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December 16, 2008

OAG—11—08

Mr. Keith Bozarth
Executive Director
State of Wisconsin Investment Board
121 East Wilson St.
Madison, WI 53703

Dear Mr. Bozarth:

You have requested an opinion regarding the management authority of the State of Wisconsin Investment Board (“SWIB”) in light of 2007 Wisconsin Act 212.

QUESTIONS PRESENTED AND BRIEF ANSWERS

Specifically, you ask three questions:

1. Would a court interpret Wis. Stat. § 25.182 (2007-08) to give SWIB authority to manage the Core Fund and the Variable Fund in any manner that meets the prudent investor standard set forth in Wis. Stat. § 25.15(2)(a), regardless of whether a specific investment or action involved in investment management is expressly authorized by the enumerated types of investments under Chapter 25, and regardless of whether such action is contrary to limitations on and requirements relating to investment management of the Core Fund and the Variable Fund remaining in the statutes other than those in Wis. Stat. § 25.17(5)?
2. Would a court conclude that SWIB is obligated to comply with the authority provided by the “legal list” and the requirements and restrictions on investment management provided in chapter 25 unless SWIB determines that the “legal list” and those restrictions are not prudent?
3. Does SWIB have a heavier burden to prove the prudence of an investment or management decision under Wis. Stat. § 25.182 than the burden it has to prove the prudence of an investment or action specifically authorized by the “legal list?”

The supreme court has held that, where public trustees have questions about the scope of their statutory or constitutional duties, they can uphold their fiduciary duty by seeking guidance from the attorney general. *See Wisconsin Retired Teachers Association v. Employee Trust Funds Board*, 207 Wis. 2d 1, 26-27, 558 N.W.2d 83 (1997).

I conclude that 2007 Wisconsin Act 212 confers upon SWIB the power to make investments that meet the standard of prudence under Wis. Stat. § 25.15(2), even if those investments are not specifically listed in Wis. Stat. ch. 25. Prior to making investments other than the types enumerated in Wis. Stat. ch. 25, SWIB is not required to make a threshold finding that investing solely in the “legal list” would not meet the standard of prudence. The statutory standard for prudence remains the same whether SWIB is investing in an enumerated investment, or one that is not enumerated. Because the standard of prudence, however, takes into account the trustees’ powers to manage the Funds, SWIB’s expanded powers are a relevant factor in evaluating whether SWIB has met that standard.

BACKGROUND

SWIB is charged with the investment and management of a number of state funds. Prior to the passage of 2007 Wisconsin Act 212, SWIB was held to the standard of prudence set forth under Wis. Stat. § 25.15:

STANDARD OF RESPONSIBILITY. Except as provided in s. 25.17(2)(f), the standard of responsibility applied to the board when it invests money or property shall be all of the following:

(a) To invest, sell, reinvest and collect income and rents with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a similar capacity, with the same resources, and familiar with like matters exercises in the conduct of an enterprise of a like character with like aims.

Wis. Stat. § 25.15(2) (2005-06).

SWIB’s management responsibilities include the Core Fund and the Variable Fund of the Wisconsin Retirement System. *See* Wis. Stat. § 25.17(1)(br), (xn). Your questions pertain to SWIB’s authority to manage those Wisconsin Retirement System funds.

Prior to the adoption of 2007 Wis. Act 212, the statutes provided a comprehensive list of the types of investments SWIB was authorized to make. Depending on the fund, SWIB's authority was limited to specific maturities, specific types of issuers, or, in the case of investment contracts, specific purposes. *See e.g.*, Wis. Stat. § 25.17(2)(a) (2005-06) (permitting investment of Core Fund in loans to the Wisconsin University Building Corporation, Wisconsin State Colleges Building Corporation, or Wisconsin State Public Building Corporation, under certain circumstances). The statutes also articulated the comprehensive list of the types of actions SWIB was empowered to take to manage assets under its control. *See, e.g.*, Wis. Stat. § 25.17(4) (2005-06) (limiting investments in companies at the venture capital stage to two percent of the assets of the Core Fund). This set of authority for investment and management options is commonly referred to as a "legal list." The Attorney General has previously opined that the former statutory scheme restricted SWIB to making only those management decisions articulated in the statutes. *See* 60 Att'y Gen. Op. 266, 269 (1971). In addition, the statutes limited SWIB's delegation of the management and control of assets in the Core and Variable Funds. External management was limited to twenty percent of the Core Fund, and twenty percent of the Variable Fund, in cases where SWIB held title to the investments. *See* Wis. Stat. § 25.18(2)(e)1.

2007 Wisconsin Act 212, enacted on April 22, 2008, amends SWIB's authority in several ways. As amended by 2007 Wisconsin Act 212, Wis. Stat. § 25.15(2)(a) now directs SWIB "to manage the money and property." *See* Wis. Stat. § 25.15(2)(a). This change makes clear that SWIB's duties include more than simply buying and selling investments.

The Act also expands the authority of SWIB to manage the Core and Variable Funds:

In addition to the management authority provided under any other provision of law, and notwithstanding any limitation on the board's management authority provided under any other provision of law, the board shall have authority to manage the money and property of the core retirement investment trust and, subject to s. 25.17(5), the variable retirement investment trust in any manner that does not violate the standard of responsibility specified in s. 25.15(2).

Wis. Stat. § 25.182.

