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**CORRESPONDENCE MEMORANDUM**

**DATE:** October 13, 2011  
**TO:** Group Insurance Board  
**FROM:** David H. Nispel, General Counsel  
**SUBJECT:** Board Members: Ethics and Fiduciary Duty

**This memo is for informational purposes only. No Board action is required.**

This memorandum will provide an overview of the ethics and fiduciary duties of board members. Board members are encouraged to use the memorandum as a reference source and supplement to the Governance Manual.

**1. Wisconsin Retirement System (WRS) and Board Responsibilities**

- The WRS is governed by Chapter 40 of the Wisconsin Statutes. Board members should become familiar with and recognize their statutory responsibilities.
- Review pages 10-14 of this memo for a list of selected statutory responsibilities.
- Review the Governance Manual for additional information (Item 6H in Agenda).
- Board members represent all participants in the WRS, not just their particular association. Board membership includes the fiduciary responsibility of protecting the trust funds to help assure funding for the future retirement benefits of all members of the system.

**2. Being a Trustee in the Public Sector has Never Been More Challenging**

- Very difficult economic period for governments at all levels.
- Rising cost of health care.

Reviewed and approved by Robert J. Conlin, Deputy Secretary.

  
Signature

  
Date

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GIB	11.8.11	3B

### **3. Fiduciary Defined**

- A fiduciary is one who holds assets in trust or in confidence for a beneficiary. A person is a fiduciary with respect to a pension plan to the extent they have discretionary authority to the plan and assets. The exercise of discretion and control, or the authority to do so, are the keys to making this determination. Trustees are clearly fiduciaries, but benefits administrators are, too. The courts have held that one who designs, recommends and implements a pension plan is a fiduciary.

### **4. Who Are Fiduciaries?**

- All board members (trustees) are fiduciaries.
- Some advisors may be fiduciaries, some may not.
- Those who have discretion over benefits eligibility are fiduciaries.
- Some internal ETF staff are fiduciaries, some are not.
- The test is whether a staff person has discretion and control over the administration of the plan or management of the assets.
- A person's fiduciary duty is limited to the scope of responsibility they assume.

### **5. How Does One Become a Fiduciary?**

- By accepting a position on a board covered by a state statute naming fiduciaries.
- By assuming certain responsibilities, even if not required by the statute.
- By agreeing to fiduciary standards in a contract.

### **6. Fiduciary Duties**

- Duty to collect contributions from employers and/or employees.
- The common law of trusts defines the scope of authority and responsibilities of trustees as all powers necessary and appropriate for the carrying out of the trusts' purposes, including acting to ensure that a plan receives all funds to which it is entitled so that those funds can be used on behalf of participants and beneficiaries. Fiduciaries are personally liable to make good to the pension plan any losses from breaching their fiduciary responsibility.
- Duty to pay benefits: the correct amount, on time, and to the right person.
- Duty to comply with plan documents.
- Most public employee pension "plan documents" are contained in statute, so the duty to understand the laws is important.
- Duty to comply with laws and regulations (local, state and federal).
- Duty to inform members.

- Duty to defray the expenses of administering the system in a reasonable manner.
- Duty of loyalty to trust fund participants.
- Duty not to use position for personal gain.
- Duty to act solely in the members' interest for the exclusive purpose of providing benefits to participants and their beneficiaries.
- Duty to act prudently.
- Duty to hire experts.

**7. Guidance for Fiduciaries**

- The Employee Retirement Income Security Act of 1974 (ERISA) and its relevance to public retirement systems.
- Federal and state laws.
- Attorney General opinions.
- Court decisions.
- Advice of legal counsel.
- Best practices of public retirement systems.
- The boards of corporations and non-profit organizations are not the models to be followed.

**8. Prudent Expert Standard**

- Trustees will be judged by those who serve in the same capacity as them and who act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.

**9. Exercising Prudence**

- If trustees are not experts, they are to carefully hire, monitor and evaluate the experts they rely on.
- Experts exist inside and outside the organization.
- Questioning experts is not impolite.
- Trustees must "do the right thing" while incurring only reasonable expenses.
- What is the definition of "reasonable?"
- Public retirement systems may be challenged about expenses in the press, but usually not in the courts.

## 10. Delegation and Interpretation of Prudence

- Delegation.
  - Delegation of responsibility is allowed; abdication is not.
  - Carefully select those working for you.
  - Monitor them regularly.
  - Trustees are protected if they act prudently in delegating duties.
  
- Interpretation.
  - Use current standards, not outdated ones.
  - Consider what is going on nationwide.
  - Focus on public retirement systems.
    - Follow the very best practices.

