

(c)(4)
801.1(a)(2)

[REDACTED]

ATTORNEYS AT LAW

[REDACTED]

[REDACTED]

October 14, 1999

Nancy Ovuka, Esq.
Federal Trade Commission
6th Street & Pennsylvania Ave. N.W.
Washington, D.C. 20580

Dear Ms. Ovuka:

The purpose of this correspondence is to confirm our recent discussion concerning the status of a state retirement fund for HSR purposes.

Our client in this matter is the [REDACTED]. The [REDACTED] (referred to as [REDACTED]) was created by self-executing provisions of Article XVI, Section 70 of the Constitution of the State of Texas (see Enclosure A). [REDACTED] (referred to as [REDACTED]) was created under Subsection (m) of Article VI, Section 70 of the Constitution of the State of Texas and Texas House Bill 183 of Legislative Session 75(R).

[REDACTED] and II are each managed by a board of trustees consisting of four public members appointed by the Governor of Texas and one member from and elected by the membership of each of the following: (i) the Board of Regents of the University of Texas System; (ii) the Board of Regents of the Texas A&M University System; (iii) the Board of Trustees of the Teacher Retirement System of Texas; (iv) the Board of Trustees of the Employees Retirement System of Texas; and (v) the State Board of Education. The Boards of Trustees of [REDACTED] and II are charged with managing the investments of the Funds and may employ and retain staff, including an executive director. The Boards of Trustees of Fund I and II have each determined that the Funds will be established and operated as a series of separate trusts. Consequently, with respect to Fund I, there is (i) the [REDACTED] 1991 Trust and (ii) [REDACTED] 1995 Trust. With respect to Fund II, there is the [REDACTED] 1998 Trust.

The governing boards of the Texas Permanent University Fund, Texas Permanent School Fund, Teacher Retirement System of Texas, Employees Retirement System of Texas and any other pension and retirement funds created under the Texas Constitution or by Texas statute are authorized to make investments in Fund I and Fund II.

[REDACTED]

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Based on our discussion, my understanding is that the Federal Trade Commission's Premerger Notification Office will not consider Fund I and Fund II, or the various trusts created with respect to Funds I and II, to be a "entities" for purposes of 16 CFR § 801.1(a)(2). Accordingly, because they are excluded from such definition of "entity," I further understand that neither Fund I or Fund II, or the various trusts created with respect to Fund I and II, will be required to make filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, (the "HSR"), should their investments reach HSR size-of-person and size-of-transaction thresholds.

If you should disagree with the conclusions expressed above, please contact me as soon as possible. Thank you very much for your attention to this matter.

Sincerely yours,

A large black rectangular redaction box covers the signature area of the letter.

Enclosure

§ 79. [redacted] management; investment of state funds

Section effective until September 1, 1998 except as provided in subsec. (9)

Sec. 79. (a) In this section:

- (1) "Board of trustees" means the board of trustees of the Texas growth fund.
- (2) "Fund" means the Texas growth fund.

(3) "Venture capital investment" means an investment in debt, equity, or a combination of debt and equity that possesses the potential for substantial investment returns, and includes investments in new or small businesses, investments in businesses with rapid growth potential, or investments in applied research and organizational activities leading to business formation and opportunities involving new or improved processes or products.

(b) The [redacted] fund is created as a trust fund. Except as otherwise provided by this section, the fund is subject to the general laws of this state governing private sector trusts. The governing boards of the permanent university fund, the permanent school fund, the Teacher Retirement System of Texas, the Employees Retirement System of Texas, and any other pension system created under this constitution or by statute of this state in their sole discretion may make investments in the fund.

(c) The fund is managed by a board of trustees consisting of four public members appointed by the governor and one member from and elected by the membership of each of the following:

- (1) the Board of Regents of The University of Texas System;
- (2) the Board of Regents of The Texas A&M University System;
- (3) the Board of Trustees of the Teacher Retirement System of Texas;
- (4) the Board of Trustees of the Employees Retirement System of Texas; and
- (5) the State Board of Education.

(d) Each public member of the board must have demonstrated substantial investment expertise. A public member serves for a six-year term expiring February 1 of an odd-numbered year.

(e) A person filling an elected position on the board of trustees ceases to be a member of the board of trustees when the person ceases to be a member of the board the person represents or as otherwise provided by procedures adopted by the board the person represents. The governor shall designate a chairman from among the members of the board of trustees who serves a term of two years expiring February 1 of each odd-numbered year. A member may serve more than one term as chairman.

