



Montana Legislative Services Division
Legal Services Office

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To: Speaker Ler
From: Julie Johnson, Staff Attorney
Re: Securities Classification of the Construction of a Behavioral Health Unit Pursuant to Section 17 of House Bill 5 from the 2025 Legislative Session
Date: October 1, 2025

I. Introduction and Issue

At the September meeting of the Legislative Finance Committee, legal staff was asked to work with Chair Kassmier to request an Attorney General Opinion on the following question of law:

Whether the behavioral health unit that the Legislature directed the Board of Investments to have constructed in House Bill 5 is a security under state and federal securities laws?

This memo provides basic research and points of law bearing upon the request. The memo also reaches a preliminary conclusion that the building would most likely constitute a security.

II. Factual Background

Article VIII, section 13, of the Montana Constitution mandates the creation of a “unified investment program for public funds.” This unified investment program is overseen and managed by the Board of Investments. The total market value of the Montana Board of Investments’ Unified Investment Program as of June 30, 2024, was \$29.6 billion.

Part of the board’s investment portfolio includes real estate and buildings. The Board of Investments owns several buildings that it rents to state agencies or third parties as a part of its real estate investment portfolio. This includes the workforce housing apartments that the Board of Investments had built pursuant to House Bill 819 from the 2023 legislative session. These assets are included in common investment pools and are commingled with other participants’ assets. These asset pools are managed by the staff at the Board of Investments with no individual participant control.

During the 2025 session, the Legislature passed House Bill 5, which provided for the construction of a behavioral health facility. See section 17 of HB 5. Specifically, the Legislature directed the transfer of \$26.5 million from the capital developments long-range building program account to the Board of Investments “for the purposes of building a behavioral health facility.”¹ According to section 17(2) of HB 5, prior to the transfer of funds to the Board of Investments, the budget director “shall adopt a plan from the board of investments and the department of public health and human services on the facility type and location.”

At its September 18, 2025, meeting, the Legislative Finance Committee discussed the

¹ Rent for the behavioral health facility may be eligible for federal reimbursement.

construction of the behavioral health facility and the committee members' understanding that the building constitutes a security under Montana law. Members want to make certain this understanding is correct. Therefore, given the importance of the facility's timely construction and the legislative directive to the Board of Investments to construct this facility instead of the Department of Administration Office of Architecture and Engineering, the Legislative Finance Committee has requested an Attorney General opinion on this question of law.

III. Applicable Law

A. Federal Law

In S.E.C. v. W.J. Howey Co., 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. (1946), the United States Supreme Court set out what is now commonly referred to as the Howey test to determine whether an investment contract exists. The Supreme Court stated that the test to determine whether an investment contract exists “is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.” Howey, 328 U.S. at 301.

The Ninth Circuit Court of Appeals distilled the Howey definition into a three-part test, which requires the following:

- (1) an investment of money
- (2) in a common enterprise
- (3) with an expectation of profits produced by the efforts of others.

Warfield v. Alaniz, 569 F.3d 1015, 1020 (9th Cir. 2009). The Montana Supreme Court has also noted that “[t]he leading case for determining the existence of an investment contract security is S.E.C. v. W.J. Howey Co.” and has similarly reiterated that the “established three criteria to the determination of an investment contract security” under Howey is: “an investment, a common enterprise, and the expectation of profits *solely* from the efforts of others.” State v. Duncan, 181 Mont. 382, 390-91, 593 P.2d 1026, 1031-32 (1979) (Emphasis in original).

B. State Law

As discussed above, the three-part Howey test determines whether an investment contract exists. Under Montana law, an investment contract is a security pursuant to § 30-10-103(24)(xiii), MCA.

C. Law Governing the Board of Investments

The Board of Investments is charged with the creation of a “unified investment program for public funds” under Article VIII, section 13, of the Montana Constitution. §17-6-201, MCA,

provides that the Board of Investments must administer public funds “in accordance with the prudent expert principle,” which requires the board to:

- (a) discharge the duties with the care, skill, prudence, and diligence, under the circumstances then prevailing, that a prudent person acting in a like capacity with the same resources and familiar with like matters exercises in the conduct of an enterprise of a like character with like aims;
- (b) diversify the holdings of each fund within the unified investment program to minimize the risk of loss and to maximize the rate of return unless, under the circumstances, it is clearly prudent not to do so; and
- (c) discharge the duties solely in the interest of and for the benefit of the funds forming the unified investment program.

§17-6-201(1), MCA (Emphasis added). The Board of Investments is charged with maximizing the rate of return on investments for the benefit of funds within the unified investment program. The board is also granted the power to execute conveyance deeds for real property and to direct the sale of securities. §17-6-201(6), MCA.

