Standards of Care and Supplemental Fiduciary Duties Governing the Conduct of Trustees Investing and Managing Assets of Public Employee Retirement Systems in the 50 States and the District of Columbia[1]

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Introduction

This paper is a review and analysis of the different fiduciary standards of care that govern the conduct of trustees responsible for investing and managing assets held by defined benefit plans state-wide in the public employee retirement systems ("PERS") of the 50 states and the District of Columbia. A state-wide PERS that offers a defined benefit plan typically has the most plan participants and holds the largest amount of assets within a state's network of public employee pension plan trusts.

Every trustee or other fiduciary in America charged with investing and managing assets is subject to the principles, standards and duties of trust investment law. This includes assets held in trust[2] by trustees for the benefit of others invested in PERS - whether at the state, county or municipal level. The fiduciary requirements of trust investment law are found in a state's statutes, regulations and/or its constitution.

The 1992 Restatement (Third) of Trusts (Prudent Investor Rule) - and subsequently the 2007 Restatement (Third) of Trusts ("Third Restatement")[3] **-** governs the conduct of trustees responsible for the investment and management of assets held by private family trusts. The extensive treatment of the principles, standards and duties of trust investment law set forth in the Third Restatement is rooted in the common law of trusts. But, for example, the duty to determine the tradeoff between the risk and return in a

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[2] § 4 of the 1997 Uniform Management of Public Employee Retirement Systems Act reads, in part: "(a) Except as otherwise provided in subsection (b) [which pertains to insurance contracts such as group annuities], all assets of a [public employee] retirement system are held in trust. The trustee has the exclusive authority, subject to [the Act], to invest and manage those assets…" Commentary to § 4 [of the Act] reads, in part: "...the requirement that assets of retirement systems [must] be held in trust…is one of the guiding principles of ERISA and is required of public retirement systems by the Constitutions in a number of States…[including California, Nevada and Texas]." Assets must be held in trust for another reason as well: in order for any retirement plan trust – whether made available in the private or public sector - to be legally offered to plan participants, the Internal Revenue Service must grant it tax-favored status to allow participants the ability to make tax-deductible contributions to their retirement account and continue to defer taxes.

[3] The Restatement (Third) of Trusts (Prudent Investor Rule) was promulgated in 1992 as a partial and preliminary revision of the 1959 Restatement (Second) of Trusts. See Restatement (Third) of Trusts (Prudent Investor Rule), (Washington D.C.: The American Law Institute, 1992), Foreword, page IX. The revision of the 1992 Prudent Investor Rule was completed in 2007 when Volume 3 of the Restatement (Third) of Trusts was promulgated. Volumes 1-2 were promulgated in 2003 and Volume 4 in 2012. Any references to the Restatement (Third) of Trusts henceforth in this paper are to the 2007 revision of the 1992 Prudent Investor Rule as the "Third Restatement," unless noted otherwise. Any page numbers cited when referencing the Third Restatement are to Volume 3, unless noted otherwise.

portfolio[4] which is set forth in the Third Restatement is not found in the common law but is derived from Modern Portfolio Theory ("MPT").

MPT was the spark that ignited the revolution in the law governing the investment and management of trust assets beginning in the 1990s. The Third Restatement was the vanguard of this revolution which has made it enormously influential in modern prudent fiduciary investing at both the state and federal levels.

At the state level, no less than five prudent investor uniform acts promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") – are progeny of the Third Restatement. The first of these acts is the 1994 Uniform Prudent Investor Act ("UPIA") which, like the Third Restatement, governs the conduct of trustees responsible for the investment and management of assets held in private family trusts. The UPIA extracted the essential principles, standards and duties laid down by the Third Restatement and codified them in its 23 pages. These, in turn, have been incorporated nearly verbatim into the other four prudent investor uniform acts promulgated by the NCCUSL.

They include the 1997 Uniform Management of Public Employee Retirement Systems Act ("UMPERSA") which governs the conduct of trustees responsible for the investment and management of the assets of state, county and municipal public employee pension plan trusts,[5] the 1997 Uniform Principal and Income Act ("UP&IA") which helps to coordinate the implementation of MPT and prudent investing through rules related to principal and income allocation for private family trusts, the 2000 Uniform Trust Code ("UTC") which is a national codification of the common law of trusts[6] and the 2006 Uniform Prudent Management of Institutional Funds Act ("UPMIFA") which governs the investment conduct of the fiduciaries (i.e., directors and trustees) serving as stewards of the portfolios (i.e., institutional funds) of assets for charitable organizations such as foundations and endowments.

The preceding prudent investor uniform acts concern different kinds of entities such as public employee retirement systems, private family trusts and non-profit foundations and endowments. Given the dissimilarities in these entities, it may be confusing why they are all subject to the same principles, standards and duties enshrined in the Third Restatement which, by its terms, pertains only to private family trusts. The answer lies in the fact that all the entities are trusts. Trust assets are not owned legally by the beneficiaries; rather, they are owned by the trust with the trustees investing and managing the trust assets for the benefit of the beneficiaries. Whether it's public employee pension plan trusts, private family trusts or charitable trusts, they are all subject - directly or indirectly - to the principles, standards and duties of trust investment law set forth in the Third Restatement.

At the federal level, the Third Restatement also plays an important role in modern prudent fiduciary investing. The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), an expansive federal law, sets forth principles, standards and duties which govern the conduct of trustees responsible for the investment and management of assets held by pension and employee benefit plan trusts such as

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[4] One of the "principles of prudence" of the Third Restatement: "risk and return are so directly related that trustees have a duty to analyze and make conscious decisions concerning the levels of risk appropriate to the purposes, distribution requirements, and other circumstances of the trusts they administer…" Introductory Note to the Third Restatement, page 290; see § 90(a) of the Third Restatement, page 292.

[5] The Prefatory Note to UMPERSA reads, in part: "[UMPERSA] will modernize, clarify, and make uniform the rules governing the management of public [employee] retirement systems."

