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ATTORNEY GENERAL

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Robert L. Borden, CFA, CAIA  
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Retirement System Investment Commission  
1201 Main Street, Suite 1510  
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Dear Mr. Borden:

You have requested an opinion on behalf of the South Carolina Retirement System Investment Commission regarding several questions which have been raised by the Commission. In summary, the Commission "seeks guidance as to the interpretation" of various statutes "and the scope of the powers which have been vested in the State Treasurer with regard to the Commission and investment of Retirement System funds or assets." You note that the "Commission respectfully submits that the powers and responsibilities vested in the Commission by the State with regard to the investment and management of Retirement System assets are very broadly framed." Your letter references a number of statutes, including S.C. Code Ann. Sections 9-16-320(G), 9-16-20(A), 9-1-1310, 9-16-340(A) and 9-1-1310. By way of background, you state the following:

[w]e believe that the Commission's enabling statute was carefully designed to grant exclusive authority to the Commission with regard to investment and management of the Retirement System's assets. Three provisions illustrate this aspect of the statute's design. First, S.C. Code Ann. Section 9-16-20(A) provides that "[a]ll assets of a retirement system ... are held in trust. The commission has the exclusive authority, subject to this chapter and Section 9-1-1310, to invest and manage those assets." Second, the enabling statute contains a representative listing of investments in which the funds of the Retirement System may be invested. This sweeping list, set forth at S.C. Code Ann. Section 9-1-1310, identifies the Commission as the sole entity which "shall invest and reinvest the funds of the retirement system", subject to certain limitations imposed by Section 16, Article X of the South Carolina Constitution and Chapter 16 of Title 9 of the Code. ... Third, S.C. Code Ann. Section 9-16-340(A) provides that "[t]he commission, acting through the chief investment officer, shall invest and reinvest the assets of the retirement systems as provided in Section 9-1-1310".

Supporting this view is another aspect of the enabling statute's design. This plenary delegation of power is closely coupled with a stringent scheme of fiduciary responsibilities. For, State law also place great emphasis on the Commission's obligations as a steward of trust funds. Chapter 16, Article 1 of Title 9 of the Code sets forth the basic fiduciary responsibilities of the Commission, its Chief Investment Officer and staff, as well as others to whom fiduciary duties are duly delegated, while Article 3

establishes exacting standards of conduct that apply to fiduciaries. ... The strong fiduciary framework put in place by the State in 2005 not only requires the Commission to adhere to an extremely high standard of care, it also puts all stakeholders on notice that “[t]he funds and assets of the various state retirement systems are not funds of the State, but are instead held in trust as provided in Section 9-16-20.” S.C. Code Ann. Section 9-1-1310(C).

The Commission seeks guidance as to the interpretation of the foregoing statutes and the scope of the powers which have been vested in the Commission with regard to investment and management of Retirement System funds and assets.

Specifically, the Commission wishes the following issues addressed:

1. The Commission seeks guidance as to the scope of the powers which have been vested in the Commission with regard to the investment and management of Retirement System funds and assets.
2. The Commissions seeks guidance as to the scope of the powers which have been vested in the Commission with regard to securities litigation.
3. The Commission seeks guidance as to the scope of the powers which have been vested in the State Treasurer with regard to the Commission and investment of Retirement System funds or assets.

With respect to your questions 1 and 3, you provide the following information:

While the State Treasurer’s function of investing in fixed income instruments was “transferred to and devolved upon” ... the Commission as part of the 2005 legislation creating the Commission, the Commission readily acknowledges that the State Treasurer continues to perform key responsibilities with regard to the Retirement System. First, the State Treasurer serves as the custodian of the funds of the Retirement System. See S.C. Code Ann. Section 9-1-1320 (“The State Treasurer shall be the custodian of the funds of the System [i.e., the Retirement System]”) ... . Second, State law provides that “[a]ll payments from such funds shall be made by him [i.e., the State Treasurer] only upon vouchers signed by two persons designated by the Board”). *Id.* The Commission also works closely with the State Treasurer, as well as the Retirement System, in monitoring and maintaining adequate cash balances to meet the needs of the Retirement System. See S.C. Code Ann. Section 9-1-1330 (“For the purpose of meeting disbursements for annuities and other payments there may be kept available cash, not exceeding ten per cent of the total funds of the System, on deposit with the State Treasurer”). ...

We will address your questions 1 and 3 herein and will issue a separate opinion regarding question 2 at a later date.

**Law / Analysis**

**Law Relating to Retirement System Prior to 2005**

As you indicate in your letter, the South Carolina Retirement System Investment Commission was created in 2005. The events leading up to the Commission's creation in 2005 date back to 1996 when Art. X, § 16 of the Constitution was amended by the voters and ratified by the General Assembly in early 1997. Art. X, Section 16 was amended in order to permit the various state-operated retirement systems to invest in certain equity securities. The 1997 Amendment, which received a favorable vote of the people in November, 1996 and subsequent ratification of the General Assembly in 1997 read in pertinent part as follows:

[n]otwithstanding the provisions of Section 11 of this article, the funds of the various state-operated retirement systems may be invested and reinvested in equity securities of any corporation within the United States that is registered on a national securities exchange as provided in the Securities Exchange Act of 1934 or any successor act or quoted through the National Association of Securities Dealers Automatic Quotations or similar service. Upon enactment of the implementing legislation required by this paragraph, there is established the State Retirement Systems Investment Panel. The panel shall consist of five members, one each appointed by the Governor, the State Treasurer, the Comptroller General, and the chairman of the respective committees of the Senate and House of Representatives having subject matter jurisdiction over appropriations ... . The General Assembly shall implement this paragraph by enacting legislation establishing the panel and providing for the terms, duties and compensation of its members, and which specifically authorizes the investments allowed by this paragraph, and may provide limitations on investments in equity securities as it considers prudent. The panel established by this paragraph shall not exist until it is established in the implementing legislation required pursuant to this paragraph.

