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COMMISSIONER



ARIZONA CORPORATION COMMISSION

JAMES MATTHEWS
EXECUTIVE SECRETARY

SECURITIES DIVISION
1300 West Washington, Third Floor
Phoenix, AZ 85007-2996
TELEPHONE: (602) 542-4242
FAX: (602) 594-7470

November 6, 1996

F. Claiborne Johnston, Jr., Esq.
Mays & Valentine
NationsBank Center
111 East Main Street
P.O. Box 1122
Richmond, Virginia 23218-1122

RE: Virginia Higher Education Tuition Trust Fund
A.R.S. §§ 44-1843(A)(1) and 44-3151

Dear Mr. Johnston:

On the basis of the facts set forth in your letter of August 30, 1996, and in reliance upon your opinion as counsel, the Securities Division will not recommend enforcement action for violation of the Securities or Investment Management Act of Arizona should the transaction take place as set forth in your letter.

The Division concurs with your opinion that the prepaid tuition contracts are exempt from registration, pursuant to A.R.S. §44-1843(A)(1), as securities "issued ... by any state ... or by any political subdivision of such state ... or by any agency or instrumentality of one or more of the foregoing." Please also note that this position applies only to the registration requirements of the Securities Act; the anti-fraud provisions of the Securities Act continue to be applicable.

As you are aware, dealer registration is required for securities exempt under A.R.S. §44-1843(A)(1), as set forth in the provisions of A.A.C R14-4-104(A)(5). Your letter of August 30, 1996 requested relief from that provision. However, the Division hereby acknowledges your subsequent withdrawal of that request for no action relief regarding dealer and salesman registration under the Arizona Securities Act and therefore, renders no opinion on that issue.

F. Claiborne Johnston, Jr., Esq.

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The Division concurs with your opinion that the activities by the Fund and its bonafide employees regarding the operation and sale of the prepaid tuition contract program does not fall within the definition of investment adviser or investment adviser representative. As a result, such licensure is not required pursuant to A.R.S. §44-3151. To the extent that the activities of the Fund do not take place as set forth in your letter or a material change in circumstances causes your client to be deemed an "investment adviser" for purposes of the Investment Managment Act, then the anti-fraud provisions will be applicable ab initio.

As this position is premised upon the facts set forth in your letter, it should not be relied on for any other set of facts or by any other person. We have attached a photocopy of your letter. By doing this we are able to avoid having to recite or summarize the facts set forth therein.

Very truly yours,

DEE RIDDELL HARRIS
Director of Securities

DRH:PHG
Attachment

MAYS & VALENTINE

5 SOUTH UNION STREET
P.O. BOX 149
ALEXANDRIA, VIRGINIA 22303-0149
TELEPHONE (703) 519-6000
FAX (703) 519-0140

500 LIBBIE AVENUE
SUITE 24
RICHMOND, VIRGINIA 23226
TELEPHONE (804) 697-1200
FAX (804) 286-8066

NATIONS BANK CENTER
111 EAST MAIN STREET
P.O. BOX 1122
RICHMOND, VIRGINIA 23218-1122

(804) 697-1200
FAX: (804) 697-1339

2525 DOMINION TOWER
999 WATERSIDE DRIVE
NOVA CLY, VIRGINIA 23502-3300
TELEPHONE (804) 627-8500
FAX (804) 627-8200

4426 CORPORATION LANE
SUITE 400
VIRGINIA BEACH, VIRGINIA 23462
TELEPHONE (804) 516-3200
FAX (804) 516-3210

DIRECT DIAL

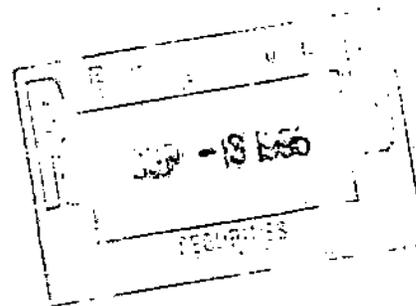
(804) 697-1214
jjohnston@maysval.com

FILE NO
17321.001

August 30, 1996

BY CERTIFIED MAIL

Corporation Commission
Securities Division
Third Floor
1300 West Washington Street
Phoenix, Arizona 85007



**Virginia Higher Education Tuition Trust Fund:
Request for Interpretative Opinion of or No Action Letter Under
Securities Act of Arizona §§ 44-1842, 44-1843 A.1., and 44-3151
and Regulations of Arizona Corporation Commission Rule 14-4-104(5)**

Ladies and Gentlemen:

This letter is written on behalf of the Secretary of Finance of the Commonwealth of Virginia (the "Commonwealth") and the Board of the Virginia Higher Education Tuition Trust Fund (the "Fund") to request certain interpretative or "no action" positions from your office with respect to the contemplated offering of prepaid tuition contracts more fully described below (the "Contracts"). The Secretary of Finance and the Board seek a determination that (1) the Contracts, if securities, are exempt from the securities registration requirements of the Securities Act of Arizona (the "Act"); (2) no member of the Board, employee, or officer of the Fund, or any other official of the Commonwealth is a "dealer," "salesman," "investment adviser," or "investment adviser representative," as those terms are defined in the Act, with respect to their activities on behalf of the Fund; and (3) no member of the Board, employee, or officer of the Fund, or any other official of the Commonwealth is required to register under Rule 14-4-104(5) of the Regulations of the Arizona Corporation Commission (the "Regulations") as a dealer or salesman dealing in exempt securities issued or guaranteed by a state or political subdivision.

Although a filing fee of \$200.00 is required under § 44-1861(L) of the Act, we are requesting, on behalf of the Fund, that you waive this fee given that the Fund is an agency of the

Commonwealth of Virginia. We would also be willing to accept an informal response if it is your policy to provide such informal advice in situations such as this one without payment of a filing fee.

The Fund and the Board

The General Assembly of the Commonwealth enacted legislation during its 1994 session (which is codified at Va. Code §§ 23-38.75 through 23-38.87, a copy of which is attached as Exhibit A) establishing the Fund within the Treasury of the Commonwealth as a special nonreverting fund, effective July 1, 1996. See Va. Code § 23-38.76.A. The Fund was established for the purpose of enhancing the accessibility and affordability of higher education for all citizens of the Commonwealth through purchase of the Contracts for the prepayment of college tuition. See, generally, Va. Code §§ 23-38.75, 23-38.77, and 23-38.81.

After the Fund commences operations, its assets are to consist of payments received pursuant to the Contracts, such bequests, endowments, or grants from the U.S. government, its agencies and instrumentalities as may be contributed to the Fund, such other funds from public or private sources as may be so contributed, and the earnings on the investment of such payments and other funds. See Va. Code §§ 23-38.76.A and 23-38.77 6. Assets of the Fund are to be dedicated solely to the purposes intended by the legislation creating the Fund and may not be loaned or otherwise transferred or used by the Commonwealth for any other purpose. Va. Code § 23-38.80.B. The assets of the Fund and its income are exempt from state and local taxation. Va. Code § 23-38.83. The Fund and its assets will also be exempt from federal taxation under § 529 of the Internal Revenue Code, a part of H.R. 3448, which was recently signed by the President.

The Board is responsible for implementing the program for the issuance of the Contracts (Va. Code § 23-38.77); determining how Fund assets will be invested and engaging contractors to render investment and actuarial services for the Fund (Va. Code § 23-38.80); determining the duties of the Executive Director and other staff members, and fixing the compensation of such personnel from such funds as may be appropriated for Fund use or otherwise received (Va. Code § 23-38.79); and otherwise administering the Fund (Va. Code § 23-38.77). Va. Code § 23-38.76.B provides that the Board shall be comprised of eight members -- four citizen members appointed for fixed terms by the Governor of the Commonwealth, and four *ex officio* members who either have been appointed to their respective offices by the Governor or continue to hold those offices at the Governor's pleasure. Although *ex officio* members of the Board receive compensation for the duties they perform under their other offices, no Board member is entitled to compensation (other than expense reimbursements) for Board service itself. Va. Code § 23-38.76.C.

The Board is required annually to submit a statement concerning the operation and financial condition of the Fund to the Governor and to specified committees of the Virginia legislature. Va. Code § 23-38.84. Accounts and records concerning the Fund are to be prepared in the form prescribed by the Commonwealth's Auditor of Public Accounts and are to be audited by the Auditor annually. Va. Code § 23-38.85.

In a May 10, 1996 opinion letter to the interim Executive Director of the Fund (the "Opinion"), the Office of the Attorney General of the Commonwealth has advised, based on the facts described above and others therein noted, that for purposes of Virginia law it is the opinion of that Office that the Fund is an agency of the Commonwealth performing a designated governmental function and is an integral part of state government. A copy of the Opinion is attached as Exhibit B.

