MINUTES

Louisiana Deferred Compensation Commission Meeting

April 10, 2017

The monthly meeting of the Louisiana Deferred Compensation Commission was held on Monday, April 10, 2017 in the offices of the Plan Administrator, 9100 Bluebonnet Centre Blvd, Suite 203, Baton Rouge, Louisiana 70809.

Members Present
Virginia Burton, Secretary, Participant Member
Thomas Enright, Designee of the State Treasurer
Whit Kling, Vice-Chairman, Participant Member
Rick McGimsey, Designee of the Commissioner of Administration
Len Riviere, Co-Designee of Commissioner of Financial Institutions

Members Not Present
Emery Bares, Chairman, Designee of the Commissioner of Insurance
Laney Sanders, Participant Member

Others Present
Emily Andrews, State of Louisiana Attorney General's Office
Andrea Hubbard, Co-Designee of the Commissioner of Administration
David Lindberg, Managing Director, Wilshire Consulting *via Teleconference*
Stephen DiGirolamo, Vice President, Wilshire Consulting *via Teleconference*
Connie Stevens, State Director, Baton Rouge, Empower Retirement
Jo Ann Carrigan, Sr. Field Administrative Support, Baton Rouge, Empower Retirement

Public: Carla S. Roberts, employee of the Louisiana State Senate; Terrie Hodges, Legislative Aide; Senator John Milkovich and Josh from Senator Milkovich's office.

Call to Order
Vice Chairman Kling called the meeting to order at 2:30 p.m.
Roll call was taken by Jo Ann Carrigan.

Public Comments: There were no comments from the public at the opening of the meeting.

Discussion of HB549

Ms. Andrews confirmed that all members of the Commission had a copy of HB 549, current LADCP legislation and Title 42. Ms. Andrews distributed copies of federal rules that govern the 457b Plan (26 USCS 457) and (26 USCS 409A). Ms. Andrews noted that HB549 was proposed by Representative Hodges, Senators Colomb, Milkovich and

Mizell and noted that it is extensive in scope proposing multiple changes to the provisions that govern the Plan. Ms. Andrews identified what she believes to be potential problems with HB549 for the purpose of assisting the Commission in deciding if someone with specific expertise in this area should be hired to:

- Determine if HB549 complies with 457b federal regulations.
- Provide information to the legislature regarding federal regulations.

As of this morning, Ms. Andrews reported that HB549 had been referred to the Committee on Appropriations but there was no date posted for a committee hearing.

Ms. Andrews' concerns were noted in order of significance:

Concern #1: The potential disqualification of the Plan as a 457b Plan. Ms. Andrews noted Page 2 of HB549, Line 25: "Voluntary, optional cash contribution" means a voluntary contribution made by the participant of some portion or all of the participant's monetary contribution to the plan that shall be available for the participant in case it is necessary for the participant to file an application for withdrawal or deferral modification based upon hardship as provided for in R.S. 42:1303(10) or for use otherwise in retirement."

Ms. Andrews pointed out that the use of the word "shall" is to be defined as "must" and noted that this particular provision has the potential to put the Plan at risk of losing its 457b status as it violates 25USCS457 that deals with distribution requirements. The 457b federal regulations clearly state when money may be distributed. The Plan would lose its 457b status if money is distributed outside of the specific circumstances noted in the federal regulations. Ms. Andrews was not clear on the meaning of the final statement in R.S. 42:1303(10), "or for use otherwise in retirement." The 457b regulations directly address what is considered a rollover. If this statement refers to rollovers then the existing 457b regulations define what constitutes a rollover. If this statement refers to the participant's ability to withdraw funds and place them in a Roth IRA, this would be in direct violation of the 457b federal distribution rules.

26 USCS409A defines the ramifications of a Plan losing 457b status. If the Plan fails to meet the requirements of the federal regulations, then all contributions made to the 457b Plan will be treated as not meeting qualifications as of the first Plan year beginning more than 180 days after the date of notification of the inconsistency. (The year depends on when the Plan is notified. If the notification is received on April 1st, it would be January 1st that preceded April 1st. If the notification is received on November 1st, it would be January 1st of the following year.) In summary, if inconsistencies are found in the administration of the Plan, all of the money put into the Plan will then be taxable. Ms. Andrews stated that it is very important that the Commission understand that every

participant in the Plan will be affected in that it will potentially make the money put into the Plan from participants, taxable. Ms. Andrews did not review whether Section 10 has implications related to loans. Ms. Andrews referenced RS 42:1303 (10) which reviews the powers and duties of the Commission related to Unforeseen Emergency Guidelines: "To establish procedures for the processing of applications for withdrawal or deferral modification based upon hardship." If the participant's particular situation does not meet the Unforeseen Emergency Guidelines and the request is denied, the participant may challenge the decision in court by referencing HB549, Section 2 (2), page 5 of 8: "The legislature finds all of the following: (2) The ability for a government employee to have emergency access to previously saved cash in times of hardships, often associated with such natural disasters as flooding and hurricanes, allows for government employees to return to their employment in a more timely manner." This language is worrisome as a judge will look at LA Law and not whether or not it complies with federal regulations.