[6] The UTC draws heavily from the Third Restatement to help incorporate modern notions of fiduciary investment conduct.

401(k) plans and ERISA-governed 403(b) plans for the benefit of private sector employees. As a federal law, ERISA also governs the investment and management conduct of trustees of Taft-Hartley union pension plan trusts.

ERISA, in effect, "federalized" the common law of trusts from which trust investment law is derived.[7] In contrast, the Third Restatement is not a law at all. Rather, it is a legal treatise that formally and systematically examines the common law and restates it as broad legal principles. Even though not a law, nonetheless the Third Restatement serves as an important reference source for judges in the federal judicial system[8] to help them understand and apply principles of trust investment law in cases, for example, involving 401(k) plans.

One such case, *Tibble v. Edison International*,[9] was decided unanimously in 2015 by the U.S. Supreme Court. The *Tibble* court reminded all of the fount from which the law of ERISA originates: "We have often noted that an ERISA fiduciary's duty is 'derived from the common law of trusts…' In determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts." In its opinion, *Tibble* relied on selected text of the Third Restatement and the UPIA, treating them as authoritative clarifications of the principles applicable under ERISA to fiduciary investment matters.[10]

The Third Restatement contains explanatory comments, instructive illustrations and supporting legal authority in the Reporter's Notes which are applicable to cases ranging from small private family trusts to multi-billion dollar 401(k) plan trusts. These are tremendously helpful in advancing an understanding of trust investment law as well as prudent investment practices and customs, at both the state and federal levels.

It may be surprising that, in the quarter century since promulgation of the Uniform Management of Public Employee Retirement Systems Act, only four states have adopted its fiduciary standard of care while two other states[11] have selected portions of the standard and incorporated them into their own standard of care. It does not follow, however, that trustees responsible for the investment and management of assets held by state, county and municipal public employee plans in the other 46 states and the District of Columbia are not subject to some fiduciary standard of care.

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[7] The legislative history of ERISA makes clear that the law governing qualified retirement plans is tied closely to trust investment law. See the preamble to ERISA regulations § 2550.404a-1 and the accompanying discussion.

[8] And state judicial systems.

[9] 135 S. Ct. 1823, 1828 (2015).

[10] A variety of other cases in which courts have cited text from the Third Restatement and the Restatement (Second) of Trusts include *Varity Corp. v. Howe*, 516 U.S. 489 (1996), *Harris Trust and Savings Bank, etc., et al. v. Salomon Smith Barney, Inc., et al.*, 530 U.S. 238 (2000), *Shaver v. Operating Engineers Local 428 Pension Trust Fund, etc.*, 332 F. 3d 1203 (9th Cir. 2003), *Santomenno v. Transamerica Life Insurance Company*, 883 F.3d 833 (9th Cir. 2018), *Putnam Investments, LLC, et al. v. Brotherston, et al*. 139 S. Ct. 1914 (2019), *Stegemann v. Gannett Company, Inc., et al.* 970 F.3d 465 (4th Cir. 2020) and *Thole, et al. v. U.S. Bank NA, et al.*, 140 S. Ct. 1615 (2020).

[11] North Carolina and Oregon.

In fact, trustees in all 51 jurisdictions examined in this paper are subject to a fiduciary standard of care whether found in (1) the 1942 Model Prudent Man Rule Statute,[12] (2) ERISA[13] (3) the UPIA, (4) UMPERSA, (5) the fiduciary standards of care created by various states from an amalgamation of other state standards or (6) the trust investment law standard of fiduciary care.

This paper is divided into five parts. Part I is a history of the evolution of trust investment law in America that began nearly two centuries ago and led eventually to promulgation of the Restatement (Third) of Trusts (Prudent Investor Rule) in 1992. Part II reproduces the text of ten current and past fiduciary standards of care that have emerged over that period of time. Part III identifies the current fiduciary standard of care for each of the 50 states and the District of Columbia. Part IV reproduces and analyzes the text of ten relevant fiduciary duties of prudence that supplement the standards of care found in ERISA, the Third Restatement, the UPIA and UMPERSA. Finally, Part V is an appendix that reproduces the statutory text of the standard of care for each of the 50 states and the District of Columbia, and identifies the state-wide PERS(s) subject to each standard. Whenever relevant, statutory language describing supplemental fiduciary duties of prudence is reproduced to augment the text of a standard of care for greater understanding of it.

I. A History of Trust Investment Law in America

1830 - Harvard College v. Amory

The fiduciary standard of care that came to be a requirement for trustees in mid-19th Century America was the result of a financial disaster in early 18th Century England.[14] Following the collapse of the South Sea Company in 1719 which ruined thousands of investors, the English Parliament enacted restrictions on investments made by trustees.[15] Trustees were allowed to make only those kinds of investments approved by the English government. This legislative reaction to a financial disaster was designed to protect beneficiaries from losses caused by what were deemed to be "speculative" trust investments.

In early 19th Century America, there were no government-backed investments equivalent in rating to English securities. As a result, American trustees had to often make investments in nascent industrial enterprises. This required American courts to judge the prudence of trustees who encountered a much wider range of trust investments than those experienced by English trustees.

One such decision was rendered by the Supreme Judicial Court of Massachusetts in 1830. The central issue in the case of *Harvard College v. Amory*[16] was whether the trustee had acted imprudently by investing in stocks of manufacturing and insurance companies without posting personal bonds for the investments. Even though the trust instrument at issue in the case had authorized such investments, the

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[12] This is not a statute because it was never enacted into law by any state legislature. Rather, the 1942 Model Prudent Man Rule Statute was published by the American Bankers Association at the behest of its membership of corporate trustees. Nonetheless, six states (including Texas) have adopted its standard of conduct while five other states have selected portions of its standard and incorporated them into their own standard.

