

## **AMENDED MINUTES**

### **Louisiana Deferred Compensation Commission Meeting**

**May 9, 2017**

The monthly meeting of the Louisiana Deferred Compensation Commission was held on Tuesday, May 9, 2017 in the offices of the Plan Administrator, 9100 Bluebonnet Centre Blvd, Suite 203, Baton Rouge, Louisiana 70809.

#### **Members Present**

Emery Bares, Chairman, Designee of the Commissioner of Insurance  
Thomas Enright, Designee of the State Treasurer  
Andrea Hubbard, Co-Designee of the Commissioner of Administration  
Whit Kling, Vice-Chairman, Participant Member

#### **Members Not Present**

Virginia Burton, Secretary, Participant Member  
Laney Sanders, Participant Member

#### **Others Present**

Rick McGimsey, Co-Designee of the Commissioner of Administration  
Len Riviere, Co-Designee of Commissioner of Financial Institutions *via Conference Call*  
William Thornton, Senior Manager, Client Portfolio Services, Great-West Financial *via Conference Call*  
Richard L. Traina, State of Louisiana Attorney General's Office  
Jo Ann Carrigan, Sr. Field Administrative Support, Baton Rouge, Empower Retirement

**Public:** Carla S. Roberts, employee of the Louisiana State Senate; Laura Gail Sullivan, Louisiana State Senate Counsel.

#### **Call to Order**

Chairman Bares called the meeting to order at 10:02 a.m.

Roll call was taken by Jo Ann Carrigan. Mr. Riviere joined the meeting via conference call for information purposes. Mr. Riviere was not a voting member at the meeting. Ms. Burton and Ms. Sanders were not in attendance. Four members of the Commission were in attendance which constituted a quorum for the meeting.

**Public Comments:** Ms. Roberts distributed to attendees a "Prohibited Investment List" from the Illinois Investment Policy Board that listed 14 named companies that boycott Israel. The companies listed have been deemed prohibited by investment through laws set forth in Article 1 of the Illinois Pension Code and approved by the Illinois Investment Policy Board.

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Mr. Enright moved that the Commission allow public comments later in the meeting as time goes on. Mr. Kling seconded the motion. The motion carried.

**Discussion of HB549**

Mr. Kling reviewed a number of issues that the Commission has with the original bill which included:

- Current language would result in the disqualification of the Plan's tax exempt status;
- The disqualification would result in a taxable situation for earnings throughout the Plan as well as the termination of the ability to tax defer current contributions;
- The requirement to provide cash or cash equivalent offerings would appear to result in a contractual dispute with Great-West in regards to Stable Value offerings;
- There is no necessity for the proposed legislation as the current statutes already provide for the ability to make product selection, hardship administration, etc.

Subsequent to the original bill, there was a substitute bill drafted dated 5/1/2017. As a result of a review of the substitute bill and discussions with counsel, it was determined that the bill would still violate the provisions allowing the Plan to keep its tax-exempt status and would be a breach of the Stable Value contract. A third substitute bill was drafted on May 8, 2017 which contains language as a result of Mr. Kling's meeting with the sponsors of the bill. Mr. Kling discussed the draft of the third substitute bill with Mr. Tarcza on Monday, May 8, 2017 and concerns remain with regards to the Plan's tax exempt status. Mr. Tarcza will address these concerns at the May 16, 2017 Commission meeting. Mr. Tarcza was not available to attend this morning's meeting.

At the Commission's request, Mr. Kling met with the sponsors of the bill and Ms. Roberts. Some agreements were reached regarding changes requested to allow access to the self directed account without having to utilize any of the current core offerings that may potentially cause discomfort to participants who choose not to use them.

Mr. Enright asked if Mr. Kling knew what Mr. Tarcza's specific concerns were in regards to the tax status. Mr. Kling stated that he would provide a paraphrase of Mr. Tarcza's concerns noting that the issues are related to the Commission's ability to do what is in the best interest of the participants, unfettered by the language in the bill. The bill requires a review of the current offerings in the core for determination of removal and replacing them with a product of equal or better earnings. Mr. Kling stated that this would be difficult for the Commission to do as the only criteria would be past performance of

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funds and past performance is not a guarantee of future performance. If future performance was less than past performance, then the question arises as to whether or not the Commission acted in the best interest of the participant. The other issue is that it is not the Commission's responsibility to make decisions for participants who are voluntarily investing in the offerings. Instead, it is the participant's responsibility to do so.

