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Dear Ms. Wilkinson:

I am writing in response to your request for an analysis of the authority of the Montana Board of Investments to construct a new office building for the State Compensation Insurance Fund (State Fund) without legislative approval through the long-range building program. This letter will constitute my analysis.

The proposal has the Montana Board of Investments investing the assets of the State Fund in a new office building to house the Montana State Fund's operations. The State Fund will be responsible for paying the Montana Board of Investments for the rental of the building, which will include a reasonable return on investment. This process would be similar to the process used by the Montana Board of Investments for the construction of the current building that houses the Montana Board of Investments.

Article VIII, section 13(4), of the Montana Constitution provides:

Investment of state compensation insurance fund assets shall be managed in a fiduciary capacity in the same manner that a prudent expert acting in a fiduciary capacity and familiar with the circumstances would use in the conduct of a private insurance organization. State compensation insurance fund assets may be invested in private corporate capital stock. However, the stock investments shall not exceed 25 percent of the book value of the state compensation insurance fund's total invested assets.

This provision was enacted by Constitutional Amendment No. 34, proposed by Chapter 516, Laws of 1999, and was approved at the general election held November 7, 2000. Although the primary focus of the discussion on this provision concerned investment in private corporate capital stock, the provision explicitly directs the Montana Board of Investments to invest Montana State Fund assets in the same manner that a prudent expert would use in investing the assets of a private insurance organization. Title 33, chapter 12, MCA, governs insurer investments.

Although section 33-1-102(5), MCA, provides that Title 33, MCA, does not apply to the workers' compensation insurance program provided for in Title 39, chapter 71, part 23, MCA, and related

sections establishing the State Fund, the provisions of Title 33, chapter 12, MCA, governing permissible investments by private insurance organizations are applicable to the investment of State Fund assets by the Montana Board of Investments pursuant to Article VIII, section 13(4), of the Montana Constitution. Section 33-1-206(1)(c), MCA, provides that workers' compensation insurance is included as a type of casualty insurance. Investments by private casualty insurance companies are governed by Title 33, chapter 12, part 3, MCA. Section 33-12-307(3), MCA, authorizes a casualty insurance company to acquire real estate for the convenient accommodation of the insurer's business operations and establishes the authority to include excess space for rent to others if the excess space would be a permitted investment under section 33-12-307(2), MCA.

Under this analysis, the Montana Board of Investments may invest the assets of the State Fund in a new office building to house the State Fund's operations if the Board determines that the rate of return will justify the investment as prudent.

The investment analysis is not determinative of whether the construction of a new office building is permissible without legislative approval through the long-range building program. The State Fund is established in section 39-71-2313, MCA, as a nonprofit independent public corporation established for the purpose of allowing an option for employers to insure their liability for workers' compensation and occupational disease coverage. The State Fund is a unique entity within state government that is a blend incorporating statutes governing private insurance companies and statutes governing state agencies. However, the State Fund is solely a statutory creation and is subject to legislative control through the enactment, amendment, and repeal of the statutes governing the State Fund. In addition, section 39-71-2314, MCA, provides that the State Fund is subject to laws that generally apply to state agencies, including but not limited to Title 2, chapters 2, 3, 4 (only as provided in section 39-71-2316), and 6, and Title 5, chapter 13, MCA. The State Fund is not exempt from a law that applies to state agencies unless that law specifically exempts the State Fund by name and clearly states that it is exempt from that law.

Section 39-71-2320, MCA, provides that all premiums and other money paid to the State Fund, all property and securities acquired through the use of money belonging to the State Fund, and all interest and dividends earned upon money belonging to the State Fund are the sole property of the State Fund and must be used exclusively for the operations and obligations of the State Fund.

However, State Fund money must be invested by the Board of Investments provided for in section 2-15-1808, MCA, and subject to the investment agreement with the Board of Investments, the earnings on investments are the sole property of the State Fund. In addition, section 39-71-2316(2), MCA, requires the State Fund to include a provision in every policy of insurance issued pursuant to Title 39, chapter 71, part 23, MCA, that incorporates the restriction on the use and transfer of money collected by the State Fund as provided for in section 39-71-2320, MCA. This provision incorporates the constitutional prohibition against the impairment of contracts contained in Article II, section 31, of the Montana Constitution and Article I, section 10, of the United States Constitution and protects those funds against legislative diversion.

