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DEPARTMENT OF JUSTICE

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OAG–02–22

The State of Wisconsin Investment Board
c/o Chief Counsel Sara Chandler
121 East Wilson Street
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Dear Chief Counsel Chandler:

¶ 1. On behalf of the State of Wisconsin Investment Board ("SWIB"), you ask for clarification about the scope of a previous attorney general opinion, Wis. Op. Att'y Gen. OAG—11—08 (Dec. 16, 2008) ("2008 Opinion").[1] That opinion addressed SWIB's expanded authority through statutory amendments in 2007 Wis. Act 212 ("2008 Amendments"). The opinion discussed the 2008 Amendments' effect on SWIB's investment authority over Wisconsin's core retirement investment trust fund (the "Core Fund"). Specifically, the opinion stated that the 2008 Amendments broadly authorized SWIB to manage the assets in the Core Fund in any manner consistent with the statutory "prudent person" standard in Wis. Stat. § 25.15(2) (2019–20)[2], regardless of whether a particular management approach was specifically listed in the statutes.

¶ 2. You now ask for an opinion clarifying whether SWIB's expanded authority over the Core Fund includes issuing debt. Debt issuance, as you explain, is one type of a broader management strategy known as leveraging, which is when an entity invests more capital than cash on hand. You offer the following

[1] As observed in Wis. Op. Att'y Gen. OAG—11—08 (Dec. 16, 2008) ("2008 Opinion"), public trustees may seek guidance from the Attorney General via an opinion request. *See Wis. Retired Tchrs. Ass'n, Inc. v. Employe Tr. Funds Bd.*, 207 Wis. 2d 1, 26, 558 N.W.2d 83 (1997).

[2] All subsequent references to the Wisconsin Statutes are to the 2019–20 version unless otherwise indicated.

explanations for why SWIB is considering issuing debt. You explain that SWIB already engages in other types of leveraging, such as investing in instruments that can be bought without full payment at the date of purchase and by using securities it currently owns as collateral. SWIB desires to also use debt leveraging as part of an overarching diversified asset allocation strategy, with the goal of improving the fund's efficiency, increasing returns, and decreasing overall risk. Further, the debt SWIB issues would come with a right of recourse only against the Core Fund. The request points out that some other large pension plans, including some in Canada, use debt issuance as part of their management strategies. For example, the Canada Pension Plan explains that it includes debt leveraging in its portfolio to ensure proper diversification and to target a specific level of overall risk.[3] Any such actions would be subject to continual oversight by SWIB staff and approval by its Board of Trustees. Your request states that SWIB believes it has the authority to leverage by issuing debt, but that it seeks an opinion making that explicit because parties involved in the debt-issuance process may require such assurances.

¶ 3. I conclude that, based on the same reasoning in the 2008 Opinion, SWIB has the statutory authority to issue debt as part of its broad Core Fund management authority, provided that the statutory "prudent person" standard is met. Whether, in a particular situation, issuing debt meets that standard would depend on the specific circumstances. This opinion does not address whether issuing debt would in fact meet the standard in any particular scenario.

Background on SWIB's powers, the 2008 Amendments, and the 2008 attorney general opinion.

¶ 4. As discussed in OAG—11—08, the 2008 Amendments vested SWIB with broad authority over the Wisconsin Retirement System's Core Fund and, to a certain extent, its variable fund, the latter of which is not at issue here. Both funds are maintained by SWIB "for the purpose of managing the investments of the retirement reserve accounts," which relates to the Wisconsin Retirement System. Wis. Stat. § 40.04(3); *see also* Wis. Stat. § 40.20 (creating the retirement system). State employers are included in the system, and other public employers may be.

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[3] *Debt Issuance*, CPP Investments, https://www.cppinvestments.com/the-fund/debt-issuance (last visited July 27, 2022). There are also reports that California's state retirement system has resolved to issue debt to fund investments, allowing it to have 105% of its funds available for investment. Simon Moore, *Major Pension Fund Adds Leverage As Assets Push Half A Trillion*, Forbes, (Nov. 16, 2021, 2:01 PM), https://www.forbes.com/sites/simonmoore/2021/11/16/major-pension-fund-adds-leverage-as-assets-push-half-a-trillion/?sh=8b3721427e1e.

See Wis. Stat. §§ 40.02(28) (defining employer), 40.21 (setting out participating employers), 40.22(1) (setting out participating employees). SWIB has "exclusive control of the investment and collection of the principal and interest of all moneys loaned or invested from . . . [the Core Fund]." Wis. Stat. § 25.17(1)(br). To that end, there are provisions setting out specific investment options, such as Wis. Stat. § 25.17(3)(a), which authorizes investment in "loans, securities, and any other investments authorized by s. 620.22," which, in turn, refers to that section's inclusion of "[p]referred or common stock of any United States or Canadian corporation," Wis. Stat. § 620.22(3), among other types of investments.

