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I-400

MEMORANDUM

Confidential Attorney-Client Privileged Communication

October 1, 2004

TO: Peter Hughes, Ph.D., CPA, Director
Internal Audit Department

FROM: Thomas C. Agin, Senior Deputy County Counsel

SUBJECT: Money Market Mutual Funds that Invest in Prohibited Investment Instruments

By Memo dated September 15, 2004 (Memo) you have requested advice regarding the purchase of money market mutual funds that may invest in instruments in which the Treasurer is prohibited from investing directly. The Memo focuses on BlackRock Provident TempFund because its prospectus identifies reverse repurchase agreements as a type of security in which it may invest up to one third of its total assets. More specifically you have asked that the following question be answered.

QUESTION

Is the Treasurer allowed to purchase money market funds, where one of the investments that the money market fund can purchase is a prohibited investment according to the Investment Policy Statement (IPS)?

ANSWER

The Treasurer is prohibited from purchasing money market mutual funds that invest in certain, but not all, investment instruments that are designated as prohibited investments under the IPS. Further, it appears that investment in a money market fund that may invest in reverse repurchase agreements is not prohibited on that basis alone. Clarification of this issue would be appropriate for consideration at the next update review of the IPS.

Peter Hughes, Ph.D., CPA, Director
Internal Audit Department
October 1, 2004
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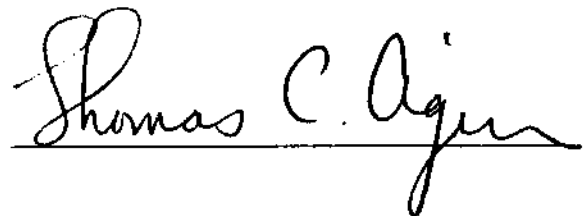
ANALYSIS

The Orange County Treasurer has developed and the Board of Supervisors has approved an Investment Policy Statement (IPS) effective as of January 1, 2004. We understand that the IPS as adopted is intended to be more conservative than the statutory requirements for investments by the Treasurer contained in Government Code Section 53630 *et seq.* Among other things, the IPS delineates the types of investment instruments that are permitted and those that are prohibited as investments for the County funds that are managed by the Treasurer. As stated in the Memo, Section V, paragraph 7 of the IPS clearly prohibits investment in reverse repurchase agreements. Money market mutual funds are included as authorized investments under Section IV, paragraph 7 of the IPS. You have asked if the prohibition against investment in reverse repurchase agreements extends to money market funds that invest in such prohibited instruments. Your query is based on the logic that someone should not be able to do indirectly what he cannot do directly.

After a careful analysis of the IPS and its statutory underpinnings, we are of the opinion that the IPS does not prohibit investment in a money market fund that may invest in reverse repurchase agreements on that basis alone. The IPS sets criteria for a money market fund to be an authorized investment. Further, the IPS specifically states that "Money market mutual funds that invest in prohibited floating rate or variable rate securities are ineligible for investment." Investment in reverse repurchase agreements is not mentioned as a disqualifying factor. Under the general principle of construction *expression unius est alterius* the enumeration of specific investments as coming within the prohibition of the IPS with regard to money market funds precludes the inclusion by implication of other prohibited instruments. *Henderson v. Mann Theatres Corp.*, 65 Cal. App. 3d 397, 403; 135 Cal. Rptr. 266 (1976).

It is our opinion that in order to prohibit investment in money market funds that invest in instruments that the Treasurer may not invest in directly, the IPS should be amended to expressly say so either listing them fully or by changing the last sentence of Section IV, paragraph 7 to read "Money market funds that invest in any investment prohibited as direct investments by this IPS are ineligible for investment." Since this is a Treasurer drafted and Board-adopted policy requirement rather than a statutory limitation, it would be appropriate for this issue to be clarified in the next annual update of the IPS.

Please do not hesitate to contact this office if you have any further questions regarding this matter.



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