

Opinion No. 59-22

March 9, 1959

BY: FRANK B. ZINN, Attorney General

TO: Mr. J. C. Hester State Investment Officer P. O. Box 1359 Santa Fe, New Mexico

State investment officer may invest state moneys in the so-called "closed-end" mutual funds subject to the restrictions provided for by the investment act.

OPINION

{*32} In a recent opinion request, you asked the following question:

"May the State Investment Council legally invest in shares of the so-called Mutual Funds?"

A categorical answer of "yes" or "no" to your question cannot be given inasmuch as the type of mutual fund involved would have a bearing on the answer to the question. It is my opinion that state funds may not be invested in the shares of "open-end" mutual fund but might be invested in the capital stock of "closed-end" mutual companies. It is possible that the "closed-end" mutuals may meet the requirements of the investment act with respect to total assets, having a listing on one or more stock exchanges and the limitation on commissions paid brokers for the purchase or sale of its stock.

Under Section 9, Subsection E, of Chapter 179, Session Laws of New Mexico 1957 (Sec. 11-2-8, N.M.S.A., {*33} 1953 Comp. P.S.), and subject to any regulations or resolutions promulgated by the State Investment Council, you may invest in:

"bonds, notes, debentures, car-trust certificates, preferred stock, or common stock of any corporation organized and operating within the United States; provided that it shall have minimum assets of ten million dollars (\$ 10,000,000) and securities listed on one or more national stock exchanges; provided further that the combined funds of the state shall not at any one time own more than ten percent of the voting stock of a company; and provided further that in the investment of the moneys of any one state fund or account, not more than twenty-five percent of the total of such fund or account shall at any time be invested in the securities of this class. Preferred and common stocks purchased by the investment officer shall be held for the long range possibility of reasonable cash dividends and growth of the capital investment. Preferred and common stocks may be sold only because of a fundamental change in their investment quality and not because of the vagaries of the market.

Commissions paid for the purchase and sale of any security shall never exceed the minimum brokerage rates prescribed and published by national stock exchanges."

Clearly, under the foregoing subsection, if you contemplate investing in the capital stock of a mutual fund, the fund must have minimum assets of \$ 10,000,000, be listed upon one or more of the national stock exchanges and the commissions to be paid for the purchase or sale of any of the mutual fund's securities must not exceed the minimum brokerage rates prescribed and published by national stock exchanges.

The "closed-end" mutual funds are listed on the national stock exchanges and the shares of stock represent as do ordinary common stocks a proportional ownership of the companies' total assets. It is quite possible for the shares of this type of mutual fund to be a permissible investment for the state permanent funds. The open mutual fund share is not a share of stock in an ordinary corporation but represents an interest in a trust fund held and invested by trustees for the benefit of the shareholders. The open-end mutual funds are not listed on the national stock exchanges. Not being common stocks or securities of the type listed in the statute, these open-end mutual fund shares are not permissible investments.

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