¶ 5. The funds are self-contained: "All costs of owning, operating, protecting, and acquiring property in which either trust has an interest shall be charged to the current income or market recognition account of the trust " Wis. Stat. § 40.04(3). The statutes further state that "[a]ny deficit occurring within the accounts of a benefit plan," which includes the retirement system's Core Fund, "shall be eliminated as soon as feasible by increasing the premiums, contributions or other charges applicable to that benefit plan." Wis. Stat. §§ 40.04(1), 40.02(10) (defining benefit plan), 40.04(2) (setting out accounts and reserves).

¶ 6. Prior to the 2008 Amendments, SWIB had specifically listed investment powers, including when it came to the Core Fund. For example, as noted above, Wis. Stat. § 25.17(4) allows SWIB to invest "the funds of the [Core Fund] in loans, securities, or investments." This office had opined in the past that, under the pre-2008 statutes, SWIB's powers were only as specifically enumerated in those kinds of statutory lists. *See* 60 Op. Att'y Gen. 266 (1971); 78 Op. Att'y Gen. 189 (1989). This was sometimes called the "legal list."

¶ 7. However, as the 2008 Opinion explains, the 2008 Amendments changed SWIB's powers. Specifically, 2007 Wis. Act 212 created Wis. Stat. § 25.182, which broadly and expressly vested SWIB with management authority over the Core Fund in addition to, and notwithstanding, any other statute, provided that SWIB's exercise of that authority complied with the "prudent person" standard in Wis. Stat. § 25.15(2):

> *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. As the emphasized language makes plain, and as recognized in the 2008 Opinion, this language expressly removes other limits on SWIB's Core Fund management authority. It does so in two ways, by stating that SWIB's management authority over the Core Fund: (1) is "in addition to" other authority and (2) operates "notwithstanding" any other statutory limits. OAG—11—08.

¶ 8. Rather, the current limit is the standard of responsibility in Wis. Stat. § 25.15(2). It establishes a "prudent person" management standard based on professionals acting in similar capacities, and it also calls for diversity of investment and for SWIB to administer trusts solely for the purposes of the trust:

> Except as provided in s. 25.17 (2) and (3) (c), the standard of responsibility applied to the board when it manages money and property shall be all of the following:
>
> (a) To manage the money and property 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.
>
> (b) To diversify investments in order to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, considering each trust's or fund's portfolio as a whole at any point in time.
>
> (c) To administer assets of each trust or fund solely for the purpose of ensuring the fulfillment of the purpose of each trust or fund at a reasonable cost and not for any other purpose.

Wis. Stat. § 25.15(2).

¶ 9. The 2008 Amendments also altered section 25.15(2) in two other ways. First, prior to the amendment, the introductory sentence provided that the standard of responsibility applied to "the board when it *invests* money or property." Wis. Stat. § 25.15(2) (2005–06). The amendment removed the more limited term "invests" and substituted the broader word "manages." Second, similarly, section 25.15(2)(a) used

to direct SWIB "[t]o invest, sell, reinvest and collect income and rents" according to the "prudent person" standard. Wis. Stat. § 25.15(2)(a) (2005–06). The amendment removed that more limited list and substituted the general language directing SWIB "[t]o manage the money and property" according to the "prudent person" standard. Wis. Stat. § 25.15(2)(a).

¶ 10. The 2008 Opinion also explains that legislative history reinforces the statutory text. A contemporaneous Legislative Reference Bureau analysis explained that, "instead of its investment authority being limited to the authorized lists, SWIB may manage the money and property of the core trust . . . in any manner that does not violate SWIB's standard of responsibility." OAG—11—08, at 5 (quoting Analysis by Wis. Legis. Reference Bureau of 2007 Wis. Assemb. B. 623).

¶ 11. The opinion thus concluded that the 2008 Amendments authorized SWIB to act according to "the standard of prudence under Wis. Stat. § 25.15(2), even if those investments are not on the 'legal list.'" OAG—11—08, at 6.

SWIB's statutory authority to issue debt is subject to same analysis of its management authority described in Wis. Op. Att'y Gen. OAG—11—08.

¶ 12. Your opinion request asks whether SWIB has the authority to issue debt as a management strategy for the Core Fund. You explain that SWIB would issue the debt, which it believes can be done "at attractively low interest rates" given its strong financial circumstances, and then invest the proceeds.

¶ 13. I conclude, based on the plain text of the statutes summarized above, that SWIB would have the authority to issue debt provided it satisfies the "prudent person" and other standards listed in Wis. Stat. § 25.15(2). The statutory standards apply the same way to issuing debt as a management tool as they apply to any other strategy.

