ALAN WILSON
ATTORNEY GENERAL

April 20, 2012

The Honorable Curtis M. Loftis, Jr.
South Carolina State Treasurer
P. O. Box 11778
Columbia, South Carolina 29211

Dear Treasurer Loftis,

You seek our opinion "regarding a co-fiduciary's duty to provide information to another co-fiduciary and a co-fiduciary's duty to request from another co-fiduciary information that he deems necessary to perform his duties." By way of background, you state the following:

> The five public pension plans operated by the State of South Carolina ("SCRS") have assets that approximate $25 billion and a huge unfunded liability that places a burden on the State of South Carolina, the participants and beneficiaries of the five public pension plans, and the taxpayers of South Carolina. The assets of the SCRS are not funds of the State but are held in trust as provided in Section 9-16-20. S.C. Code Ann. § 9-1-1310(C). Under South Carolina law, the Budget and Control Board ("B&CB") is the trustee of the SCRC, S.C. Code Ann. § 9-1-1310, and has legal title to the assets of the SCRS, Op. Att'y Gen'l, p. 14 (Nov. 16, 2011). The State Treasurer is the custodian of the assets in the SCRS. S.C. Code Ann. § 9-1-1320. The six-member Retirement System Investment Commission ("RSIC") has the responsibility to invest the assets of the SCRS. *See* S.C. Code Ann. § 9-16-20(A).
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> The State Treasurer has a unique role regarding the SCRS. First, the State Treasurer serves as custodian of the funds in the SCRS. S.C. Code Ann. § 9-1-1320. In this role, he serves as an "other fiduciary" with respect to the SCRS pursuant to S.C. Code Ann. § 9-16-40. Op. Att'y Gen, p. 12 (Nov. 16, 2011). Second, the State Treasurer serves ex-officio as a member of the six-member RSIC. S.C. Code Ann. § 9-16-315(A)(2). The RSIC is responsible for investing the assets of the SCRS, hiring staff, and establishing investment objectives. *See* S.C. Code Ann. §§ 9-16-50, 9-16-315(G), 9-16-330(A). As a member of the RSIC, the State Treasurer is also a fiduciary. S.C. Code Ann. § 9-16-10(4)(c). Finally, the State Treasurer is a member of the B&CB, S.C. Code Ann. § 1-11-10, which has legal title to the assets of the SCRS and serves as trustee of the SCRS.
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> The State Treasurer serves as a fiduciary or a trustee in each of his roles regarding the SCRS. Failure to perform his fiduciary duties could be detrimental to the SCRS, its participants and beneficiaries, and State's taxpayers and could result in personal liability for the State Treasurer, S.C. Code Ann. § 9-16-70(A). He therefore has the need for

timely and complete information to perform his duties. Accordingly, the specific issues for which the State Treasurer is seeking your opinion include the following:

1. Whether the RSIC and its staff have a duty to provide information to the State Treasurer regarding each of the State Treasurer's roles in the SCRS.
2. Whether the State Treasurer has a duty to request from the RSIC and its staff information and to request to examine all relevant records of the co-fiduciary that the State Treasurer deems necessary to fulfill his trustee and other fiduciary responsibilities regarding the SCRS.
3. If the answer to issue number 2 is yes, whether the RSIC and its staff have a duty to timely provide to the State Treasurer the requested information and to timely access to the State Treasurer to examine relevant records of the RSIC.
4. Whether the scope of information that the RSIC and its staff must provide to the State Treasurer is limited in any fashion.

As background, the information that the RSIC and its staff may need to provide to the State Treasurer or that the State Treasurer may need to fulfill his fiduciary duties may include, but is not limited to, the following: investments made by the RSIC or its staff; additional information on investments recommended to the RSIC by its staff, third-party investment managers used; contracts entered into with third-party managers and so called strategic partners; information about outside custodians of SCRS' funds; investment management fees paid and other costs incurred by the RSIC; soft-dollar benefits received from outside persons by members of the RSIC or its Staff, and documentation of initial and ongoing due diligence procedures performed on investment managers by the RSIC, its staff, and others on their behalf.

Law / Analysis

In an Opinion, dated November 16, 2011, we addressed at considerable length the interaction of various statutes "'and the scope of the powers which have been vested in the State Treasurer with regard to the [South Carolina Retirement System Investment] Commission and Investment of Retirement System funds or assets.'" This Opinion answers the questions you have raised in your letter concerning the duty of Retirement System co-trustees to cooperate with each other and specifically, in that regard, to provide requested information to each other. In the 2011 Opinion, we concluded that "[p]ursuant 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." We further stated as follows:

> 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 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."*

(emphasis added).