[13] As will be seen, while a public employee retirement plan trust is classified by ERISA as a "governmental plan," it is not subject to the law of ERISA. However, the majority of states and the District of Columbia have copied ERISA's standard of care and enacted it into law as their own standard.

[14] Portions of this introductory material were adapted from "The Prudent Investor Act: A Guide to Understanding" by W. Scott Simon (Namborn Publishing Co.: Camarillo, CA, 2002).

[15] See the Bubble Act, 1719, 6 Geo., chapter 18 (Eng.).

[16] 9 Pick. (26 Mass.) 461 (1830).

beneficiaries contended that the trustee had imprudently exposed the trust portfolio to loss instead of investing in government and bank securities.[17]

The court ruled, however, that it was permissible for the trustee to invest in any kind of investment, including more "speculative" ones such as common stocks, as long as he used good judgment and care.[18] The court recognized implicitly that there is no such thing as a "safe" investment: "Do what you will, the capital is at hazard. If the public funds [i.e., government securities] are resorted to, what becomes of the capital when the credit of the government should be so much impaired as it was at the close of the last war [i.e., the War of 1812]?"

While investing in American enterprises had always been speculative by nature,[19] the court recognized that even government bonds could be "risky" at times. Because all investments place capital at risk (more or less), it was impossible to provide absolute safety from the capriciousness of financial markets which could make even "safe" investments turn "risky." This led to a sensible realization: "Do what you will, the capital is at hazard."

Dictum in *Harvard College* – which became the Prudent Man Rule and laid the foundation of trust investment law in America[20] - admonished trustees to "observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."

The Harvard College fiduciary standard of care – the Prudent Man Rule - does not govern the conduct of trustees responsible for investing and managing assets held by the defined benefit plan(s) in any state-wide PERS. As noted, however, six states have adopted in whole the standard of the Prudent Man Rule's progeny - the 1942 Model Statute - while five other states have each selected portions of the 1942 Model Statute's standard and incorporated them into their own standard of care.

Harvard College set forth a general and flexible standard of investment prudence to guide trustees,[21] thereby rejecting the attempt to specify approved types of investments as the English Parliament had

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[17] The *Harvard College* case, in brief: John McLean died in 1823. In his will, he left money in trust to trustees Jonathan Amory and Francis Amory for investment "in safe and productive stock" with the proceeds going to his wife. At some point, Jonathan Amory died and Francis Amory, the surviving trustee, tendered his resignation in 1828. Harvard College, which was to receive 50% of the value of the proceeds of McLean's estate upon the death of McLean's wife, thereafter sued Francis Amory and alleged that the stocks in which Amory had invested suffered losses because of Amory's speculation and negligence.

[18] "Chasing Down the Devil: Standards of Prudent Investment Under the Restatement (Third) of Trusts" by W. Brantley Phillips, Jr., *Washington & Lee Law Review*, Volume 54, 1997, pages 335-85.

[19] "Nontraditional Investments of Fiduciaries: Re-Examining the Prudent Investor Rule" by Leslie Joyner Bobo, *Emory Law Review*, Volume 33, 1984, pages 1067-1102.

[20] The Introductory Note to the Third Restatement reads, in part: "The foundation of trust investment law [in the United States] in the [1935] First and [1959] Second Restatements [of Trusts] has been the so-called "prudent man rule" of *Harvard College v. Amory*, 9 Pick. (26 Mass.) 446, 461 (1830)." Commentary to § 1 of the UPIA adds: "The prudence standard for trust investing traces back to *Harvard College v. Amory*…"

[21] "Redefining the 'Prudent Investor Rule' for Trustees" by Edward C. Halbach, Jr., *Trusts & Estates*, December 1990, pages 14-22. The Reporter for the 1992 Restatement (Third) of Trusts (Prudent Investor Rule) and the 2007 Restatement (Third) of Trusts is the late Edward C. Halbach, Jr. (1931-2017) who was the Walter Perry Johnson Professor of Law Emeritus at the University of California, Berkeley law school which he also served as dean from

done.[22] The American judiciary thereafter began to give trustees much broader latitude than their English counterparts when making investment decisions. Investment practice under the Prudent Man Rule in America led rapidly to judicial approval of corporate stocks and bonds for trust portfolios.[23]

1889 - New York State Legal List Law

American courts, however, didn't leave well enough alone. In the second half of the 19th Century, they began to refine the Prudent Man Rule. In rendering their decisions, they transformed the general and flexible principles established in *Harvard College* into narrow rules. As these rules were adopted in an effort to offer guidelines to trustees, the Prudent Man Rule lost much of its flexibility. Judging and classifying investments on a stand-alone basis tended to stamp broad classes of assets and courses of action as imprudent, or "speculative" as a matter of law.[24]

Following the end of the Civil War in 1865, America experienced an economic depression. Concerned with the resulting instability in financial markets, the New York Court of Appeals ruled in the 1869 landmark case of *King v. Talbot*[25] that only government bonds and mortgage-backed corporate debts were prudent trust investments. The New York state legislature eventually codified this decision and added it to the New York Laws in 1889. Itemized lists of legislatively-approved trust investments appeared subsequently in other states as well. Courts also issued their own lists of approved trust investments. This trend became known as the "Legal List Rule" in the jurisdictions that followed it.

Over the next half-century, a majority of states adopted the Legal List Rule. It limited trustees to investing primarily in certain fixed-income investments such as long-term government and corporate bonds.[26] The rule reflected a conservative approach to trust investing, thereby closely resembling the English rule of government-authorized trust investments.

1935 - Restatement of Trusts

Changing business and economic conditions in America led eventually to the decline of the Legal List Rule. The Great Depression in America reinforced the fallacy of "safe" investments in that nearly all investments decreased significantly in value during those hard times. But unlike stocks, the permissible Legal List Rule investments such as government bonds, secured mortgages and some bonds of the most blue-chip companies didn't recover their value even when economic conditions improved.