## 11. Prudence in Action

- In Benefits Administration.
  - Accurately interpret the law and policies.
  - Carefully determine benefits and distribution eligibility.
  - Maintain confidentiality of certain information.
  - Protect the tax-qualified status of the trust.
  
- In Operations.
  - Respect open meetings and open records laws.
  - Disclose whatever personal information is required.
  - Uphold the ethics policy.
  - Respect your internal operations policies.
  - Ensure labor laws and personnel policies are followed.

## 12. How is Prudence Verified?

- Ask about legal compliance.
- Review policy compliance and exceptions.
- Invite and listen to concerns of staff, members, and other interested parties.
- Study audit findings.
- Seek out best practices of others.

**13. Duty of Loyalty**

- Fiduciaries are to act solely for the benefit of the beneficiaries.
- This means current and future beneficiaries.
- When creating policies or making other decisions, the fiduciaries can only “wear one hat.” The law is very strict about this.

**14. The “Two-Hat” Rule**

- What about Trustees who are also:
  - Plan Sponsor or Employer representatives.
  - Elected or appointed representatives of member or retiree constituencies.
  - “Ex officio” elected officers.
- Not precluded from serving as a trustee because of dual status.
- No fiduciary duty is owed to the appointing board.
- No fiduciary duty is owed to a sub-group of “constituents.”
- Maintaining a good working relationship with them is wise; however, the fiduciary duty to the current and future beneficiaries of the fund is paramount to all other duties or obligations.
- May only wear one “hat” at a time.

**15. Impact of Two-Hat Rule**

- MUST wear fiduciary “hat” when making fiduciary decisions.
- Ultimately, trustee must make decisions solely on what is in the best interests of members, retirees and beneficiaries.
- Should ask how decisions will impact plan participants.
- Should raise open, honest discussion on these questions during meetings.
- Should consider recusal if:
  - Trustee can’t help but be influenced by other “hat.”
  - Appearance of conflict is too strong to overcome.

**16. Loyalty in Action**

- Your job is not to please everyone who wants something from the Fund.
- Under trust law, you must act solely in the interest of the beneficiaries of the Fund.
- The duty of loyalty requires that you collect all money owed to the Fund.
- Collections of overpayments from beneficiaries can be difficult.

**17. Duty of Impartiality**

- Derives from the duty of loyalty.
- Duty of loyalty owed to **all** members and beneficiaries—fiduciary must be impartial among differing interests.
  - Retirees and actives.
  - Younger and older members.
  - Long-term and short-term members.
- Doesn't require absolute equality.
- Decision to favor one group over another must be made carefully after weighing different interests.

**18. Duty of Care**

- Prudent Expert Standard (see page 4).
- Emphasizes process over outcome.
- Not “one size fits all.”
- Evaluate in terms of the actions of prudent fiduciaries for other systems facing similar circumstances.
- Independent of the question of good faith.

**19. Conflicts of Interest**

- Avoid self-dealing.
- Avoid self-enrichment.
- Personal financial gain from the Fund is prohibited.
- Reputational enhancement by using your status with the Fund is to be avoided.
- Courts are very strict on fiduciaries.
- The “court of public opinion” is very strict as well.
- Fiduciary standards have increased in complexity.

**20. Cofiduciary Liability**

- Cofiduciary liability means “you are your brother’s keeper.”
- If you know of a violation and do nothing about it, you are breaching your fiduciary duty.

## 21. Protection from Liability

- Protection.
  - By relying on “experts” (not always).
  - By governmental immunity (maybe, for some actions).
  - By fiduciary insurance (to a limited extent).
- Indemnification for damages.
  - The state will pay any “excess damages” awarded in proceedings against a Board member who is sued in his or her official capacity or for acts committed while carrying out Board duties and the court or jury finds that the Board member was acting within the scope of employment.
  - Excess damages are those that exceed any applicable insurance coverage of the Board member.
- Legal representation.
  - The state will defend a Board member sued for acts committed while carrying out Board duties.
  - Generally, this representation will be provided by the Attorney General.
  - If the Board member refuses the state's offer of legal counsel and hires outside counsel of his or her own choice, then the Board member is not entitled to reimbursement for the expenses and costs of that representation.
- Avoidance.
  - Orientation and continuing education.
  - Thorough decision-making processes.
  - Clear documentation of Board actions.
  - Expert advice in certain areas - law, actuarial issues, audits, technology.
  - Good governance and ongoing oversight activities.

## 22. Conclusion

- Fiduciary standards are very high.
- When times are tough, boards are more closely scrutinized.
- Careful, thorough, and scrupulous behavior is expected.
- A good process is very important to a good outcome.

- Your members and beneficiaries expect you to meet and maintain fiduciary standards.
- Conduct open and public meetings in accordance with applicable law.
- Process, Process, Process.