As we noted in an Opinion dated April 28, 1999 (1999 WL 387052), "[t]he General Assembly enacted the implementing legislation, S.C. Code Ann. 9-16-10 *et seq.* and amended 9-1-1310 to allow investment in equity securities." Section 9-16-320(C) authorized the Investment Panel to "discuss, deliberate upon and make decisions on a portion of the annual investment plan or other related financial or investment matters ... ." Section 9-16-320(F) stated that "[t]he panel does not act as a fiduciary with respect to the funds of the retirement system, but must exercise reasonable care and skill in carrying out its duties." However, Section 9-16-340(A) made it clear that the Panel did not possess the authority to invest and reinvest the assets of the Retirement System. Such provision stated:

[t]he State Budget and Control Board, as trustee of the retirement system, shall invest and reinvest the assets of the retirement systems as provided in Section 9-1-1310. The State Treasurer shall serve as agent of the Board with respect to investments made pursuant to Article 7, Chapter 9, Title 11. Investments allowed by law in equities may be made by the board [Budget and Control Board] in the manner it shall determine, consistent with Section 9-16-330 and consistent with its fiduciary duties with respect to the retirement funds. The board [Budget and Control Board] may employ or retain administrators, agents or consultants, or other advisors it considers necessary with

respect to making equity investments. The board is subject to the provisions of Chapter 23 of Title 1, the Administrative Procedures Act, in the implementation of this article.

Subsection (B) further stated that

[a]fter receiving the proposed plan of the panel, the board [Budget and Control Board] shall adopt an annual investment plan, which must be implemented by the board. The board shall regularly review the plan implementation and make amendments as it considers appropriate.

Thus, it can be seen, that following the 1997 constitutional amendment to Art. X, § 16, and implementing legislation, the Budget and Control Board continued to possess the authority to “invest and reinvest the assets of the retirement systems” and that the State Treasurer served “as the agent of the board” for certain investments made pursuant to Article 7, Chapter 9, Title 11. Importantly, even following the constitutional amendment, any investments in equities allowed by law were to be made by the Budget and Control Board. As you correctly note, the “Investment Panel served only in an advisory capacity to the trustees of the Retirement System, the State Budget and Control Board.”

**Act No. 153 of 2005**

However, in 2005, by Act No. 153 of 2005, the General Assembly substantially modified this statutory scheme. The Act created the Retirement System Investment Commission and bestowed upon the Commission broad investment powers. Section 9-1-1310 was further amended by Act No. 153 to read as follows:

Section 9-1-1310(A) the board [Budget and Control Board] is the trustee of the retirement system as ‘retirement system’ is defined in Section 9-16-10(8). The Retirement System Investment Commission shall invest and reinvest the funds of the retirement system as ‘retirement system’ is defined in Section 9-16-10(8) subject to all the terms, conditions, limitations, and restrictions imposed by Section 16, Article X of the South Carolina Constitution, subsection (B) of this section, and Chapter 16 of this title.

(B) Except where not allowed pursuant to Sections 11 and 16, Article X of the Constitution of this State and Chapter 16 of this title, the funds of the system may be invested in, including but not limited to the following:

- (1) bonds of this State, other states of the United States, the United States or any political subdivisions or agencies thereof;
- (2) banks and savings and loan institutions;
- (3) top-rated commercial paper;
- (4) funds of funds;



- (5) foreign certificates of deposit;
- (6) short-term debt;
- (7) investment trust securities;
- (8) real estate securities;
- (9) foreign fixed income obligations;
- (10) futures and options regulated by the United States Securities and Exchange Commission;
- (11) private equity;
- (12) domestic and foreign group trusts;
- (13) investment vehicles of Federal Deposit Insurance Corporation approved institutions;
- (14) bonds of foreign countries designated industrialized by the International Monetary Fund;
- (15) collateralized mortgage obligations;
- (16) World Bank bonds;
- (17) debt of the United States or Canadian corporations;
- (18) equipment trust debt;
- (19)
  - (a) purchase money mortgages received for real estate;
  - (b) real property;
  - (c) exchange traded funds;
  - (d) American Depository Receipts;
- (20) real estate investment trusts; and
- (21) investments allowed pursuant to Section 11-9-660 and equity investments as allowed pursuant to Section 16, Article X of the Constitution of this State.

(C) The funds and assets of the various state retirement systems are not funds of the State, but are instead held in trust as provided in Section 9-16-20.

Act No. 153 of 2005 also amended § 9-16-20(A), by substituting the word “commission” (meaning Retirement System Investment Commission) for the word “trustee” (which is the Budget and Control Board). Subsection (A) of § 9-16-20 now reads as follows:

- (A) All assets of a retirement system are held in trust. The Commission [Retirement System Investment Commission] has the *exclusive authority*, subject to this chapter, and Section 9-1-1310 to invest and manage those assets.

(emphasis added). Section 9-16-30(A) also authorized the Retirement System Investment Commission to delegate functions “that a prudent person acting in a like capacity and familiar with those matters could properly delegate under the circumstances but final authority cannot be delegated.” Subsections (B) imposed the standard of “reasonable care, skill and caution” in terms of selecting an agent and delegation of authority thereto. Subsection (C) imposed a duty upon the agent to the retirement system and “if a fiduciary, to comply with the duties imposed by Section 9-16-40.”