Mr. Enright referenced two letters addressed to the LA House Committee on Retirement submitted by Andrew Dalin, Counsel, Dentons US LLP and Lawrence M. Hill, Senior Tax Partner of the international law firm of Winston & Strawn LLP. Mr. Kling stated that in his conversation with Mr. Tarcza, Mr. Tarcza expressed that he did not agree with the letters as they are either not on point or did not take into account the full measure of regulations that govern the Plan.

Ms. Roberts stated that she had a lengthy conversation with Mr. Tarcza on Monday evening, May 8, 2017 and understood that Mr. Tarcza does not believe that the tax deferred status of the Plan is in jeopardy. Ms. Roberts pointed out that Mr. Tarcza was not here to speak for himself but that she did not have the same conclusions that Mr. Kling had from his conversations with Mr. Tarcza. Ms. Roberts wanted the Commission to know that the group of legislators/co-authors who have worked with Mr. Kling and made changes based on the Commission's concerns, were reasonable and willing to work with the Commission.

Ms. Sullivan asked Ms. Roberts to clarify the language written in the bill that states that every core investment be subject to screening. Ms. Roberts' understanding is that only one category of funds would be affected by this screening requirement and that would be international funds. Ms. Roberts stated that in her conversation with Mr. Tarcza, he did not believe there would be any change in what the Commission is already doing since the list of prohibited companies is not extensive. The possible exception would be the Black Rock International Fund.

Mr. Kling moved to open the meeting to public comments and the Commission concurred.

Ms. Sullivan observed that initially the issue to be addressed by the Commission was that there were no offerings in the core that were conflict-free. This has now grown from being "no offerings" to mandating every offering in the core. Mr. Kling noted that the original bill did not address anti-terrorism but rather whether or not there was an option that allowed alternative social investing without having to place any funds in the core investment offerings. The substitute bill brought in the anti-terrorism issue related to investment options.

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Ms. Sullivan pointed out that she has worked with public retirement systems for 15 years and also worked on the original prohibitive nations Title 11 list. Per Ms. Sullivan, the role of retirement systems is to screen and report. They are not required to divest. The funds in the LA Deferred Compensation Plan belong to participants in the Plan. Anything that mandates a restriction on the core choices is a restriction on what the participant is free to invest his/her money in regardless of social issues associated with the fund. This would be considered a restriction on a private individual. Ms. Sullivan stated that citizens of the United States express themselves through the use of their money. How a participant uses his/her money is a form of free speech and any restriction such as, “can’t” or “must”, is considered a violation of a person’s freedom of speech. Mr. Kling expressed his concern that the bill puts restrictions on the Commission causing the Commission to do something that is not in the best interest of the participant.

Mr. Enright commented that he found that the letter from Winston & Strawn contains information that “looks” substantial. Mr. Enright distributed copies of the “Interpretive Bulletin Relating to the Fiduciary Standard under ERISA in Considering Economically Targeted Investments” that was referenced in the Winston & Strawn letter. Mr. Enright stated that the bulletin clearly states that there is no violation of fiduciary duty for social investments. Mr. Kling pointed out that the Plan is not subject to ERISA. Mr. Enright stated that if the Plan is not subject to ERISA, the Commission has no fiduciary duty. Ms. Sullivan stated that the Plan is subject to 457-4G regulations. Mr. Enright referenced the DOL’s ERISA Fiduciary Advisor algorithm that states that governmental plans are not subject to Title 11 of ERISA so therefore, the Commission doesn’t have federal fiduciary responsibility. Mr. Enright stated that the Commission may have fiduciary responsibilities under state law but nothing under Title 11. Ms. Sullivan stated that the issue is in the difference between whether the Commission may provide a socially constructed investment option versus mandating that every choice be subject to that social investing rule. Ms. Roberts referenced a portion of the May 8, 2017 substitute bill, page 4 lines 3 – 8, ensuring that funds be selected that offer economically equivalent returns and are morally acceptable. In regards to public funds, Ms. Roberts pointed out that there are some public funds in the Plan as some local governments offer a match of contributions

Ms. Sullivan noted that the language in the bill does not say, if there is no equivalent fund then the Commission does not have to divest. Further, Ms. Sullivan questioned whether or not the Commission has to offer something or if the issue is about placing a restriction on every option that is available to the participant on the first \$2,500.

