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TO: Pension Board of Trustees

FROM: Margaret C. Daun, Acting Corporation Counsel
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CC: County Executive Chris Abele
County Board Chairman Theodore Lipscomb, Sr.
County Board Supervisors
Scott A. Manske, Comptroller

RE: Fiduciary Duties

DATE: March 8, 2017

In conjunction with a memorandum from Reinhart, Boerner van Deuren, s.c. issued contemporaneously herewith, the Office of Corporation Counsel recommends to the Pension Board that it adopt the rules outlined below that define each trustee's fiduciary obligations to the pension fund. This memorandum also serves as a general substantive guide on fiduciary duties.

I. FIDUCIARY DUTIES

1. In General. All trustees (Trustees) of the Milwaukee County Employees' Retirement System (Plan) are fiduciaries. As such, each Trustee is expected to act in accordance with the highest standards of professionalism, ethics, and fiduciary best practices. Trustees should seek, in all instances, to avoid the appearance of any Conflict of Interest (defined below) as would be judged by a reasonable person and to engage in good faith best efforts to comply with Milwaukee County Ordinances – Chapter 9, "Code of Ethics," at all times. Interactions with Plan vendors, potential vendors to the Plan, Plan staff, other Trustees, stakeholders, and Plan members should be conducted at all times with courtesy and respect and according to the highest standards of professionalism.

Each year, all Trustees shall sign a written acknowledgement of their ethical, professional, and fiduciary obligations as a Trustee and shall attend at least one educational session related to fiduciary obligations.

SIGNIFICANT OR MATERIAL ETHICAL LAPSES, FIDUCIARY BREACHES, OR PROFESSIONAL FAILURES MAY SUBJECT A TRUSTEE TO WRITTEN PRIVATE OR PUBLIC CENSURE, AS DETERMINED BY A MAJORITY OF THE BOARD.

As a fiduciary, a Board Trustee must always act solely in the best interests of all members and beneficiaries, without placing the interests of any one member or group of members above any other; for the exclusive purpose of providing benefits and defraying reasonable expenses in administration of the plan; exercising the care, skill, prudence, caution, and diligence that a prudent person acting in a like capacity and familiar with similar matters would use in the conduct of an enterprise of like character with like aims; 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 in accordance with the documents and instruments governing the plan.

See 29 USC § 1104(a)(1); Wis. Stats. Chapter 881; 2A A. Scott & W. Fatcher, *Trusts* 170, 311 (4th ed. 1987); G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 543 (rev.2d ed. 1980).

The duty of loyalty requires Trustees to act without any regard to their own interests or the interests of third-parties and to instead consider only the interests of all Plan members. The duty of care (also known as the prudent person standard) requires Trustees to act as a prudent person would with similar information in similar circumstances. *See id.*

As stated above, fiduciaries must also conduct themselves with the highest levels of professionalism and ethics, including the avoidance of even the appearance of any Conflict of Interest.¹ Because these concepts have many facets, below follows a non-exclusive listing of some of the fundamental dos and don'ts of fiduciary duties, which incorporate related professional and ethical standards of conduct, and which must be applied and understood in context of the particular facts and circumstances of a given situation.

2. Duty of Loyalty (General).

- Always act *solely* in the interests of *all* members and beneficiaries (a.k.a, the exclusive benefit rule).
 - A trustee bears an unwavering duty of complete loyalty to all beneficiaries of the trustee to the exclusion of the interests of all other parties. To deter the trustee from all temptation, to prevent any possible

¹ A “Conflict of Interest” means any situation in which a reasonable person might perceive a Trustee to have an incentive to make any decision (including how to resolve any dispute, to grant or deny a benefit, such as hardship withdrawal request, to select a particular vendor or investment, or to make any recommendation) based upon anything other than the interests of *all* members and beneficiaries (i.e., because the Trustee accepted a Gift, *see infra*, from a vendor, because the Trustee has a relationship with a particular group or individual, or because the Trustee has a direct or indirect outside business interest that may benefit from a particular Board decision).

injury to the beneficiary, the rule against the trustee dividing his loyalty is enforced with the utmost rigidity.