Pursuant to Section 9-16-40, the Legislature set forth the standard of care for a trustee, commission member or other fiduciary. Such provision states that “a trustee, commission member or other fiduciary shall discharge duties with respect to a retirement system with the care, skill and caution under the circumstances then prevailing which a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an activity of like character and purpose.” Section 9-16-40(3). And, Section 9-16-50 sets forth guidelines for investment and managing assets of the retirement systems that the Commission must consider in making investments.

Act No. 153 of 2005 also provided for a transition from the reduction of authority of the Budget and Control Board and the Treasurer to the bestowal of such authority upon the Retirement System Investment Commission. Part V, § 1 of the Act provided as follows:

- (A) Beginning October 1, 2005, all assets and liabilities, appropriations, FTE’s, employees, contracts, real and personal property, records, and archives of the State Budget and Control Board, with respect to its investment duties for the various state retirement systems are transferred to and devolved upon the Retirement System Investment Commission.
- (B) It is the intention of the General Assembly that the transfer required by this act occur seamlessly, and to this end, the Executive Director of the State Budget and Control Board and the State Treasurer shall ensure an orderly transfer that allows no hiatus in the investment of the funds of the retirement systems.

At the same time that Act No. 153 created the Retirement System Investment Commission, the Legislature left in place the authority of the State Treasurer to serve as the “custodian,” of retirement system assets. S.C. Code Ann. Section 9-1-1320 provides that

[t]he State Treasurer shall be the custodian of the funds of the [Retirement] System. All payments from such funds shall be made by him only upon vouchers signed by two persons designated by the [Budget and Control] Board.

Other statutes addressing the State Treasurer's role as custodian of the Retirement System funds were left in place as well. *See*, §§ 9-3-560 [Treasurer shall be ex officio treasurer and custodian of the contribution fund]; 9-5-470 [same]; 9-8-170 [State Treasurer shall be the custodian of the funds of the Retirement System for Judges and Solicitors]; 9-9-160 [State Treasurer shall be the custodian of the funds of the Retirement System for members of the General Assembly]; 9-10-80 [State Treasurer is the custodian of the funds of the National Guard Retirement System]; 9-11-250 [State Treasurer is the custodian of the South Carolina Police Officers Retirement System].

Thus, it may be seen that with the passage of Act No. 153 of 2005, the General Assembly carefully established a system for the investment of assets of the state retirement systems. Such a system has three basic components. The system designates the State Budget and Control Board as the "trustee" of the retirement systems. The Retirement System Investment Commission possesses the exclusive power of investment and reinvestment. And, the State Treasurer is the "custodian" of the assets. Delineating these general roles is the thrust of your request.

Your questions 1 and 3 seek guidance concerning "the scope of the powers which have been invested in the Commission with regard to the investment and management of Retirement System funds and assets" and the "scope of the powers which have been vested in the State Treasurer with regard to the Commission and investment of Retirement System funds or assets."

#### **Applicable Rules of Statutory Construction**

Our Supreme Court has repeatedly emphasized that "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). The words found in the statute must be given their "plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459. "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5<sup>th</sup> ed. 1992)). Statutes, as a whole, must receive practical, reasonable and fair interpretation, consonant with the purpose, design and policy of the lawmakers." *TNS Mills, Inc. v. S.C. Dept. of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998). When confronted with an undefined statutory term, the Court must interpret the term in accord with its usual and customary meaning. *Strother v. Lexington County Recreation Commission*, 332 S.C. 54, 504 S.E.2d 117 (1998). Also, we must construe the various provisions, if possible, consistently with the rule that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result, *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 536 S.E.2d 372 (2000).

#### **Investment Powers of Commission**

Our Supreme Court has termed the power to "invest and reinvest" to be a broad one. *South Carolina Nat. Bank of Chas. v. Johnson*, 260 S.C. 585, 197 S.E.2d 668 (1973). As one decision stated, "[a] trustee is given wide discretion in making investments." *Old Colony Trust Co. v. Comstock*, 195

N.E. 389, 392 (Mass. 1935). Examination of Article 3, of Chapter 16 of Title 9 entitled "Investment of Funds" confirms the broad authority bestowed upon the Retirement System Investment Commission with respect to the power to invest and reinvest and to manage the assets of the retirements systems. Section 9-16-315(G) provides as follows:

(G) The Retirement System Investment Commission is established to invest the funds of the retirement system. All of the powers and duties of the State Budget and Control Board as investor in equity securities and the State Treasurer's function of investing in fixed income instruments are transferred to and devolved upon the Retirement System Investment Commission. To assist the commission in its investment function, it shall employ a chief investment officer, who under the direction and supervision of the commission, and as its agent, shall develop and maintain annual investment plans and invest and oversee the investment of retirement system funds. The chief investment officer serves at the pleasure of the commission and must receive the compensation the commission determines appropriate. The commission may employ the other professional, administrative, and clerical personnel it determines necessary and fix their compensation. All employees of the commission are employees at will. The compensation of the chief investment officer and other employees of the commission is not subject to the state compensation plan.

In addition, § 9-16-340 further provides:

**§ 9-16-340. Investment of retirement systems assets; annual investment plan; adoption and review.**

(A) The commission, acting through the chief investment officer, shall invest and reinvest the assets of the retirement systems as provided in Section 9-1-1310. The commission may employ or retain administrators, agents, consultants, or other advisors it considers necessary with respect to making investments. The chief investment officer may use the services of the State Treasurer in making nonequity security investments as the chief investment officer determines appropriate.

(B) After receiving the proposed plan of the chief investment officer, the commission shall adopt an annual investment plan, which must be implemented by the commission through the chief investment officer. The commission shall regularly review the plan implementation and make amendments as it considers appropriate. The plan must include the minimum and maximum portions of system assets that may be allocated to equity investments on an ongoing basis not to exceed seventy percent.