1966 to 1975. The foreword to volume 4 (2012) of the Third Restatement places Professor Halbach's legendary standing in the field of American trust investment law in context: "Ed Halbach has been a law professor for half a century and an [American Law Institute] Reporter for more than a quarter century. In his generation he is the leading scholar of the law of trusts. In his ALI role, he is the successor to the iconic Austin Wakeman Scott, author of the original Restatement of Trusts and then of Restatement Second…The Institute has praised and thanked Professor Halbach in many forms, and this is probably the final opportunity. He has done extraordinary work."

[22] "The Uniform Prudent Investor Act and the Future of Trust Investing" by John H. Langbein, *Iowa Law Review*, Volume 81, 1996, pages 641-69. Professor Langbein is the Reporter for the Uniform Prudent Investor Act and the Sterling Professor of Law Emeritus and Legal History at Yale University.

[23] *Id*.

[24] See "Trust Investment Law in the Third Restatement" by Edward C. Halbach, Jr., *Real Property, Probate and Trust Journal*, Volume 27, Fall 1992, pages 407-65.

[25] 40 N.Y. 76 (1869).

[26] *Id*., Langbein.

These developments helped prompt the American Law Institute ("ALI") to publish the Restatement of Trusts in 1935. The ALI, an eminent group of attorneys, law school professors and judges was founded in 1923 to address what it regarded to be the two primary defects in American law - its uncertainty and complexity – by formulating broad principles of law. Given the prestige of the ALI,[27] its pronouncements in areas of the law become sources of legal authority that are accorded great respect by courts and legislatures.[28]

It's important to understand that the ALI is not a governmental body but a private, non-profit organization and the Restatement of Trusts (and its successors as well as restatements in other fields of law[29]) is not a law but rather a legal treatise that deals formally and systematically with trust investment law. The Restatement of Trusts examines the common law – that is, judge-made law or case law stated in written opinions that's derived from custom and judicial precedent[30] - and restates it as broad legal principles.[31] Establishment of the common law of England began as early as the 12th Century. Settlors who populated the English colonies in North America were governed largely by the common law but also by statutory law – that is, parliamentary legislation which supplemented the common law. Today, fiduciaries responsible for, say, 401(k) plans are subject to a complex system of congressional legislation – the statutory scheme of ERISA – which is largely derived from the common law.[32]

The fiduciary standard of care set forth in § 227 of the ALI-drafted 1935 Restatement of Trusts reads: "In making investments of trust funds the trustee is under a duty to the beneficiary…to make such investments and only such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived ..." This standard reflected a continuing adherence to the general and flexible standard of investment prudence established in *Harvard College*.

[27] "[The Restatement of Trusts and the Restatement (Second) of Trusts have] achieved canonical standing in the law of private trusts." "Modern Investment Management and the Prudent Man Rule" by Bevis Longstreth (New York, NY: Oxford University Press, 1986), page 12.

[28] Within four years after publication of the 1935 Restatement of Trusts, a California court described its influence: "[I]n the absence of a contrary statute or decision in this state, [the Restatement of Trusts] is entitled to great consideration as an argumentative authority." *Canfield v. Security-First National Bank of Los Angeles*, 87 P. 2d 830, 844-45 (Cal. 1939).

[29] According to the ALI, "[b]etween 1923 and 1944, Restatements of the Law were developed for agency, conflict of laws, contracts, judgments, property, restitution, security, torts, and trusts. In 1952, [the ALI] started the Restatement Second – works that covered subjects not included in the first Restatement [e.g., the 1935 Restatement of Trusts], as well as new editions of the original Restatements [e.g., the 1959 Second Restatement] that updated them and reflected new analyses and concepts. A third series of Restatements was inaugurated in 1987 [one of which was the 1992 Restatement (Third) of Trusts (Prudent Investor Rule)]; work on that series continues today."

[30] Known as *stare decisis* which, in Latin, means "to stand by things decided."

[31] The ALI adds: "Restatements [of the law] are primarily addressed to courts [i.e., judges] and aim at clear formulations of common law and its statutory elements, and reflect the law as it presently stands or might appropriately be stated by a court…Restatements…also…reflect the flexibility and capacity for developments and growth of the common law. That is why they are phrased in the descriptive terms of a judge announcing the law to be applied in a given case rather than in the mandatory terms of a statute."

[32] "An ERISA fiduciary's duty is derived from the common law of trusts." *Tibble v. Edison International*, 135 S. Ct. 1823, 1828 (2015).

1942 - Model Prudent Man Rule Statute

Seven years after the ALI's publication of the Restatement of Trusts in 1935,[33] the trust division of the American Bankers Association, acting on behalf of its member corporate trustees, published the 1942 Model Prudent Man Rule Statute ("1942 Model Statute").[34] This effort was intended to enact the fiduciary standard of care of *Harvard College* and, in fact, incorporated much of its language[35] – even more so than the 1935 Restatement of Trusts:[36] "…a fiduciary shall exercise the judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital."[37]

This effort, like that of the ALI before it, was prompted by the damaging effects of the Great Depression. Unlike stocks, as noted, the permissible investments allowed by the Legal List Rule such as government bonds didn't recover their value even when the American economy improved towards the end of the 1930s. Studies showed that trusts in states such as Massachusetts that followed the 1830 Prudent Man Rule earned a 4% return, while those governed by the Legal List Rule earned only 2%. This gap in

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[33] In comparison, 24 years elapsed between publication of the 1935 Restatement of Trusts and the 1959 Second Restatement, and 33 years between publication of the 1959 Second Restatement and the 1992 Restatement (Third) of Trusts (Prudent Investor Rule).

[34] See "The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century" by Mayo A. Shattuck, *Ohio State Law Journal*, Volume 12, 1951, pages 491-521.

[35] Commentary to § 1 of the UPIA reads, in part: "The Model Prudent Man Rule Statute (1942), sponsored by the American Bankers Association, undertook to codify the language of the [*Harvard College*] case. "For the text of the [1942] model act, which inspired many state statutes, see [*Id.*, Shattuck] at [pages] 508-09." The 1942 Model Statute was comprised of only four relatively short sections.