- Do not put the interests of any one member, group of members, or other constituency above the interests of *all* members collectively, regardless of how you came to hold your Board seat (i.e., you must ignore the fact that an elected official or department head may have selected or appointed you to serve on the Board).
 - The “duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed the trustee” or any interest of the constituency that elected the trustee. *Nat’l Labor Relations Bd. v. Amax Coal Co.*, 453 U.S. 322, 331-32 (1981); ERISA § 404(a)(1)(B).
- Even though the Plan includes constituents that may have competing interests (i.e., young employees and retirees), you must fairly and impartially balance the interests of all beneficiaries and members. Restatement of Trusts 3d, Comments to § 79(1); § 183 (duty of impartiality).
- Never allow your own personal interests to impact your conduct, judgment, or decisions.
- Never allow the interests of third-parties or the interests of family, friends, or other personal relationships to influence your conduct, judgment, or decisions.
- Do not communicate on behalf of the Board/Plan or hold yourself out to any third-party as a representative of the Board/Plan unless expressly authorized by the Board to do so. Do not use any letterhead, signature block, or other designation in any written communication that might expressly or implicitly indicate that you are a representative of the Board/Plan unless expressly authorized by the Board to do so (this includes email signature blocks). Only the Executive Director shall communicate with third-parties and/or the press regarding matters related to the Plan, unless the Board specifically authorizes another party to do so on behalf of the Board/Plan. Notwithstanding the foregoing, incidental communications or communication necessary to conduct Plan business between Trustees and internal County personnel and stakeholders, such as the Department of Employee Relations, the Office of Corporation Counsel, the County Board of Supervisors, Plan vendors, etc. is permitted, so long as such does not violate applicable Open Meetings laws.
- If you do choose to speak publicly about any Board/Plan matter without prior Board authorization, you must preface any such communication, whether written or oral, with the following disclaimer: “These remarks are my own and do not reflect the views of Milwaukee County, the Milwaukee County Employees’ Retirement System, RPS staff, Plan Board Trustees, the County Executive or the County Board.”

3. Duty of Loyalty (Conflicts of Interest).

- Do not directly or indirectly seek or accept gifts, money, property, bonuses, fees, commissions, gratuities, honoraria, entertainment, meals, hospitality, travel accommodations, tickets, use of vacation facilities, personal or professional services at anything less than market rates, favorable access or treatment in connection with investment opportunities, promises of future employment or investment opportunities, or any other form of consideration (collectively, “Gifts”) from any person, agent, firm, corporation, or association that to your knowledge does or seeks to do business with Plan, and that might be reasonably perceived to influence your conduct, judgment, or decisions *unless* you (a) request and obtain Board approval before accepting such a Gift; and (b) disclose any such Gift with a fair market value equal to or greater than \$25.00 on your annual statement of economic interests as required by the County under MGCO § 9.02(1).
 - “[N]o county public official or employee shall use his/her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself/herself or his/her immediate family, or for an organization with which he/she is associated.” MGCO § 9.02(2).
- Avoid, if possible, any Conflict of Interest and if such is unavoidable, (a) disclose the Conflict of Interest to the Board; and (b) recuse yourself from any Board or committee vote (whether in closed or open session) and/or any discussion (whether in closed or open session) where the Conflict is relevant. Any such disclosures and recusals should be recorded in the Board or committee minutes.²
- Do not engage in or conduct outside activities of financial or personal interest that may conflict with the impartial and objective execution of Plan business.
- Do not sell or provide goods or services, directly or through any third-party, to the Plan without prior disclosure to the Board and Board approval.
- Do not solicit campaign or charitable contributions from Plan staff. (Of course, Plan staff is free to make contributions as they independently see fit, regardless of a particular candidate’s or charity’s affiliation with any Trustee.)