Ms. Andrews stated the proposed legislation is not necessary as there is some redundancy between HB549 and the federal regulations governing 457b Plans. This legislation creates a voluntary cash contribution as defined in Section 10 and on page 4, Line 14 which is not currently in the Title 42 statutes. Mr. Enright observed that inferred within the legislation is that there be an investment option available that is not as subject to market. Ms. Andrews stated that the legislation does not infer but clearly states that this is the case, referencing page 6 of 8 (3): "Due to the failure to provide a cash option for investment, as well as the complicated nature and risk associated with most investments in mutual funds, stocks, and bonds, it is believed that some government employees may be deterred from ever getting started saving for retirement via the Louisiana Deferred Compensation Plan." Ms. Andrews stated that Title 42:1301(5) already allows for the option of a savings account: "Investment Product" means any fixed annuity, variable annuity, life insurance contract, savings account, or any other form of investment selected by the Commission for the purpose of receiving funds under the plan." Mr. Riviere observed that the legislation addresses two separate issues: (1) The Commission's decision to offer a savings account or not; (2) Allowing participants to access their money outside of the Unforeseen Emergency Withdrawal rules and guidelines.

Concern #2: Selection of Custodial Financial Institutions for voluntary cash contributions as it relates to time and fiduciary responsibility.
Time: The effective date for this legislation is upon signature of the governor or Article III, Section 18 of the Constitution of LA. The current session ends June 8, 2017. The legislation requires that no later than July 31, 2017, the administrator of the LADCP Commission solicit requests for proposals from all interested financial institutions (page

5 of 8, C Line 9). Ms. Andrews stated that the current plan administrator is not going to issue an RFP. Ms. Stevens agreed with this statement. Ms. Andrews noted that it would be difficult to find an administrator who will issue an RFP within the timeframe noted (July 31, 2017). Asking a plan administrator to be both a fiduciary and issue an RFP increases the probability of greater administrator costs due to the additional responsibilities required. The legislation further states that the LADCP Commission shall select and enter into contracts with one or more custodial financial institutions no later than August 31, 2017 (page 5 of 8, C Line 12). The Commission already has a contract in place with a plan administrator.

Fiduciary: Money in a 457b Plan is held in trust (established in 1997) for the exclusive benefit of the participants and their beneficiaries which is set forth in the federal legislation of government plans. Because this is a trust, there is a fiduciary relationship. The definition of a "custodial financial institution" is provided Page 2, Line 2-9. "A custodial financial institution means a financial institution or institutions in which either of the following apply: (a) Funds are deposited between the date on which they are deferred from a participant's compensation and the date on which they are transmitted to an investment product company. NOTE: This is already in the law governing the Plan. (b) Cash is held for those participants who choose to keep some or all of their contributions in a savings account in which voluntary, optional cash contributions are deposited. When combined with 1303.2 A(3), "The request for proposals shall advise the financial institutions that the Commission shall give preference to the financial institution or institutions that offer the highest interest rate to plan participants." Ms. Andrews stated that the definition is very broad and requiring that preference be given to whoever has the highest interest rate does not take into account fees, stability and length of service in the industry. To look only at the interest rate creates a fiduciary problem. The administrator is made the plan fiduciary in 1303.2 A(4), "The administrator shall act as a fiduciary to the plan participants when seeking the proposals from financial institutions provided for in this Section and administering the voluntary, optional cash contributions savings accounts." Ms. Andrews stated that the legislation requires that a savings account be made available and to allow participants to put all or some of their money into the savings account. Ms. Andrews suggested that there might also be a fiduciary problem if the savings account performs poorly and cannot cover the $2500 Self Directed Brokerage fee.

Concern #3 Definition concerns.
Investment Products: Page 2 of 8, (5) Line 14, "…in which voluntary optional cash contributions shall be deposited and Page 2 of 8 (10) Line 26, "…some portion or all of the participant's monetary contribution." Ms. Andrews stated that she did not understand the difference between "monetary contribution" and "voluntary optional cash

contributions." The additional language is not necessary as "investment product" already includes a savings account.