¶ 14. The meaning of provisions in Wis. Stat. ch. 25 presents a question of statutory interpretation. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Id.* "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its

meaning." *Id.* (quoting *Bruno v. Milwaukee County*, 2003 WI 28, ¶ 20, 260 Wis. 2d 633, 660 N.W.2d 656). Ascertaining the plain meaning may be aided by "reference to the dictionary definition." *Id.* ¶ 53.

¶ 15. Further, statutory history—"the previously enacted and repealed provisions of a statute"—is part of a plain-meaning contextual analysis. *County of Dane v. Lab. & Indus. Rev. Comm'n*, 2009 WI 9, ¶ 27, 315 Wis. 2d 293, 759 N.W.2d 571 (quoting *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581). Lastly, extrinsic legislative history, while not part of a plain meaning analysis, may be consulted to confirm that analysis. *State ex rel. Kalal*, 271 Wis. 2d 633, ¶ 51.

¶ 16. That framework was properly applied in the 2008 Opinion, which addressed the plain meaning of the statutory terms in the 2008 Amendments that explicitly broadened SWIB's management authority over the Core Fund. The opinion further confirmed that plain meaning based on legislative history. I conclude that there is no reason to treat debt issuance differently. In other words, there is no statutory basis to limit the "prudent person" standard to categorically exclude debt issuance.

¶ 17. The "prudent person" standard refers to SWIB's duty to "manage the money and property" of the Core Fund. Wis. Stat. § 25.25(2)(a). The term "manage" is not defined, so a court properly would resort to a dictionary. *State ex rel. Kalal*, 271 Wis. 2d 633, ¶ 53 (explaining that a term's meaning may be discerned "by reference to the dictionary definition"). The term broadly means "to handle or direct with a degree of skill." *Manage*, Merriam-Webster, https://www.merriam-webster.com/dictionary/manage (last visited July 27, 2022). Further, the statutory history shows that the Legislature removed more limited terms ("invest," "sell") and replaced them with the broader term, "manage." Thus, there is no basis, either in the text or the statutory history, to limit the "prudent person" standard to the superseded statutory limits on investing in specific ways. Instead, SWIB is allowed to go beyond those specific limits so long as it handles the trust "with a degree of skill" contemplated by the "prudent person" standard.

¶ 18. The text of Wis. Stat. § 25.182 does not single out a management strategy as forbidden but broadly confers "management authority" "[i]n addition to" and "notwithstanding" any other grant or limit of authority in the statutes, provided the standards in Wis. Stat. § 25.15(2) are met. Thus, for issuing debt with recourse against the Core Trust, as with any strategy, the question is whether the

"prudent person" and other standards would be met under the circumstances. That is a fact-specific question that is beyond the scope of this opinion.

Consideration of the Wisconsin Constitution's "public debt" restrictions.

¶ 19. Lastly, although your request does not ask for an analysis of the Wisconsin Constitution's "public debt" limitations, for the sake of completeness, the following explains how the precedent would apply. This concerns the Wisconsin Constitution's provision that, "[t]he state shall never contract any public debt except in the cases and manner herein provided." Wis. Const. art. VIII, § 4.

¶ 20. The Wisconsin Supreme Court has ruled that the Wisconsin Constitution's limits on "public debt" apply only when "the state itself is under a legally enforceable obligation." *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 428, 208 N.W.2d 780 (1973). For example, *Nusbaum* addressed the Wisconsin Housing Finance Authority's "powers and structure" and ruled it was an "independent entity" and was "neither an arm nor agent of the state." *Id.* at 424–25. The court confirmed that the Legislature has the power to create such "separate entities" to accomplish a purpose that the State may not be able to achieve directly. *Id.* at 425. For example, when the Authority issued bonds, the State could not be held liable on them; rather, the debts were "satisfied out of rents and interest the Authority receives from the property the Authority acquires and the investments it makes." *Id.* at 424.

¶ 21. The court ruled that this scenario did not constitute "public debt" because there was no "absolute obligation[ ] to pay money or its equivalent" running against "the state itself." *Id.* at 427–28. Put differently, no legal obligation ran against the State "to be satisfied or discharged out of future appropriations." *Id.* at 428–29. And the court further explained that it would not matter if the State might wish to help with the obligation in the future "at the state's option," provided there was "no presently binding legal obligation on the part of the state." *Id.* at 429.