Section 2-15-1019, MCA, establishes the Board of Directors of the State Fund and provides that the State Fund is attached to the Department of Administration for administrative purposes only as prescribed in section 2-15-121, MCA, but authorizes the Board to hire its own staff. This provision reflects the condition contained in section 2-15-121(2)(d), MCA, that an administratively attached entity may not hire its own staff unless specifically indicated otherwise in Title 2, chapter 15, MCA. Section 2-15-121(3)(b), MCA, provides that the department head of a department to which any agency is allocated for administrative purposes only in Title 2, chapter 15, MCA, shall allocate office space to the agency as necessary, subject to the approval of the Department of Administration. However, section 2-15-1019(3), MCA provides that the Board may provide for its own office space and the office space of the State Fund. This provision is inconsistent with section 2-15-121(3)(b), MCA. Section 1-2-102, MCA, provides that in the construction of a statute, the intention of the Legislature is to be pursued if possible. When a general and particular provision are inconsistent, a particular intent will control an inconsistent general provision. This tenet of statutory construction is also reflected in section 1-3-225, MCA. Therefore, it is my opinion that the Board of Directors of the State Fund may provide office space for the State Fund without seeking an allocation of office space by the Department of Administration even though the State Fund is not specifically exempt from section 2-15-121(3)(b), MCA, as contemplated by section 39-71-2314, MCA.

The long-range building program is provided for in Title 17, chapter 7, part 2, MCA. Section 17-7-201, MCA, defines a building as including a building, facility, or structure constructed or purchased wholly or in part with state money and a building, facility, or structure owned or to be owned by a state agency, including the Department of Transportation. Section 17-7-202, MCA, requires each state agency to submit to the Department of Administration, on forms furnished by the Department, a proposed long-range building program, if any, for the agency or institution. Each agency is also required to furnish any additional information requested by the Department relating to the utilization of or need for buildings. Section 17-7-203, MCA, requires the Governor to submit to the Legislature the requests of all state agencies compiled in the form of a comprehensive, long-range proposed building program containing specifically enumerated information. That section also provides that a building program proposed by the Governor for the ensuing biennium in the form of a capital construction budget is required to include enumerated information including any changes in the law necessary to ensure an effective, well-coordinated building program for the state. Section 17-7-204, MCA, provides that the executive budget for all state agencies must include detailed recommendations for the state long-range building program presented in order of importance by fund type. Each recommendation is required to be presented by agency or branch by funding source, with a description of each proposed project, an explanation of the problem to be addressed by the proposed project, alternative methods of addressing the problem, the rationale for the selection of a particular alternative, and a projection of increased operating costs incident to the project for the next three bienniums.

Section 17-7-102, MCA, defines an "agency" for the purposes of Title 17, chapter 7, MCA, as all

offices, departments, boards, commissions, institutions, universities, colleges, and any other person or any other administrative unit of state government that spends or encumbers public money by virtue of an appropriation from the Legislature under section 17-8-101, MCA. Section 17-8-101(1), MCA, implements Article VIII, section 14, of the Montana Constitution by providing that money deposited in the general fund, the special revenue fund type (except money deposited in the treasury from nonstate and nonfederal sources restricted by law or by the terms of an agreement, such as a contract, trust agreement, or donation), and the capital projects fund type, with the exception of refunds authorized in section 17-8-101(4), MCA, may be paid out of the treasury only on appropriation made by law. Section 39-71-2321(2), MCA, provides that all money deposited in the State Fund may be spent as provided in section 17-8-101(2)(b), MCA. That subsection provides that money may be expended from the state treasury under general laws, or contracts entered into in pursuance of law, permitting the disbursement if a subclass is established on the state financial system. Under this provision, the money deposited in the State Fund is exempt from the appropriation process. Therefore, the State Fund is not an "agency" as defined section 17-7-102, MCA. Because the State Fund is not an "agency" for the purposes of Title 17, chapter 7, MCA, the State Fund is not subject to the requirements of the long-range building program. In addition, section 39-71-2314, MCA, which provides that the State Fund is subject to laws that generally apply to state agencies, does not apply because the State Fund is not a "state agency" for the purposes of Title 17, chapter 7, MCA.

I hope that I have adequately addressed your questions. If I can provide additional information or if this analysis raises other questions, please feel free to contact me.

Sincerely,

Gregory J. Petesch
Director of Legal Services

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