[36] The 1942 Model Statute added the phrase, "under the circumstances then prevailing," which was not present in the *Harvard College* fiduciary standard of care nor was it included in the standard of either the 1935 Restatement of Trusts or the 1959 Second Restatement. However, the phrase was included in the standard set forth in ERISA § 404(a)(1)(B) which reads, in part: "…with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims…"). Although neither the Third Restatement nor the UPIA include the phrase in their standards of care, both elaborate on its meaning elsewhere as a fiduciary duty. See the Third Restatement, Comment on Basic Duties of the Prudent Investor, b. Duty to conform to fiduciary standards, pages 294-295: "The trustee's compliance with these fiduciary standards is to be judged as of the time the investment decision in question was made, not with the benefit of hindsight or by taking account of developments that occurred after the time of a decision to make, retain, or sell an investment." See also § 8 of the UPIA which reads: "Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight." Commentary to § 8 of the UPIA adds: "Trustees are not insurers. Not every investment or management decision will turn out in the light of hindsight to have been successful. Hindsight is not the relevant standard. In the language of law and economics, the standard is ex ante, not ex post." § 10(1) of UMPERSA (which copies § 8 of the UPIA nearly identically) reads: "Compliance by the trustee or other fiduciary with [UMPERSA] Sections 6 through 8 must be determined in light of the facts and circumstances existing at the time of the trustee or fiduciary's decision or action and not by hindsight." Commentary to § 10 of UMPERSA explains: "Trustees are not insurers. Not every investment or management decision will turn out in the light of hindsight to have been successful. Hindsight is not the relevant standard. In the language of law and economics, the standard is ex ante, not ex post."

[37] Compare to the 1830 Prudent Man Rule: Trustees are "to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."

investment return was large enough to affect the trust business of corporate trustees such as banks.[38] It was hoped that the fiduciary standard of care set forth in the 1942 Model Statute would adapt more easily to changing business and economic conditions.[39]

The acceptance of the 1942 Model Statute grew appreciably in the 1940s and into the 1950s[40] as the movement to replace the Legal List Rule that had begun in the late 19th Century continued to gain momentum. The 1942 Model Statute, along with the 1830 Prudent Man Rule, eventually achieved judicial and legislative popularity across the U.S. often displacing by state court decisions or legislation the more restrictive Legal List Rule statutes."[41]

The fiduciary standard of care set forth in the 1942 Model Statute now governs the conduct of trustees responsible for investing and managing assets held by the defined benefit plan(s) in the state-wide PERS in six states - Iowa, Minnesota, Nevada, North Dakota, South Dakota and Texas.

Four other states – Kansas, North Carolina, Oregon and Pennsylvania - have each selected portions of the 1942 Model Statute's fiduciary standard of care and incorporated them into their own standard that governs the conduct of trustees responsible for investing and managing assets held by the defined benefit plan(s) in their state-wide PERS.

1959 - Restatement (Second) of Trusts

The fiduciary standard of care set forth in § 227 of the 1959 Restatement (Second) of Trusts ("Second Restatement") is identical in wording to that of the 1935 Restatement of Trusts except for deletion of the word "primarily." The 1959 version directs trustees "…to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived…"

The goal of the fiduciary standard of care first set forth in *Harvard College* in 1830 remained unchanged in its progeny for nearly 60 years beginning with the 1935 Restatement of Trusts through the 1942 Model Statute and 1959 Second Restatement, and up to the 1992 Restatement (Third) of Trusts (Prudent Investor Rule). That goal was to make trust assets productive by seeking the highest income possible while preserving the nominal value of a trust's principal.

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[38] The animating factor for the shift from the Legal List Rule to the 1942 Model Statute, then, seems to have been the competition for trust business. See "The Puzzling Persistence of the Constrained Prudent Man Rule" by Jeffrey N. Gordon, *New York University Law Review*, Volume 62, April 1987, pages 52-114.

[39] *Id*., Langbein. § 10 of the UPIA specifies a number of "terms or comparable language [commonly found] in the provisions of [trust instruments]." These authorize any investment or strategy permitted under the UPIA. An example of such language copies the fiduciary standard of care set forth in the 1942 Model Statute and is cited in § 10: "Using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital."

[40] "The trust division of the American Bankers Association in February 1942 devoted a part of its annual meeting to the subject [of abolishing the state Legal List Rule statutes] and ended by instructing its legislative committee to prepare a model statute designed to enact the Massachusetts rule [i.e., the Prudent Man Rule of *Harvard College*]. The present writer prepared the statute in the form set out later in this [law review] article. The governing words were those of the court in *Harvard College v. Amory.* No way was found to improve them." *Id*., Shattuck, page 501.

[41] See Introductory Note to the Third Restatement, pages 287-288.

For most of the 20th Century, many trustees remained preoccupied with avoiding “speculative” investments at all costs by investing heavily in “safe” portfolios of low yield fixed-income investments such as government bonds. These trustees likely were comfortable investing trust assets conservatively and the abolishment of the state Legal List Rule statutes did nothing to forbid them from continuing to do so. This attitude dominated American trust investment law until publication of the Restatement (Third) of Trusts (Prudent Investor Rule) in 1992.

1974 - Employee Retirement Income Security Act

ERISA was signed into law on Labor Day 1974 by President Gerald Ford in the Rose Garden at the White House. As a federal law, ERISA is broadly preemptive of state laws that set forth duties required of trustees and other fiduciaries that have responsibility for governing pension and employee benefit plan trusts of private sector employees as well as Taft-Hartley union pension plan trusts.

The primary goals of ERISA are to protect plan participants (and their beneficiaries) as well as union workers from financial mismanagement and abuse at the hands of plan fiduciaries while also ensuring that taxpayer dollars won’t be required to fund any shortfalls in these trusts because their trustees failed to invest and manage assets prudently.