Advising: Page 4 of 8 (b) Line 8, "To establish a procedure for advising any participant who has filed an application for withdrawal or deferral modification based upon hardship as to the amount of the voluntary, optional cash contribution, if any, that has been deposited by the participant and is available to the participant in the individual participant account." Ms. Andrews stated that the term "advising" in this section is not clear. Mr. Riviere stated that the interpretation of the term "advising" must be consistent with LA Securities Law as it relates to investment advice. To provide account status such as balances in the account does not constitute investment advice and therefore, would not violate LA Securities Laws.

Having highlighted her concerns, Ms. Andrews concluded that:

- The legislation is not necessary as the Commission already has the power to invest in a savings account under RS42:1301.5.
- The Commission already has the power to select a Custodial Financial Institution.
- Annual reports are already made available to everyone.

The intent of the legislation is to offer a savings account for government employees. If the legislature sees that the Commission is taking this request seriously and is addressing concerns, it may make the proposed legislation unnecessary. In her research, Ms. Andrews found that other retirement accounts have addressed this issue by offering TIPS where the $2500 Self Directed Brokerage fee could be placed. Ms. Andrews stated that TIPS may be the better option as banks use money from savings accounts to invest in companies that participants may be trying to avoid.

Mr. Riviere voiced concern that even if the savings account becomes an option, the money would not be accessible to participants for withdrawal outside of the Unforeseeable Emergency Withdrawal guidelines. To do so, would be to lose the Plan's 457b status. Mr. Kling stated that whatever savings option is selected, it would be almost impossible to give participants 100% assurance that funds would not be invested in companies supporting morally objectionable issues.

Ms. Roberts stated that if the $2500 core fee was not mandated for participating in the Self Directed Brokerage account, there would be no issue. Mr. Kling and Ms. Andrews shared that the $2500 fee is "normal" of almost all retirement accounts with a Self Directed Brokerage option. Ms. Stevens stated that the $2500 fee covers such things as administrative fees and Self Directed Brokerage fees. Mr. Kling stated that if a participant wants to participate in the Self Directed Brokerage account, the cost would be

the responsibility of the participant and not to be shared by the rest of the Plan participants. Ms. Andrews stated that the LADCP should never be marketed as a savings account in the traditional sense. It is a retirement account. Ms. Andrews recommended that the Commission consider contacting a financial expert to review the legislation as it relates to federal regulations. Ms. Andrews believes that the legislation violates the federal regulations that govern the 457b Plan. A decision must also be made as to how the information will be relayed to the legislature.

Mr. Enright recognized Senator Milkovich who joined the meeting late and invited the Senator to make a statement to the Commission. Senator Milkovich stated that it is a given that he and all 144 legislators desire to maintain tax exempt retirement accounts for State employees. The concern behind the bill is to address other options. LA is a pro-life state – leading the nation on this issue. State employees should have an option of having their money placed in accounts that do not support Planned Parenthood. If there are other options, stocks/investments/cash funds that are not tied to abortion agendas, pro-life participants have a right to this option. Senator Milkovich thanked the Commission for the opportunity to address this issue and provided his cell phone number for use in any further discussion/questions that the Commission may have (318-294-3464). Senator Milkvoich reiterated that the intent of the bill was not to undermine the tax exempt status of the Plan and would ask his staff to look at the regulations to see if there was a way to achieve both goals (tax exemption and pro-life investment options).

Ms. Stevens pointed out that the Stable Value Fund provides the "No Loss Option" in the core lineup. There is a Stable Value Fund contract that defines "competing funds" as any fund with a known or periodically declared rate of interest, any money market fund or bond fund with a duration of three years or less. If this is on the table in the future, Wilshire will be aware of this and will make any recommendations. Since there is a Stable Value Fund contract, the option would be to select something greater than a four year duration. Ms. Lindberg stated that to meet the requirements, the selection would have to be something that would have some level of volatility to its returns – not akin to a savings account with a fixed rate of interest. Mr. Kling stated that 45% of assets are in the Stable Value Fund which means this is a primary investment vehicle for participants. The Stable Value Fund has a guaranteed rate of return as a result of an insurance wrapper. Mr. McGimsey stated that the Commission has a fiduciary duty to all Plan members in relation to increased costs. Ms. Stevens offered to research whether or not offering a savings account for the purpose of maintaining the $2500 Self Directed Brokerage account fee would be seen as in violation of the "no-compete" clause. Mr. Kling stated that TIPS is one of the least controversial options but returns are not guaranteed and participants may not get the full rate when withdrawing funds. Ms.

