999, for example, include payment services, savings products, fiduciary services, business and consumer lending, underwriting issuance of debt and equity, and insurance risk management products. Id. at 3, Table 1-1B.[1]

Application of these definitions and examples to the tasks typically performed by bond and disclosure counsel lead to the conclusion that the legal opinions and advice provided by firms acting in those capacities as described herein do not constitute the provision of "financial services." There may be, however, other statutory or regulatory prohibitions that apply to these legal counsel. See, e.g., the Gift Act, 2007 N.M. Laws, Ch. 226, and the Campaign Practices Act, NMSA 1978, §§ 1-19-1 through -37 (as amended through 2003).

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[1] It also may be of some benefit to consider the jurisdiction of the U.S. House of Representatives Committee on Financial Services. The Committee "oversees all components of the nation's housing and financial services sectors including banking, insurance, real estate, public and assisted housing and securities." Subcommittees include those focusing on capital markets, insurance and government-sponsored enterprises, financial institutions and consumer credit, housing and community opportunity and domestic and international monetary policy, trade and technology. See House Committee on Financial Services' website, <http://financialservices.house.gov/jurisdiction.html>. The Committee's jurisdiction evidently does not extend to those services of bond and disclosure counsel described herein.