

STATE GOVERNMENT EMPLOYEE RETIREMENT PROTECTION ACT

1. Definitions.

~~a. This Act applies to any government plan (as defined by ERISA section 10023(32) (29 U.S.C. section 1002(32)) including, but not limited to, any employee pension benefit plan, fund or program established, administered or maintained by the government of the State of [state name] or any subdivision, county, municipality, agency or instrumentality thereof (collectively “the State”).~~

~~a~~b. The term “pension benefit plan” or “plan” shall mean any plan, fund or program which was heretofore or is hereafter established, ~~or~~ maintained, or offered by [the State] or any subdivision, county, municipality, agency or instrumentality thereof, or any school, college, university, administration, authority, or other enterprise operated by the State (collectively “the State”), to the extent that by its terms or as a result of surrounding circumstances –

(i) Provides retirement income or other retirement benefits to employees or former employees, or

(ii) Results in a deferral of income by such employees for period extending to the termination of covered employment or beyond.

c. The term “fiduciary” means a person ~~is a fiduciary~~who with respect to a pension benefit plan ~~to the extent~~ (i) ~~he~~ exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) ~~he~~ renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) ~~he~~ has any discretionary authority or discretionary responsibility in the administration of such plan, including making recommendations or voting a plan’s shares or proxies.

d. The term “investment duties” means any duties imposed upon, or assumed or undertaken by, a person in connection with the investment of plan assets which make or will make such person a fiduciary of an employee benefit plan or which are performed by such person as a plan fiduciary.

e. The term “investment course of action” means any series or program of investments or actions related to a fiduciary’s performance of the fiduciary’s investment duties, and includes the selection of an investment fund or manager as a plan investment.

f. When used to qualify a risk or return, the term ‘material’ means a risk or return regarding which there is a substantial likelihood that a reasonable investor would attach importance when –

(i) evaluating the potential financial return and financial risks of an existing or prospective investment, or

(ii) exercising, or declining to exercise, any rights appurtenant to securities.

(iii) When used to qualify a risk or return, the term “material” does not include: ~~a risk or return that –~~

(a) ~~primarily~~ further~~ings~~ non-pecuniary, ~~non-economic or non-financial environmental,~~ social, political, ideological, or other goals or objectives, or

(b) ~~any portion of a risk or return that~~ primarily relates to events that –

(A) involve a high degree of uncertainty regarding what may or may not occur in the distant future, and~~or~~

(B) are systemic, general, or not investment-specific in nature.

g. The term “pecuniary factor” means a factor that has a material effect on the financial risk and/or financial return of an investment based on appropriate investment horizons consistent with the plan’s investment objectives and the funding policy. The term excludes non-pecuniary factors.

h. The term “non-pecuniary” includes any action taken or factor considered by a fiduciary with any purpose to further environmental, social, or political goals. A fiduciary purpose may be reasonably determined by evidence, including, but not limited to, a fiduciary’s statements indicating its purpose in selecting investments, engaging with portfolio companies, or voting shares or proxies, or any such statements by any coalition, initiative, or organization that the fiduciary has joined, participated in, or become a signatory to, in its capacity as a fiduciary.

2. Sole Interest and Prudent man standard of care.

a. A fiduciary shall discharge his duties with respect to a plan solely in the pecuniary interest of the participants and beneficiaries for the exclusive purpose of –

(i) providing pecuniary benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

b. and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

c. by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and,

d. in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this chapter.

3. Investment duties.

~~a. With regard to the consideration of an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to the fiduciary’s investment duties, the requirements of section 2 of the Act are satisfied if the fiduciary:~~

~~(i) Has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties;~~

~~(ii) Has evaluated investments and investment courses of action based solely on pecuniary factors that have a material effect on the return and risk of an investment based on appropriate investment horizons and the plan's articulated funding and investment objectives;~~

~~(iii) Has not subordinated the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to unrelated objectives, or sacrificed investment return or taken on additional investment risk to promote goals unrelated to those pecuniary interests of the plan's participants and beneficiaries or the purposes of the plan;~~

~~(iv) Has not otherwise acted to subordinate the interests of the participants and beneficiaries to the fiduciary's or another's interests and has otherwise complied with the duty of loyalty;~~

~~(v) Has not subordinated the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other non-pecuniary environmental, or non-financial social, political or other benefits or goals and may has not sacrificed investment return or taken on additional investment risk to promote non-pecuniary or non-financial environmental, social, political or other benefits or goals; and~~

~~(vi) Has acted accordingly.~~

~~b. For purposes of paragraph (3)(a) of this section, "appropriate consideration" shall include, but is not necessarily limited to,~~

