

SB0096S01 compared with SB0096

~~{deleted text}~~ shows text that was in SB0096 but was deleted in SB0096S01.

inserted text shows text that was not in SB0096 but was inserted into SB0096S01.

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Senator Chris H. Wilson proposes the following substitute bill:

FIDUCIARY DUTY MODIFICATIONS

2023 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Chris H. Wilson

House Sponsor: _____

LONG TITLE

General Description:

~~{ }~~This bill addresses fiduciary duties for ~~{management of government funds}~~funds managed by public entities.

Highlighted Provisions:

This bill:

▶ ~~{defines terms;~~

→ ~~requires a person who manages or invests funds on behalf of a governmental entity or votes on an ownership share in a governmental entity to consider only certain factors;~~

→ ~~creates a rebuttable presumption that a person did not comply with the requirement to consider only certain factors}~~requires a public entity to invest public funds in accordance with the prudent investor rule;

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- ▶ provides that a public entity's consideration of environmental, social, or governance investment factors is a violation of the public entity's fiduciary duties under certain circumstances;
- ▶ addresses ~~{proxy voting requirements within a governmental entity;~~
→ ~~requires a governmental entity to compile and publicly provide proxy voting reports}~~a public entity's proxy voting duties; and
- ▶ makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

49-11-203, as renumbered and amended by Laws of Utah 2002, Chapter 250

49-11-303, as last amended by Laws of Utah 2005, Chapter 116

~~{ 53D-1-601, as enacted by Laws of Utah 2014, Chapter 426~~

~~{ 67-19d-301}~~51-7-2, as last amended by Laws of Utah ~~{2012}~~2022, ~~{Chapter 376~~

ENACTS:

~~63G-28-101, Utah Code Annotated 1953~~

~~63G-28-201, Utah Code Annotated 1953~~

~~63G-28-202, Utah Code Annotated 1953}~~Chapters 186, 298

51-7-14, as last amended by Laws of Utah 2006, Chapter 277

53B-8a-107, as last amended by Laws of Utah 2011, Chapter 46

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 49-11-203 is amended to read:

49-11-203. Powers and duties of board.

(1) The board shall:

(a) appoint an executive director to administer the office;

(b) receive and act upon reports covering the operations of the systems, plans, programs, and funds administered by the office;

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(c) ensure that the systems, plans, programs, and funds are administered according to law;

(d) review any final order of a hearing officer and approve or modify the order at the board's discretion in accordance with Section 49-11-613;

(e) examine and approve an annual operating budget for the office;

(f) serve as investment trustees of the Utah State Retirement Investment Fund as provided under this title;

(g) maintain, in conjunction with participating employers and members, the systems, plans, and programs on an actuarially sound basis;

(h) report annually to the governor, the Legislature, and each participating employer the contribution rates, premium rates, and any adjustments necessary to maintain the systems, plans, and programs on a financially and actuarially sound basis;

(i) receive and act upon recommendations of the executive director;

(j) recommend to the governor and Legislature, through the executive director, any necessary or desirable changes to this title;

(k) develop broad policy for the long-term operation of the various systems, plans, and programs under broad discretion and power to perform the board's policymaking functions, including the specific authority to interpret and define any provision or term under this title when the board or office provides written documentation which demonstrates that the interpretation or definition promotes uniformity in the administration of the systems or maintains the actuarial soundness of the systems, plans, or programs;

(l) adopt interest rates, premium rates, and annual contribution rates after reviewing actuarial recommendations;

(m) establish the compensation of the executive director and adopt compensation plans and policies based on market surveys for positions in the office;

(n) take action consistent with this title for the administration of the systems, plans, and programs in order to carry out the purposes of this title;

(o) provide for audits of the systems, plans, programs, and funds;

(p) take actions not in conflict with the board's trust and fiduciary responsibilities or other law, with respect to the governance of the office which are substantially similar to those governing other public agencies; ~~fund~~

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~~(q)~~ and

(q) in accordance with the board's fiduciary responsibilities, make investment decisions with the sole purpose of maximizing the risk-adjusted return on the investments;

(r) to the extent practicable;

(i) (A) retain the right to vote investor proxies; or

(B) if the investments are commingled with another investor's funds, request the right to vote investor proxies; and

(ii) ensure proxy voting is exercised:

(A) to maximize risk-adjusted returns for the exclusive benefit of beneficiaries; and

(B) against investments that prioritize social or environmental objectives or the non-pecuniary governance of another entity; and

~~[(q)]~~ (s) otherwise exercise the powers and perform the duties conferred on the board by this title.

