

1979 S.C. Op. Atty. Gen. 21 (S.C.A.G.), 1979 S.C. Op. Atty. Gen. No. 79-11, 1979 WL 29017

Office of the Attorney General

State of South Carolina

Opinion No. 79-11

January 24, 1979

***1 SUBJECTS: Securities, Constitutional Law, Insurance**

Where transactions in the stock of a domestic stock insurance company are generally subject to the provisions of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78 a *et seq.*), and a transaction comes within the exemptions found in SEC Rules X-16b-1 through X-16b-11 ([17 C.F.R. §§ 240.16b-1 through 240.16b-11](#)), such transaction is exempt from the operation of [§ 35-9-40 of the Code of laws of South Carolina \(1976\)](#).

TO: John W. Lindsay
Chief Insurance Commissioner

QUESTION:

Where transactions in the stock of a domestic stock insurance company are generally subject to the provisions of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78 a *et seq.*), is a transaction which is exempt from § 16(b) of the Act [15 U.S.C. § 78 p(b)] by SEC Rules X-16b-1 through X-16b-11 ([17 C.F.R. § 240.16b-1 through 240.16b-11](#)) also exempt from the operation of [§ 35-9-40 S.C. Code \(1976\)](#), even where no exemptions therefrom have been promulgated by the State?

STATUTES AND CASES:

Article I, § 8, Constitution of the United States of America

Article VI, Constitution of the United States of America

[§ 35-9-40 Code of Laws of South Carolina \(1976\)](#).

§ 16(b) Securities Exchange Act of 1934 [[15 U.S.C. § 78p\(b\)](#)]

§ 28(a) Securities Exchange Act of 1934 [[15 U.S.C. § 78bb\(a\)](#)]

Securities and Exchange Commission Rules X-16b-1 through X-16b-11 ([17 C.F.R. §§ 240.16b-1 through 240.16b-11](#))

[Crosby v. Weil](#), 382 Ill. 538, 48 N.E.2d 386 (1943)

[Foremost-McKesson, Inc. v. Provident Securities Company](#), 423 U.S. 232 (1976)

[Great Western United Corporation v. Kidwell](#), 577 F.2d 1256, (5th Cir. 1978)

[Kaminsky v. Abrams](#), 281 F.Supp. 501 (D.C. N.Y.1968)

[Smolowe v. Delendo Corporation](#), 136 F.2d 231 (2nd Cir. 1943) cert. denied 320 U.S. 751, 64 S.Ct. 56, 88 LEd 446 (1943).

[Travelers Health Association v. Commonwealth](#), 188 Va. 877, 51 S.E.2d 263 (1949)

[Wright v. Securities & Exchange Commission](#), 112 F.2d 89 (2nd Cir. 1940).

79 C.J.S. Supp. [Securities Regulation](#) § 191 (1974)

DISCUSSION:

You have asked whether a transaction which is exempt from § 16(b) of the Securities Exchange Act of 1934 [[15 U.S.C. § 78p\(b\)](#)] by SEC Rules X-16b-1 through X-16b-11 ([17 C.F.R. §§ 240.16b-1 through 240.16b-11](#)) is also exempt from [§ 35-9-40 S. C. Code \(1976\)](#), even where the State has promulgated no exemption therefrom. As the federal law would appear to supersede the state law, it is the opinion of this Office that transactions which are exempt from § 16(b) of the Exchange Act by SEC Rules X-16b-1 through X-16b-11 would also be exempt from [S. C. Code § 35-9-40 \(1976\)](#).

[South Carolina Code § 35-9-40](#), a provision of this State's Insider Trading Statute, was modeled after, and is nearly identical to, § 16(b) of the Exchange Act. The purpose of the 'short swing' profits provisions of § 16(b), and hence [§ 35-9-40](#), is to 'curb the evils of insider trading by . . . taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great.' [Foremost-McKesson, Inc. v. Provident Securities Company](#), 423 U.S. 232, 243 (1976). This is accomplished by permitting the corporation to recover for itself the profits realized on a sale and purchase, or purchase and sale, of its securities within six months by officers, directors or beneficial owners of more than ten percent of any class of the corporation's stock. [Foremost-McKesson, Inc., supra](#); [15 U.S.C. § 78p\(b\)](#); [§ 35-9-40 S.C. Code \(1976\)](#).

