

LETTER OPINION
2021-L-03

Rep Keith Kempenich
District 39, 9005 151st Avenue SW
Bowman, ND 58623-8857

Dear Representative Kempenich,

Thank you for requesting my opinion on whether the State Investment Board's (SIB) compliance with H.B. 1425, § 2, 2021 N.D. Leg., breaches SIB's fiduciary duty. It is my opinion that, provided selected in-state investment firms and financial institutions are qualified, and investment decisions are otherwise consistent with the prudent investor rule, SIB's compliance with the Section 2 preference, in and of itself, is not a breach of SIB's fiduciary duty.

ANALYSIS

North Dakota's legislature established SIB in 1963 to invest various state funds.¹ Like other state agencies created by statute, SIB has only such authority or powers as are granted to it or necessarily implied from the grant.² In 1987, the legislature amended SIB's statute, mandating application of the prudent investor rule to all SIB managed investments.³

In November 2010, North Dakota's voters approved a constitutional amendment that established the North Dakota legacy fund (legacy fund).⁴ Additionally, the constitutional amendment assigned responsibility for investing the legacy fund's principal to SIB.⁵ Consequently, the SIB has been investing the legacy fund principal since September 2011, applying the statutorily mandated prudent investor rule. The value of the fund as of September 2021 is approximately \$8.25 billion.⁶

¹ 1963 Sess. Laws, ch. 205, § 1.

² N.D.A.G. 99-L-38 (citing *First Bank of Buffalo v. Conrad*, 350 N.W.2d 580, 584-585 (N.D. 1984)).

³ 1987 Sess. Laws, ch. 190, § 9.

⁴ N.D. Const. art. X, § 26.

⁵ *Id.*

⁶ <https://www.rio.nd.gov/legacy-fund> (Nov. 4, 2021).

The H.B. 1425, § 2, 2021 N.D. Leg. amendment, passed by the legislature in 2021, which is the subject of this opinion, incorporates into legacy fund management a preference for in-state investment firms and financial institutions. The question presented, essentially, is whether SIB's compliance with the new, statutorily mandated, preference can be reconciled with SIB's fiduciary duties, which are also statutorily mandated.⁷

Generally, a fiduciary is one who is required to act for the benefit of another, in "good faith, trust, confidence, and candor . . . exercise[ing] a high standard of care in managing another's money or property."⁸ The legal duties imposed on fiduciaries generally include the duty of loyalty and the duty of care.⁹ The duty of loyalty means the fiduciary acts solely in the interest of the beneficiaries¹⁰ while the duty of care, or prudence, means exercising the care an ordinarily prudent person in a like position would exercise under similar circumstances.¹¹

Specifically pertinent here are two statutes and one constitutional provision that direct management of the legacy fund principal.

When construing constitutional provisions, we ascertain the framers' intention and purpose primarily from the language of the Constitution itself.¹² If the language is ambiguous, we look to the rules of statutory construction, and, if necessary, to legislative history.¹³

When we interpret statutes, our primary purpose "is to determine the legislative intent, and we start with the plain language of the statute and give each word of the statute its ordinary meaning."¹⁴ "Statutes are construed as a whole and are harmonized to give meaning to related provisions."¹⁵ "We presume the legislature did not intend an absurd or ludicrous result or unjust consequences, and we construe statutes in a practical manner, giving consideration to the context of the statutes and the purpose for which they were enacted."¹⁶

⁷ N.D.C.C. § 21-10-07; N.D.C.C. §21-10-07.1

⁸ Black's Law Dictionary 640 (7th ed. 1999).

⁹ N.D.C.C. § 47-36-14.

¹⁰ N.D.C.C. § 59-16-02.

¹¹ N.D.C.C. § 59-21-02.

¹² *Newman v. Hjelle*, 133 N.W.2d 549, 551 (N.D. 1965).

¹³ *Id.*

¹⁴ *Grand Prairie Agric., LLP v. Pelican Twp. Bd. of Supervisors*, 955 N.W.2d 87, 89 (N.D. 2021).

¹⁵ *Id.*

¹⁶ *Id.*

Here, the constitutional provision is plain: “[t]he state investment board shall *invest* the principal of the North Dakota legacy fund.”¹⁷ Though undefined in the constitution, “invest” generally means to apply money for profit.¹⁸ Stated otherwise, as to legacy fund principal investment, the legacy fund principal must be applied for the purpose of generating profit.