The Contracts

The prepaid tuition payment program contemplated by the legislation establishing the Fund is intended to make it possible for a parent or other interested persons in effect to "cap" at a specified, pre-determined amount some or all of the future cost of tuition for an eligible child who later attends one of the Commonwealth's two-year or four-year public institutions of higher education (a "Virginia Public Institution"). This "cap" is achieved through entering into a Contract and making advance payment of that amount to the Fund. Although the final forms for the Contracts have not yet been approved by the Board, many of the provisions to be included are specified by the enabling legislation, and the Board also has provided direction on a number of other provisions to be included. Consequently, the principal provisions of the finalized forms of Contracts are not expected to differ significantly from those described below. In the ensuing discussion, where a Contract term is mandated by statute, the pertinent statutory section is cited.

Each beneficiary of a Contract must be a resident of Virginia (Va. Code § 23-38.75) at the time the Contract is purchased and must not have completed the ninth grade. Each Contract purchaser must be a resident of the United States. Although under the current legislation a beneficiary must be a Virginia resident, there is no such restriction on Contract purchasers. The Fund does not anticipate active marketing of the sale of Contracts outside of Virginia, although, as noted above, non-Virginia residents may purchase Contracts.

Contracts will be available in one-year increments. A purchaser will be able to pay the required Contract amount in a lump sum, monthly installment payments over five years, or extended payments from the time of purchase until the time the beneficiary reaches college age. The amount required to be paid for the Contract will be determined actuarially, based on certain

facts and assumptions, including the age of the beneficiary when the Contract is entered into, the time or times when payments are to be made, whether the Contract applies to attendance at a four-year institution or a two-year institution, tuition rates being charged at the time the Contract is purchased by the type of institution covered, and assumptions concerning future tuition increases and future returns on the investment of Fund assets. Purchasers will be permitted to "trade" up or down with regard to the number of college years covered by a Contract, subject to payment of an administrative fee for processing the change and, if trading up, to payment of an appropriate additional actuarial charge.

Once the amount required by a Contract has been paid, if the beneficiary is accepted and enrolls at a Virginia Public Institution during the time period specified in the Contract, the Contract will require the full tuition and mandatory fees at the "in-state" rate to be paid by the Fund for the agreed number of years, without further charge to the beneficiary or the Contract purchaser. If the beneficiary is no longer entitled to in-state tuition rates at such time, the beneficiary will be responsible for the difference between in-state and out-of-state tuition and fees.

If the beneficiary does not attend a Virginia Public Institution, but does attend an accredited, nonprofit, independent institution of higher education in Virginia (a "Virginia Private Institution") or a public or accredited, nonprofit, independent institution of higher education located in another state (an "Out-of-State Institution"), the Contract (if fully paid for) will require that the Fund apply contract benefits toward tuition payments on the beneficiary's behalf directly to that institution instead. (In-state and out-of-state proprietary or trade schools will not be covered by this requirement.) If a beneficiary attends a Virginia Private Institution, the amount payable by the Fund for any covered year will not exceed the cost of in-state tuition at the Virginia Public Institution with the highest tuition for that year, less an administrative fee. If a beneficiary attends an Out-of-State Institution, the amount payable by the Fund for a covered year will not exceed the average in-state tuition cost at Virginia Public Institutions for that year, less an administrative fee. Va. Code § 23-38.81.B.

If the beneficiary of a Contract dies or becomes disabled before attending college, or if the beneficiary receives a full-tuition scholarship for the years covered by the Contract, the purchaser (or another person designated by the purchaser in the Contract) will be entitled to receive a refund of the amount of payments made for those years under the Contract plus interest reflecting a reasonable return, as determined by the Board on an annual basis. If payments to be made by a purchaser under a Contract are not made when due, the Board may declare the Contract in default and unilaterally cancel it, or the purchaser may cancel at any time for any reason. In either of these cases, the purchaser will only be entitled to receive a refund of payments made, less an administrative fee.

Contracts will not be assignable, and substitution of Contract beneficiaries will be permissible only if the new beneficiary is a member of the same family as the original beneficiary, as defined in § 2032(A)(e)(2) of the Internal Revenue Code.

Tuition payment obligations under the Contract will not be obligations, or backed by the full faith and credit, of the Commonwealth or any political subdivision thereof and, instead, will be obligations of the Fund only and payable only from its assets, Va. Code § 23-38.78. If the required annual accounting and audit for the Fund should reveal that there are insufficient assets in the Fund to ensure its actuarial soundness, the Board is authorized to adjust the prices of future Contracts or to arrange for refunds to purchasers of then-outstanding Contracts, Va. Code § 23-38.80.A. However, it is not expected that any such refunds will be made unless other means of ensuring soundness have been exhausted and the program is being discontinued.