Wisconsin Stat. § 25.182 now states that SWIB may manage the Core and Variable Funds "in any manner" consistent with the standard of prudence "in addition to" the management authority that is enumerated elsewhere in the statutes, and "notwithstanding" any limitation provided elsewhere in the statutes. SWIB's investment of monies in the Variable Fund remains subject to Wis. Stat. § 25.17(5), which requires Variable Fund assets to be invested primarily in equity securities. *See* Wis. Stat. § 25.182.

MAY SWIB MANAGE THE MONIES IN WAYS OTHER
THAN THOSE ARTICULATED ON THE LEGAL LIST?

Your first question turns on the meaning of “in addition to” and “notwithstanding” in Wis. Stat. § 25.182, as amended. “Statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *See State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110 (citations omitted).

“Notwithstanding,” commonly used in our statutes, has generally been accepted by courts as meaning “in spite of.” In *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993), the U.S. Supreme Court held, “the use of such a ‘notwithstanding’ clause clearly signals the drafter’s intention that the notwithstanding section overrides conflicting provisions of any other section.” *See also Bartholomew v. Wisconsin Patients Compensation Fund*, 2006 WI 91, ¶ 84, 293 Wis. 2d 38, 717 N.W.2d 216. A dictionary is used to ascertain the meaning of non-technical statutory terms. *See Garcia v. Mazda Motor of America, Inc.*, 2004 WI 93, ¶ 14, 273 Wis. 2d 612, 682 N.W.2d 365. The dictionary definition of “in addition to” is “over and above.” Webster’s Third New International Dictionary (1986).

Wisconsin Stat. § 25.182 gives SWIB the power to invest “in addition to”—“over and above”—its other powers. It allows SWIB to make such management decisions “notwithstanding”—“in spite of”—any other limitations in the statutes. Answering your first question, I conclude that SWIB’s management authority over the Core and Variable Funds thus now includes the authority to manage the monies in ways other than those articulated on the “legal list,” as long as its management meets the standard of prudence under Wis. Stat. § 25.15(2), and as long as the assets of the Variable Fund are invested primarily in equity securities.

The legislative history confirms this reading. Courts have approved the use of legislative history to confirm the plain meaning of statutory language. *See State v. Burriss*, 2004 WI 91, ¶ 32, 273 Wis. 2d 294, 682 N.W.2d 812. The legislative history of 2007 Act 212 indicates that its purpose was to expand SWIB’s management authority beyond the “legal list”:

Under this bill, instead of its investment authority being limited to the authorized lists, SWIB may manage the money and property of the core trust and the variable trust in any manner that does not violate SWIB's standard of responsibility. However, SWIB must continue to invest assets of the variable trust primarily in equity securities.

2007 Assem. Bill 623, Analysis by the Legislative Reference Bureau.

IS THE "LEGAL LIST" OF INVESTMENTS SWIB
MAY MAKE TO BE GIVEN PRECEDENCE?

Your second question is whether the statute articulates a presumption for investments on the "legal list" over other investments that SWIB could make—i.e., that SWIB should confine its investments to the "legal list" unless it finds that it would not be prudent to do so. I find no indication of such a preference or presumption in 2007 Wisconsin Act 212.

IS SWIB REQUIRED TO MEET A HIGHER STANDARD
WHEN MAKING INVESTMENTS OTHER THAN THOSE
ON THE "LEGAL LIST"?

Finally, your third question is whether SWIB must satisfy a higher standard of prudence in cases where it has chosen to make investments other than from those on the "legal list." Again, I conclude that the answer is "no." Prior to the passage of 2007 Wisconsin Act 212, SWIB was held to a standard of prudence in making investments. *See* Wis. Stat. § 25.15(2)(a) (2005-06). The fact that a trustee selected an investment from the "legal list" did not in and of itself constitute prudence; the trustee is required to meet the standard in choosing from among those options. *See, e.g. Estate of Collins v. Hughes*, 72 Cal. App. 3d 663, 672-73 (Cal. Ct. App. 1977) (trustee's choice of enumerated investment does not in itself satisfy the standard of care).

The standard of prudence articulated in Wis. Stat. § 25.15(2), which considers the nature of the resources and circumstances surrounding a trust, implicitly takes into account the trustee's scope of powers in assessing the duty of prudence. *See Welch v. Welch*, 235 Wis. 282, 312, 290 N.W. 758 (1940). A trustee's ability to invest in a wide spectrum of investment options carries with it the duty to wield that power with care, skill, prudence and diligence.

CONCLUSIONS

I conclude that 2007 Wisconsin Act 212 confers upon SWIB the power to make investments of assets in the Core and Variable Funds that meet the standard of prudence under Wis. Stat. § 25.15(2), even if those investments are not on the “legal list.” SWIB remains subject to Wis. Stat. § 25.17(5), which requires that Variable Fund assets be invested primarily in equity securities. SWIB is not required to determine that investing solely in the “legal list” would not meet the standard of prudence prior to choosing a different investment. The standard of prudence remains the same regardless of whether SWIB’s management choice is one enumerated on the “legal list.” The standard of prudence takes into account, however, SWIB’s expanded power to select among management options for the two Trusts.

Sincerely,

A handwritten signature in black ink, appearing to read "J.B. Van Hollen". The signature is fluid and cursive, with a long horizontal stroke at the end.

J.B. Van Hollen
Attorney General

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Mr. Keith Bozarth
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