¶ 22. A similar analysis is found in other Wisconsin cases. *See Wis. Solid Waste Recycling Auth. v. Earl*, 70 Wis. 2d 464, 482, 235 N.W.2d 648 (1975) (holding that the issuance of bonds by the Wisconsin Solid Waste Recycling Authority to finance its programs was not "public debt" where there was no recourse against the State because "no state debt or pledge of state credit exists unless there is an obligation which is legally enforceable against the state"); *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 64, 205 N.W.2d 784 (1973) (in the parallel municipal context, concluding there was no public debt where "bonds shall not

constitute nor give use to a pecuniary liability of the municipality or a charge against its general credit or taxing powers" but rather were payable out of a project).

¶ 23. Regarding SWIB's status, the court of appeals has held that, like the Wisconsin Housing Finance Authority in *Nusbaum*, SWIB is not an arm of the State but is an "independent going concern" with "independent proprietary powers and functions." *Bahr v. State Inv. Bd.*, 186 Wis. 2d 379, 388–89, 521 N.W.2d 152 (Ct. App. 1994) (discussing these principles in the context of sovereign immunity). The *Bahr* court observed that SWIB is designated "an independent agency of the state." *Id.* at 396 (emphasis omitted) (quoting Wis. Stat. § 25.15(1)). Consistent with that, its operation and finances are a closed system. It is not funded by general state revenue but rather employers and employees contribute to the fund. Wis. Stat. § 40.05(1)–(2) (discussing employee and employer contributions). SWIB then has "exclusive control" and can, for example, act "to execute instruments indemnifying against its failures and losses, to secure insurance against any risks relating to its functions, to liquidate any corporation in which it owns 100% of the stock, [and] to sell stock and engage in a variety of financial and stock transactions." *Bahr*, 186 Wis. 2d at 396–98. "In each instance, the expenses incurred in the exercise of these powers are to be paid by the board out of the current income of the particular fund for which the action is taken; no state-appropriated funds are involved." *Id.* at 397.

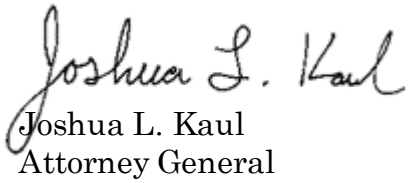
¶ 24. Thus, like the Authority in *Nusbaum*, SWIB has the characteristics of an independent going concern whose Core Fund investment-management actions do not create debt payable by the State. Rather, obligations run against the funds, not the State, as in *Nusbaum*. That is consistent with the representations in SWIB's request letter, which explains that any debt issuance it would engage in would explicitly be limited to recourse against the Core Fund and not the State.

¶ 25. As a final note, a previous opinion, 78 Op. Att'y Gen. 189, addressed SWIB's powers prior to the 2008 Amendments discussed in OAG—11—08 and, in passing, made reference to whether SWIB was an independent going concern, suggesting it might not be. 78 Op. Att'y Gen. 189 addressed the constitutional limits on contracting debt for "internal improvements," something that is not at issue in this request. *See id.* at 194, 197 (discussing internal-improvements analysis in *State ex rel. Dep't of Dev. v. State Bldg. Comm'n*, 139 Wis. 2d 1, 12–13, 18, 406 N.W.2d 728 (1987), and reconfirming the separate analysis in *Nusbaum*). In the course of addressing that separate provision, this office opined, with little analysis, that SWIB did not "appear[ ]" to be an independent authority. 78 Op. Att'y Gen. at 195.

The only reasoning, however, was that SWIB was created to be in the executive branch. *Id.* at 195–96. As discussed above, the salient question posed by *Nusbaum* and answered by *Bahr* is whether an entity is created to be independent in its function. *Bahr* ruled that SWIB was indeed an "independent going concern" and not an "arm" of the State for the reasons summarized above. To the extent this office's pre-*Bahr* comment in the context of internal improvements is in tension with the subsequent *Bahr* decision, *Bahr* is controlling.[4]

¶ 26. In sum, the analysis in Wis. Op. Att'y Gen. OAG—11—08 of SWIB's broad management authority would apply equally to debt issuance as a management strategy for the Core Fund. SWIB would have the statutory authority to issue debt as part of its Core Fund management authority if the statutory "prudent person" standard is met. Whether a particular use of debt issuance meets the standards in Wis. Stat. § 25.15(2), including the "prudent person" standard, would depend on the circumstances.

Sincerely,



Joshua L. Kaul
Attorney General

JLK:ADR:jrs

[4] Also, for the reasons discussed in this opinion and the 2008 Opinion, the discussion in 78 Op. Att'y Gen. 189 (1989) about a lack of authority "to borrow money for leverage purposes" no longer applies because SWIB's statutory powers no longer are limited to an investment list. 78 Op. Att'y Gen. at 192; *see also* 60 Op. Att'y Gen. 266 (1971) (also addressing the superseded statutory scheme).