(2) The board may:

(a) subpoena witnesses and compel ~~[their]~~ the witnesses' attendance to testify before ~~[it]~~ the board, for which purpose each board member may administer oaths and affirmations to witnesses and others transacting business of the office;

(b) establish councils to recommend to the board and the executive director policies affecting members of any systems, plans, and programs administered by the board;

(c) pay the travel expenses of council members who attend council meetings; and

(d) sue and be sued in ~~[its]~~ the board's own name.

Section ~~{1}~~ 2. Section 49-11-303 is amended to read:

49-11-303. Fund investment standard -- Prudent investor rule~~;~~

~~[The] Subject to Title 63G, Chapter 28, Government Fiduciary Duties, the~~;~~~~ ---
Consideration of environmental, social, or governance factors.

(1) The fund shall be invested in accordance with the prudent investor rule established in Title 75, Chapter 7, Part 9, Utah Uniform Prudent Investor Act.

(2) An investment by the board that equates or subordinates the maximum of risk-adjusted returns to social or environmental objectives or the non-pecuniary governance of another entity is a violation of the board's duty under Subsection (1).

Section 3. Section 51-7-2 is amended to read:

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51-7-2. Exemptions from chapter.

(1) [The] Except as provided in Subsection (2), the following funds are exempt from this chapter:

~~[(1)]~~ (a) funds invested in accordance with the participating employees' designation or direction pursuant to a public employees' deferred compensation plan established and operated in compliance with Section 457 of the Internal Revenue Code of 1986, as amended;

~~[(2)]~~ (b) funds of the Utah State Retirement Board;

~~[(3)]~~ (c) funds of the Utah Housing Corporation;

~~[(4)]~~ (d) endowment funds of higher education institutions, including funds of the Higher Education Student Success Endowment, created in Section ~~{53B-7-801}~~ 53B-7-801;

~~[(5)]~~ (e) permanent and other land grant trust funds established pursuant to the Utah Enabling Act and the Utah Constitution;

~~[(6)]~~ (f) the State Post-Retirement Benefits Trust Fund;

~~[(7)]~~ (g) the funds of the Utah Educational Savings Plan;

~~[(8)]~~ (h) funds of the permanent state trust fund created by and operated under Utah Constitution, Article XXII, Section 4;

~~[(9)]~~ (i) the funds in the Navajo Trust Fund;

~~[(10)]~~ (j) the funds in the Radioactive Waste Perpetual Care and Maintenance Account;

~~[(11)]~~ (k) the funds in the Employers' Reinsurance Fund;

~~[(12)]~~ (l) the funds in the Uninsured Employers' Fund;

~~[(13)]~~ (m) the Utah State Developmental Center Long-Term Sustainability Fund, created in Section 62A-5-206.7;

~~[(14)]~~ (n) the funds in the Risk Management Fund created in Section 63A-4-201; and

~~[(15)]~~ (o) the Utah fund of funds created in Section 63N-6-401.

(2) Except for the funds of the Utah State Retirement Board and the Utah Educational Savings Plan, the funds described in Subsection (1) are not exempt from Subsections 51-7-14(2) and (3).

Section 4. Section 51-7-14 is amended to read:

51-7-14. Prudent ~~{man}~~investor rule for management of investments -- Proxy voting -- Consideration of environmental, social, or governance factors -- Sale of security or investment for less than cost.

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(1) ~~[Persons]~~ Subject to Subsection (2), a person selecting investments authorized by Sections 51-7-11 and 51-7-13 shall:

~~[(a) exercise that degree of judgment and care, under the circumstances prevailing at the time the investment is selected, that persons of prudence, discretion, and intelligence exercise in the management of their own affairs;]~~

~~[(b)]~~ (a) select investments not for speculation but for investment; and

~~[(c)]~~ (b) consider:

- (i) the probable safety of the capital;
- (ii) the probable benefits to be derived;
- (iii) the probable duration for which that investment may be made;
- (iv) the investment objectives specified in Section 51-7-17; and
- (v) the investment portfolio as a whole.