Next, we consider the two statutes. The first is N.D.C.C. § 21-10-07, which identifies, for SIB fiduciaries, the prudent investor rule as the duty of care. The prudent investor rule means:

[T]hat in making investments the fiduciaries shall exercise the judgment and care, under the circumstances then prevailing, that an institutional investor of ordinary prudence, discretion, and intelligence exercises in the management of large investments entrusted to it, not in regard to speculation but in regard to the permanent disposition of funds, considering probable safety of capital as well as probable income.¹⁹

As necessary or appropriate to informed decision making, the fiduciary duty of prudence may also call for obtaining and considering the advice of subject matter experts.²⁰

Prior to H.B. 1425, § 2, the constitutional provision and the prudent investor rule guided legacy fund principal investment. Section 2, codified at N.D.C.C. § 21-10-07.1, added another element for SIB’s consideration, specifically that “[n]otwithstanding section 21-10-07, for purposes of investment of the legacy fund, the state investment board shall give preference to qualified investment firms and financial institutions with a presence in the state.”²¹

“Notwithstanding” means “in spite of”²² and creates an exception to the prudent investor rule, since the prudent investor rule, as provided in N.D.C.C. § 21-10-07, does not require consideration of an investment firm or financial institution’s presence

¹⁷ N.D. Const. Art. X, § 26 (emphasis added).

¹⁸ See N.D.A.G. 2011-L-05. (“The word ‘invest’ is not defined in N.D. Const. art. X, § 26, but its usage within the section does not imply something different than the ordinary definition for the word which could mean both the ‘laying out of money in a way intended to secure income or profit,’ and also the expenditure of funds to purchase securities . . . or to place money or property in business ventures or real estate . . . so that it may produce revenue”) (citations omitted). *Id.*

¹⁹ N.D.C.C. § 21-10-07.

²⁰ Restatement (Third) of Trusts § 77 (2007).

²¹ N.D.C.C § 21-10-07.1.

²² Black’s Law Dictionary 1091 (7th ed. 1999).

within the state. Section 2 requires that additional consideration but does not define either “preference” or “qualified.” Consequently, we construe the words with their ordinary meaning. “Preference” is the act of favoring one person or thing over another.²³ “Qualified” means capable or competent.²⁴

Reconciling N.D.C.C. §§ 21-10-07 and 21-10-07.1 means the SIB must favor investment firms and financial institutions with a presence in the state over those that do not have a presence in the state, provided the selected investment firms and financial institutions are capable and competent. But the other elements of the prudent investor rule provided in N.D.C.C. § 21-10-07, unrelated to investment firm or financial institution presence, such as “exercising judgment and care, under circumstances then prevailing . . . [while] . . . considering probable safety of capital as well as probable income”, are not disregarded. This is because not “considering probable safety of capital as well as probable income” could produce the “absurd or ludicrous result” of jeopardizing the existence, and not fulfilling the purpose, of the legacy fund, which, according to legislative history, is to benefit future generations of North Dakotans.²⁵

In my opinion, the SIB may comply with H.B. 1425, § 2 without breaching its fiduciary duty. Next steps might include development of an investment firm and financial institution selection process that merges the statutory mandates of in-state preference and fiduciary duty.

Sincerely,

Wayne Stenehjem
Attorney General

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.²⁶

²³ Black’s Law Dictionary 1197 (7th ed. 1999).

²⁴ Black’s Law Dictionary 1254 (7th ed. 1999).

²⁵ *See generally* Hearings on H.C.R. 3054 Before the House Comm. On Const. Revision, 2009 N.D. Leg. (Feb. 26, Mar. 4); Hearings on H.C.R. 3054, Before the Senate Comm. on Fin. and Tax’n, 2009 N.D. Leg. (Mar. 25., Mar. 30, Apr. 1); Hearings on H.C.R. 3054, Before the House Const. Revision Conf. Comm., 2009 N.D. Leg. (Apr. 20, Apr. 23, Apr. 24, Apr. 27, Apr. 28, Apr. 29).

²⁶ *See State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).