**SELECTED STATUTORY RESPONSIBILITIES  
EMPLOYEE TRUST FUNDS BOARD (S. 40.03 (1), STATS.)**

- Shall authorize and terminate payment of all annuities and death benefits, except disability annuities.
- Shall ensure that the Wisconsin Retirement System complies with the Internal Revenue Code as a qualified plan for income tax purposes and that each benefit plan is administered consistent with the Internal Revenue Code.
- Shall approve the tables to be used for computing benefits.
- Shall appoint the Secretary of the department.
- Shall select and retain an actuary or an actuarial firm.
- Shall approve the contribution rates and actuarial assumptions determined by the actuary.
- May determine the length of creditable prior service from information available.
- Shall accept timely appeals from department determinations, other than appeals of determinations made by the department regarding disability annuities.
- May require any employer to distribute to its employees any materials which are determined to be necessary for the efficient administration of the fund.
- Shall approve or reject all administrative rules proposed by the Secretary.

**SELECTED STATUTORY RESPONSIBILITIES  
TEACHERS RETIREMENT BOARD (S. 40.03 (7), STATS.)**

- Shall appoint 4 members of the Employee Trust Funds Board.
- Shall study and recommend alternative administrative policies and rules concerning the objectives of benefit programs for teacher participants.
- Shall appoint one member of the State of Wisconsin Investment Board.
- Shall approve or reject administrative rules that relate to teachers, except rules promulgated under s. 40.30, Stats. (intrastate retirement reciprocity).
- Shall authorize and terminate payment of disability annuity payments to teacher participants in accordance with ch. 40, Stats.
- Shall accept timely appeals of department determinations regarding disability annuities for teacher participants.
- May amend any rule of the department, Milwaukee Teachers Retirement Board, State Teachers Retirement Board, and Wisconsin Retirement Fund Board in effect on January 1, 1982, to make it no longer applicable to teacher participants.

**SELECTED STATUTORY RESPONSIBILITIES  
WISCONSIN RETIREMENT BOARD (S. 40.03 (8), STATS.)**

- Shall appoint 4 members of the Employee Trust Funds Board.
- Shall study and recommend alternative administrative policies and rules concerning the objectives of benefit programs for participants other than teachers.
- Shall appoint one member of the State of Wisconsin Investment Board.
- Shall approve or reject administrative rules that relate to participants other than teachers, except rules promulgated under s. 40.30, Stats. (intrastate retirement reciprocity).
- Shall authorize and terminate payment of disability annuity payments to participants other than teachers in accordance with ch. 40, Stats.
- Shall accept timely appeals of department determinations regarding disability annuities for participants other than teachers.
- May amend any rule of the department, Milwaukee Teachers Retirement Board, State Teachers Retirement Board, and Wisconsin Retirement Fund Board in effect on January 1, 1982, to make it no longer applicable to participants other than teachers.

**SELECTED STATUTORY RESPONSIBILITIES  
GROUP INSURANCE BOARD (S. 40.03 (6), STATS.)**

- Shall enter into contracts with one or more insurers for the purposes of providing group insurance plans.
- May provide any group insurance plan on a self-insured basis.
- May provide other group insurance plans for employees and their dependents and annuitants and their dependents.
- May take action to carry out the purpose and intent of the group insurance plans provided under ch. 40, Stats.
- Shall not enter into agreements to modify or expand group insurance coverage which conflicts with ch. 40, stats., or rules, or materially affects the level of premiums required to be paid or the level of benefits to be provided.
- Shall offer long-term care insurance policies.
- Shall accept timely appeals of department determinations affecting any right or benefit under any group insurance plan provided under ch. 40, Stats.
- May contract for data collection and analysis services related to HMO's and insurance companies that provide health insurance to state employees.

**SELECTED STATUTORY RESPONSIBILITIES  
DEFERRED COMPENSATION BOARD (S. 40.03 (9), 40.80 (2), and 40.80 (2m))**

- Shall determine the requirements and qualifications of plan providers.
- Shall approve the terms and conditions of contracts for administrative and investment services.
- Shall determine the procedure for the selection of the deferred compensation plan providers.
- Shall approve model salary reduction agreements used by state agencies and the service provided to state agencies by plan providers.
- Shall require that plan providers reimburse the department for costs incurred in soliciting, evaluating, monitoring and servicing deferred compensation plans.
- May accept timely appeals of department determinations affecting any right or benefit under any deferred compensation plan provided under s. 40.80, Stats.
- Shall serve as trustee of any deferred compensation plan established under s. 40.80, Stats., hold the assets and income of the plan in trust, and maintain the plan as an eligible deferred compensation plan as defined in the United States Code.