

Office of the Attorney General
State of North Dakota

Opinion No. 86-13

Date Issued: March 27, 1986

Requested by: Karlene Fine
Secretary to the State Industrial Commission

--QUESTION PRESENTED--

Whether the North Dakota Export Trading Company is exempt from the registration provisions of the North Dakota Securities Act of 1951 (N.D.C.C. Ch. 10-04).

--ATTORNEY GENERAL'S OPINION--

It is my opinion that the North Dakota Export Trading Company is exempt from the registration provisions of the North Dakota Securities Act of 1951 (N.D.C.C. Ch. 10-04).

--ANALYSIS--

The Industrial Commission was created to operate, manage, control, and govern all utilities, industries, enterprises and business projects established, owned, undertaken, administered, or operated by the state of North Dakota, except those carried on in penal, charitable, or educational institutions. N.D.C.C. § 54-17-10. The Industrial Commission has broad powers with respect to the conduct and operation of state business projects and industries. See N.D.C.C. §§ 54-17-09 and 54-17-10. N.D.C.C. § 54-17-01 provides that the acts of the Industrial Commission are the acts of the state of North Dakota functioning in its sovereign capacity.

In operating the North Dakota Mill and Elevator Association, the Industrial Commission has the power to participate with export trading companies to acquire and dispose of raw and finished farm products. N.D.C.C. § 54-18-04(6). The North Dakota Export Trading Company (NDETC) was conceived as part of the marketing arm for the State Mill and Elevator. The proposal to form the NDETC grew from studies conducted by Touche Ross & Company and Braxton Associates. These studies outlined economic problems and disadvantages the State Mill and Elevator would experience in future operations unless changes were made to make it more competitive and profitable. To achieve this end, the studies recommended that an export trading company be used to assist in the marketing of North Dakota agricultural products. The NDETC would function to promote international trading, international transportation, and export financing for North Dakota agricultural products.

The NDETC was formed by members of the Industrial Commission, under the North Dakota Business Corporation Act, to allow the state of North Dakota to engage in the business of export trade. The NDETC is to operate as a separate subsidiary of the North Dakota Mill and Elevator Association. N.D.C.C. § 54-18-02 provides that the acts of the State Mill and Elevator Association are the acts of the state of North Dakota functioning in its sovereign and governmental capacity. The State Mill and Elevator Association is exempted from the provisions of the Securities Act (N.D.C.C. Ch. 10-04) when it performs authorized marketing functions. N.D.C.C. § 54-18-04.1. In addition, the exemption applies to any agency or instrumentality of the association performing authorized marketing functions.

Two classes of common stock will be offered for sale to private as well as public interests in the state of North Dakota. Class A common stock shall be held by the state of North Dakota through the State Mill and Elevator Association. Class B common stock may be held by financial institutions, credit unions, mutual investment corporations, or trust companies authorized to do business in North Dakota as defined by N.D.C.C. § 6-01-02.

The state of North Dakota, through the Industrial Commission and directly through the State Mill and Elevator Association, exercises significant control over the operation of NDETC. This control is manifested in the organizational structure of the NDETC and decision-making process used by directors of the NDETC. The corporation's bylaws will be adopted by the initial directors of the NDETC who are the members of the State Industrial Commission. The corporation is a subsidiary of the State Mill and Elevator Association. The principal office of the corporation is located at the North Dakota State Mill and Elevator in Grand Forks, North Dakota. The State Mill and Elevator Association will hold the class A common stock. Of the five members of the board of directors, the class A stock shareholders will elect three (3) of the directors. At least two (2) of the directors representing the class A common stock shareholders must attend a directors' meeting in order to constitute a quorum for the transaction of business at the meeting. Directors do not receive compensation but their expenses for attending meetings will be paid in the manner provided by North Dakota law for the reimbursement of expenses of state employees. Directors elect the officers of the corporation as well as the manager, who serves as the principal executive officer of the corporation. Funds of the corporation are deposited to the credit of the corporation in the Bank of North Dakota.

N.D.C.C. § 10-04-05 provides, in part, as follows:

10-04-05. EXEMPT SECURITIES. Sections 10-04-04, 10-04-07, 10-04-07.1, and 10-04-08 shall not apply to any of the following securities:

1. Securities issued or guaranteed by the United States of America, or by any state, territory, or insular possession thereof, or by any political subdivision of any such state, territory, or insular possession, or by the District of Columbia, or by any public agency or instrumentality of one or more of any of the foregoing, or payable from assessments for improvements or revenues of publicly owned utilities therein.

N.D.C.C. § 54-18-04.1 provides as follows:

54-18-04.1. MARKETING FUNCTIONS EXEMPT FROM SECURITIES ACT. The association shall be exempt from the provisions of chapter 10-04 when in the performance of its authorized marketing functions. The exemption provided under this section shall also apply to any agency or instrumentality of the association and to any agency or employee of the association or any agency or instrumentality thereof.

The words public agency or instrumentality are not defined in N.D.C.C. Chs. 10-04 or 54-18. The words are used in Section 402 of the Uniform Securities Act but are not defined in the Uniform Act. Because no definition is contained in either the uniform statute or in the state statutes, the words used in the statutes must be understood in their ordinary sense, unless a contrary intention plainly appears in the statutes. N.D.C.C. § 1-02-02. No case law defining the words is available as a guide to interpretation of the words. The available case law which discusses whether an entity is an agency or instrumentality of government does so in the context of whether the agency or instrumentality has immunity from suit or immunity from the assessment of taxes.

Webster's New World Dictionary, Second College Edition, 1980, pp. 730, 731 defines the word instrument as 'a thing by means of which something is done. . . .' The word instrumentality, which is derived from the word instrument, is defined as 'the condition, quality, or fact of being instrumental, or serving as a means. . . .' By using the common, accepted meaning of the word instrumentality, it is apparent that the NDETC is an instrumentality of the state of North Dakota and the State Mill and Elevator Association.

First, the establishment of NDETC is a means for the state to assist in the marketing of agricultural products. There is little question that the state, through the Industrial Commission, has the authority to establish a corporation as a means of effecting its sovereign powers. In establishing the NDETC, the state is

effectuating the purposes outlined in N.D.C.C. §§ 54-18-02 and 54-18-04.

Second, the state, through the Industrial Commission and the State Mill and Elevator Association, exercises significant control over the organization and operation of the NDETC. As stated earlier, the NDETC is a subsidiary of the State Mill and Elevator Association. The State Mill and Elevator Association will hold the class A common stock and will control decision making by the board of directors of the NDETC. The NDETC was formed by the members of the Industrial Commission who act on behalf of the state functioning in its sovereign capacity. The acts of the State Mill and Elevator Association in controlling the operations of the NDETC are the acts of the state functioning in its sovereign and governmental capacity. These facts demonstrate the dominant role of the state in the operation of NDETC.

As an instrumentality of the State and the State Mill and Elevator Association, the NDETC is exempt from the registration provisions of N.D.C.C. Ch. 10-04. N.D.C.C. §§ 10-04-05(1), 54-18-04.1, and 10-04-06(12) provide for the exemption.

--EFFECT--

This opinion is issued pursuant to N.D.C.C. § 54-12-01 which governs the actions of public officials until such time as the question presented is decided by the courts.

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