

6550 Liberty



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON  
ATTORNEY GENERAL

August 21, 1998

The Honorable Robert E. Walker  
Member, House of Representatives  
P.O. Box 159  
Landrum, South Carolina 29356

Re: Informal Opinion

Dear Representative Walker:

Your opinion request has been forwarded to me for reply. You have asked whether the board of directors of the Gift of Life Trust Fund (hereinafter the "Trust") is required by its enabling legislation to invest trust monies only in pooled investment funds maintained by the State. Your reading of the statute is that the Trust is authorized, but not required, to invest its monies in the pooled investment funds maintained by the State.

The Trust is an eleemosynary corporation, the resources of which must be used to promote and encourage organ and tissue donation and education and to assess and assist with the needs of transplant recipients in South Carolina. S.C. Code Ann. § 44-43-1310. The trust fund may accept gifts, bequests, and grants from individuals, foundations, organizations, associations, and any other source. *Id.* The trust fund supplements and augments services provided by state agencies and does not take the place of these services. *Id.*

The Trust is to be administered by a board of directors appointed by the Governor, with the advice and consent of the Senate. S.C. Code Ann. § 44-43-1320. Members of the board shall serve terms of four years and until successors are appointed and qualify. S.C. Code Ann. § 44-43-1320(B). The powers of the board include, but are not limited to, the power to invest trust monies, including pooled investment funds maintained by the State. S.C. Code Ann. § 44-43-1340(6). The statute sets forth four permitted uses of

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funds credited to the Trust. However, the statute provides that the funds may be used for these purposes, but are not limited to these purposes. S.C. Code Ann. § 44-43-1370.

Your question is based on Section 44-43-1340 of the Code and in particular subsection (6). This section provides in pertinent part:

In administering this article, the board is authorized, but not limited to:

(6)invest trust monies, including pooled investment funds maintained by the State;

I agree with your reading of the statute. In my opinion, the aforementioned provision should not be read as a requirement that the board only invest trust monies in pooled investment funds maintained by the State, but as an investment option available to the board. The board is authorized, but not required, to make this investment decision.

Having answered the question raised in your opinion request, I must now turn to the larger question present. That question being whether an equity investment by the Trust would violate Article X, Section 11 of the South Carolina Constitution. This Section of the Constitution provides in pertinent part as follows:

Neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation.

Thus, it must be determined whether the Trust is a state agency for purposes of Article X, Section 11. While the Trust was created as an eleemosynary corporation, courts sometimes look beyond an eleemosynary corporation's status as such to determine whether, in reality, the corporation is an "alter ego" of the State. In an opinion dated September 6, 1996, this Office addressed the question of whether the Carolina Capital Investment Corporation (a non-profit corporation established by JEDA), was a State Agency for purposes of Article X, Section 11. This opinion provided a very detailed examination of the law on this subject which, as I have attached a copy of this opinion for your review, I will not repeat herein. After reviewing the law, this opinion concluded:

Of course, this Office, in a legal opinion cannot make factual determinations. Op. Atty. Gen., December 12, 1983. Ultimately, the conclusion of whether or not CCIC is a State agency is a factual question, applying all the criteria referenced above. Based upon the facts at hand, it appears that CCIC is a separate legal entity incorporated as a non-profit corporation, and is not a State agency. As noted above, this Office, in its

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previous opinions, has generally presumed that an entity incorporated as a separate non-profit corporation is not a State agency. This is consistent with Section 41-43-240 which refers to the authority of JEDA to create either "profit or non-profit corporations as the authority considers necessary to carry out the purposes of this act." Likewise, it would not appear that CCIC is such "an integral part of State government as to come within regular patterns of administrative organization and structure." I am advised that there are interlocking directors serving on both the JEDA Board and the CCIC Board and that CCIC is deemed a "public procurement unit" pursuant to the State Procurement Code. See, Section 11-35-4610(5). Notwithstanding these attributes of a State agency, however, I am of the opinion, based upon the facts presented, and previous opinions of this Office, that CCIC is probably not a State agency for purposes of Article X, § 11. I must caution that you should review the various criteria contained in the authorities referenced herein, applying these criteria to all the facts, for any final resolution of this matter.

Consistent the conclusion reached in the September 6, 1996 opinion, and the authorities cited therein, it does not appear that the Trust is a State agency for purposes of Article X, Section 11. However, as previously stated, this Office cannot make factual determinations in a legal opinion and, ultimately, whether the Trust is a State agency is a factual question.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,



Paul M. Koch

Assistant Attorney General