

MEMORANDUM

To: Colleen Davis, State Treasurer
From: Jason W. Staib, Deputy Attorney General
Copy: Jordan Seemans, Deputy State Treasurer
Khairat Makanjuola, Chief Operating Officer
Re: CMPB Authority Over Donations
Date: October 21, 2024

Question

You have asked whether the Cash Management Policy Board (the “**Board**”) has authority over funds held by school districts and other State entities where the funds represent private donations (gifts or bequests) (“**Donations**”), whether the uses of such Donations are restricted to specified purposes (*e.g.*, to fund student scholarships), or unrestricted, such that the Donations could be used for the benefit of Delawareans at large.

Short Answer

Though not free from doubt, we think that the Board has authority over (and oversight responsibility for) Donations made directly to school districts and most other State entities, irrespective of use restrictions. Such authority and duties likely would not extend to Donations made directly to State entities with separate banking and investment authority, or Donations made to or for the benefit of independent foundations that support school districts through fund raising campaigns.

Analysis

The question posed necessitates an inquiry into the Board’s authority over Donations held by a school district or other State entity. The analysis begins with section 2716, which sets forth the statutory authority and duties of the Board. The Board’s primary mandate is to “establish policies for the investment of all money belonging to the State or on deposit from its political subdivisions, except money deposited in any state pension fund or the State Deferred Compensation Program, including the designation of permissible investments, and to determine the terms, conditions and other matters relating to those investments.”¹ The Board also is charged, under section 2716, with approving the selection of financial institutions to provide banking and investment services to the State.²

¹ 29 *Del. C.* § 2716(a). We read the term “investment” in this context as inclusive of banking activities.

² *See* 29 *Del. C.* § 2716(a)(2).

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We also note that section 2716 imposes on the Board a “prudent person” standard of care³ that is consistent with the level of diligence and care demanded of fiduciaries under Delaware law, including the statutory standards of care of the Board of Pension Trustees⁴ and the Plans Management Board.⁵ We have previously determined that members of the Board serve in a fiduciary capacity⁶ with respect to funds falling within the Board’s sphere of authority.

The Board has express policymaking authority and duties with respect to money covered by section 2716. To address the questions posed, we need first to determine what types of money fall within scope of section 2716, such that the Board would have authority and duties with respect to it.

Initially, we note that certain money is carved out, such as pension funds and deferred compensation funds that are overseen by separate fiduciaries. We also note that, as we have previously advised, some State entities have independent banking and investment authority under other sections of the Delaware Code, such as the Delaware State Housing Authority. Section 2716 is focused on money held by school districts and other State entities that do not have independent investment and banking authority (“**Covered Entities**”). The Board, in our view, would not be responsible for money held by State entities with independent banking and investment authority outside the State’s banking system or investment portfolio.

Next, we turn to the operative language of section 2716, which cabins the Board’s sphere of authority to “money belonging to the State or on deposit from its political subdivisions.”⁷ The phrase “belongs to,” as commonly understood, usually suggests a relationship implying ownership.⁸ We think that the phrase, as used in section 2716, is more expansive than ownership and would include money in the rightful possession of a Covered Entity. In our view, Section 2716 includes cafeteria funds held by a school district for the benefit of parents and students, as well as restitution amounts collected by Delaware courts pending disbursement to crime victims, money in the custody of the Delaware Department of Corrections that is owned by inmates (commissary funds), and money held by the Department of Health and Social Services in trust for the benefit of chronically ill patients.

³ See *id.* (“In carrying out its purpose to designate permissible investments, the Board shall exercise the judgment and care under the circumstances then prevailing which persons of prudence, discretion and intelligence exercise in the management of their own affairs with due regard to the probable income and level of risk from investments of money belonging to the State or its political subdivisions.”).

⁴ See 29 Del. C. § 8308.

⁵ See 29 Del. C. § 2722(d).

⁶ See *Del. Op. Att’y Gen.* 85-I010, 1985 WL 165943, *1-2 (1985).

⁷ We note that school districts may be considered “political subdivisions” for certain purposes. See *Delawareans for Educ. Opportunity v. Carney*, 199 A.3d 109, 154 (Del. Ch. 2018) (“[L]ocal school districts, as they have evolved under Delaware law, are more analogous to political subdivisions.”). The distinction is not critical to our analysis, as we think that school districts are more appropriately treated as State entities for purposes of section 2716.

⁸ See [Belong to - Idioms by The Free Dictionary](#).

With this analysis as a backdrop, we turn back to the first question originally posed – namely, whether the Board has authority over Donations to school districts and other Covered Entities. We think that Donations made directly to Covered Entities are owned by the State and thus “belong to” the State within the meaning of section 2716, even if the use of the money is restricted. For example, a decedent may bequeath \$10,000 to the Department of Natural Resources and Environmental Control for use in maintaining a section of a particular State Park. Another decedent may make a Covered Entity a beneficiary of a life insurance policy without use restrictions. We think, in both examples, that the Donations would generally be considered State funds that would need to be banked and invested with a Board-approved financial institution. These are relatively straight-forward examples, as both involve money that is to be used for State government purposes.

The analysis is a little more complicated with respect to use restrictions that require Donations to be used for what may not be traditional State purposes. We are not convinced that the scope of 2716 necessarily hinges on the distinction between State versus non-State purposes. Rather, we think that, as long as a Covered Entity receives a monetary Donation (*i.e.*, the money has been placed with a Board-approved financial institution), the Board arguably has at least some degree of authority over and duties with respect to the funds. This makes sense to us because a Covered Entity having actual possession of a monetary Donation would arguably make the State as a whole financially responsible for the safekeeping of the Donation, regardless of permitted uses.⁹

The final step of the analysis involves Donations made to independent foundations that have been formed for the express purpose of helping school districts raise additional funding for scholarships and other purposes (“**Foundations**”).¹⁰ We are not convinced that monetary Donations made to separate Foundations were intended to be covered by section 2716, even if a particular Donation may have a permitted use that arguably would be considered a State government purpose. Unless a monetary Donation made to a Foundation is within the actual possession of a Covered Entity, we do not think that the Board would have authority over or duties with respect to it.

Conclusion

For the foregoing reasons, we think that the Board has authority over Donations held by Covered Entities.

⁹ We also think that the Board could, at least in theory, require a Covered Entity to remove a monetary Donation for non-State purposes from the State’s banking system or investment portfolio. This is consistent with Section 7.12.4 of the State’s Budget and Accounting Policy Manual (the “**BAM**”), which requires all State entities covered by the BAM to establish and use their own EINs for outside bank accounts that support “non-State activities such as employee sunshine accounts, [school district] booster club accounts, volunteer entities, and foundations.” We note, however, that this option would appear to be of limited practical utility, as most Covered Entities do not have their own EINs.

¹⁰ We assume for present purposes that all such Foundations have separate corporate or other legal existence and independent boards (with fiduciary obligations).