(2) A public treasurer shall:

(a) invest public funds in accordance with the prudent investor rule established in Title 75, Chapter 7, Part 9, Utah Uniform Prudent Investor Act;

(b) make public fund investment decisions with the sole purpose of maximizing the risk-adjusted return on the investments; and

(c) to the extent practicable:

(i) (A) retain the right to vote investor proxies; or

(B) if the investments are commingled with another investor's funds, request the right to vote investor proxies; and

(ii) ensure proxy voting is exercised:

(A) to maximize risk-adjusted returns for the exclusive benefit of beneficiaries; and

(B) against investments that prioritize social or environmental objectives or the non-pecuniary governance of another entity.

(3) An investment by a public treasurer that equates or subordinates the maximum of risk-adjusted returns to social or environmental objectives or the non-pecuniary governance of another entity is a violation of the public treasurer's duty under Subsection (2)(a).

~~[(2)]~~ (4) A public treasurer may sell or otherwise dispose of, at less than cost, any security or investment in which public funds under ~~[his]~~ the public treasurer's jurisdiction have been invested if that sale or other disposition tends to maximize the benefits that may be

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derived from the changed investment.

Section 5. Section 53B-8a-107 is amended to read:

53B-8a-107. Program, administrative, and endowment funds -- Investment and payments from funds -- Consideration of environmental, social, or governance factors.

(1) ~~[(a)]~~ The plan shall segregate money received by the plan into three funds, the program fund, the administrative fund, and the endowment fund.

~~[(b) The plan, as approved by the board, may hold, deposit, and invest program fund, administrative fund, and endowment fund money in the following:]~~

~~[(i) the Public Treasurer's Investment Fund;]~~

~~[(ii) mutual funds, securities, or other investments registered with the United States Securities and Exchange Commission;]~~

~~[(iii) federally insured depository institutions;]~~

~~[(iv) stable value products, including guaranteed investment contracts, guaranteed interest contracts, and guaranteed insurance contracts; and]~~

~~[(v) any investments that are determined by the board to be appropriate and that would be authorized under:]~~

~~[(A) the provisions of Section 51-7-11; or]~~

~~[(B) rules of the State Money Management Council applicable to gift funds.]~~

~~[(2)]~~

(2) The board shall:

(a) invest the plan in a manner that is consistent with the prudent investor rule for trustees established in Title 75, Chapter 7, Part 9, Utah Uniform Prudent Investor Rule;

(b) in accordance with the board's fiduciary responsibilities, make investment decisions with the sole purpose of maximizing the risk-adjusted return on the investments; and

(c) to the extent practicable:

(i) (A) retain the right to vote investor proxies; or

(B) if the investments are commingled with another investor's funds, request the right to vote investor proxies; and

(ii) ensure proxy voting is exercised:

(A) to maximize risk-adjusted returns for the exclusive benefit of beneficiaries; and

(B) against investments that prioritize social or environmental objectives or the

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non-pecuniary governance of another entity.

(3) (a) An investment by the board that equates or subordinates the maximum of risk-adjusted returns to social or environmental objectives or the non-pecuniary governance of another entity is a violation of the board's duty under Subsection (2)(a).

(b) Subsections (2) and (3)(a) do not prohibit the board from offering individual account owners a variety of voluntary investment options that have different risk profiles and investment objectives.

~~(2)~~ (4) Transfers may be made from the program fund to the administrative fund to pay operating costs:

(a) associated with administering the plan and as required under Sections 53B-8a-103 through 53B-8a-105; and

(b) as included in the budget approved by the board.

~~(3)~~ (5) (a) All money paid by account owners in connection with account agreements shall be deposited as received into separate accounts within the program fund which shall be invested and accounted for separately.

(b) Money accrued by account owners in the program fund may be used for:

(i) payments to any institution of higher education;

(ii) payments to the account owner or beneficiary;

(iii) transfers to another 529 plan; or

(iv) other expenditures or transfers made in accordance with the account agreement.

~~(4)~~ (6) (a) All money received by the plan from the proceeds of gifts and other endowments for the purposes of the plan shall be:

(i) deposited, according to the nature of the donation, as received into the endowment fund or the administrative fund; and

(ii) invested and accounted for separately.

