

SEC Doesn't Appeal Tax-Related Charges in Kenneth Ough Case; Reaction Mixed

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The SEC's decision not to appeal the tax-related charges in the **Kenneth Ough** case is a victory for the former **Dain Rauscher** Inc. banker, but a disappointment for some securities lawyers who were spoiling for a court fight.

That is the conclusion some market participants reached when they realized that the Securities and Exchange Commission's recent appeal of the case did not contest the lower court's decision that tossed out the agency's charge that Ough failed to disclose the risk that the bonds might not be tax-exempt.

Sources said yesterday that the Securities and Exchange Commission did not appeal this part of the case because it was not sure it would win, particularly after **Robert Dean Pope**, who was brought into the case as an expert by Ough's lawyers, said it was reasonable and well within industry practice for Ough to rely on the bond counsel's opinion that the notes were tax-exempt.

As a result of the SEC's decision to only partially appeal the case to the Ninth Circuit Court of Appeals, federal judge **Gary Taylor**'s decision to drop the SEC's tax-related charges against Ough will stand.

Ough's lawyers said the SEC move is a victory for their client. "We're delighted that they dropped this from the case. It should have been dropped a long time ago," said [Charles Rice](#), a partner at **Shartsis, Friese & Ginsburg**.

However, the SEC's decision not to go forward with the tax-related charges means they will not be litigated. That's a disappointment for some securities lawyers who had been itching for such a court fight. The commission has previously settled cases, such as one involving **Thorn Welch & Co.**, in which it contended an underwriter violated the securities fraud laws by failing to disclose the risk that bonds would lose their tax-exempt status because of actions taken by transaction participants. But this would have been the first case in which the issue was litigated in a court.

The SEC first filed charges against Ough in August 1998. The commission claimed he violated the securities fraud laws and the Municipal Securities Rulemaking Board's Rule G-17 on fair dealing by failing to disclose key information in the bond offering documents for several taxable and tax-exempt note issues that were sold by **Orange County** issuers. Rauscher served as underwriter or financial adviser for the note issues. The SEC charged he should have disclosed the proceeds from most of the issues were invested in the Orange County's investment pools solely to earn profits and that the pools were risky.

On the tax-exempt Trans issue, which a group of school districts sold in 1994 for cash flow purposes, the SEC charged the bond documents should have disclosed there was a risk the notes were not tax-exempt because of alleged tax law violations. The SEC claimed some of the districts, artificially restricted funds to increase the size of the offering through their bond counsel, **Jean Costanza**, who was then with **LeBouef, Lamb, Greene & MacRae**. Costanza settled charges with the SEC over this and other note issues.

But Ough's lawyers claim the restrictions were not unreasonable and that Ough properly relied on bond counsel for assurance the notes were tax-exempt. They backed up their claims with Pope's opinion.

Taylor threw out all of the SEC's charges against Ough last year, ruling that Ough's disclosures followed industry standards and that he could rely on bond counsel. The SEC appealed all of the charges except those related to the Trans issue in a brief filed earlier this week with the appeals court.

Ough's lawyers, who must respond to the SEC's appeal by Mar. 15, claim the SEC case is unfair. "Ken Ough's being held out to suffer the sins of a whole industry, and I think that raises questions of fairness," said Rice. "The SEC is saying Ough should have done the job of [former Orange County Treasurer] **Robert Citron**, the lawyers, and the issuers. That's too much to ask of Ken Ough," said **Robert Friese**, another Shartsis lawyer.