IV. Analysis

Because a security is defined as an investment contract under Montana law, the three-part Howey test applies.

1. Is there an investment of money? Yes, 26.5 million is to be invested in the construction of a behavioral health unit pursuant to section 17 of HB 5 (2025).
2. Is there a common enterprise? Most likely, yes. HB 5 does not explicitly provide that the building will be included in a common investment pool managed by the Board of Investments. However, it is reasonable to infer that the Legislature, by directing the board, instead of the Department of Administration Office of Architecture and Engineering, to construct the building, intended to have the building be included in the “unified investment program for public funds.”
3. Is there an expectation of profits produced by the efforts of others? Most likely, yes. The Board of Investments charges rent to state agencies and third parties on buildings in its real estate portfolio. HB 5 does not explicitly provide that the board will charge rent on the new behavioral health facility. However, given the board’s duty under §17-6-201, MCA, to maximize its rate of return and produce profits for its investors, it is reasonable to infer that the Legislature intended the board to charge whoever occupies the behavioral health facility a rent that yields a rate of return. It is possible that the building rent would be partially reimbursed with federal funds, which depends on the purpose of the facility. If the building rent is reimbursed with federal funds, it is not clear how the Board of Investments can maximize profits while adhering to strict policies for federal reimbursement.

V. Preliminary Conclusion

The three-part Howey test indicates that the behavioral health facility would most likely be considered a security under state and federal law. This conclusion is bolstered by the fact that the workforce housing project constructed by the Board of Investments pursuant to House Bill 219 in the 2023 session is included in the board's real estate portfolio that is in a common investment pool. Lastly, had the Legislature not intended the facility to be considered a security, it would have instead directed the Department of Administration Office of Architecture and Engineering to construct the facility, and not the Board of Investments.



December 19, 2025

Sent via USPS and Email

Speaker Brandon Ler
Montana House of Representatives
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RE: Request for Attorney General's Opinion

Dear Speaker Ler:

The Attorney General received your formal opinion request dated October 28, 2025. As Speaker of the Montana House of Representatives, you are authorized to request legal opinions on matters pertinent to your office. *See* Mont. Code Ann. § 2-15-501(7).

However, the Attorney General typically resolves some requests through informal letters of advice due to concerns such as the separation of powers and potential for litigation. In this case, a letter of advice will be provided because the specific financial instrument(s) evidencing BOI's investment has not been provided for consideration as part of this review. Thus, this response shall be construed as a letter of advice and **shall not be cited and/or presented as controlling authority nor carrying the force of law.**

The Attorney General rephrases your question as follows:

Whether the Montana Board of Investments' statutory mandate to build a behavioral health facility, utilizing transferred funds, may be classified as a "security" under applicable law.

DEPARTMENT OF JUSTICE

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BACKGROUND

I. Board of Investments

The Montana Legislature established the Board of Investments (the “BOI”) in 1971. The BOI functions as an independent, quasi-judicial body having full and final authority over its two major responsibilities: the Unified Investment Program and the In-State Investment Program. *See* Mont. Code Ann. § 2-15-1808 (creating BOI); §17-6-201 (creating Unified Investment Program); and §§ 17-6-301 et. seq. (the Montana In-State Investment Act of 1983).

Article VIII, section 13 of the Montana Constitution mandates that the Unified Investment Program (“UIP”) be managed by BOI in accordance with “prudent expert principle.” Mont. Code Ann. § 17-6-201(1). Therefore, the BOI has “primary authority to invest state funds” and “shall direct the investment of state funds in accordance with the laws and constitution of this state.” Mont. Code Ann. § 17-6-201(4). Montana law grants BOI broad authority in fulfilling this mandate. *See* Mont. Code Ann. § 17-6-201(5) (granting BOI the specific authority to “determine the type of investment to be made”, among others).

II. House Bill 5

During Montana’s 2025 Legislative Session, an executive proposal included a one-time transfer of several million dollars to the BOI for the purpose of constructing a regional health facility as part of a behavioral health initiative backed by Montana’s Department of Public Health and Human Services (“DPHHS”).

A final version of the proposal was ultimately incorporated into [Montana House Bill 5](#) as follows:

Section 17. Transfer of funds – plan and reporting.

(1) By June 30, 2026, the state treasurer shall transfer \$26.5 million from the capital developments long-range building program account established in 17-7-209 to the board of investments for the purpose of building a behavioral health facility.

(2) Prior to the transfer in subsection (1) taking place, the budget director shall adopt a plan from the board of investments and the department of public health and human services on the facility type and location. The board of investments and the department of public health and human services shall report to the health and human services interim budget committee established in 5-12-201 on the progress of choosing the facility type and location. Once a plan is adopted by the budget director, the board of investments and the department of public health and human services shall provide a progress report at each

subsequent meeting of the long-range planning budget committee that are held prior to December 31, 2026.