The 2011 Opinion also quoted the following language from *Restatement* 3d on *Trusts* § 81 regarding the duty of co-trustees, particularly as to the duty of co-trustees to share information with each other:

> [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 or distributions, 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 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.
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> 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 ... . *Furthermore, absent clear provision in the trust to the contrary, even in the absence of any duty to intervene or grounds of 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.*

(emphasis added).

Another leading treatise, Bogert, *The Law of Trusts and Trustees*, § 584, confirms the foregoing conclusions contained in the 2011 Opinion. In Bogert, it is stated quite clearly that "[t]rustees also are under a duty to furnish information relevant to the administration of the trust to co-trustees. The duty ensures that each Trustee can fully participate in the administration of the trust, carry out the trust purposes and terms, avoid possible liability for breach of trust, and prevent or redress a breach of trust by a co-trustee." (citing *Benedict v. Amaducci*, 1993 WL 87937 (S.D.N.Y. 1993; *Equitable Trust Co. v. Schwebel*, 32 F.Supp. 241 (E.D. Pa. 1940), affd. 117 F.2d 738 (3d Cir. 1941); *Henley v. Birmingham Trust Nat. Bank*, 322 So.2d 688 (Ala. 1975); *Pa. Co. v. Wilmington Trust Co.*, 186 A.2d 751 (Del. 1962), affd., 200 A.2d 441 (Del. 1964).

Previous opinions of this Office are in accord. We have emphasized, by way of analogy, that a custodian of public funds is held to the highest standards of a trustee. In *Op. S.C. Atty. Gen.*, June 2, 2003 (2003 WL 21471508), we stated:

> "typically, a public officer responsible for the handling and collection of public funds is considered a trustee, a bailee, or an insurer with all applicable duties and responsibilities of such funds or property ...." See *Op. Atty. Gen.*, dated March 3, 1997. Such public funds
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> > ... are considered trust funds, and he [the public officer] is responsible to the same degree as the trustee of a private fund. It is the policy of the law to hold an official custodian of public funds to strict accountability, *and he must exercise ordinary diligence to keep informed of the conditions of funds subject to his disposal.* 67 C.J.S., *Officers*. § 211.
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> *Id.*, When presented with similar questions our Supreme Court has expressed general agreement with the principle stated above. For example, in *Sumter Co. v. Hurst*, 189 S.C. 316, 319, 1 S.E.2d 242 (1939), the Court held that "when a public officer receives money for the public use, he is a trustee to received such monies and to pay them to the public official or function for whom or which they were intended."

(emphasis added). Thus, we have found that a custodian of funds must "'exercise ordinary diligence to keep informed of the conditions of funds subject to his disposal.'" *Id.*

Conclusion

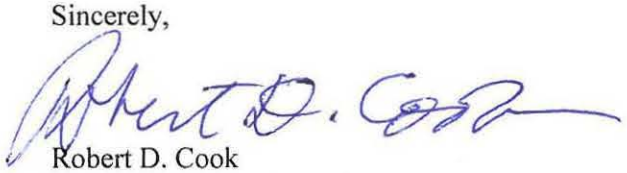
We are of the opinion that the November 16, 2011 Opinion answers the majority of your questions, and that Opinion is herein reaffirmed. As we concluded therein, each of the agencies involved in the operation of the State Retirement Systems – the Retirement System Investment Commission, the Budget and Control Board and the State Treasurer – "possesses a fiduciary duty to the statutory trust." Thus, our further conclusion was that "in view of the fact that each of the three agencies possess[es] 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." Quoting from the Florida

decision in *Ball v. Mills*, 376 So.2d 1174, 1182 (Fla. App. 1979), we stated that "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." Further quoting from *Restatement* 3d on *Trusts* § 81, we stated that "... 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."

With respect to your final question as to whether there are any limitations upon the scope of information which must be provided by one co-trustee to another (such as the RSIC to the Treasurer), we have been unable in our research to find such a limitation. We note that the *Restatement* 3d (§ 81) speaks of the duty of a co-trustee to provide "reasonable information." Bogert states that "[a] co-trustee is entitled to full information from his fellow trustee ...." Bogert, *supra* at § 962, n. 48. Our June 2, 2003 opinion, referenced above, emphasizes that a custodian "must exercise ordinary diligence to keep informed of the conditions of funds subject to disposal."

Thus, as we advised in the November16, 2011 Opinion, a "close cooperation [between the co-trustees] and sharing of *all available information* should continue, and even be improved upon, if possible." Because each of the co-trustees owes the highest fiduciary duty to protect the Retirement trust funds, the rule must be: when in doubt, provide the information to fellow trustees.

Sincerely,



Robert D. Cook
Deputy Attorney General

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