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Mr. McGimsey inquired as to how HB 549 went from addressing options in the first \$2,500 to a bill regarding boycotting Israel. Ms. Roberts' understanding is that The American Israel Public Affairs Committee (AIPAC) reached out to Representative Hodges as part of a national platform and she agreed to include this issue in the substitute bill. It is Ms. Roberts' understanding that this is part of a national initiative to put into state law so that the issue can be submitted to Congress regarding whether or not the funds should be offered on the New York Stock Exchange. Per Ms. Roberts, approximately 20 states have already adopted this law. Mr. McGimsey stated that HB 549 has been taken in a different direction than its original intent. Ms. Roberts agreed that the original issue that she asked be addressed has been solved and that the bill is no longer about her original problem.

Mr. McGimsey asked that another part of the bill related to a "false quorum" be discussed wherein the Commission consist of nine members including the speaker of the House of Representatives (or his designee) and the president of the Senate (or his designee) yet a quorum of four members be required for the transaction of business. Mr. Kling stated this language was added to assure that a quorum could be reached to transact business even with the addition of two more members who may or may not attend the meetings. Mr. Enright asked that the Attorney General research the specifics of a quorum.

Mr. McGimsey asked why the issue of boycotting Israel could not be handled under a separate bill. Ms. Roberts responded that AIPAC's goal is to add this issue to this year's agenda and this was the only bill that they could add this language to. Mr. Kling reiterated that his concern is that the language of the bill creates a restriction on the Commission's ability to do what it needs to do to be able to maintain its tax-exempt status. There is a Committee on Retirement meeting on Thursday, May 11, 2017 in which Mr. Kling and Mr. Tarcza will be in attendance. Mr. Kling stated that the Commission must decide whether or not they will support the bill.

Mr. Enright stated his intent to vote in favor of adding a neutral investment that does not compete with the Stable Value Fund and offers participants a neutral place to put their first \$2,500, no matter what happens to the bill. Further, Mr. Enright stated that he did not have a concern with the bill if Great-West agrees that a 3-year plus bond fund does not conflict with the contract. Mr. Enright does not have a concern with the tax status after reading a recent DOL Interpretive Bulletin on this point. From the treasury's perspective, if the legislature instructs treasury to make a list, a list will be made.

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Ms. Hubbard voiced concern that the bill only allows the Commission 90 days to find and convert to an equivalent fund. Federal regulation requires that sufficient notice be made to Plan members so that they may be allowed to choose something else. Ms. Hubbard does not believe that 90 days is sufficient time to complete all the steps noted in the bill. Ms. Roberts noted that Mr. Tarcza shares Ms. Hubbard's concern about this timeframe issue. Ms. Roberts also noted that as more and more people become familiar with issues, such as Planned Parenthood, they are boycotting companies that support them. As a result, the Prohibited List of Companies is actually shrinking.

Mr. Bares asked for the pleasure of the Commission. Mr. Kling motioned that the currently drafted/latest substitute bill (May 8, 2017) is not supported by the Commission and that this position be made known with general counsel's assistance to the Committee on Retirement at the scheduled May 11<sup>th</sup> meeting. Mr. Enright made a substitute motion asking that the Commission obtain the general counsel's opinion in writing to determine whether or not there is a tax consequence or legal impediment and to stay neutral on the bill until that point. Ms. Hubbard seconded the motion because without having the actual opinion of general counsel in writing, it appears that there is conflicting information. A voice vote was called for by Mr. Bares with three members voting to approve the substitute motion (Ms. Hubbard, Mr. Enright and Mr. Bares) and one member voting not to approve (Mr. Kling). The motion carried.

Mr. Thornton asked for a clarification of the substitute bill language with respect to the Stable Value Fund, re: page 3, Line 7-15. Mr. Thornton asked if the Commission would be giving Great-West a list of prohibited companies. Ms. Roberts stated that the substitute bill need only address the boycotting of Israel as the issue related to Planned Parenthood has been resolved with the option of the treasury fund. Ms. Sullivan confirmed that a list would be provided to Great-West from the treasury department. Mr. Enright, First Assistant, State Treasurer, confirmed that the bill instructs the treasury department to make a list by August 15<sup>th</sup> of every year and to provide that list to the LADCP Commission and to post it on the Department of Treasury's website. The list would also be given to Great-West stating that investments in LA would not be able to include companies appearing on the list. Mr. Enright asked Mr. Thornton if there are other Great-West clients that share this situation. Mr. Thornton identified the State of North Carolina that has a similar "Investments in Iran" list that is forwarded to Great-West each year.