Moreover, as noted above, § 9-16-20 specifies that the Retirement System Investment Commission "has the *exclusive* authority subject to this chapter and Section 9-1-1310, to invest and manage" Retirement System assets. (emphasis added). The word "exclusive" means "excluding or tending to exclude all others; shutting out other considerations, happenings, existences, etc." *New World Dictionary* (2d College Ed.). Such phraseology, as well as the other statutory provisions, referenced above, clearly demonstrate that the Legislature intended that the Commission, and the Commission alone, possesses responsibility with respect to the investment and reinvestment of retirement system

assets. The only limitations contained in § 9-1-1310 is the designation of the Budget and Control Board as trustee and the enumeration of the many investments which the Commission is authorized to make. No mention in § 9-1-1310 is made with respect to the State Treasurer.

Likewise, Chapter 16 of Title 9 does not refer to the State Treasurer, except in § 9-16-315 and § 9-16-340. Section 9-16-315 provides in pertinent part:

(A) There is established the Retirement System Investment Commission (RSIC) consisting of six members as follows:

- (1) one member appointed by the Governor;
- (2) the State Treasurer, ex officio;
- (3) one member appointed by the Comptroller General;
- (4) one member appointed by the Chairman of the Senate Finance Committee;
- (5) one member appointed by the Chairman of the Ways and Means Committee of the House of Representatives;
- (6) one member who is a retired member of the retirement system who shall serve without voting privileges. This representative member must be appointed by unanimous vote of the voting members of the commission.

(B) The State Treasurer may appoint a member to serve in his stead. A member appointed by the State Treasurer shall serve for a term coterminous with the State Treasurer and must possess at least one of the qualifications provided in subsection (E). Once appointed, this member may not be removed except as provided in subsection (C).

(C) Except as provided in subsection (B), members shall serve for terms of five years and until their successors are appointed and qualify, except that of those first appointed, the appointees of the Comptroller General and the Chairman of the Senate Finance Committee shall serve for terms of three years and the appointee of the Chairman of the Committee on Ways and Means and the representative appointee shall serve for terms of one year. Terms are deemed to expire after June thirtieth of the year in which the term is due to expire. Members are appointed for a term and may be removed before the term expires only by the Governor for the reasons provided in Section 1-3-240(C).

(D) The commission shall select one of the voting members to serve as chairman and shall select those other officers it determines necessary, but the State Treasurer may not serve as chairman.

(E) A person may not be appointed to the commission unless the person possesses at least one of the following qualifications:



- (1) the Chartered Financial Analyst credential of the CFA Institute;
- (2) the Certified Financial Planner credential of the Certified Financial Planner Board of Standards;
- (3) at least ten years professional securities broker experience;
- (4) at least ten years professional actuarial experience;
- (5) at least ten years professional teaching experience in economics or finance; or
- (6) an earned Ph.D. in economics or finance.

(F) Not including the State Treasurer, no person may be appointed or continue to serve who is an elected or appointed officer or employee of the State or any of its political subdivisions, including school districts.

As noted above, Subsection (G) of § 9-16-315 states in pertinent part that “[a]ll the powers and duties of the State Budget and Control Board as investor in equity securities and the State Treasurer’s function of investing in fixed income instruments are transferred to and devolved upon the Retirement System Investment Commission.” Section 9-16-340 further authorizes “[t]he chief investment officer [to] ... use the services of the State Treasurer in making nonequity security investments as the chief investment officer determines appropriate.”<sup>1</sup>

#### **Treasurer As Custodian of Retirement System Assets**

Thus, any independent authority of the Treasurer (aside from his membership on the Retirement Investment System Commission, as well as the Budget and Control Board) with respect to the retirement systems’ management and investment of assets may be derived only from his capacity as custodian of the retirement funds. However, our research indicates that the position of a “custodian” of funds is primarily ministerial in nature and would not bestow upon the State Treasurer any authority regarding the investment of retirement assets. As discussed above, such investment and reinvestment function lies exclusively with the Retirement System Investment Commission.

There exists a wealth of authority defining the role of a “custodian” of funds, whether these funds be retirement assets, public funds or other funds. See, *University of S.C. v. Elliott*, 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966) [“Insofar as the clerk’s relation to the funds was concerned, he was simply the lawful custodian of funds deposited by a litigant, pending in the termination of the litigation.”]; *County Commrs v. Winnsboro Nat. Bank*, 7 S.C. 78 (1876) [“the County Treasurer [is] the legal custodian of the fund ... whose duty it was to see that proper steps were taken to prevent the funds in the treasury from being improperly disposed of.”]. *Senske v. Fairmont & Waseca Canning Co.*, 48 N.W.2d 640, 645 (Minn. 1951) [“By the wording of the statute, it is quite clear that the state treasurer as

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<sup>1</sup> The West Virginia Public Employment Retirement System (PERS) is similar to South Carolina’s in the sense that the duties of investment have, in West Virginia, been delegated to the State Board of Investments, while the “PERS Board of Trustees ... has the responsibility of administering and managing the PERS, effectuating the statute. *Dadisman v. Moore*, 384 S.E.2d 816, 821-822 (W.Va. 1989).

custodian is possessed of no discretionary power over the disbursement of total disability benefits from such fund, but is vested only with the ministerial duty to disburse its proceeds.”]; *State ex rel. Clark v. Bailey*, 44 P.2d 740, 746 (Mont. 1935) [“The municipality is merely a custodian, and its duties relative to such funds is ministerial.”]; 20 C.J.S. *Counties* § 195 [A county treasurer is the proper custodian of county funds .... As to a fund received and held by a county treasurer, he or she holds a fiduciary relationship constituting the treasurer a bailee ... . However, the treasurer is a special bailee, with special obligations imposed by the office.”]. As we stated in Opinion No. 1802, dated February 26, 1965,

[i]n *Rhea v. Brewster* (Iwa. 1906), 107 N.W. 940, the court held that where a public officer, as a clerk of court, was the custodian of funds, these funds did not place him in the category of owner of the public funds but a mere custodian thereof and accountable for interest which he received from a bank or other depository of such funds.

