OPINION NO. 80-090

Syllabus:

1. The State Highway Patrol Retirement System may invest in certificates of deposits only if such certificates meet the requirements of R.C. 5505.06(A)(4).

2. The State Highway Patrol Retirement System may invest in promissory notes only if such notes meet the requirements of R.C. 5505.06(A)(2) or R.C. 5505.06(A)(5).

3. As the term "negotiable instruments" does not adequately describe an investment obligation as defined in R.C. 5505.06, no determination can by made as to permissibility of investment by the State Highway Patrol Retirement System in "negotiable instruments" as a class.

4. The State Highway Patrol Retirement System may not invest in United States treasury bills pursuant to R.C. 5505.06.

To: Jack Walsh, Superintendent, State Highway Patrol, Columbus, Ohio
By: William J. Brown, Attorney General, December 17, 1980

You have requested an opinion as to whether certificates of deposit, promissory notes, other types of negotiable instruments, and United States treasury bills are permissible investments by the State Highway Patrol Retirement System, pursuant to R.C. 5505.06.

It is well accepted that the boards of retirement systems are limited to their statutorily-created authority. See, e.g., State of Ohio ex rel. George v. Board of Trustees, No. 931 (Ct. App. Portage County, March 31, 1980); 1949 Op. Att'y Gen. No. 1210, p. 839; 1937 Op. Att'y Gen. No. 1432, p. 2384; 1933 Op. Att'y Gen. No.

1246, p. 1163. In addition, the statutory authority to utilize public moneys, including the authority to invest, is precisely delineated. See State v. Herbert, 49 Ohio St. 2d 88, 358 N.E.2d 1090 (1976); 1965 Op. Att'y Gen. No. 65-97; 1961 Op. Att'y Gen. No. 2455, p. 469; 1915 Op. Att'y Gen. No. 1052, p. 2289.

R.C. 5505.06 details the investment authority of the Board of the Highway Patrol Retirement System. R.C. 5505.06 is structured around, and initially bases eligibility on, the issuer of the security. Within each issuer classification further restrictions, including the type of security, are stated. In other words, a permissible obligation for investment is defined by its issuer and by its type within each issuer classification. Since your request identifies certificates of deposit, promissory notes, and other types of negotiable instruments only generally, by type of security, and not by reference to the issuer, I must consider your question in general terms.

The general definition of "certificate of deposit," as found in the Uniform Commercial Code (U.C.C.), is "an acknowledgement by a bank of receipt of money with an engagement to repay." R.C. 1303.03(B)(3). Under the classification scheme of R.C. 5505.06, the State Highway Patrol Retirement System may invest in obligations of only certain financial institutions. Thus, R.C. 5505.06(A)(4), which is the only portion of R.C. 5505.06 to specifically name certificates of deposits, limits investments in these securities to those "issued by a state chartered building and loan association organized under the law of the state (but only to the extent that said shares, certificates or other evidences of deposits are insured under the 'National Housing Act')."

The term "promissory notes" is even broader and incorporates many types of negotiable and non-negotiable instruments. The U.C.C. defines "note" as an obligation which contains an "unconditional promise. . .to pay a sum certain in money," and which is a promise other than a certificate of deposit. R.C. 1303.03. In Burke v. State of Ohio, 104 Ohio St. 220, 135 N.E. 144 (1922), a nearly identical definition is adopted for the term "promissory note"; this case's lengthy analysis of the term indicates that a note containing a promise of payment, as opposed to a simple receipt for deposit, is a promissory note. Thus, it would appear that the terms "note" and "promissory note" are used interchangeably. Under the retirement system's investment authority, notes are permissible investments only as conditioned in R.C. 5505.06(A)(2) and R.C. 5505.06(A)(5). R.C. 5505.06(A)(2) permits investment in notes of the "state, of any county, township, municipal corporation, school district, conservancy district or sanitary district of the state, or any other legally constituted taxing or bond issuing authority, subdivision, or municipal corporation within the state." R.C. 5505.06(A)(5) allows investments in notes which are "direct obligations of a corporation engaged directly and primarily in the production, transportation, distribution, or sale, of electricity or gas, or the operation of telephone or telegraph systems or water works, or any combination of them," provided that such corporations are incorporated under the laws of the United States, any state, or the District of Columbia, and that their notes are rated by two standard rating services in their highest or next highest classifications. In turn, notes not specifically referenced under these authorizing sections would be deemed, by their omission from this section, to be ineligible for investment by the State Highway Patrol Retirement System.