ERISA’s fiduciary standard of care, as defined under ERISA § 404(a)(1)(B), requires fiduciaries to discharge their duties “with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”

27 states and the District of Columbia have each adopted ERISA’s fiduciary standard of care (often verbatim) as their own standard to govern the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) in their state-wide PERS. These states include Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, Ohio, Oklahoma, Rhode Island, Virginia, Washington and Wisconsin.

UMPERSA’s fiduciary standard of care is nearly identical in wording to that of ERISA’s standard. Four states - Kentucky, New Hampshire, South Carolina and Wyoming - have adopted UMPERSA’s standard as their own to govern the conduct of trustees responsible for investing and managing assets held by the defined benefit plan(s) in their state-wide PERS.

In addition, four states - Kansas, North Carolina, Oregon and Pennsylvania - have each selected portions of ERISA’s fiduciary standard of care and incorporated them into their own standard to govern the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) in their state-wide PERS.

In all, ERISA’s fiduciary standard of care appears in whole (28), nearly identically (4) or partially (4) in 36 of the 51 jurisdictions (or 70%) examined in this paper. This speaks to the enormous influence that ERISA’s fiduciary law has had on state public employee retirement systems in America. Although beyond the scope of this paper, ERISA’s standard of care and relevant supplemental fiduciary duties of prudence have a similar substantial influence on county, municipal and other public employee retirement systems as well.

The legislative history of ERISA, as noted, indicates that the law governing qualified retirement plans such as 401(k) plans is tied closely to the principles of trust investment law which are derived from the common law of trusts.[42] A federal appeals court described the standard of trust investment law this way: "By declaring that all retirement…assets are held in trust…[participants and their beneficiaries] are guaranteed the highest standard of conduct in the management and investment of assets for retirement that the law can establish. A trustee…carries the greatest burdens of care, loyalty and utmost good faith for the beneficiaries to whom he or she is responsible." The trust [investment] law standard is 'the highest known to law.'"[43]

The law of ERISA is directly applicable to the trusts of pension and benefit plans for private sector employees as well as Taft-Hartley union pension plan trusts. Some believe that ERISA also applies directly to the trusts of, say, defined benefit plans offered to employees in a PERS. Others believe that public sector employee retirement plans are not bound by any legal duties at all – fiduciary or otherwise. Both beliefs are wrong.

In fact, the law of ERISA does not govern public sector employee benefit plans. A "governmental plan," as defined under § 3(32) of ERISA, is "a plan established or maintained for its employees by the Government of the United States, by the government of any State [such as a state-wide PERS] or political subdivision thereof, or by any agency or instrumentality [such as a public healthcare district] of any of the foregoing." § 4(b)(1) of ERISA provides that Title I of ERISA does not apply to an employee benefit plan that is a "governmental plan."

Since ERISA does not govern the conduct of trustees of public employee benefit plan trusts, what body of fiduciary law does? The answer is that each state (as well as the District of Columbia) has its own set of fiduciary laws applicable to their respective PERS;[44] they have the option to adopt any fiduciary standard of care they wish. These standards and laws are described and analyzed by the author for each of the 51 jurisdictions examined in this paper. As noted, 70% of these jurisdictions have chosen to copy ERISA's fiduciary standard of care *in toto*, nearly identically or partially.

1992 - Restatement (Third) of Trusts (Prudent Investor Rule)/2007 - Restatement (Third) of Trusts

Subsequent to publication of the Second Restatement in 1959, legal experts came to recognize that the customs and practices of trustees - apart from the Legal List Rule statutes surviving in a few states – that restricted trust assets to certain investments were inadequate and even harmful to the long-term goals

[42] See the preamble to ERISA regulations § 2550.404a-1 and the accompanying discussion. The Prefatory Note to the UPIA reads, in part: "[ERISA]…absorbs trust-investment law through the prudence standard of ERISA § 404(a)(1)(B)." Because trust investment law underlies ERISA, the assets held in the account of a participant in, say, a 401(k) plan are not owned by the participant in a legal sense; rather, they are owned by the trust. A plan trustee (whose conduct is governed by the fiduciary responsibility laws of ERISA) holds the assets in trust, and invests and manages them for the benefit of the participants who are beneficiaries of the trust.

[43] *Donovan v. Bierwirth*, 680 F.2d 263, 272 (2d Cir. 1982). See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989): "ERISA abounds with the language and terminology of trust law. See, e.g., 29 U.S.C. §§ 1002(7) ('participant'), 1002(8) ('beneficiary'), 1002(21)(A) ('fiduciary'), 1103(a) ('trustee'), 1104 ('fiduciary duties'). ERISA's legislative history confirms that [ERISA's] provisions, 29 U.S.C. §§ 1101-1114, 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.' H.R. Rep. No. 93-533, p. 11 (1973)."

[44] The Prefatory Note to UMPERSA reads, in part: "…[ERISA]…does not apply to [public employee retirement] systems…Instead, the systems are regulated by law in each State."

of many trust beneficiaries. Recognition of this problem was aided by the explosion of theoretical and empirical research conducted by financial economists that began in the early 1960s.[45]

Another factor that caused legal experts to recognize the inadequacy of the customs and practices of trust investing was the advent of inflation during certain periods after World War II. It became clear that even moderate amounts of inflation could be a threat to the purchasing power of a trust portfolio's principal as well as its income stream.[46] Inflation became a major problem over the course of the Vietnam War and particularly during the world oil price spikes of the early and late 1970s. As it became more apparent that the principles, standards and duties set forth in the Second Restatement were insufficient in dealing with these evolving developments, dissatisfaction with it became more widespread.

