

Opinion No. 56

BANKS AND BANKING; State Banking Department; Superintendent of Banks; supervision of investment companies—INVESTMENT COMMISSIONER; Jurisdiction; "blue sky law"—Chapter 20, Title 66, RCM, 1947; Sections 5-102, 5-107, 5-206, 5-508, 5-509, 5-602, RCM, 1947

- Held:** 1. Under Chapter 20 of Title 66, Revised Codes of Montana, 1947 (the Blue Sky Law) permits to sell securities are issued by the Investment Commissioner after investigation if the sale of such securities to the public will not subject the purchasers to fraud, inequities and no opportunity for profit.
2. That receiving a permit from the Investment Commissioner under the Montana "Blue Sky Law" does not permit any investment company to conduct any business, advertising or acts in violation of the Montana Bank Act and the Superintendent of Banks has the authority and duty to investigate and proceed to collect the penalties specified in Sections 5-508 and 5-509, Revised Codes of Montana, 1947, and enjoin the violations by appropriate injunctive action.

March 14, 1960

Mr. R. E. Towle
State Examiner and ex-officio
State Superintendent of Banks
State Capitol
Helena, Montana

Dear Mr. Towle:

You have requested my opinion as to the distinction between an investment company licensed by the State Investment Commissioner and investment companies which are chartered under the Montana Bank Act. Also you asked to be advised concerning your duties and powers relative to both types of investment companies.

The Montana Bank Act, which is found in Title 5 of the Revised Codes of Montana, 1947, relates to banks, trust companies and investment companies and provides for their organization, regulation and manner of operation. Stockbrokers and investment companies are regulated by Chapter 20 of Title 66, Revised Codes of Montana, 1947, which is known as the "Blue Sky Law." The purposes of these two laws are materially different.

The Montana Bank Act governs the operation of "banks" which, in the broad sense of the term, includes "(a) Commercial Banks, (b) Savings Banks, (c) Trust Companies, (d) Investment Companies." Section 5-102, R.C.M., 1947.

The "Investment Company" defined in the Montana Bank Act (Section 5-107, R.C.M., 1947) is any corporation which is incorporated under the laws of this state for any one or more of the following purposes:

- "1. To receive moneys in trust, and to accumulate the same at such rates of interest as may be obtained or agreed upon, or to allow such interest as may be agreed upon, and to issue and sell its contracts or certificates of indebtedness directly or through an agent or broker, bearing fixed rates of interest, in whole or in part, with participation or non participation in the profits of the corporation, and maturing at fixed periods of time, or otherwise, as may be fully set forth in said contracts or certificates.
- "2. To buy and sell government, state, county, municipal, and other bonds, and all kinds of negotiable and non-negotiable and commercial paper, stocks, and other investment securities.
- "3. To accept, receive, and hold money on deposit, payable either on time or on demand, with or without interest, as may be agreed upon with depositors, and to collect coupons, interest, and dividends on said above described securities."

An investment company under the Bank Act must have as corporate powers one or more of the powers in the above quoted statute. As was observed above, an investment company under the Bank Act is one type of bank (Sec. 5-102, R.C.M., 1947). Before such an investment company can receive a certificate of authorization to do business from the Superintendent of Banks it must have on deposit at least one hundred thousand dollars in cash as payment for subscribed stock (Sec. 5-206, R.C.M., 1947) and only such an investment company, which has received a certificate from the Superintendent of Banks, may use or transact business under any name or title which contains "investment company" (Sec. 5-508, R.C.M., 1947). It is such investment companies which have received certificates from the Superintendent of Banks as a condition precedent to doing business over which the Superintendent of Banks has supervisory powers and jurisdiction.

The phrase "investment company" as used in the "Blue Sky Law" is a generic term and used in the act so as to give the Investment Commissioner the broadest powers over individuals, syndicates and corporations who sell any type of securities to the public. Under Sec. 3 of Section 66-2003, the "Blue Sky Law" has no application to state banks authorized by the Superintendent of Banks to do business in Montana. While this statute does not specifically state that investment companies authorized by the Superintendent of Banks to do business are excluded, yet the use of the word "banks" must be construed to include investment companies under the supervision of the Superintendent of Banks as such investment companies are defined in Sec. 5-102, R.C.M., 1947, as one type of state bank.

