

47 Op. Att'y Gen. No. 1

AUDIT - Audit fees owed by Montana Higher Education Student Assistance Corporation;
BONDS - Audit fees owed by Montana Higher Education Student Assistance Corporation;
EDUCATION, HIGHER - Audit fees owed by Montana Higher Education Student Assistance Corporation;
MONTANA CODE ANNOTATED - Title 17, chapter 5, parts 13, 22; sections 17-5-1302, -1312, -2201;
MONTANA LAWS OF 1987 - Chapter 190, sections 2, 13;
UNITED STATES CODE - Title 20, section 1087-1(e); title 26, sections 144(b)(1), 146.

HELD:

The Montana Higher Education Student Assistance Corporation (MHESAC) is not a "state bond issuer" as that term is used in Montana Code Annotated § 17-5-2201, and therefore the fees provided in that section are not applicable to bonds issued by MHESAC.

April 7, 1997

Ms. Lois A. Menzies, Director
Department of Administration
Mitchell Building, Room 155
P.O. Box 200101
Helena, MT 59620-0101

Dear Ms. Menzies:

You have requested my opinion on the following question:

Is the Montana Higher Education Student Assistance Corporation (MHESAC) a "state bond issuer" as that term is used in Montana Code Annotated § 17-5-2201?

For reasons that follow, I conclude that because MHESAC is a "state issuer" under Mont. Code Ann. § 17-5-1312(2), it cannot be considered a "state bond issuer" as that term is used in § 17-5-2201.

MHESAC is a private, nonprofit corporation established to provide a statewide student loan program. The Higher Education Act of 1965, Pub. L. No. 89-329, and its subsequent amendments created a national system for making higher education loans available to qualified students while at the same time protecting the makers of the loans from loss or default. The post-1965 amendments to the Higher Education Act authorized the creation of nonprofit corporations to purchase student loans from the initial lenders. 20 U.S.C. § 1087-1(e). These nonprofit corporations were to act as "secondary markets" for student loans and were authorized to sell tax exempt bonds in order to raise money to purchase the student loans. *Id.* MHESAC is such a secondary market corporation.

Congress put a limit on the tax-exempt non-general obligation debt or private activity bonds that could be issued in one year by a state, its political subdivisions, and nonprofit corporations within the state. 26 U.S.C. § 146. States were allowed to allocate this bond cap, also known as the volume cap, among eligible entities, for specific uses authorized by Congress. One use specifically authorized was the issuance of "qualified student loan bonds" such as those issued by MHESAC. 26 U.S.C. § 144(b)(1).

In 1987, the Montana Legislature enacted the Montana Unified Volume Cap Bond Allocation Plan Act (hereinafter referred to as the Act) which established the current procedures for allocation of the volume cap. 1987 Mont. Laws, ch. 190. The Department of Administration was given the responsibility for allocating Montana's share of private activity bonds under the cap. Mont. Code Ann. §§ 17-5-1301 to -1325. MHESAC was expressly included as one of the entities eligible for an allocation of the volume cap. Under Montana Code Annotated § 17-5-1302(15) a "state issuer" is defined as the state and any agency thereof authorized to issue private activity bonds. *For this part only, the Montana higher education student assistance corporation is considered an agency of the state.*

(Emphasis supplied.) Importantly, a "state issuer" is a state agency authorized to issue private activity bonds. *Id.*

The Act also provided for imposition of an audit fee. Two separate statutory sections were enacted to impose the fee: Montana Code Annotated §§ 17-5-1312(2) and -2201. Section 17-5-1312(2) established a procedure for payment of the audit fee as a condition of receiving an allocation under the bond cap limit:

As a condition of receiving an allocation, each *state issuer*, upon issuance of the bonds, shall pay 30 cents per thousand of bonds to be deposited in the state general fund for the purpose of funding a portion of the comprehensive annual financial report audit.

(Emphasis supplied.) MHESAC, as a "state issuer," is clearly subject to this provision.

Your question, however, deals with Montana Code Annotated § 17-5-2201 and whether the audit fee in this section applies to MHESAC. Section 17-5-2201 provides:

Except for issuers of general obligation bonds which are payable solely by general fund revenues, each *state bond issuer* shall, upon issuance of the bonds, pay 30 cents per thousand of bonds to be deposited in the state general fund for the purpose of funding a portion of the comprehensive annual financial report audit.

(Emphasis supplied.) This section applies to each "state bond issuer."