The enabling legislation does not specify any particular method for determining the respective refund amounts Contract purchasers would receive in a case of actuarial unsoundness, and the Board has not yet determined what method it would employ in the unlikely event that unsoundness should occur, but it is probable that such a procedure would take into account the time or times at which payment was made on a given Contract and/or the proportion which the amount paid on the Contract bears to the total amount of Fund assets then available for refunds.

Marketing and Investment Activities

The availability of Contracts for purchase initially will be announced in Virginia through press releases and other means customarily used by the Commonwealth for communicating with the public. As stated above, the Fund does not anticipate active marketing of the sale of Contracts outside of Virginia, although non-Virginia residents may purchase contracts.

All other activity that might be considered an offer of Contracts, all processing of applications for Contracts, and all sales of Contracts will be handled solely by officers and employees of the Fund as part of their normal job responsibilities or by contractors selected in accordance with the Commonwealth's public procurement procedures. No transaction-based compensation of any sort will be paid to any Board member, officer, or employee of the Fund or any other official of the Commonwealth in connection with such activities.

Discussion

We believe it is arguable that the Contracts should not be considered "securities" at all for purposes of the Act for the following reasons:

- The purpose for which Contracts are intended to be purchased;
- Their limited transferability; and
- The fact that, except in the unlikely case of actuarial unsoundness described above, to the extent any refund which becomes payable under any Contract exceeds the amount paid for the Contract, such excess will be determined based on a criterion unrelated to the time at which the Contract payment was made or the proportion which the Contract payment bears to the total amount of assets in the Fund.

Because we believe the questions for which your advice is sought in this letter can be resolved without considering that matter, however, we are not requesting your advice on that matter at this time.

In light of the Opinion and the matters concerning the Fund discussed therein and under "The Fund and the Board" above, we believe that, in any event, the Fund should be considered an "agency" of the Commonwealth as that term is used in § 44-1843 A.1. of the Act. Accordingly, it is our opinion that the Contracts, if securities at all, are exempt from registration under the Act pursuant to that section.

Because of the status of the Fund as an agency or instrumentality of the Commonwealth of Virginia, we also believe that any activities concerning the marketing of the Contracts or the investment or management of assets of the Fund undertaken in his or her official capacity by any Board member or any other officer or employee of the Fund or of any other political subdivision, agency, authority, or instrumentality of the Commonwealth would not require registration as a dealer, salesman, investment adviser, or investment adviser representative under the Act.

In addition, to avoid the administrative burden, delay, and expense that would be associated with any attempt to register any Board member or any other officer or employee of the Fund or of any other political subdivision, agency, authority, or instrumentality of the Commonwealth as a dealer or salesman dealing in exempt securities guaranteed by a state or political subdivision, we request that Rule 14-4-104(5) of the Regulations not apply to such persons.

Accordingly, we hereby respectfully request your concurrence with the conclusions expressed above, by means of an interpretive letter, or the assurance of your office that no enforcement action will be recommended if the above-described offering of the Contracts proceeds without registration of the Contracts under the Act. In addition, we respectfully request

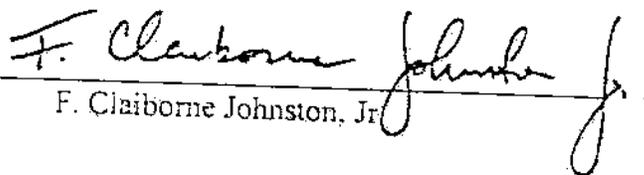
Corporation Commission
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your office's concurrence or a "no action" position concerning our conclusion that any activities relating to the investment or management of Fund assets undertaken by a Board member or other officer or employee of the Fund or of another state entity will not require registration under the Act. Finally, we respectfully request your assurance, by means of an interpretive letter, that Rule 14-4-104(5) will not apply to such persons.

Currently, the Board is planning to begin public announcements concerning the Contracts in the fall and to begin making them available for purchase on December 2, 1996. Because the prepaid tuition payment program described in this letter is of great significance to the Commonwealth and its residents, consideration of these requests on an expedited basis will be greatly appreciated. If any staff member of your office or any other Division to which you may consider it appropriate to refer certain of these requests requires further information, please feel free to contact the undersigned or R. Joel Ankney of this office. In any case, we would appreciate being informed at your earliest convenience, by letter or telephone call to the undersigned (804/697-1214) or to Mr. Ankney (804/697-1255), of the identity of the individual(s) assigned to consider this letter.

Very truly yours,

MAYS & VALENTINE

By 
F. Claiborne Johnston, Jr.

037/594

Attachments:

cc: Cynthia Wilkinson Comer, Esquire
Assistant Attorney General

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