The Superintendent of Banks has no authority over the sale of the stock and debentures of private corporations which are not incorporated under the Bank Act, as Section 5-602, R.C.M., 1947, in defining the duties of the Superintendent of Banks says:

" . . . It shall be his duty to execute all laws in relation to banks, acting personally or through his examiners, regular or special."

It is possible, however, for any person or legal entity to violate "The Bank Act" by conduct and actions. In such event, the responsibility and authority of the Superintendent of Banks are clear. Sections 5-508 and 5-509, R.C.M., 1947, specify practices that would violate the Bank Act and expose the parties violating the act to severe penalties. By Section 5-508, R.C.M., 1947, advertising and use of words are prohibited which imply that the business "is receiving or accepting money or savings for deposit" or that "deposits are received" at the place of business or "indicating that such business is in the business of a bank, savings bank, or trust or investment company." Also, it is forbidden to "solicit or receive deposits or transact business in the way or manner of a bank, savings bank, trust or investment company . . ." The penalty for violation is forfeiture "to the State of one hundred dollars a day for every day or part thereof during which such violation continues." Moreover, the Superintendent of Banks has the authority and responsi-

bility to bring an action to enjoin practices which are in violation of the provisions of said Section 5-508, R.C.M., 1947.

Section 5-509, Revised Codes of Montana of 1947, provides that it is a violation of law if one not having "a certificate to do a banking business" advertises "that he or it is receiving or accepting money or savings" or uses "words indicating ***that deposits are received" *** "or that interest is paid on deposits." Other limitations are specified in the section. Violations expose the perpetrator to a penalty of one hundred dollars a day and suit for injunction by the Superintendent of Banks as in Sec. 5-508, R.C.M., 1947. In addition, the Superintendent of Banks has "authority to examine the accounts, books, papers, cash and credits" to ascertain whether the statute has been violated or is being violated.

An "investment company" under the "Blue Sky Law" includes corporations "who shall sell, attempt to sell, or negotiate for the sale of, or of taking subscriptions for any stock, bonds, units or shares, or debentures . . ." (Section 66-2001, R.C.M., 1947). This is a broad statement and includes the sale of a corporation's own shares or securities.

The purpose of the "Blue Sky Law" is expressed in Section 66-2011, R.C.M., 1947, where it is stated that the Investment Commissioner may issue a permit "if he finds that such investment company is solvent, that its articles of incorporation or association, its constitution and by-laws, its proposed plan of business and proposed contracts contain and provide for a fair, just and equitable plan for the transaction of business and that its promotion expense shall not be greater than twenty-five per centum (25%) of the sale price of its securities, and in his judgment promises a fair return on the stocks, bonds, or other securities by it offered for sale . . ."

A similar statute was construed in the case of *Hornaday vs. State*, 21 Okla. Crim. Rep. 354, 208 Pac. (2d) 228, where the court said:

"The objects, then, are to prevent fraud and unfair dealing in securities, as well as to prevent honest people, free from sinister influences, from investing in uncertain ephemeral, 'get-rich-quick' stocks and securities. In other words, it is a statute designed in part to protect credulous persons against their own inherent weakness—a weakness akin to the gambler's hope of winning a prize. We think it is now well settled that both of these objects, within constitutional bounds, properly come within regulations prescribed by the police power of the state. Clearly the state has the right to protect its citizens against impositions and frauds."

As an investment company granted a permit to "sell securities under the "Blue Sky Law" is limited in authority to the sale of non-fraudulent securities, it is possible as outlined above that such corporation could conduct its affairs in a manner that would violate the Montana Bank Act.

It is my opinion that under Chapter 20 of Title 66, Revised Codes of Montana, 1947 (the Blue Sky Law) permits to sell securities are issued by the Investment Commissioner after investigation if the sale of such securities to the public will not subject the purchasers to fraud, inequities and no opportunity for profit.

It is also my opinion that receiving a permit from the Investment Commissioner under the Montana "Blue Sky Law" does not permit an investment company to conduct any business, advertising or acts in violation of the Montana Bank Act and the Superintendent of Banks has the authority and duty to investigate and proceed to collect the penalties specified in Sec. 5-508 and 5-509, Revised Codes of Montana, 1947, and enjoin the violations by appropriate injunctive action.

Very truly yours,
FORREST H. ANDERSON
Attorney General