Your letter informs me that at least two propositions are undisputed. First, when MHESAC issues private activity bonds to finance its student loan activities, it acts as a "state issuer" under Montana Code Annotated § 17-5-1302(15), and is subject to the fee prescribed for "state issuers" under Montana Code Annotated § 17-5-1312(2). Second, no one apparently contends that the fee prescribed by the latter statute and the fee prescribed by Montana Code Annotated § 17-5-2201 can both be applied to the same bond issue, in effect levying a fee of 60 cents per thousand of bonds issued.

The issue you present is important because, in addition to its private activity bonds, MHESAC may occasionally issue other bonds, such as refunding bonds, that arguably may not be considered "private activity bonds" subject to the State's allocation cap in title 17, chapter 5, part 13. It is clear that the fee prescribed by Montana Code Annotated § 17-5-1312(2) would not apply to these "other" bonds because they are not subject to allocation under part 13. The question you pose is whether, when it issues these other kinds of bonds that may not be within the definition of "private activity bonds," MHESAC is considered a "state bond issuer" subject to the fee prescribed by § 17-5-2201.

Montana Code Annotated § 17-5-1302(15) states that MHESAC is a "state issuer" for "this part only." Ostensibly, then, MHESAC would only be considered a state agency for title 17, chapter 5, part 13, and could not be considered a state agency for title 17, chapter 5, part 22. The codification is confusing, however. Montana Code Annotated § 17-5-2201 was originally enacted as section 13 of the Act. 1987 Mont. Laws, ch. 190, § 13. "State issuer" as defined in the Montana session laws meant "the state and any agency thereof authorized to issue private activity bonds. *For [this Act] only*, the Montana higher education student assistance corporation is considered an agency of the state." 1987 Mont. Laws, ch. 190, § 2(16) (emphasis added). Under Montana Code Annotated § 1-11-103(6), if there is any inconsistency between the provisions of the Montana Code Annotated and the corresponding portion of the official enrolled bill, effect shall be given to the official enrolled bill. Under section 2(16) of the Act, as it was officially enrolled, MHESAC was to be considered a state agency. Arguably, then, MHESAC could be considered a "state bond issuer" as well as a "state issuer" as enrolled under the Act.

It must be presumed, however, that the legislature would not pass meaningless legislation, and statutes relating to the same subject must be harmonized as much as possible, giving effect to each. *Crist v. Segna*, 191 Mont. 210, 212, 622 P.2d 1028, 1029 (1981). Here, the legislature enacted two separate provisions imposing the audit fee, one applying to "state issuers" and one applying to "state bond issuers." As such, the two terms apply to different types of bond issuances. A "state issuer," by definition, issues only private activity bonds. Mont. Code Ann. § 17-5-1302(15). In contrast, a "state bond issuer" is not so

limited. The fee in Montana Code Annotated § 17-5-2201 applies to all state bond issuers, except for issuers of general obligation bonds which are payable solely by general fund revenues. Thus, in order to give effect to both statutes, a reasonable interpretation of Montana Code Annotated § 17-5-1312(2) is that it governs application of the audit fee for entities issuing private activity bonds while § 17-5-2201 governs application of the fee for all other types of bond issuances.

Further, if MHESAC were subject to § 17-5-2201, it could be charged the audit fee twice upon issuance of private activity bonds. Under § 17-5-1312(2), it would be charged the audit fee as a condition of allocation, and under § 17-5-2201, it would be charged the audit fee again upon issuance of the bonds. The legislative history of the Act does not support imposing the fee twice for the same issuance.

In 1987, when the legislature adopted the Act, the audit fee was amended into the Act to assure that "issuers of bonds would be responsible to pay into the general fund \$0.30 per thousand dollars worth of bonds to help pay for the statewide financial report and for the costs of the legislative auditor to do the report." Mins., State Admin. Comm., SB 230, Jan. 30, 1987, comment of David Hunter. Thus, the intent of the legislature was to impose a 30 cent fee. If MHESAC were subject to both § 17-5-1312(2) and § 17-5-2201, it could be subject to a 60 cent fee per thousand of bonds. The legislature did not intend to impose a 60 cent audit fee per thousand of bonds issued.

Statutes relating to the same subject are to be harmonized, giving effect to each. The legislative history indicates that the audit fee in § 17-5-2201 would apply to a state bond issuer who was not otherwise subject to the fee imposed under § 17-5-1312(2).

THEREFORE, IT IS MY OPINION:

The Montana Higher Education Student Assistance Corporation (MHESAC) is not a "state bond issuer" as that term is used in Montana Code Annotated § 17-5-2201, and therefore the fees provided in that section are not applicable to the bonds issued by MHESAC.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/elg/lrb