Stevens stated that all operational fees are in the core account and cannot be subtracted from the Self Directed Brokerage (TD Ameritrade).

Ms. Stevens stated that Marilyn Collister and another attorney with Empower Retirement reviewed HB 549 and noted that it is possible that if a savings account were offered, it would have to be record-kept on multiple platforms – something that Empower Retirement may not be able to do. Further, it would increase the burden of the Commission. Mr. Enright asked if Ms. Collister had the expertise to review the 457b federal rules for the purpose of comparing it to the proposed legislation and providing the Commission with an opinion. Ms. Stevens doubted that this expertise was available through Empower Retirement. Ms. Andrews pointed out that there would be a conflict of interest to ask an attorney that works for the Plan Administrator to review the bill on behalf of the Commission. Ms. Stevens offered to ask Empower Retirement if TIPS (a lower rated option) would be considered competition to the Stable Value Fund. Ms. Hubbard asked if TIPS would address any/all social issues that participants may have in the future. Mr. Kling could not state with 100% confidence that the Federal Government would not invest in companies not to the liking of participants. Ms. Burton stated that this is also the case with a savings account.

Ms. Roberts inquired as to the origin of fiduciary responsibility of the Commission as this is not included in State law. Ms. Andrews stated that in 1997 the 457b law was changed to consider assets as a trust from assets of the State. Ms. Andrews addressed Ms. Roberts' fiduciary-related questions by referencing page 8 G of USCS 457, " In general, a plan maintained by an eligible employer described in subsection (e)(1)(A) shall not be treated as an eligible deferred compensation plan unless all assets and income of the plan described in subsection (b)(6) are held in trust for the exclusive benefit of participants and their beneficiaries." In 1997, Mr. Bares asked the Attorney General if the LADCP was authorized to create a trust with the Commission acting as trustee of the Plan. The Attorney General concluded that the Plan was authorized to create a trust and that the Commission could act as trustee of the Plan. The definition of fiduciary is one who holds assets for the benefit of an active trust. Ms. Andrews stated that there was no question that the Commission has a fiduciary duty to its participants.

The purpose this meeting, as stated by Ms. Andrews, was to assure that Commission members have a clear understanding of HB 549 so that they would be able to discuss the bill at the next Commission Meeting scheduled for Tuesday, April 18, 2017. Ms. Stevens stated that Empower Retirement should not be considered for legal resource on this issue. Mr. Kling stated that it would be better to have an independent legal counsel to prevent any appearance of a conflict-of-interest. Mr. Kling noted that attorney Bob Tarcza has previously served the Commission and is familiar with the statutes and laws that govern

the Plan. Mr. Kling recommended that Mr. Tarcza be contacted to see if he might assist the Commission in discussing HB549 with the authors. Ms. Burton stated that it would not be in the best interest of anyone to take no action at this time. Ms. Burton agreed that Mr. Tarcza be asked to provide expert opinion on this issue. Mr. Kling suggested that the Chairman or Vice Chairman of the Commission along with legal counsel, meet with the authors of HB549 to discuss federal regulations and how they might impact the proposed legislation. Ms. Andrews stated that her duty as an assistant Attorney General, is to communicate potential problems with the Commission not to draft legislation or negotiate with bill sponsors. Ms. Andrews stated that the Attorney General's office cannot appear to approve or disapprove legislation. Ms. Andrews offered to review the situation with her supervisor as to whether or not she could meet with the sponsors of the bill but was doubtful this would be an option. Ms. Andrews agreed to discuss the concerns with Mr. Tarcza should the Commission choose to employ his services. Ms. Burton motioned to open discussion with Mr. Tarcza as it relates to HB549 and to allow Mr. Tarcza, Chairman or Vice Chairman to meet with the sponsors of the bill. Mr. McGimsey seconded the motion. Mr. Enright objected to the timing of the hiring of legal counsel by the next meeting. Clarification of the motion was made to state that Mr. Tarcza would be contacted to determine his willingness and availability so that the Commission may make a final decision on securing his services at the April 18th Commission meeting. Mr. Enright withdrew his objection to the motion. There was no further objection to the motion and the motion passed.

Adjournment

With there being no further items of business to come before the Commission, Vice Chairman Whit Kling declared the meeting adjourned at 4:07 p.m.

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Virginia Burton, Secretary