The response was the ALI's publication in 1992 of the Restatement (Third) of Trusts (Prudent Investor Rule). This treatise sought to restore the generality and flexibility of the *Harvard College* Prudent Man Rule.[47] Another important purpose in publishing the 1992 Restatement was to revise and supersede the Prudent Man Rule of the Second Restatement by incorporating modern principles and theories of investment and finance into the basic text of the 1992 Prudent Investor Rule and its supporting commentary.

The Third Restatement's fiduciary standard of care, set forth in § 90 - General Standard of Prudent Investment, reads:[48] "The trustee has a duty to the beneficiaries to invest and manage the funds of the

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[45] This research – falling within the scope of Modern Portfolio Theory - led to a whole new understanding of how financial markets work and investors behave. By the early 1970s, MPT was being used more widely as an investment management technique by professional money managers. This was aided by a rapid acceleration in computing power.

[46] The recent significant increase in inflation that began in 2021, continued in 2022 and perhaps extending into 2023 and beyond - brings to mind the potentially devastating impact of even low amounts of long-term inflation. For example, Investors have been told by the investment information system that inflation in the 2-3% range is not a threat to their financial security. That is untrue. An annual 3% inflation rate compounded over 20 years results in a 45% loss of purchasing power while a rate even as low as 2% results in a 33% loss. Investors welcome the "miracle" of compounding when it runs in their favor as their investments grow in value over time. But no one welcomes the reverse: when the "curse" of negative compounding - in the form of inflation - works against them. See "Index Mutual Funds: Profiting From an Investment Revolution" by W. Scott Simon (Namborn Publishing Co.: Camarillo, CA, 1998), pages 177-178, footnote 18.

[47] See Introductory Note to the Prudent Investor Rule of the Third Restatement, page 289. The Reporter for the Third Restatement observes: "Flexibility is needed not just for the widely varied objectives and circumstances of different trusteeships but also to adapt over time to changes in the operation of financial markets, in the investment products available and in the practices of fund managers, as well as in the theories and knowledge underlying these practices." See "Redefining the 'Prudent Investor Rule' for Trustees" by Edward C. Halbach, Jr., *Trusts & Estates*, December 1990, pages 14-22.

[48] The black letter law and comments of the Third Restatement (as is the case with any Restatement of the Law) are approved by the ALI Council and membership of the ALI, and therefore represent their official views. However, the detailed Reporter's Notes on § 90 (beginning on page 340 of the Third Restatement) which contain explanatory comments, instructive illustrations and supporting authority by the Reporter aren't subject to review by the Council and membership, and therefore aren't considered part of the ALI's views. Every Restatement of the law has a Reporter who is a widely respected professor of law in their relevant field. A Reporter, with the assistance of other distinguished law professors, jurists and attorneys, drafts and coordinates the black-letter law of a Restatement such as § 90 of the Third Restatement. The Reporter for the 1992 and 2007 Restatement of Trusts, as noted, is the late Edward C. Halbach, Jr. Professor Halbach was tremendously helpful to the author of this paper in (patiently) reading successive drafts of his 2002 book, "The Prudent Investor Act: A Guide to Understanding," which led to offering many

trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust." § 90(a) reads, in part: "This standard requires the exercise of reasonable care, skill, and caution…"[49]

Unlike a Justice of the U. S. Supreme Court who couldn't come up with a definition of pornography,[50] § 90(a) defines a "prudent investor" as someone who must exercise reasonable care, skill, and caution in meeting the Third Restatement's standard of care set forth in § 90.

"The duty of care requires the trustee to exercise reasonable effort and diligence in making and monitoring investments for the trust, with attention to the trust's objectives. The trustee has a related duty of care in keeping informed of rights and opportunities associated with those investments."[51]

"The exercise of care alone is not sufficient, however, because a trustee is liable for losses resulting from failure to use the skill of an individual of ordinary intelligence (§ 77). This is so despite the careful use of all the skill of which the particular trustee is capable."[52]

"On the other hand, it follows from the requirement of care as well as from sound policy that, if the trustee possesses a degree of skill greater than that of an individual of ordinary intelligence, the trustee is liable for a loss that results from failure to make reasonably diligent use of that skill."[53]

"In addition to the duty to use care and skill, the trustee must exercise the caution of a prudent investor managing similar funds, in similar circumstances, for similar purposes…In the absence of contrary provisions in the terms of the trust, this requirement of caution requires the trustee to invest with a view both to safety of the capital and to securing a reasonable return."[54]

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suggestions that greatly strengthened it. That book is cited in Reporter's Notes on § 90, page 345 of the Third Restatement. Another book, written by the author in 1998, "Index Mutual Funds: Profiting From an Investment Revolution," is cited in Reporter's Notes on § 90, comment m, page 386.

[49] In accord is the second sentence of § 2(a) of the UPIA: "In satisfying this standard [of care set forth in the first sentence of § 2(a) of the UPIA], the trustee shall exercise reasonable care, skill, and caution." Although there are many ways to demonstrate competency with respect to the care, skill and caution required of a prudent trustee, social or business relationships or employment titles are not among them. See "Managing Investment Expenses: Trustee Duty to Avoid Unreasonable or Inappropriate Costs" by Luther J. Avery and Patrick J. Collins, *ACTEC Notes*, Volume 25, No. 2, Fall 1999, pages 123-36.

[50] "I shall not…attempt further to define the kinds of material I understand to be embraced within [the] shorthand description [of pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it. . ." Justice Potter Stewart in *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964).

[51] § 90 of the Third Restatement, comment d, pages 299-300.

[52] *Id.,* page 299.

[53] *Id*.

[54] § 90 of the Third Restatement, comment e, pages 301-302. "Caution, the traditional duty to invest conservatively, has been the primary source of arbitrary prohibitions in the case law. These prohibitions involve an unfortunate tendency to classify some types of investments and courses of action as excessively risky without regard to a particular trust's objectives, distribution requirements, and general risk tolerance or a particular investment's role in the trust portfolio." See "Trust Investment Law in the Third Restatement" by Edward C. Halbach, Jr., *Real Property, Probate and Trust Journal*, Volume 27, Fall 1992, pages 407-65.