*2 Both statutes exempt from their operation those transactions wherein a beneficial owner was such at both the time of sale and purchase or purchase and sale. The statutes further exempt those transactions which the Securities and Exchange Commission or the Chief Insurance Commissioner may exempt by rule or regulation. [15 U.S.C. § 78p\(b\)](#); [§ 35-9-40 S.C. Code \(1976\)](#). Exercising its power to exempt transactions from the operation of § 16(b), the SEC has promulgated regulations wherein some eleven classes of transactions are exempted. *See*, [17 C.F.R. §§ 240.16b-1 through 240.16b-11](#). No rules or regulations have been promulgated by the Chief Insurance Commissioner to exempt specific transactions from the operation of [§ 35-9-40](#).

The question of whether transactions which are exempt from § 16(b) are likewise exempt from [§ 35-9-40](#) depends upon the relationship between, and the applicability of, the respective federal and state securities laws. It is well settled that the regulation of securities transactions is clearly within the police power of the State. 79 C.J.S. Supp., [Securities Regulation](#) § 191 (1974). It is equally clear, however, that the Congress may regulate securities transactions under its power to regulate interstate commerce. Article I, § 8, U.S. Constitution; [Smolowe v. Delendo Corporation](#), 136 F.2d 231 (2nd Cir. 1943), cert. denied 320 U.S. 751, 64 S.Ct. 56, 88 L.Ed. 446 (1943); [Wright v. Securities & Exchange Commission](#), 112 F.2d 89 (2nd Cir. 1940).

There is nothing in the Securities Exchange Act of 1934 to evidence a congressional intent to occupy the field of securities regulation to the exclusion of the states. Indeed, § 28(a) of the Exchange Act [[15 U.S.C. § 78bb\(a\)](#)] shows an unmistakable intent by Congress that there exist concurrent federal and state jurisdiction over securities transactions:

. . . Nothing in this title . . . shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any state over any security or any person insofar as it does not conflict with the provisions of this title . . . or the rules and regulations thereunder.

On the other hand, by recognizing state jurisdiction only insofar as it does not conflict with federal law, Congress clearly intended that federal law would override state law where such conflicts exist. In § 28(a), Congress specifically acted to incorporate the Supremacy Clause of the United States Constitution (Art. VI) into the securities law, thereby making it both a statutory and a constitutional requirement, [Great Western United Corporation v. Kidwell](#), 577 F.2d 1256, 1271-1272 (5th Cir. 1978). Moreover, courts which have discussed the question have uniformly recognized that where federal and state securities laws

conflict, the federal law must supersede the state law. See e.g., [Great Western United Corporation v. Kidwell](#), supra; [Kaminsky v. Abrams](#), 281 F. Supp. 501 (D.C.N.Y. 1968); [Crosby v. Weil](#), 382 Ill. 538, 48 N.E.2d 386 (1943); [Travelers Health Association v. Commonwealth](#), 188 Va. 877, 51 S.E.2d 263 (1949). To the extent that § 35–9–40 is construed to prohibit those transactions which are expressly permitted by SEC Rules X–16b–1 through X–16b–11, there would appear to be a direct conflict between state and federal securities law. In such circumstances, the federal law would have to control, such that persons who complied with the Rules of the SEC would be exempt from liability under § 35–9–40.

CONCLUSION:

*3 It is therefore the opinion of this office that where transactions in the stock of a domestic stock insurance company are generally subject to the provisions of the Securities Exchange Act of 1934, and a transaction comes within the exemptions found in SEC Rules X–16b–1 through X–16b–11, such transaction is exempt from the operation of § 35–9–40 of the Code of Laws of South Carolina (1976).

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