² A Plan Board member must recuse him/herself from any meeting, discussion, or vote when an actual or perceived Conflict of Interest exists. If the Board member fails to recuse him/herself, and other Trustees are aware of the Conflict, they have an affirmative duty to ask the conflicted member to recuse him/herself voluntarily, or to take additional procedural actions necessary to make sure that a breach of the public trust does not occur. *See generally*, Milwaukee County – Chapter 9, Code of Ethics; Restatement of the Law of Trusts, 3d §§ 224, 184; Comment e to § 183.

- Do not solicit campaign or charitable contributions from any individual working for any firm, corporation, or association with which Plan does or seeks to do business. (Of course, any individual is free to make contributions as they independently see fit, regardless of a particular candidate's or charity's affiliation with any Trustee.)³
- Do not engage in employment with any providers of goods or services to the Plan.
- Do not use your position to influence your own future employment opportunities or the employment of any family member or other personal associate by the Plan or by any firm, corporation, or association with which the Plan does or seeks to do business.
- Do not lend the prestige of your Board position to advance your own personal interests or the private interests of others, nor convey or permit to convey the impression that you hold any special position of influence.
- Do not use any property, information, or resources of the Plan for personal gain.
- Do not endorse or otherwise insure any money loaned by or borrowed from the Plan.
- Do not use Board or committee meetings to promote or advocate positions adverse to the Plan in pending or threatened litigation. Notwithstanding the foregoing, a Trustee may pursue a review of his/her own Plan benefits through standard Plan administrative review processes and/or subsequent adjudications.
- Do not attempt to influence any Plan staff member, any entity doing business with or seeking to business with the Plan, or any other Trustee to take a certain position or certain action through improper or wrongful pressure, scheme, threat, or other improper inducement (such as a Gift), so as to cause a person to act in a way that they would not otherwise act if left to act freely.
- Do not engage in insider trading, which is an illegal activity in which a person makes trades for their own personal pecuniary gain, whether directly or through an intermediary, based upon proprietary and confidential information received about a security that is not generally available to all investors.
- Do not engage in front running, which is an illegal activity in which a person, knowing an institution or a firm is about to make a market-moving trade in a

³ However, under Securities and Exchange Commission ("SEC") Rule 206(4)-5, investment advisors that make campaign contributions above specified *de minimis* amounts are ***prohibited*** from providing compensated services to the Plan for a period of two years, and such investment advisers are required to disclose such contributions to the SEC.

security, takes or sells a position in that security “in front” of the trade for their own personal pecuniary gain, whether directly or through an intermediary.

4. Duty of Care

- Invest and manage assets as a prudent investor would, by considering the purposes, terms, distributions, and other circumstances of the fund and evaluate investments in consideration of the overall trust portfolio, with investment strategy and objectives reasonably suited to the trust. (Prudent Investor Rule, MGCO § 201.24(9.1)(a)). How?
 - Conduct a thorough investigation and diligence process before acting.
 - Consider benchmarks and other investor practices as reference points.
 - Consult with experts before engaging complex or unfamiliar transactions.
 - Question experts to understand their advice.
 - Seek second opinions if necessary.
- Use any relevant special skills or expertise you may have.
- Hire experts and/or delegate responsibility when appropriate, including investment managers. *See, e.g.*, MGCO §§ 201.24(8.11)-(8.13), (8.22). When responsibility is delegated, Trustees must:
 - Conduct a thorough investigation and diligence potential contractors before making a selection.
 - Seek expert assistance where necessary in the selection, contracting, benchmarking, and/or assessment process.
 - Develop written policies to govern the contractor’s actions.
 - Develop written benchmarks to evaluate the contractor’s performance.
 - Independently monitor and formally assess the contractor’s performance at regular intervals to ensure compliance with policies and results relative to benchmarks.
 - Require indemnification of the Plan for contractor’s bad acts, fraud, and negligence, unless impracticable.
 - Follow the expert contractor’s reasonable advice or carefully document why that advice is rejected.

