



KANSAS

OFFICE OF THE SECURITIES COMMISSIONER

MARK PARKINSON, GOVERNOR
CHRIS BIGGS, COMMISSIONER

July 23, 2009

Adam Law
Baker & Hostetler LLP
1000 Louisiana
Suite 2000
Houston, TX 77002-5019

RE: Interpretive Opinion No. 2010-001
Handy Hardware Wholesale, In.
File No. 2009X0000008

Synopsis: Stock of Handy Hardware Wholesale, Inc. is not a security as defined by K.S.A. 17-12a102(28) because it does not possess the principal attributes of a stock and it is not purchased with the expectation of profits to be generated through the efforts of others.

Dear Mr. Law,

In your letter dated April 28, 2009, you request confirmation that the sale of stock by Handy Hardware Wholesale, Inc. (Handy) would not be subject to regulation under the Kansas Uniform Securities Act. You argue that just because an instrument is labeled as a stock does not necessarily warrant the conclusion that it is a security and that the five factor *Foreman* test and investment contract test should be used to determine if an instrument is a security. Your position is that the instruments Handy Hardware are offering and selling do not constitute securities under K.S.A. 17-12a102(28).

I incorporate by reference the facts a represented in your letter. Handy currently operates on a cooperative basis. Any independent hardware dealer can become a shareholder member. Member must purchase 10 shares of Class A Common Stock, which gives voting rights, and Class B Common Stock based upon warehouse purchases. The shares can only be transferred to Handy and the shares may not be pledged or hypothecated. Handy will repurchase its shares for an amount equal to or less than \$100 per share. Handy is not publicly traded and has never been publicly traded.

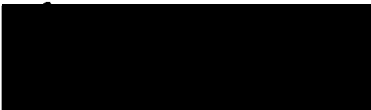
Our office typically looks to K.S.A. 17-12a102(28) to determine if an instrument is a defined security. Although Handy calls its instruments “stock”, which is a term included in the list of items that is a security, we also look to see if the substance of the instrument falls within the definition of a security. Our office has looked at the principle attributes of stock as noted in United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975). The five attributes include (1) the right to receive dividends; (2) negotiability; (3) the ability of stockholders to pledge or hypothecate the shares; (4) voting rights in proportion to the number of shares owned; and (5) the capacity of the shares to appreciate in value. It appears when applying the Forman test, the shares offered by Handy would not be considered a “stock” as is defined in the Kansas Uniform Securities Act.

We also must consider whether the instrument is a security because it is an “investment contract”. Kansas courts follow SEC v. W.J. Howey Co., 328 U.S. 293 (1946), to determine whether an interest is an investment contract and that test has been codified in K.S.A. 17-12a102(28). It is our opinion the stock would not meet the definition of an investment contract because the shares are not purchased to achieve a profit through the efforts of others.

The Office of the Kansas Securities Commissioner concludes that the stock of Handy is not a security under the Kansas Uniform Securities Act. Therefore your request for a no action interpretation is granted, and our office will take no enforcement action if the interest are offered or sold in Kansas without registration under the act.

Any variance from the facts expressed in your letter inconsistent with the information you have submitted could result in a different conclusion. This opinion is intended solely as an expression of enforcement policy by this agency, and its legal conclusions are not binding on any court, legal tribunal, or any other person.

Sincerely,



Erin Hoestje
Associate General Counsel
Office of the Kansas Securities Commissioner