Particularly instructive is *Day v. New Hampshire Retirement System*, 635 A.2d 493 (N.H. 1993), a case which distinguished the role of the State Treasurer as custodian of retirement assets from the duties to invest those assets. The issue in *Day* was whether the New Hampshire Retirement System was in privity with the State Department of Transportation or any other executive agency and thus was collaterally estopped as to a particular issue. The Court held that estoppel was inapplicable and, in doing so, described the operation of the retirement system as part of its reasoning. Noting that the retirement system “is administered by a thirteen-member board,” and “is a contributory one to which both employers and employees are required to contribute,” the *Day* Court further explained:

[t]he state treasurer has historically been the custodian of retirement system funds, but the board [of trustees of Retirement System] retains the power to appoint whomever it chooses to hold that position ... . Even though the state treasurer may serve as custodian, the funds are not part of the State’s general treasury and may be used only for providing retirement benefits ... . The board has the power to invest funds in accordance with the limitations placed upon any domestic life insurance company, ... and may charge the fund for the advice of investment advisors and actuaries when it is empowered to employ .... The board may always engage legal counsel for investment, federal and tax matters and, with the approval of the attorney general, may engage counsel for all other matters ... .

We hold that because of the distinct identity, constituency and interests of the retirement system, is not in privity with executive agencies of the State, including the department of transportation.

635 A.2d at 496-497. See also, *Milliman, Inc. v. Md. State Retirement and Pension System*, 25 A.3d 988, 1009 (Md. 2011) [adopting *Day*’s reasoning].

However, it is also well recognized that where the State Treasurer is acting as the custodian of trust funds, he “is acting in a fiduciary capacity ....” *Whitbeck v. Estate of Ramsay*, 74 Ill. App. 524, 543 (1896). Moreover, as the Supreme Court of Minnesota, stated in *Senske v. Fairmont and Waseca Canning Co.*, *supra* even though the state treasurer, as custodian is “vested only with the ministerial duty to disburse ... proceeds”, one cannot assume, however, “that because his ministerial role gives him no

discretionary control over the payment of benefits that he does not have, by virtue of the inherent nature of his custodianship, a right and a duty, for the preservation of the fund, to resist disbursements and invasions which have no basis in law.” See also, *Olin Mathieson Chem. Corporation v. Planters Corporation*, 236 S.C. 318, 325, 114 S.E.2d 326-327 (1960) [“Ordinarily, the treasurer is the custodian of the funds of the corporation, and its disbursing officer. The treasurer of a corporation holds the corporate funds in trust for the benefit of the corporation ....”]; *County Commr’s. v. Winnsboro National Bank, supra* [“... the County Treasurer [is] the legal custodian of the fund, and whose duty it was to see that proper steps were taken to prevent the funds in the treasury from being improperly disposed of, either through the forms of the law, or contrary to them ....”].

Section 9-16-40(3) mandates that “a trustee, commission member or *other fiduciary* shall discharge duties with respect to a retirement system” with the “care, skill and caution under the circumstances then prevailing which a prudent person acting in a like capacity and familiar with those matters, would use in the conduct of an activity of like character and purpose.” We deem the Treasurer, as custodian of the retirement funds, even though he acts in a ministerial capacity, to be an “other fiduciary” as described in § 9-16-40(3), with the fiduciary duties appertaining thereto.

Thus, in our opinion, based upon the foregoing authorities, the State Treasurer, as custodian of the various retirement assets, possesses no authority *as State Treasurer*, regarding the investment of retirement funds. The Treasurer, as custodian of the retirement assets, is a ministerial officer, responsible for the proper disbursement of the funds. While the Treasurer, as a member of the Commission plays a role in these investment functions, as Treasurer, he does not. His duties as custodian are principally ministerial. As discussed above, such duties encompass disbursement of the funds upon instruction and protection of those funds as a bailee.

We hasten to emphasize again, however, that as custodian, the Treasurer is also a fiduciary and is responsible for the safekeeping of the retirement funds. As was said in the *Senske* case, and also noted in *Winnsboro National Bank* by virtue of the inherent nature of the Treasurer’s custodianship, he has a duty to preserve the funds and to “resist disbursements and invasions [of the funds] which has no basis in law.”

#### **Budget and Control Board as Trustee**

We turn now to the role of the trustee of the Retirement Systems funds. As noted above, § 9-1-1310 specifies that the Budget and Control Board “is the trustee of the retirement system ... .” However, the various retirement statutes delineate few, if any, duties of the Board as trustee. Section 9-16-20 does make it clear that “[a]ll assets of a retirement system are held in trust.” And subsection (C) of § 9-16-20 provides that “[t]he board shall hold the assets of the retirement systems in a group trust under Section 401(a)(24) of the Internal Revenue Code that meets the requirements of Revenue Ruling 81-100, 1981-1 C.B. 326, as amended by Revenue Ruling 2004-67.” Such Subsection further states:

Any group trust shall be operated or maintained exclusively for the commingling and collective investment of funds from other trusts that it holds. The board shall be permitted to hold in this group trust funds that consist exclusively of trust assets held under plans qualified under Internal Revenue Code Section 401(a), individual retirement accounts that are exempt under Internal Revenue Code Section 408(e), and eligible

governmental plans that meet the requirements of Internal Revenue Code Section 457(b). For this purpose, a trust includes a custodial account under Internal Revenue Code Section 401(f) or under Internal Revenue Code Section 457(g)(3).

