



**IDAHO**  
DEPARTMENT OF FINANCE

**DIRK KEMPTHORNE**  
Governor

**GAVIN M. GEE**  
Director

January 26, 2005

Re: Request for Interpretation

Dear M

This is in reference to your request for an interpretation as to whether an offering proposed by a group organizing as a state chartered bank in Idaho, would qualify for exemption from registration in Idaho pursuant to Section 30-14-201(3)(b) of the Idaho Uniform Securities Act (the Act).

As we have discussed, the exemption under Section 30-14-201(3)(b) of the Act, and the corresponding exemption under the Idaho Securities Act (the Predecessor Act), have historically been interpreted by our Department as applicable only to those securities offered by state or federally chartered banks.

**Exemption from Registration—Section 30-14-201(3)(b)**

Specifically, the Act states that a security is exempt from the registration requirements of Section 30-14-301 if the security is:

“A security issued by and representing, or that will represent, an interest in or a direct obligation of, or be guaranteed by:

(b) A banking institution organized under the laws of the United States; a member bank of the federal reserve system; or a depository institution a substantial portion of the business of which consists or will consist of receiving deposits or share accounts that are insured to the maximum amount authorized by statute by the federal deposit insurance corporation...”

Your letter questions the language “or that will represent” and “or will consist of receiving deposits” as implying that the exemption applies to banks in formation as well as those that are already chartered. We do not concur with this interpretation. It is our view that the above language refers to a security: 1) that is being issued by a bank or depository institution; and 2) which does, or will in the future “represent an interest in or direct obligation of, or be

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**PROTECTING THE INTEGRITY OF IDAHO FINANCIAL MARKETS**

guaranteed by” a bank or depository institution. Our view is that this exemption is intended to exempt only those securities of institutions that are already organized as a bank or depository institution, as is defined under Section 30-14-102(3) of the Act.

**State Preemption--15 USC §77r(a)**

As you have noted, federal preemption of state securities laws relating to “covered securities” is provided in 15 USC §77r(a). As it pertains to banks, this section reads:

(a) Scope of exemption

Except as otherwise provided in this section, no law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof

(1) requiring, or with respect to, registration or qualification of securities, or registration or qualification of securities transactions, shall directly or indirectly apply to a security that

(A) is a covered security; or

(B) will be a covered security upon completion of the transaction;

Your letter indicates your view that the language in subsection (B), which reads “will be a covered security upon completion of the transaction” implies that securities issued by banks in organization are also “covered securities” and therefore, state law is preempted. We do not agree with this interpretation. It is our view that this language pertains to securities that will, solely as a result of the offering, be considered “covered securities” upon completion of the offering. This is not the case with regard to securities issued by a bank in formation. Capitalization is but one element in the process of becoming a state chartered bank. Simply raising the required capital does not result in the bank in formation becoming chartered. Therefore, it is our view that subsection (B) does not apply to this situation.

**No Enforcement Action**

In light of the above, we do not view the exemption from registration provided under Section 30-14-201(3)(b) of the Act as available to your client.

However, based on the representations reflected in your letter and in discussions with you, we understand that the offering will be structured to incorporate the following:

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- 1) An escrow account will be established into which investor funds will be held until your client has obtained the appropriate FDIC approval, and is granted a state charter from this Department. We understand that the escrow funds will be held in a state or federally chartered bank, in certificate of deposits or other Federal Deposit Insurance Corporation (FDIC) insured accounts, and that if your client is not granted a charter by this Department, all funds will be returned to investors along with any interest accrued on the account. Furthermore, your client agrees to structure the escrow agreement in such a manner that the Director of this Department must give approval to release the escrowed funds.
- 2) Your client will comply with all provisions of the Idaho Bank Act, and rules and requirements of the FDIC.
- 3) The offering will be sold only by your client's officers, directors, and employees, and those individuals will not be compensated either directly or indirectly for the sale of the securities.
- 4) A copy of the prospectus will be submitted to our Department for review and comment prior to the commencement of the offering.

We view the above structure of your client's offering as providing necessary investor protections and assurances for an offering of this nature. Therefore, based on the representations contained in your letter, our Department will take a "no-action" position with regard to the registration of the securities in question. Should circumstances in this matter change, or should your representations be deemed inaccurate, our "no-action" position may also change.

If you have any questions regarding the above, please contact the undersigned.

Sincerely,



MARILYN T. CHASTAIN  
Securities Bureau Chief  
Idaho Department of Finance

CC:

Gavin Gee  
Mary Hughes

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Attorneys

RECEIVED  
JAN 12 2005  
DEPARTMENT OF FINANCE

January 11, 2005

**(Via FedEx)**

Ms. Patricia Highley, Securities Examiner  
Department of Finance – Securities Bureau  
700 West State Street, 2nd Floor  
P.O. Box 83720  
Boise, Idaho 83720-0031  
(208) 332-8000

**Re: Request for Interpretation**

Dear Ms. Highley:

Our firm represents a group in the process of organizing a proposed new FDIC-insured, state-chartered bank. This group is led by \_\_\_\_\_ with whom you have previously spoken. The purpose of this letter is to request an interpretation of both the Idaho Uniform Securities Act of 2004 and the application of federal securities law to preempt state law.

