KANSAS BOARD OF REGENTS

To: RPC members
From: Madi Vannaman, Staff Affiliate for Benefits, and Theresa Schwartz, General Counsel
Date: September 1, 2016
Re: Fiduciary Duties Overview; Retirement Plans

The Kansas Board of Regents Retirement Plan is an essential component of the benefits and compensation package available to faculty and staff who serve at the six state universities and the Board Office. This Plan currently has four components: (1) a mandatory plan; (2) a voluntary plan; (3) a long term disability benefit; and (4) an optional phased retirement plan.

Fiduciary Duties for the Mandatory Plan

The Kansas Board of Regents Mandatory Retirement Plan was established by the Kansas Legislature under Internal Revenue Code § 403(b). This Plan provides a retirement program for the benefit of eligible unclassified employees at the state universities and Board Office. Most 403(b) plans are regulated by the Employee Retirement Income Security Act of 1974 (ERISA), which outlines employers' fiduciary duties for employer sponsored 403(b) plans. However, ERISA specifically exempts governmental plans like the Board's Plan.[1] Nevertheless, the Board still has fiduciary duties and has chosen to follow many of the ERISA fiduciary duty rules, as best practice.[2]

The Board exercises these fiduciary duties by and through its Retirement Plan Committee (RPC), staff assigned to oversee administration of the Plan, and expert consultants hired to assist the RPC and staff in meeting these obligations.

The Board's fiduciary duties (and thus the RPC's) for the Mandatory Plan can be summarized as follows:

1. ***Loyalty*****:** The duty of loyalty requires the Board to invest and manage the assets in the Mandatory Plan solely in the interests of the beneficiaries. The Board and RPC must avoid "self-dealing" and consider the interests of the participants first and foremost. Fiduciaries must deal fairly and honestly with participants. The duty of loyalty encompasses impartiality, which is defined as considering any differing interests among the participants, and investing and managing assets, without favoring some participants over others. In other words, the Board and RPC must deal fairly and act in good faith. This duty means that members of the Board and RPC shall not manage plan assets in their own interest, act in ways that are adverse to the interests of the

[1] 29 U.S.C. §§ 1002(32) and 1003(b).
[2] Also helpful as guidance on these duties are the provisions of the Kansas Uniform Prudent Investor Act," K.S.A. 58-2401a *et seq.* http://www.kslegislature.org/li/b2015_16/statute/058_000_0000_chapter/058_024a_0000_article/

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plan or of the participants, or receive any consideration from a party relating to a transaction involving plan assets.

2. ***Prudence*:** What actions are required under the duty of prudence depend upon the circumstances. It usually means using the care, skill and due diligence that a prudent person acting in a like capacity would use under the circumstances then prevailing. To do so, the Board and RPC must not only act prudently in the selection of investment options but also must monitor their performance on an ongoing basis. Being prudent may also include a duty to seek advice and counsel from independent experts when a fiduciary's own ability is not sufficient under the circumstances and necessitate reviewing other matters such as the appropriateness of administrative fees.

3. ***Diversification*:** The Board and RPC must offer diverse investment options unless there is a reasonable determination that the assets are better served without diversifying. The Board and RPC should attempt to ensure investment options offer a sufficiently broad range of alternatives so that the participants can develop reasonable investment portfolios in their accounts. Under this duty, the Board and RPC monitor and replace investment options that are deemed to no longer meet the criteria for which they were selected. This duty also encompasses reviewing all associated costs to ensure that they are appropriate and reasonable in relation to the amount of assets. To do so, the Board and RPC must understand the expenses incurred for plan administration and those expenses imposed on participants for the available investment options, and the Board and RPC must compare those with other providers to ensure that they are reasonable and appropriate.

4. ***Administering the Plan in Accordance with Governing Documents*:** This duty requires the Board and RPC to discharge its duties in accordance with plan documents and other instruments governing the plan. Further, this duty requires knowledge of how the Plan is set up and managed. The documents serve as the foundation for plan operations. The Board and RPC should be familiar with their Plan document, especially when it is drawn up by a third-party service provider, and periodically review the document to make sure it remains current.

5. ***Monitor and Communicate Plan Changes*:** The Board and RPC must ensure that it or its vendors disclose and explain any potential or actual plan changes to the participants. This duty requires monitoring all changes, explaining ambiguous provisions of the plan and affirmatively avoiding misleading participants about how the plan works. Attempts to educate participants concerning their retirement account and options may be associated with the duty to communicate.

In summary, to best ensure that it is meeting its fiduciary duties for the Mandatory Plan, the RPC should review its responsibilities as a fiduciary regularly, actively oversee matters involving or impacting the Mandatory Plan, utilize the assistance of experts, and always keep in mind and serve the interests of the participants when reviewing the plan or making any changes.