Section 9-16-40 also includes a “trustee” in its establishment of standards as a fiduciary for the “discharge [of] duties with respect to a retirement system,” indicating that the Budget and Control Board possesses fiduciary responsibilities. Likewise, a “trustee” is included in § 9-16-60, requiring compliance with Sections 9-16-30, 9-16-40 and 9-16-50, to be determined “in light of the facts and circumstances existing at the time of the trustee’s, commission’s, or fiduciary’s decision or action and not by hindsight.” Thus, there is no question that the Legislature intended the Budget and Control Board to function as a “fiduciary” in the exercise of its duties as “trustee” of the funds of the Retirement Systems. Moreover, the five Retirement Systems are placed under the administration of the Budget and Control Board. See, §§ 9-1-20, 9-8-20; 9-9-20 - 9-11-20. See also, §§9-1-210; 9-8-30(1); 9-9-330(1); 9-11-30(1).

The question we must now address is the responsibility of the Budget and Control Board as “trustee” with respect to the investment and management of retirement assets. As we have noted, when confronted with an undefined statutory term, the Court will interpret the term in accord with its usual and customary meaning. *Strother v. Lexington Co. Recreation Comm., supra*. Thus, we believe a court would determine that the duties of the Budget and Control Board as “trustee” would be in keeping with the usual and customary duties imposed upon a trustee under the common law, South Carolina statutes and general authorities. It is well recognized in South Carolina that there is a presumption that the common law remains in full force, absent a clear change by an unambiguous statute. *State v. McAteer*, 344 S.C. 644, 532 S.E.2d 865 (2000).

We are fully cognizant of the fact, as already stated, that the Retirement System Investment Commission, as a fiduciary, possesses the “exclusive” authority to invest and reinvest retirement system assets. Thus, like the Treasurer, the Budget and Control Board, as the trustee of the Retirement Systems, possesses no direct authority in this regard, such authority having been transferred to the Commission by Act No. 153 of 2005.

What then are the duties, if any, of the Budget and Control Board as trustee in this regard? Our Supreme Court has stated that “[t]he cardinal duties, and therefore liabilities of trustees are these: (1) to carry out the trust (2) to use due care thereabout; and (3) to act in good faith thereabout.” *Klugh v. Seminole Securities Co.*, 103 S.C. 120, 87 S.E. 644, 646 (1916). Further, the Court in *Klugh* stated:

[i]t is true a trustee must exercise about the performance of his trust due care, and he must do that independently of the question of good faith. But the law does not exact of the trustee the exercise of extraordinary care. If he is a man of common prudence, and used that prudence about his own business, he is not required to use more than that about his neighbor’s business, which means the business of the cestui que trust.

*Id.* And, in an Opinion dated August 20, 1963, we explained:

[t]he trustee of a trust, private or charitable, is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person. Thus, it has

been recognized that it is improper for the trustees to sell property to a third person for the purpose of benefitting the third person rather than the trust estate. See 1 Restatement of Trusts 2d Section 170 q. The duties of the trustees of a charitable trust are similar to the duties of a private trust. The duties of the TranSouth Educational Foundation include use of reasonable care and skill to preserve the trust property, and the trustees generally have the duty to defend actions which may result in a loss to the trust estate, unless it is unreasonable under all the circumstances to make such defense. 1 Restatement of Trusts 2d Section 379.

Further, our Supreme Court in *Hamiter v. Retirement System of the S. C. Budget and Control Board*, 326 S.C. 93, 96-97, 484 S.E.2d 586, 587-588 (1997) recognized that general principles of trust law are applicable to the Budget and Control Board's duties as trustee, and that the Board, as trustee, holds legal title to the retirement assets. Although decided prior to Act No. 153 of 2005, the Court's decision regarding the Board's role as trustee is still applicable today in this regard. In *Hamiter*, the Court stated:

[a] trustee is a person holding legal title to property under an express or implied agreement for the benefit and use of another. *Neel v. Clark*, 193 S.C. 412, 8 S.E.2d 740 (1940). The Senate retains no control over these funds. Rather under the Act, the State Budget and Control Board manages these funds ....

S.C. Code Ann. § 9-1-1310 (1986) (Board shall be trustee of funds.) Thus, the Senate is not a trustee of these retirement funds and owes Hamiter no fiduciary duty.

In this same regard, it has been stated that

[a] trustee is a person who holds legal title to property under an express or implied agreement to apply it, and the income arising from it, to the benefit and use of another person ... . In a trust relationship, the burdens belong to the trustee ... . A trustee may also be defined as a person to whom property or funds have been committed in the belief or trust that the person will hold and apply them for the benefit of those who are entitled according to an expressed intention either by the parties themselves or by the deed, will, settlement, or arrangement of another ... . A fiduciary acting in a representative capacity is a different person for juridicial purposes from the same person acting in an individual capacity ... .

90 C.J.S. *Trusts*, § 2.

The West Virginia statutory retirement scheme, PERS, is also instructive here. In *Dadisman, supra*, the West Virginia Supreme Court of Appeals deemed the West Virginia PERS, created by statute to "provide an orderly general retirement system for public employees ...," as a "classic example of a statutory trust." 384 S.E.2d, *supra* at 821. Further, the Court defined the "trust" as

... a legal relation between two or more persons by virtue of which one is bound to hold property to which he has the legal title, for the use or benefit of the other or others who have an equitable title or interest. It is a right, enforceable in equity, to the beneficial



enjoyment of property, real or personal, of which the legal title is in another. The person so holding the legal title or interest is called the "trustee," and the one having the equitable interest and entitled to the benefit is the beneficiary or "cestui que trust." The person creating the trust is called the "trustor" or "settlor." An essential feature of trusts is the division of the title to property, the vesting of legal title in the trustee and of the equitable title or beneficial interest in the cestui que trust.