The issue is whether the securities of a bank in organization are exempt from state securities registration requirements. We believe that securities of a state bank, including those of a state bank in organization, are exempt from Idaho securities registration requirements based on our understanding of the following statutes:

- Idaho Code §30-14-201(3) and
- 15 USC §77r(a) (a federal preemption of state law).

To simplify your review, we have provided relevant information regarding these two possible exemptions underneath the appropriate bold heading provided below.

**State Law Exemption**

The Idaho Uniform Securities Act of 2004 provides that the following securities are exempt from the registration requirements of §§30-14-301 through 30-14-306 of the Idaho Code, and §30-14-504 of the Idaho Code:

A security issued by and representing, or that will represent, an interest in or direct obligation of or be guaranteed by:

- (a) an international banking organization;
- (b) a banking institution organized under the laws of the United States; a member bank of the Federal Reserve System; or a depository institution a substantial portion of the business of which consists or will consist of receiving deposits or share accounts that are insured to the maximum amount authorized by statute by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or a successor authorized by federal law, or exercising fiduciary powers that are similar to those permitted for national banks under the authority of the Comptroller of the Currency pursuant to Section 1 of the public law 87-722 (12 USC §92a); or
- (c) any other depository institution, or any trust company organized or chartered under the laws of this state, unless by rule or order the administrator proceeds under §30-14-204 of the Idaho Code. Idaho Code §30-14-201(3).

We believe that this exemption clearly exempts bank securities from state securities registration requirements. In addition, we believe that the careful use of the phrases "or that will represent" and "or will consist of receiving deposits" imply that the exemption also applies to securities issued by banks in organization. In fact, the securities will not actually be issued until the bank's organization has been approved.

### **Federal Preemption**

Federal securities laws provide for an exemption from state regulation of securities offerings for "covered securities" under the federal law. Covered securities include those issued by banks and banks in organization. The relevant statute provides as follows:

Except as otherwise provided in this section, no law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof –

- (1) requiring, or with respect to, registration or qualification of securities, or registration or qualification of securities transactions, shall directly or indirectly apply to a security that –

- (A) is a covered security; or
  - (B) will be a covered security upon completion of the transaction;
- (2) shall directly or indirectly prohibit, limit, or impose any conditions upon the use of
- (A) with respect to a covered security described in subsection (b) of this section, any offering document that is prepared by or on behalf of the issuer; or
  - (B) any proxy statement, report to shareholders, or other disclosure document relating to a covered security or the issuer thereof that is required to be and is filed with the commission of any national securities organization registered under §78o-3 of this title, except if this subparagraph does not apply to the laws, rules, regulations, orders, or other administrative actions of the State of incorporation of the issuer; or
- (3) shall directly or indirectly prohibit, limit, or impose conditions, based on the merits of such offering or issuer, upon the offer or sale of any securities described in paragraph (1). 15 USC §77r(a).

A covered security as provided in 15 USC §77r(a)(1) includes those where the transaction is exempt from registration pursuant to –

- (C) Section 77c(a) of this title, other than the offer or sale of a security that is exempt from such registration pursuant to paragraph (4), (10), or (11) of such section . . . 15 USC §77r(b)(4)(C).

Any security issued or guaranteed by any bank is exempt under §77c(a)(2) of this title. *See*, 15 USC §77c(a)(2). Therefore, a bank security is a covered security within the meaning of 15 USC §77r(b). The scope of the exemption also includes securities that "will be a covered security upon completion of the transaction[.]" 15 USC §77r(a)(1)(B). Therefore, we believe that a covered security also includes securities issued by banks in organization since securities issued by banks in organization will be covered securities upon completion of the transaction. Based on this interpretation, we believe that federal law preempts any state law (including Idaho Code §30-14-201(3)) to the extent it requires the registration of securities issued by banks in organization.

**Conclusion**

Based on the above analysis, we believe that securities issued by a bank in organization are exempt from state securities registration requirements under the exemption provided by Idaho Code §30-14-201(3). In addition, we believe that state securities registration requirements are preempted by federal law for covered securities, which includes securities of banks and securities that will be covered securities upon completion of the transaction as will be the case for a bank in organization.

Our goal is to avoid the technical state securities registration requirements in order to streamline the process and reduce the expense to our client. We will, however, follow the rules and requirements of the Federal Deposit Insurance Corporation ("FDIC") regarding the preparation of an offering circular that will be used in the solicitation of potential investors in the proposed new state bank. We will provide a draft copy of that offering circular and the subscription application to the Idaho Department of Finance's Financial Institutions Bureau as part of the Interagency Charter and Federal Deposit Insurance Application. We intend to make any changes to the offering circular, as required by the FDIC and the Department of Finance, prior to its use in soliciting potential investors.

Please call me at \_\_\_\_\_ if you have any questions regarding this request for an interpretation of state and federal securities laws.

Sincerely,