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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

April 28, 1999

Edwin Pearlstein, Chairman
State Retirement Systems Investment Panel
Post Office Box 11960
Columbia, South Carolina 29211-1960

RE: Informal Opinion

Dear Mr. Pearlstein:

This is in reply to your predecessor's request for an opinion of this Office. Your predecessor informed this Office that during a meeting of the State Retirement Systems Investment Panel, two issues were raised by Panel members as they discussed the development of an equity investment plan for the Retirement Systems.

Article X, Section 16 of the State Constitution was amended so as to permit the various state-operated retirement systems to invest in certain equity securities. This Section now reads in pertinent part as follows:

> Notwithstanding the provisions of Section 11 of this article, the funds of the various state-operated retirement systems may be invested and reinvested in **equity securities of any corporation within the United States that is registered on a national securities exchange as provided in the Securities Exchange Act of 1934 or any successor act or quoted through the National Association of Securities Dealers Automatic Quotations Systems or similar service**. Upon enactment of the implementing legislation required by this paragraph, there is established the State Retirement Systems

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> Investment Panel. The panel shall consist of five members, one each appointed by the Governor, the State Treasurer, the Comptroller General, and the chairman of the respective committees of the Senate and House of Representatives having subject matter jurisdiction over appropriations. The appointee of the Governor shall serve as chairman. All persons appointed must possess substantial financial investment experience and no person may be appointed or continue to serve who is an elected or appointed officer or employee of the State or any of its political subdivisions, including school districts. The General Assembly shall implement this paragraph by enacting legislation establishing the panel and providing for the terms, duties, and compensation of its members, **and which specifically authorizes the investments allowed by this paragraph, and may provide limitations on investments in equity securities as it considers prudent**. The panel established by this paragraph shall not exist until it is established in the implementing legislation required pursuant to this paragraph. (emphasis added).

The General Assembly enacted the implementing legislation, S.C. Code Ann. § 9-16-10 et seq., and amended § 9-1-1310 to allow investment in equity securities. Section 9-1-1310 now provides the same pertinent language as the constitutional provision relating to the general parameters of acceptable equity investments.

In his opinion request, your predecessor states that given the language of the constitutional provision and § 9-1-1310, the Panel questioned the parameters of acceptable equity investments considering the phrase "*any corporation within the United States that is registered on a national securities exchange ...*" Mr. Way further states that the Panel seeks guidance on the interpretation of these phrases as the meaning could impact its investment strategy tremendously. *The Panel questions whether the parameters are narrowed by an interpretation that would require the physical location of the company or its headquarters to be within the United States, i.e., "any corporation within the United States", or whether greater parameters are acceptable because the focus is on the phrase "registered on a national securities exchange."*

Mr. Way goes on to state:

> If the focus is on the registration of the securities, the location of the company or its headquarters or the location of incorporation is irrelevant; the goal would be to insure that the company is qualified to register on a national

> securities exchange in consideration of equity investment risks and to provide an additional safeguard over management of the Retirement Systems' portfolio. Additionally, focus on the qualification of registration and the phrase "within the United States" would clarify that the national securities exchange must be in the Unites States so that the corporation would be subject to the jurisdiction and regulations of the United States Securities Exchange Commission.

When construing a constitutional amendment, the Court applies rules similar to those relating to the construction of statutes, in its effort to determine the intent of its framers and of the people who adopted it. McKenzie v. McLeod, 251 S.C. 226, 161 S.E.2d 659 (1968). The Court must give clear and unambiguous terms their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the constitution's operation. Davis v. County of Greenville, 313 S.C. 459, 443 S.E.2d 383 (1994). Consideration of the object sought to be accomplished by these amendments is also an appropriate inquiry in the judicial effort to determine the intent of the framers and of the people who adopted them. McKenzie v. McLeod, supra.

An appropriate interpretation of Article X, Section 16 seems to be that the phrase "within the United States" modifies the term "corporation" rather than "national securities exchange." Thus, in response to your question, the focus of the phrase "within the United States" is on "corporations" rather than "national securities exchanges." Accordingly, the various state-operated retirement systems may invest in corporations that pass a two prong test: the corporation must be within the United States and be registered on a national securities exchange as provided in the Securities Exchange Act of 1934 or any successor act or quoted through the National Association of Securities Dealers Automatic Quotations System or similar service.

What must be determined, however, is the meaning of the phrase "corporation within the United States." I agree with Mr. Way's assessment that this phrase should not be read so narrowly as to limit permissible equity investments to only those corporations located, headquartered, incorporated and conducting business in the United States exclusively. If such was desired, these requirements could have been specifically spelled out in the amendment.[1] Instead, the framers chose to use the broad phrase "corporation within the

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[1] For example, Section 38-11-40, the statute governing appropriate investments for insurance companies, permits investment in:

United States."

The word "within" is defined as "1. In the inner part of parts of; inside." The American Heritage College Dictionary 1550 (3rd ed. 1993). The plain and ordinary meaning of the phrase "corporation within the United States" would thus seem to mean a corporation inside the United States. In light of the fact that the framers did not include specific language regarding the place of incorporation such as that found in the previously cited insurance statute, and recognizing the growing global economy in which South Carolina is a leader, it appears that the framers did not intend to limit investments to only equity securities of corporations incorporated under the laws of the United States or any state thereof. Instead, it appears that the framers intended to permit investment in equity securities of any corporation with some corporate presence inside the United States and registered on a national securities exchange as provided in the Securities Exchange Act of 1934 or any successor act or quoted through the National Association of Securities Dealers Automatic Quotations Systems or similar service. This broad interpretation seems appropriate, especially since the framers included the safeguard of granting the General Assembly the authority to limit investments as it considers prudent.

Mr. Way has also questioned whether several specific types of equity investments would be permitted under Article X, Section 16 and the statutes. This Office will defer to the agency charged with the administration of a statute. Op. Atty. Gen. dated October 30, 1996. The interpretation of the agency charged with the administration of statutory provisions will be accorded the most respectful consideration and will not be overruled absent compelling reason. Goodman v. City of Columbia, 318 S.C. 489, 458 S.E.2d 531 (1995). Thus, this Office must defer to the judgment of the State Budget and Control Board and the Panel in determining which types of investments meet the constitutional and statutory requirements as those entities are charged with the administration of the law in this area. In addition, the General Assembly is granted the power to determine allowable investments under the Section 16.

In regards to the second issue raised by the Panel, in considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects.

(r) Common stocks of any solvent corporation incorporated under the laws of the United States or any state, or Canada, or any of its provinces, if the stocks of the corporation are listed or admitted to trading on a securities exchange located in the United States ... .

Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1938); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

Article X, Section 16 provides that the General Assembly shall implement the Section by enacting legislation which specifically authorizes the investment allowed under the Section. Section 16 further provides that the General Assembly may limit investments in equity securities as it considers prudent. The General Assembly implemented Article X, Section 16 by enacting Act No. 371 of 1998 (codified as S.C. Code Ann. § 9-16-10 et seq.). Section 9-16-20(B) provides: "[i]f the retirement system invests in a security issued by an investment company registered under the Investment Company Act of 1940 (15 U.S.C. Section 80a-1, et seq.), the assets of the system include the security, but not the assets of the investment company." The adoption of Section 9-16-20(B) seems to indicate that the General Assembly interpreted Article X, Section 16 to permit the investment in securities issued by such an investment company, which apparently may include mutual funds. Given the presumption of constitutionality attached to acts of the General Assembly, this Office cannot say that this code section violates Article X, Section 16.

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

Paul M. Koch
Assistant Attorney General