

STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

_____))
IN THE MATTER OF:))
)) Case No: C2011000036
Local Government Center, Inc., et al.))
_____))

BUREAU OF SECURITIES REGULATION'S
MOTION FOR RECONSIDERTION

NOW COMES Petitioner, the New Hampshire Bureau of Securities Regulation (the “Bureau” or the “Petitioner”), through counsel Bernstein, Shur, Sawyer & Nelson, P.A., and pursuant to R.S.A. 421-B:26-a, XXVI, submits this motion for reconsideration of portions of the Presiding Officer’s August 16, 2012 Final Order, contingent on whether or not the LGC remains subject to substantial regulation under R.S.A. 5-B. Petitioner states as follows:

1. By Final Order dated August 16, 2012, the Presiding Officer ruled in favor of the Bureau with respect to Counts 1 and 2 of the Petition (the “5-B Counts”), and ruled in favor of the Respondents with respect to Counts 3, 4, & 5 of the Petition (the “Securities Counts”).

2. In order to preserve its rights in the event of an appeal of the Final Order, the Bureau respectfully requests that the Presiding Officer reconsider his ruling on the Securities Counts to clarify the impact of a potential reversal of the 5-B Counts on the Presiding Officer’s finding that the risk pool contracts are not securities.

3. The Presiding Officer ruled that the Bureau failed to demonstrate that LGC’s risk pool contracts satisfy the “expectation of profit” prong of the *Howey* test, because political subdivisions enter into risk pool contracts for the purpose of acquiring and using insurance products and insurance coverage, rather than to earn a profit. Final Order at 62-63, 66.

4. In reaching this ruling, the Presiding Officer relied heavily on case law addressing similar insurance products issued by mutual insurance companies. *See, e.g.*, Final Order at 67 (*citing Dryden v. Sun Life Assurance Company of Canada*, 737 F.Supp 1058 (S.D. Ind. 1989) (mutual insurance company); *Collins v. Baylor*, 302 D.Supp. 408 (N.D. Ill. 1969) (same).

5. Despite relying on an analogy to regulated insurance companies, the Presiding Officer did not specifically address the Bureau's citation to case law demonstrating that the existence or absence of comprehensive regulation by an independent agency is a critical factor in the analysis of what constitutes a security. *See* BSR's Combined Response to Respondents' Post-Hearing Memoranda at 15; BSR's Trial Memorandum at 22-23 (*citing Reeves v. Ernst & Young*, 494 U.S. 56, 67 (1990)). *See also* Testimony of Respondent's expert Attorney Murphy at HT 2125.

6. The Presiding Officer's failure to address this issue likely stems from his ruling that the Bureau is empowered to regulate the size of reserves held by LGC and the return of surplus to LGC members pursuant to R.S.A. 5-B. Thus, while the LGC is comprehensively regulated by the Bureau pursuant to R.S.A. 5-B there is less risk to political subdivisions, and, correspondingly, a lesser need for risk pool contracts to be deemed securities.

7. However, in the event that the Presiding Officer either revises his decision on the 5-B Counts, or is reversed on appeal to the New Hampshire Supreme Court, the protection of comprehensive regulation by the Bureau would disappear. As stated by the United States Supreme Court in *Reeves*, in the absence of comprehensive regulation there is a greater likelihood that an instrument is a security subject to securities regulation. *Reeves*, 494 U.S. at 67.

8. Accordingly, the Bureau respectfully requests that the Presiding Officer reconsider his Final Order on the Securities Counts to clarify that in the absence of comprehensive regulation of LGC pursuant to R.S.A. 5-B, risk pool contracts should be deemed securities that are subject to securities regulations.

9. In the absence of some form of comprehensive independent regulation, there would be no mechanism to prevent LGC from conducting the same abuses found by the Presiding Officer in the future, and political subdivisions purchasing risk pool contracts would not be adequately protected.

10. In relying on an analogy to mutual insurance funds when ruling that the risk pool contracts are not securities, the Presiding Officer repeatedly stated that participating political subdivisions were purchasing an “insurance vehicle” or “insurance coverage.” *See* Final Order at 64-69. This characterization is not accurate as there is a critical difference between insurance and pooled risk management.

11. Purchasing insurance, even in a mutual insurance fund, is inherently different from participating in a risk pool. Political subdivisions are doing more than purchasing insurance coverage, they are investing their premiums and taking on the risk that the collective premiums will be sufficient to cover the collective claims of all participating political subdivisions, in exchange for the potential benefit of a return of their investment, with interest, if claims are less than premiums.

12. Because pooled risk programs involve an assumption of risk by political subdivisions, particularly when there is an absence of comprehensive regulation by an independent agency, risk pool contracts should be deemed securities subject to regulation by the Bureau.