(3) Any unspent funds must revert to the capital developments long-range building program account.

DISCUSSION

The issue here is whether BOI's statutory mandate to build a behavioral health facility, utilizing transferred funds, may be classified as a "security" under applicable law.

Federal and state securities laws apply to instruments that meet the definition of "security". Simply put, a security is a financial instrument that represents a claim or interest in an asset. A physical building itself is not a security by default, but an investment in a building or real estate may be classified as a security depending on how the transaction is structured. While there are many types of such instruments, a real estate offering is typically analyzed as an "investment contract." *Revan v. SEC Realty Corp.*, 18 F.3d 81 (2nd Cir. 1994).

The Securities Act of 1933, as amended, defines "security" to include any "investment contract". 15 U.S.C. § 77b(a)(1). The Securities Act of Montana similarly provides that an "investment contract" is a type of "security." Mont. Code Ann. § 30-10-103(24)(a)(xiii).

The term "investment contract" is undefined by state and federal securities laws. The term has come to be defined in case law as "a contract or scheme for the placing of capital or laying out of money in a way intended to secure income or profit from its employment." *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298 (1946) (citing *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 56, 177 N.W. 937, 938 (1920)). *State v. Duncan*, 181 Mont. 382, 593 P.2d 1026 (1979) (The touchstone of an investment contract is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.).

To be considered an investment contract, and thereby a security, the instrument must meet the following elements: (1) an investment, (2) in a common venture, (3) with a reasonable expectation of profits, and (4) derived through the entrepreneurial or managerial efforts of others. *Redding v. Montana First Judicial Dist. Court*, 365 Mont. 316, 281 P.3d 189 (2012). Though Montana's third element differs slightly,¹ this test restates the elements announced by the United States Supreme Court in *Howey*.

¹ The third element of Montana's test differs from the *Howey* test, where the profits were to derive "solely" from the efforts of the third party. The *Redding* court explained

A. BOI's Use of the Transferred Funds Constitutes an Investment.

The first issue under the *Howey* test is whether the BOI's use of the transferred funds may be considered an investment.

Montana Code Annotated § 17-1-102(4) requires state agencies to report the receipt, use, and disposition of all public money and property in accordance with generally accepted accounting principles (GAAP). Applicable here is GAAP's requirement that real estate be classified either as an investment or a capital asset, depending on its primary use. If the future use of the building is predominantly for housing the investor's own operations, the building should be classified as a capital asset. *See BOI Financial Compliance Audit*, Ch. II – Findings and Recommendations at 08-04A (Dec. 2008) (citing Mont. Code Ann. § 17-1-102(4)).

Because the statute authorizes BOI to build a behavioral health facility in connection with a DPHHS initiative, the property will not be used to house the investor's own operations but those of DPHHS. Therefore, the BOI's use of the transferred funds to develop real estate is considered an investment.

B. BOI Likely Satisfies the Commonality Element.

The Montana Supreme Court has analyzed the commonality element as “met when return on investment is dependent on the efforts of the ‘enterprise’ to generate it.” *Redding*, 365 Mont. at 326, 281 P.3d at 196–97 (internal citation omitted) (also explaining that Montana has not expressly adopted an explicit test and concluding that “a common venture can be established by satisfying the elements of...horizontal, broad vertical, or narrow vertical commonality.”).

“[T]he requirement that profits be derived from the entrepreneurial or managerial efforts of others is generally satisfied so long as ‘the efforts made by those other than the investor are undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.’” *Redding*, 365 Mont. at 330, 281 P.3d at 199 (citing *SEC v. SG Ltd.*, 265 F.3d 42, 55 (1st Cir. 2001)).

HB 5 does not explicitly require that the building will be included in a common investment pool managed by BOI. Past practice, *see HB 219* (2023), indicates this is likely to occur and consistent with legislative intent. This would satisfy the commonality element.

the word “solely” “was purposely left out of our test.” *Redding*, 365 Mont. at 329, 281 P.3d at 199.

C. The Attorney General Lacks Sufficient Information to Make a Determination on the Final Two Elements.

Because the respective financial instrument(s) evidencing BOI's investment has not been provided for consideration as part of this review, the second two elements of the investment contract test cannot be analyzed. BOI currently charges rent to tenants of buildings in its real estate portfolio. These agreements can comply with the *Howey* test, but in absence of a specific agreement, I cannot offer an opinion or advice as to whether the project in HB 5 will comply.

Sincerely,



Austin Knudsen

ATTORNEY GENERAL OF MONTANA