(f) The board of trustees shall manage the investment of the fund, and may:

- (1) employ and retain staff, including a chief executive officer;
- (2) analyze and structure investments;
- (3) set investment policy of the fund;
- (4) take any action necessary for the creation, administration, and protection of the fund;

(5) enter into investment contracts with the participating funds or systems;

(6) adopt rules regarding the operation of the fund;

(7) pay expenses of the fund based on an assessment on investor contributions; and

(8) alternatively, or in combination with its own staff, contract for the management of investments under this section with a private investment management firm or with an investing fund or system electing a member of the board of trustees.

(g) In making investments, including venture capital investments, the board of trustees shall exercise the judgment and care under the circumstances then prevailing that persons of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital of the fund. All investments of the fund shall be directly related to the creation, retention, or expansion of employment opportunity and economic growth in Texas. In making venture capital investments, all other material matters being equal, the board of trustees shall invest in technological advances that could be expected to result in the greatest increase in employment opportunity and economic growth in Texas.

(h) The board of trustees shall establish and operate the fund to the extent practical under the generally accepted business procedures relating to a mutual fund and shall

value the investments for determining the purchase or sales price of participating shares of investing funds or systems participating in the fund consistent with investment contracts. Evidences of participation in the fund shall be held by the state treasurer in keeping with the custodial responsibilities of that office.

(j) An investing fund or system, without liability at law or in equity to members of the governing board of the fund or system in their personal or official capacities, may cumulatively invest in the [redacted] not more than one percent of the book or cost value of the investing fund or system, as determined at the end of each fiscal year.

(k) The board of trustees shall establish criteria for the investment of not more than 10 percent of the fund in venture capital investments. Not more than 25 percent of the funds available for venture capital investments may be used for unilateral investment. Investments of the remainder of the funds available for venture capital investments must be matched at least equally by funds from sources other than the fund, with matching amounts established by the board of trustees. The board of trustees shall also establish criteria for the investment of not less than 50 percent of the fund in equity or debt security, or a combination of equity and debt security, for the initial construction, expansion, or modernization of business or industrial facilities in Texas. The board of trustees may invest in money funds whose underlying investments are consistent and acceptable under the investment policy of the fund.

(l) On a quarterly basis, the amount of income realized on investments under this section shall be distributed in each of the systems and funds investing in the [redacted] proportion to the number of participating shares of each investing system. [redacted] capital appreciation becomes a part of the corpus of the [redacted] and shall be distributed in accordance with the investment contracts.

(m) The board of trustees shall make arrangements to begin liquidation, phase out investments, and return the principal and capital gains on investments to the investors in the fund not later than the 10th anniversary of the date of the adoption of this section. Except under unusual circumstances where it may be necessary to protect investments previously made, further investments may not be made in or by the fund after the 10th anniversary of the date of the adoption of this section.

(n) At the regular legislative session next preceding the 10th anniversary of the date of the adoption of this section, the legislature, by two-thirds vote of each house, may authorize the creation of Texas growth fund II, which shall operate under this section and under the board of trustees created by this section in the same manner as the Texas growth fund. Funds in [redacted] may not be commingled with funds in the Texas growth fund.

(o) The board of trustees may purchase liability insurance for the coverage of the trustees, employees, and agents of the board.

(p) The legislature shall provide by law for the periodic review of the board of trustees in the same manner and at the same intervals as it provides for review of other state agencies, except that the legislature shall provide that the board of trustees is not subject to abolishment as part of the review process.

(q) This section expires September 1, 1998, except that if the legislature authorizes the creation of [redacted] as provided by Subsection (n) of this section, this section expires September 1, 2008.

(r) This section is self-executing and takes effect on its adoption by the voters. All state officials named in this section, the state treasurer, and the comptroller of public accounts shall take all necessary actions for the implementation of this section. The legislature shall provide by law for full disclosure of all details concerning investments authorized by this section.

(s) The board of trustees may not invest money from the Texas growth fund in a business unless the business has submitted to the board of trustees an affidavit disclosing whether the business has any direct financial investment in or with South Africa or Namibia.

Historical Notes

This section was adopted in 1988 as proposed by Act 1987, 70th Leg., 2nd C.S., H.J.R. No. 1, § 1.