~~(i) A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking~~

~~into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action, and~~

~~(ii) Consideration of the following factors as they relate to such portion of the portfolio:~~

~~(A) The composition of the portfolio with regard to diversification;~~

~~(B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan;~~

~~(C) The projected return of the portfolio relative to the funding objectives of the plan; and~~

~~(D) How the investment or investment course of action compares to available alternative investments or investment courses of action with regard to the factors listed in paragraphs (b)(2)(ii)(A) through (C) of this section.~~

34. Consideration of *Pecuniary vs. Non-Pecuniary Factors Prohibited*. A fiduciary's evaluation of an investment, or evaluation or exercise of any right appurtenant to an investment, must take into account ~~be focused only on~~ pecuniary factors; other factors may not influence its evaluation. Plan fiduciaries are not permitted to sacrifice investment return or take on additional investment risk to promote non-pecuniary benefits or any other non-pecuniary goals. Environmental, social, corporate governance, or other similarly oriented considerations are pecuniary factors only if they present economic risks or opportunities that qualified investment professionals would treat as material economic considerations under generally accepted investment theories. The weight given to those factors should solely appropriately reflect a prudent assessment of their impact on risk and return. Fiduciaries considering environmental, social, corporate governance, or other similarly oriented factors as pecuniary factors are also required to examine the level of diversification, degree of liquidity, and the potential risk-return in comparison with other available alternative investments that would play a similar role in their plans' portfolios. Any pecuniary consideration of environmental, social, or governance factors must necessarily include evaluating whether greater returns can be achieved through investments that rank poorly on such factors.

~~5. Economically indistinguishable alternative investments. When alternative investments are determined to be economically indistinguishable even after conducting the evaluation described in paragraph 4, and one of the investments is selected on the basis of a non-pecuniary factor or factors such as environmental, social, or corporate governance considerations (notwithstanding the requirements of paragraphs (3) and (4), the fiduciary should document specifically why the investments were determined to be indistinguishable and document why the selected investment was chosen based on the purposes of the plan, diversification of investments, and the interests of plan participants and beneficiaries in receiving benefits from the plan.~~

~~645. Voting Ownership Interests. [Bracketed portions m~~May need to be adjusted for the needs of each state]

a. All shares held directly or indirectly by or on behalf of a pension benefit plan and/or the beneficiaries thereof shall be voted solely in the pecuniary interest of plan participants. Voting to further non-pecuniary, environmental, or non-financial social, political, ideological or other benefits or goals is prohibited.

b. [Unless no economically practicable alternative is available,] a fiduciary may not adopt a practice of following the recommendations of a proxy advisory firm or other service provider unless such firm or service provider has a practice of, and in writing commits to, follow's proxy voting guidelines that are consistent with the fiduciary's obligations to act based only on pecuniary factors.

c. [Unless no economically practicable alternative is available,] plan assets shall not be entrusted to a fiduciary, unless that fiduciary has a practice of, and in writing commits to, follow guidelines, when engaging with portfolio companies and voting shares or proxies, that match the [governmental entity's] obligation to act based only on pecuniary factors.

de. Authority to vote such shares should be in the hands of a State official politically accountable to the people of [State name]. As such, all current proxy voting authority with respect to any and all shares held directly or indirectly by or on behalf of a pension benefit plan and/or the plan participants is hereby revoked. All such voting authority shall reside with [the State Treasurer or appropriate board or committee], [except that the [state official or board] may

delegate such authority to a person who has a practice of, and in writing commits to, follow guidelines that match the [governmental entity's] obligation to act based only on pecuniary factors].

e. All proxy votes shall be tabulated and reported annually to the [Board]. For each vote, the report shall contain a vote caption, the plan's vote, the recommendation of company management, and, if applicable, the proxy advisor's recommendation. These reports shall be posted on a publicly available webpage on the Board's website.

56. Enforcement

a. This [article] may be enforced by the attorney general.

b. If the attorney general has reasonable cause to believe that a person has engaged in, is engaging in, or is about to engage in, a violation of this article, he may:

i. Require such person to file on such forms as he prescribes a statement or report in writing, under oath, as to all the facts and circumstances concerning the violation, and such other data and information as he may deem necessary.

ii. Examine under oath any person in connection with the violation.

iii. Examine any record, book, document, account, or paper as he may deem necessary.

iv. Pursuant to an order of the [state trial court], impound any record, book, document, account, paper, or sample or material relating to such practice and retain the same in his possession until the completion of all proceedings undertaken under this article or in the courts.

76. Severability. Should a court of competent jurisdiction hold any provision(s) of this chapter to be invalid, such action will not affect any other provision of this chapter.