- Do not micromanage the expert contractor.
- Seek to ensure that the operation and administration of the Plan complies with all governing laws and regulations, as well the Plan's Investment Policy, other plan documents, Plan contracts, etc.
- Understand, to a reasonable degree, the laws and regulations governing the Plan, including relevant Plan documents and the Plan's Investment Policy.
- Ensure that benefits are paid in the correct amount, on time, and to the right person.
- Ensure that all reasonable efforts are made to cease improperly paid benefits and to recoup any such benefits whenever legally and practically possible.
- Ensure that payroll deductions are collected from the appropriate Plan members.
- Manage the expenses of administering the Plan in a reasonable manner.
- Ensure that Plan members are sufficiently informed, have reasonable access to all necessary information and forms, and that member inquiries are handled in a timely and accurate manner.
- Ensure that the Plan maintains its qualified status under applicable provisions of the Internal Revenue Code, so that members and beneficiaries continue to enjoy favorable tax treatment.
- Attend and be sufficiently prepared for all meetings of the Board and any committees on which you may serve.
- Always make well-informed, thoughtful, and well-reflected upon decisions. If you do not feel you have enough information, ask for it and/or ask questions. You are responsible for making yourself knowledgeable enough to make a reasoned decision.
- Ensure that all key decisions and discussions of the Board are accurately documented, particularly when any Trustee objects to an action.
 - If any objection is lodged based upon fiduciary grounds, the objecting Trustee should insist that his/her objections and the responses to those objections are carefully and specifically noted in the Board minutes.
 - Roll call votes must be recorded in the minutes. If the vote is taken in closed session, the vote should nonetheless be recorded, and its disclosure (if requested) then analyzed under the Public Records Law.
- Conduct all Plan business in a fair and honest manner.

- Conduct yourself in all Plan matters with decorum, integrity, and professionalism.
- Educate yourself regarding Plan matters through educational sessions, conferences, and seminars on an ongoing basis.
- Use care and discretion when handling or discussing confidential information.
- Complete the County's annual statement of economic interests accurately and in a timely manner.
- Do not falsify any document, record, or request for reimbursement or fail to record proper entries on any books or records of the Plan.
- Do not knowingly permit any Plan document or record which contains false or misleading information to stand uncorrected.
- Do not knowingly be a party to, or otherwise condone, any illegal activity.
- Do not engage in activities or otherwise condone dishonesty, fraud, deceit, or misrepresentation.

II. TRUSTEE EDUCATION AND CONFERENCES

1. Subject to available funds, each Board member shall be authorized to travel to no more than one convention per year. To be eligible, a convention program shall bear a direct relationship to the operation or administration of the County Employees' Retirement System.
2. Each Board Member is expected to complete at least one continuing education session annually and shall attend at least one fiduciary training session annually (they may be the same session). To facilitate this expectation, the Director of the Plan will schedule at least one continuing education session each year. The Director will schedule and notice such education sessions at least two months in advance; the Director will make education session materials available to members electronically and/or will post materials to the Plan's website whenever possible. Education opportunities provided by third-parties (e.g., conferences) may satisfy the annual continuing education expectation. Each Board member will be expected to certify their attendance at an education session (including the length and topic of the session) each year to the Director (this may be done in any format, including via electronic mail).
3. Exceptions to this policy shall be reviewed and evaluated by the Board Chair in consultation with the Director on a case by case basis. Exceptions may be approved if they are in the best interests of Plan members.

4. Requests for conferences and/or educational programming that exceed one-thousand dollars (\$1,000.00) inclusive of all registration, materials, travel and other expenses, shall be reviewed and approved by the Board as being financially prudent and in the best interests of the Plan members. Requests for conferences and/or educational programming that are less than one-thousand dollars (\$1,000.00) inclusive of all registration, materials, travel and other expenses, shall be reviewed and approved by the Board Chair as being financially prudent and in the best interests of the Plan members.