Mr. Kling motioned to instruct Wilshire perform a search and present at least three but not more than six viable alternatives for the Commission's consideration no later than July 31, 2017. Mr. Kling further motioned that the Chairman be authorized to take those actions with regards to Great West to allow the selected products be placed on the Great-

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West record keeping platform. The motion authorizes the Chairman to take actions necessary to provide for the addition of the selected products to the core investment menu. The purpose of the motion is to provide the ability for participants to invest in the Self-Directed Brokerage platform without having to provide \$2,500 in any core investment account or offering that has equity or stocks that are objectionable to the participant. Mr. Kling has spoken with David Lindberg of Wilshire. Mr. Kling amended his motion to include that investment options have an average maturity term of three years or greater. Mr. Enright seconded the amended motion. There was no objection to the motion. The motion carried.

Mr. Kling clarified the motion to offer a treasury index, treasury bond or treasury money market with an average maturity date in excess of three years (reference page 3 of 6, lines 3-6).

Ms. Hubbard made a substitute motion to receive in writing from Mr. Tarcza whether or not he believes that there is a possibility that the tax exempt status of the Plan would be impacted by the bill. If Mr. Tarcza believes this to be the case, then the Commission objects to the substitute bill as it is currently written. Mr. Enright stated that the primary issue remaining is to address this tax-exempt status issue. Mr. Tarcza is being asked by the Commission to provide his opinion on whether or not he has concerns related to tax exempt status. Mr. Enright noted that for years Title 11 has required retirement systems to “review and report” but not to divest. The difference is that the bill instructs the Commission to divest. Mr. Enright would like Mr. Tarcza to point out where in the tax laws this directive causes a tax problem with the Plan. Ms. Sullivan pointed out that the Winston & Strawn letter references the Plan “pursuing” an investment strategy as opposed to mandating that all core investments be subject to this. Mr. Kling stated that initially, the Commission was asked to provide a means to invest without going into any of the prohibitive companies. Now, the Commission is being asked to extend this to all other core investment options which had nothing to do with original request or the participant’s ability to select investments that they wish to invest in. Per Mr. Kling, AIPAC is dictating to the participant what they may invest in. Ms. Hubbard noted page 3, Line 3, stating that this should satisfy what the remainder of the bill is asking the Commission to do. Since the treasury options will not be investing in companies that are boycotting Israel then, if the first \$2,500 goes into what is being required by item B, the participant may choose the companies they wish after the initial \$2,500.

Ms. Roberts asked if she and the authors of the bill should work with Mr. Tarcza to adjust the language of the bill as it relates to the timelines noted. Mr. Kling responded that Mr. Tarcza must work through the Chairman or Vice Chairman. Mr. Enright is expecting Mr. Tarcza to present in writing his legal opinion on whether or not he sees a specific

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problem in addition to providing a way to fix the problem. Ms. Roberts offered to ask Ms. Hodges to go to the floor of the Senate to state that the intention of the bill is not to jeopardize the tax exempt status of the Plan. Mr. Enright stated that if it became evident that the bill was going to impact the tax exempt status of the Plan, the Commission would have to ask the governor to veto the bill to clear this issue. Mr. McGimsey stated that two days does not seem to be enough time for Mr. Tarcza to provide the information needed especially when the original intent of the bill has already been addressed by the Commission.

Mr. Kling asked that Ms. Hubbard clarify her motion to state that the Commission have no opinion (remain neutral) unless Mr. Tarcza provides a written opinion that there may be an issue with the bill. If this occurs, the Commission will oppose the bill. Ms. Hubbard agreed to the clarification as noted by Mr. Kling. Mr. Kling seconded the motion. A voice vote was taken with three members voting to approve the motion (Ms. Hubbard, Mr. Kling and Mr. Bares) and one member voting not to approve the motion (Mr. Enright).

**Adjournment**

With there being no further items of business to come before the Commission, Chairman Emery Bares declared the meeting adjourned at 11:09 a.m.

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Virginia Burton, Secretary