(b) Any gifts, grants, or donations made by any governmental unit or any person, firm, partnership, or corporation to the plan for deposit to the endowment fund or the administrative fund is a grant, gift, or donation to the state for the accomplishment of a valid public eleemosynary, charitable, and educational purpose and is not included in the income of the donor for Utah tax purposes.

~~(c)~~ (c) The endowment fund or the administrative fund may be used to enhance the savings

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of low income account owners investing in the plan, for scholarships, or for other college savings incentive programs as approved by the board.

(d) Transfers may be made between the endowment fund and the administrative fund upon approval by the board.

(e) Endowment fund earnings not accruing to a beneficiary under an account agreement, not transferred to the administrative fund, or not otherwise approved by the board for expenditure, shall be reinvested in the endowment fund.

~~{ Section 2. Section 53D-1-601 is amended to read:~~

~~53D-1-601. General management and investment principles -- Duty of person with special skills or expertise:~~

~~(1) Board members, the director, and office staff shall act in the best interests of the beneficiaries and comply with the duty of undivided loyalty to the beneficiaries.~~

~~(2) [A] Subject to Title 63G, Chapter 28, Government Fiduciary Duties, a person who manages and invests trust fund money or assets shall:~~

~~(a) manage and invest in good faith and with the care a prudent professional in a like position would exercise under similar circumstances;~~

~~(b) consider, as relevant:~~

~~(i) general economic conditions;~~

~~(ii) the possible effect of inflation or deflation;~~

~~(iii) any expected tax consequences of investment decisions or strategies;~~

~~(iv) the role that each investment or course of action plays within the overall investment portfolio of the trust fund;~~

~~(v) the expected net return from income and the appreciation of investments;~~

~~(vi) the expected returns and risk characteristics of individual assets;~~

~~(vii) the needs of the beneficiaries to receive distributions and to preserve capital;~~

~~(viii) liquidity;~~

~~(ix) asset allocation; and~~

~~(x) costs and management fees; and~~

~~(c) make management and investment decisions about an individual asset not in isolation but in the context of the trust fund's portfolio of investments as a whole and as part of an overall investment strategy, having risk and return objectives reasonably suited to the trust~~

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fund and to the beneficiaries:

~~—— (3) A person who has special skills or expertise, or who is selected to assist in managing and investing the trust fund money or assets based on the person's representation of having special skills or expertise, has a duty to use those skills and that expertise in managing and investing trust fund money and assets:~~

~~—— Section 3. Section **63G-28-101** is enacted to read:~~

~~CHAPTER 28. GOVERNMENT FIDUCIARY DUTIES~~

~~Part 1. General Provisions~~

~~—— **63G-28-101. Definitions:**~~

~~—— As used in this chapter:~~

~~—— (1) "Fiduciary" means a person who manages, invests, or advises on the investment of funds:~~

~~—— (2) (a) "Fiduciary commitment" means evidence of a fiduciary's purpose or goal in managing funds or assets as a fiduciary:~~

~~—— (b) "Fiduciary commitment" includes:~~

~~—— (i) an advertisement, statement, explanation, report, letter to a client, communication with a portfolio company, statement of principles, or commitment; or~~

~~—— (ii) the fiduciary's participation in, affiliation with, or status as a signatory to, a coalition, initiative, joint statement of principles, or agreement.~~

~~—— (3) (a) "Financial factor" means a factor considered by a fiduciary that has a material effect on the financial risk or return of an investment.~~

~~—— (b) "Financial factor" does not include a factor considered by a fiduciary for the purpose of furthering a social, political, or ideological interest.~~

~~—— (4) "Government funds" means funds that:~~

~~—— (a) are derived from public taxes or public revenue; or~~

~~—— (b) are owned, held, or administered by a governmental entity.~~

~~—— (5) (a) "Governmental entity" means:~~

~~—— (i) the state;~~

~~—— (ii) a county, city, town, metro township, school district, local district, special service district, or other political subdivision of the state; or~~

~~—— (iii) an independent entity.~~

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~~(b) "Governmental entity" includes an agency, bureau, office, department, division, board, commission, institution, laboratory, or other instrumentality of an entity described in Subsection (5)(a):~~