*Id.*, quoting R. Kimbrough, *Summary of American Law*, § 22:1 (1974). Continuing, the West Virginia Court described the PERS trust more specifically as follows:

[t]he "body corporate" of the public employees retirement system constitutes a trust. The terms of the trust contract are spelled out in the PERS statute. ... Membership is mandatory for employees of participating public employers ... . The members and their employers are the "trustors" or "settlers" and the retirants, active and deferred, and their survivors are "cestui que trust," entitled to the benefits of the trust.

*Id.*

The Court in *Dadisman* commented upon the fiduciary duties of the trustee (there, the PERS Board of Trustees), as well as the State Board of Investment. With respect to the State Board of Investment, the Court noted:

... the Respondent Board of Investments has the highest fiduciary duty to see to it that the PERS funds are placed in secure, not speculative, investments .... "A fiduciary relation exists between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation." Restatement (Second) Torts § 874 comment a (1977). Thus, the Board of Investments has a fiduciary relation with the PERS trust and participants and must invest employee earned pension systems assets consistently with the highest standards of fiduciary duty. It must utilize competent, educated and trained financial managers to seek and manage high quality investments and to avoid speculative commercial and industrial ventures and schemes.

*Id.*, at 831-832. And, with respect to the PERS Board of Trustees, the Court explained:

[b]y the very use of the term "Trustee," as well as by the allocation of responsibilities to them, the Legislature has placed the Respondent trustees in a fiduciary relationship with PERS and its participants. Other courts examining the role of statutorily designated trustees judge their actions by the high standards to which fiduciaries are held. See, e.g., *Withers v. Teachers' Retirement System*, 447 F.Supp. 1248 (S.D.N.Y 1978), *aff'd.*, 595 F.2d 1210 (1979); *In re State Employees' Pension Plan*, 364 A.2d 1228 (Del. 1976); *Weaver v. Evans*, 80 Wash.2d 461, 495 P.2d 639 (1972) (en banc). We conclude that the Respondent Trustees have the highest fiduciary duty to maintain the terms of the PERS trust, as spelled out in the statute.

*Id.* at 822.

In view of the exclusive nature of the Commission's duties with respect to the investment of retirement assets, we must treat the Commission and the Board, as trustee, as co-fiduciaries, but with certain duties expressly assigned exclusively to one trustee. Accordingly, we look to the general duties of a fiduciary where specific duties are reserved exclusively to the other fiduciary.

The *Restatement* 3d on Trusts (§ 81) specifically speaks to this situation. Section 81 deals with the "Duty With Respect to Co-Trustees" and the Comments thereto are particularly instructive. Comment (b) states in pertinent part:

[t]hus, trust provisions may and often should allocate roles and responsibilities among the trustees, or relieve one or more of the trustees of duties to participate in particular aspects of the trust's administration. A settlor may even designate, or provide for the appointment of, a "special trustee" to handle only one or more specified functions or types of decisions (e.g., the exercise of tax-sensitive powers of distribution, when the general trustee or trustees are beneficiaries of those powers), with the special trustee having no authority in or responsibility for other aspects of the trust's administration. The settlor's limiting of a trustee's functions or allocation of functions among the trustees usually, either explicitly or as a matter of interpretation, has the effect of relieving the trustee(s) to whom a function is not allocated of any affirmative duty to remain informed or to participate in deliberations about matters within that function. Similarly, exculpatory provisions (§ 96) may be designed to apply selectively.

Even in matters for which a trustee is relieved of responsibility, however, if the trustee knows that a co-trustee is committing or attempting to commit a breach of trust, the trustee has a duty to take reasonable steps to prevent the fiduciary misconduct. See Comments *d* and *e*. Furthermore, absent clear provision in the trust to the contrary, even in the absence of any duty to intervene or grounds for suspicion, a trustee is entitled to request and receive reasonable information regarding an aspect of trust administration in which the trustee is not required to participate.

In Comment (d) referenced above, it is stated that "[w]hen a trust has multiple trustees each trustee ordinarily ... has a duty to exercise reasonable care to prevent a co-trustee from committing a breach of trust." In addition, there is a duty of co-trustees to cooperate. As was said in *Ball v. Mills*, 376 So.2d 1174, 1182 (Fla. App. 1979), "co-trustees owe to each other, as well as to the beneficiaries ... the duty and obligation to so conduct themselves as to foster a spirit of mutual trust, confidence, and cooperation to the extent possible." The Florida Court went on to say, however, that "[a]t the same time, the trustees should maintain an attitude of vigilant concern for the proper administration of protection of trust business and affairs." *Id.*<sup>2</sup>

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<sup>2</sup> Interestingly, the West Virginia Court in *Dadisman*, *supra*, concluding that pension funds had been invested in speculative investments, ordered both the Trustees and the Board of Investments to "invest the System's funds in compliance with the highest standards of fiduciary duty, and the Board of Investments must make immediate necessary accounting adjustments to rectify past investments not consistent with those standards." 384 S.E.2d, *supra* at 833.