The term "negotiable instrument" encompasses an extremely broad and diverse category of obligations. Negotiability indicates a quality of an obligation rather than its type. Again, reference to the U.C.C. aids in determining the scope of this term. R.C. 1303.03(A) designates the attributes of negotiability. It defines a negotiable instrument as a writing which (1) is "signed by the maker or drawer"; (2) is an "unconditional promise to pay a sum certain in money"; (3) is "payable on demand or at a definite time"; and (4) is "payable to order or to bearer." Drafts, checks, certificate of deposits, and notes are all defined as negotiable instruments. R.C. 1303.03(B). However, such obligations may also be non-negotiable under varying circumstances. R.C. 1303.03(C). As noted earlier, R.C. 5505.06 is structured to restrict investment authority by types of issuer (e.g., United States government, chartered building and loan association, utility company) and by types of obligations (e.g., notes, bonds, certificates of deposit). Since specific qualities of these securities, such as negotiability, are not mentioned, and because each reference within the statute to notes, certificates of deposit, and bonds may refer to either a negotiable or non-negotiable instrument, no determination of eligibility for "negotiable instruments" as a class can be made under this statute.

In regard to the permissibility of investment in "treasury bills," you have identified both obligation and issuer. Therefore, a definite answer is possible. The short answer is that treasury bills are not a permissible investment. R.C. 5505.06(A)(1) provides the statutory authority for the State Highway Patrol Retirement System to invest in United States government obligations. This authority extends only to "bonds of the United States. . .or [to] debentures. . .guaranteed in full by the United States government." Inclusion of treasury bills as either a bond or debenture under R.C. 5505.06 is unwarranted, as the following discussion will illustrate.

Government obligations are clearly distinguished by title. Treasury obligations include, as indicated by designation: bills, notes, certificates, and bonds. Non-treasury obligations specifically titled debentures are issued by the Federal National Mortgage Association, Federal Housing Administration, Export-Import Bank of the United States, and the Small Business Administration.

These differences in title evidence important underlying characteristics of the obligations. Treasury bills have maturities ranging from three months to one year, whereas treasury bonds have a maturity over ten years and New Communities debentures mature in twenty years. The United States government, in issuing securities, does use the terms "bond" and "debenture" to refer to specific subclasses of obligations either in title or form. Because the federal government has given these terms commercial meaning, and because the General Assembly has used them in a technical sense, it must be presumed that the legislature incorporated the governmental definitions. 2A Sutherland Statutory Construction §47.31; R.C. 1.42. To find otherwise would be to find that the General Assembly enacted a broad and loose term in an otherwise precise statute. Therefore, absent specific statutory authority for the State Highway Patrol Retirement System to invest in treasury "bills," I am constrained to conclude that such is not permissible under existing law.

Serving to reinforce this conclusion is the comparison of the construction of R.C. 5505.06(A)(1) with other provisions of R.C. 5505.06, and similar grants of authority. R.C. 5505.06(A)(2) and (A)(5), in addition to using "bond" and "debenture," add the term "obligations" as an all-inclusive category, thus narrowing the meaning of the terms "bond" and "debenture." To permit an expansive reading of the terms "bond" and "debenture" would not only create a conflict of usage in the same statute, but would also make the use of "obligations" within the statute superfluous. Moreover, if the General Assembly had wished to authorize investments in any obligation of the United States government, it would have granted such authority as it did with the other state retirement systems. Pursuant to R.C. 145.11(A)(1), R.C. 742.11, R.C. 3307.15, and R.C. 3309.15, the other retirement systems are permitted to invest in specifically named obligations and "any other obligations" of the United States government. The General Assembly failed to include such inclusive language in R.C. 5505.06(A)(1), thereby negating this vehicle of investment for the Highway Patrol Retirement System.

In conclusion, is is my opinion that:

1. The State Highway Patrol Retirement System may invest in certificates of deposits only if such certificates meet the requirements of R.C. 5505.06(A)(4).

2. The State Highway Patrol Retirement System may invest in promissory notes only if such notes meet the requirements of R.C. 5505.06(A)(2) or R.C. 5505.06(A)(5).

3. As the term "negotiable instruments" does not adequately describe an investment obligation as defined in R.C. 5505.06, no determination can be made as to permissibility of investment by the State Highway Patrol Retirement System in "negotiable instruments" as a class.

4. The State Highway Patrol Retirement System may not invest in United States treasury bills pursuant to R.C. 5505.06.