~~(6) "Independent entity" means the same as that term is defined in Section 63E-1-102.~~

~~(7) "Member" means:~~

~~(a) an owner of an interest in a governmental entity; or~~

~~(b) a person acting as the owner's agent.~~

~~Section 4. Section 63G-28-201 is enacted to read:~~

Part 2. Fiduciary Duties

~~**63G-28-201. Fiduciary duties -- Rebuttable presumption.**~~

~~(1) Notwithstanding any other law of this state, in making or supervising an investment of government funds or discharging any other duty with respect to government funds, a fiduciary may only consider:~~

~~(a) a factor the fiduciary determines is a financial factor;~~

~~(b) defraying reasonable administration expenses; or~~

~~(c) whether another person knowingly engages in unlawful activity.~~

~~(2) There is a rebuttable presumption that a fiduciary did not comply with Subsection (1) if, before taking an action described in Subsection (1), the fiduciary makes a fiduciary commitment to further any of the following interests beyond applicable state and federal law requirements:~~

~~(a) elimination, reduction, offset, or disclosure of greenhouse gas emissions;~~

~~(b) institution or assessment of a board of directors or employment, composition, compensation, or disclosure criteria that incorporates race, color, sex, pregnancy, religion, ancestry, or national origin;~~

~~(c) divestment from, limitation on investment in, or limitation on the activities or investments of, a company, for:~~

~~(i) failing or not committing to meet environmental standards or disclosures; or~~

~~(ii) facilitating or supporting the manufacture, importation, distribution, marketing, advertisement, sale, or lawful use of a firearm, ammunition, or a component or accessory of a firearm or ammunition; or~~

~~(d) access to abortion or sex characteristic surgical procedures.~~

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~~Section 5. Section 63G-28-202 is enacted to read:~~

~~**63G-28-202. Member voting -- Proxy voting -- Reporting.**~~

~~(1) Notwithstanding any other law of this state, in voting on an ownership share in a governmental entity, a member may only consider:~~

~~(a) a factor the member determines is a financial factor;~~

~~(b) defraying reasonable administration expenses; or~~

~~(c) whether another person knowingly engages in unlawful activity.~~

~~(2) A governmental entity may not grant proxy voting authority to, entrust government funds to, or adopt a practice of following the recommendations of a person outside of the governmental entity, unless:~~

~~(a) (i) the person has a practice of acting on and considering only financial factors when making or supervising the investment of funds; and~~

~~(ii) the person agrees in writing to act on and consider only financial factors when making or supervising an investment of government funds or discharging any other duty with respect to government funds; or~~

~~(b) there is no economically practicable alternative available.~~

~~(3) (a) A governmental entity shall annually compile a report of proxy votes within the governmental entity during the previous year that includes:~~

~~(i) a tabulation of the proxy votes; and~~

~~(ii) for each proxy vote:~~

~~(A) a vote caption;~~

~~(B) the governmental entity's vote;~~

~~(C) if applicable, the recommendation of the governmental entity's management; and~~

~~(D) if applicable, the proxy advisor's recommendation.~~

~~(b) The governmental entity shall post a report described in Subsection (3)(a) on the governmental entity's website or another publicly accessible location.~~

~~Section 6. Section 67-19d-301 is amended to read:~~

~~**67-19d-301. Investment of State Post-Retirement Benefits Trust Fund.**~~

~~(1) [The] Subject to Title 63G, Chapter 28, Government Fiduciary Duties, the state treasurer shall invest the assets of the State Post-Retirement Benefits Trust Fund created under Section 67-19d-201 and the Elected Official Post-Retirement Benefits Trust Fund created~~

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~~under Section 67-19d-201.5 with the primary goal of providing for the stability, income, and growth of the principal:~~

~~—— (2) Nothing in this section requires a specific outcome in investing.~~

~~—— (3) The state treasurer may deduct any administrative costs incurred in managing trust fund assets from earnings before distributing them.~~

~~—— (4) (a) The state treasurer may employ professional asset managers to assist in the investment of assets of the trust fund.~~

~~—— (b) The treasurer may only provide compensation to asset managers from earnings generated by the trust fund's investments.~~

~~‡~~