Again, it should be noted that Subsection (C) of § 9-16-20 expressly states that the Budget and Control Board “shall hold the assets of the retirement systems in a group trust ....” The group trust was created for the purpose of “commingling and collective investment of funds from other trusts that it holds.” Such specific and express language reinforces the principle that the Budget and Control Board retains important fiduciary duties even though the Board now possesses no direct investment authority. Thus, the legal responsibilities of a co-trustee, referenced above, would be applicable to the Budget and Control Board. In short, while the Board does not make investments of the retirement assets, as a co-trustee with independent fiduciary responsibilities to the beneficiaries, the Board and the Retirement System Investment Commission, must keep each other fully informed and work closely together to insure that the beneficiaries of the retirement trust are fully protected and well served.

### Conclusion

Pursuant to Act No. 153 of 2005, the General Assembly has established the structure for the administration of the State Retirement System, which constitutes a statutory trust. In our opinion, the Retirement System Investment Commission is given *exclusive authority* to “invest and manage” Retirement System assets in accordance with Art. X, § 16 of the state Constitution and the statutory guidelines which the Legislature has set forth. No other agency or entity is now authorized by law to invest these funds, Act No. 153 having transferred all investment authority to the Commission. Thus, in this regard, we concur in your view that the Investment Commission’s powers and responsibilities are “very broadly framed.”

Such does not mean, however, that the other entities involved in the Retirement System - the Budget and Control Board, as trustee, and the State Treasurer, as custodian, do not themselves have important responsibilities in this regard. The Investment Commission’s authority is the “investing and managing assets” of the Retirement System. See, § 9-16-50. [describes how the Commission shall perform its investing and managing function]. We note also that the Budget and Control Board remains the “trustee” of the Retirement System, holding the “legal title” to such assets on behalf of and in trust for the beneficiaries of the trust. *Hamiter, supra*. The five Retirement Systems are placed under the administration of the Budget and Control Board. See, §§ 9-1-20; 9-8-20; 9-9-20; 9-11-20. See also §§ 9-1-210; 9-8-30(1); 9-9-30(1); 9-11-30(1). *Hamiter, Id.* The State Treasurer remains the “custodian” of the Retirement System assets, and acts as a bailee of those funds, possessing the ministerial duty to disburse such funds upon proper warrant or other directive authorized by law.

Each of these agencies – the Retirement System Investment Commission, the Budget and Control Board and the State Treasurer possesses a fiduciary duty to the statutory trust. Each must have the protection and preservation of that trust uppermost in mind and actions. See § 9-16-40(3) [a “trustee, commission member or other fiduciary shall discharge duties with respect to a retirement system with the care, skill and caution under the circumstances then prevailing ... ”]. As the West Virginia Court stated in *Dadisman, supra*, involving a similar statutory scheme, the entity performing the investment function possesses a fiduciary relation with the trust and thus “has the highest fiduciary duty to see to it” that the retirement funds are invested in secure investments. In that instance, the Court intervened when the investment authority of the Investment Board had been abused by investment in speculative ventures. Here, the Budget and Control Board, as trustee, has been placed “in a fiduciary relationship” with the trust and its participants. *Id.* As trustee, the Board possesses all common law responsibilities as trustee, in addition to its statutory duties. While the Board no longer possesses the authority to invest, the



Mr. Borden  
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statutes require that the Board holds the assets of the retirement system in a group trust. That group trust is created so that collective investment may be made. Thus, as a co-trustee, the Budget and Control Board must independently exercise care to protect the trust, including acting accordingly if it deems investments are not being carried out in the best interests of the trust. *Dadisman, Id.*

Similarly, even though the Treasurer, as custodian, acts in a ministerial role, he does so as a fiduciary. We deem the State Treasurer to be an "other fiduciary" pursuant to § 9-16-90(3). Thus, the Treasurer may not disburse funds which have no basis in law. In addition, the Treasurer is not only the custodian of the assets, but also a member of the Budget and Control Board, the trustee of the funds, as well as a member of the Retirement System Investment Commission.

Accordingly, in view of the fact that each of the three agencies possess the highest of fiduciary duties owed to the Retirement System trust, it is essential that each keep the other fully informed and that each cooperate fully with their fellow fiduciaries. The important fiduciary duties of each were designed by the Legislature as a check and balance. It is indeed the Retirement System Investment Commission which has been given the exclusive investment function by the Legislature. However, the other fiduciaries – the Budget and Control Board, as trustee, and the Treasurer, as custodian – also owe an independent fiduciary duty to protect the trust and to insure that the trust is fully preserved. Your letter indicates that the Commission "works closely with the State Treasurer, as well as the Retirement System, in monitoring and maintaining adequate cash balances to meet the needs of the Retirement System." This close cooperation and sharing of all available information should continue and even be improved upon, if possible. Each fiduciary should recognize that it is the trust, i.e. the Retirement System assets, which the law has charged them to protect. As the Florida Court stated in *Ball, supra*, "co-trustees owe to each other, as well as to the beneficiaries ... the duty and obligation to so conduct themselves as to foster a spirit of mutual trust, confidence and cooperation to the extent possible."

In setting forth our legal conclusions herein, by no means do we suggest or imply that investments are not being made for the trust in full and complete performance of the fiduciary duties imposed upon the Retirement System Investment Commission. Indeed, your letter recognizes the high standards of fiduciary responsibility placed upon the Commission. And, it appears to us that the Commission is doing an excellent job in carrying out its fiduciary responsibilities. All that is presented herein is our best effort to state the law of fiduciary responsibilities of the three key components of the Retirement System, and to provide legal guidance for all as to what the law expects of them as fiduciaries. We believe that those responsibilities are being and will be fully performed consistent with the highest fiduciary duties owed under the law.

Sincerely,

A handwritten signature in blue ink, appearing to read "Robert D. Cook", is written over a horizontal line.

Robert D. Cook  
Deputy Attorney General

RDC/an