

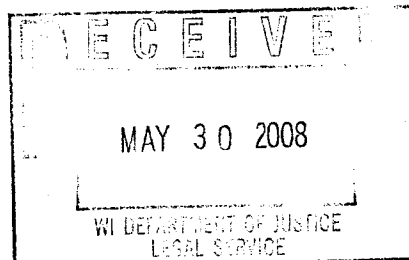


State of Wisconsin Investment Board

MAILING ADDRESS
PO BOX 7842
MADISON, WI 53707-7842

121 EAST WILSON ST
MADISON, WI 53703
(608) 266-2381
FAX: (608) 266-2436

May 28, 2008



Attorney General J.B. Van Hollen
Wisconsin Department of Justice
P.O. Box 7857
17 West Main Street
Madison, WI 53707-7857

Re: SWIB's Authority under 2007 Wisconsin Act 212

Dear Attorney General Van Hollen:

I write to request an Attorney General's opinion on the investment management authority of the State of Wisconsin Investment Board (SWIB) that is provided by certain provisions of 2007 Wisconsin Act 212, which became effective on April 22, 2008. Act 212 created new Wis. Stat. § 25.182, which provides as follows:

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. 25.15(2) specifies the prudent investor standard of responsibility. Act 212 also amended that subsection by replacing "To invest, sell, reinvest and collect income and rents [with the prudent expert standard]" with "To manage the money and property [with the prudent expert standard]."

Before Act 212 became effective, SWIB's investment management authority for all the funds and trusts under its investment authority, including the Wisconsin Retirement System core retirement investment trust ("Core Fund") and variable retirement investment trust ("Variable Fund") was limited to investments and actions that were specifically authorized for such funds and trusts by statute. I refer to this kind of statutory investment management authority in this request letter as a "legal list." In some cases, the legal list specifies specific maturities, specific types of issuers or, in the case of investment contracts, specific purposes. Because an

administrative agency has only those powers that are expressly conferred or necessarily implied by the statutes under which it operates (*Kimberly-Clark Corp. v. Public Service Comm.*, 110 Wis. 2d 455, 461-62, 329 N.W.2d 143 (1983)), SWIB had no authority to take any investment action that was not expressly authorized by the statutory legal list. In addition to the specific authority provided by the statutory legal list, the statutes also require, prohibit or limit certain investment management actions by SWIB with respect to the funds and trusts under its management, including the Core Fund and the Variable Fund. The language of 2007 Wisconsin Act 212 states that, “[i]n 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,” SWIB may manage the Core Fund and, subject to Wis. Stat. § 25.17(5), the Variable Fund in any manner that does not violate the prudent investor standard in Wis. Stat. § 25.15(2).

None of the provisions of the legal list nor any language restricting or limiting SWIB’s investment management were repealed. New Wis. Stat. § 25/182 applies only to the Core Fund and the Variable Fund. SWIB must continue to invest the other funds under its control in accordance with the “legal list” and must comply with the investment management requirements and limitations with respect to those other funds.

Based on the decision in *Wisconsin Retired Teachers Ass’n, Inc. v. Employe Trust Funds Board*, 207 Wis.2d 1, 558 N.W.2d 83 (1997), the trustees of SWIB have concluded that requesting an Attorney General’s opinion on the authority provided to SWIB by the new law is prudent and is consistent with SWIB’s fiduciary duty in applying the statutes. Consequently, I request your opinion on the following questions:

1. Would a court interpret Wis. Stat. § 25.182 to give SWIB authority to manage the Core Fund and the Variable Fund in any manner that meets its 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 “legal list” and regardless of whether the 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”?

It may be helpful to provide examples of how my opinion request applies to the pre-existing statutes. An example of the legal list authority is the express authority to sell securities that SWIB does not actually own but has the right to acquire upon the exercise of conversion rights. Wis. Stat. § 25.18(1)(h). A 1971 Attorney General’s opinion opined that SWIB had only this

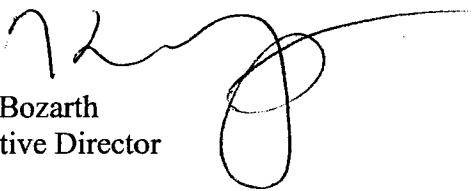
express authority and had no authority to short sell or sell securities to be procured in the future. 1971 OAG 266, 267-68. Applying Question #1 above to this example, the question would be: Would a court find that SWIB has authority under Wis. Stat. § 25.182 to short sell securities so long as such short selling does not violate the prudent investor standard in Wis. Stat. § 25.15(2), even though short selling is not expressly authorized?

An example of the restrictions and limitations on investment authority appears in Wis. Stat. 25.18(2)(e)1., which authorizes SWIB to delegate management and control of assets from any fund or trust to external investment advisors. It also limits that authority with respect to the Core Fund and the Variable Fund such that no more than 20% of either fund could be externally managed in accounts in which SWIB directly held title to the investments.¹ Applying Question #1 above to this example, the question would be: Would a court find that SWIB has authority under Wis. Stat. § 25.182 to invest more than 20% of the Core Fund or Variable Fund in externally managed accounts in which SWIB directly holds title provided that it does not violate the prudent investor standard in Wis. Stat. § 25.15(2) even though the language of Wis. Stat. 25.18(2)(e)1. contains a 20% limitation?

I enclose a legal memorandum that was prepared by SWIB's Chief Legal Counsel on these questions. Attachment A to that memorandum sets out the statutory legal list that applies to the Core Fund and the Variable Fund. Attachment B to that memorandum sets out the statutory restrictions at issue.

If you have any questions about this request, or need any additional information, please do not hesitate to contact Jane Hamblen, Chief Legal Counsel of SWIB, at (608) 266-8824 or jane.hamblen@swib.state.wi.us.

Very truly yours,


Keith Bozarth
Executive Director

cc: Kevin Potter
Administrator, Legal Services Division

¹ Wis. Stat. § 25.18(2)(e)1. provides: [The Board may] “[c]ontract with and delegate to investment advisers the management and control over assets from any fund or trust delivered to such investment advisers for investment in real estate, mortgages, equities, and debt and pay such advisers fees from the current income of the fund or trust being invested. Subject to subd. 2., no more than 20 percent of the total assets of the core retirement investment trust or 20 percent of the total assets of the variable retirement investment trust may be delivered to investment advisers to manage in accounts in which the board directly holds title to all securities purchased or the accounts.”