The Prudent Investor Rule of the Third Restatement restates the common law of trust investing. Commentary to the 1997 Uniform Principal and Income Act puts this into perspective:[55] "Even if a State's legislature or courts have not formally adopted the [Prudent Investor Rule], the [Third] Restatement establishes [it] as an authoritative interpretation of the common law prudent man rule, referring to the [Third Restatement's] prudent investor rule as a '[modest] reformulation of the Harvard College dictum and the basic rule of prior Restatements.'"[56]

The Third Restatement's standard of care does not govern the conduct of trustees responsible for investing and managing assets held by the defined benefit plan(s) in any state-wide PERS. However, two states – North Carolina and Oregon – have each selected portions of the Third Restatement's fiduciary standard and incorporated them into their own standard of care that governs the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) in their state-wide PERS.

1994 - Uniform Prudent Investor Act

The UPIA was promulgated in 1994 by the NCCUSL.[57] Like other such uniform acts, the UPIA was the template from which state legislatures worked to adapt, and enact into law, their own version of the UPIA to achieve their legislative goals. All such versions, however, closely track the text of the UPIA.[58]

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[55] The Uniform Principal and Income Act was originally promulgated in 1931, updated in 1962 and 1997, and amended in 2000 and 2008. It was then replaced and updated further in 2018 as the Uniform Fiduciary Income and Principal Act.

[56] See commentary to § 104 of the 1997 Uniform Principal and Income Act, pages 14-15, citing the Introduction to the 1992 Restatement (Third) of Trusts (Prudent Investor Rule), page 5.

[57] The NCCUSL, founded in 1892, is a consortium of state governments that operate a pooled drafting service for the states, and is composed of commissioners appointed by the governors of all the states and the District of Columbia. The commissioners, who must be members of a state bar, are a mix of more than 300 practicing lawyers, judges, state legislators, and academics. Legislation promulgated by the NCCUSL tends to be especially well drafted due to its resources and procedures. Drafting is normally done under the supervision of a committee of commissioners, which engages a reporter, typically an academic specialist, to prepare and revise drafts. American Bar Association advisors sit with all committees as do representatives of affected interest groups. The NCCUSL particularly emphasizes drafting projects in fields in which multistate transactions, interests, or contacts make uniformity of state law advantageous. The NCCUSL's drafting has played a major role in the transformation of American trust law into statutory law. THE NCCUSL's reputation for good drafting tends to predispose state bar associations and state legislators toward acts that it promulgates. Because so much of American trust legislation has been NCCUSL-generated, state trust law has become ever more uniform. Even in a state with a well-developed common law of trusts, authority regarding many points is lacking, or unclear, or sometimes conflicting. A particular attraction of comprehensive, uniform legislation is that it resolves many such issues. See "Why Did Trust Law Become Statute Law in the United States?" by John Langbein, *59 Alabama Law Review*, 2007, pages 1069-1082. The NCCUSL - also known as the Uniform Law Commission - has promulgated more than 300 uniform and model laws (such as the Uniform Commercial Code) in its 130 years of existence.

[58] According to the NCCUSL, the Uniform Prudent Investor Act has been enacted into law by the District of Columbia and 44 states including California which codified the UPIA in probate code §§ 16002(a), 16003 and 16045 through 16054. Each of the other six states - Delaware, Florida, Kentucky, Louisiana, New York and Pennsylvania - has enacted a set of laws substantially similar to that of the UPIA. The Third Restatement adds: 45 "states have now (2006) enacted legislation codifying the prudent-investor principles of this Chapter [17 - INVESTMENT OF TRUST FUNDS (THE 'PRUDENT INVESTOR RULE')], most by enacting the Uniform Prudent Investor Act…[while]…the remaining [5] states have comparable, modernized statutes that were enacted several years before the ALI promulgated its prudent investor rule [of the Third Restatement]." See Forenote to the Prudent Investor Rule of

The UPIA fiduciary standard of care reads: A trustee "shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust."[59] The UPIA sets forth supplemental fiduciary duties of prudence (e.g., diversification, loyalty, impartiality, delegation if necessary) that govern the conduct of trustees responsible for the investment and management of assets held in private family trusts.

Even though the UPIA pertains to private individuals and families, seven states - Arkansas, Georgia, New Mexico, Tennessee, Utah, Vermont and West Virginia - have enacted into law the entire text of the UPIA to govern the conduct of trustees responsible for investing and managing assets held by defined benefit plan(s) in their state-wide PERS.[60]

Three other states - Maine, North Carolina and Oregon - have each selected portions of the UPIA's fiduciary standard of care (as well as portions from other standards) and incorporated them into their own standard to govern the conduct of trustees responsible for investing and managing assets held by defined benefit plan(s) in their state-wide PERS.

The UPIA was intended to replace the 1942 Model Statute. But the immediate impetus for its publication in 1994 was the promulgation of the Restatement (Third) of Trusts (Prudent Investor Rule) in 1992.[61] The UPIA and its commentary draw upon and codify the wording and essential principles of investment prudence laid down by the Third Restatement. The UPIA's tie to the Third Restatement is significant because the latter work provides the underlying rationale for the duties codified by the UPIA while also specifying numerous examples of prudent and imprudent investing.

The Prefatory Note to the UPIA underscores the significant influence that Modern Portfolio Theory has had on investing and its tremendous effect in prompting and shaping the reform of trust investment law in America:

- "[F]rom the late 1960's the investment practices of fiduciaries experienced significant change.
- [The UPIA] undertakes to update trust investment law in recognition of the alterations that have occurred in investment practice.
- These changes have occurred under the influence of a large and broadly accepted body of empirical and theoretical knowledge about the behavior of capital markets, often described as 'modern portfolio theory.'"[62]

It is useful for trustees as well as those who advise them such as attorneys, accountants and other professionals concerned with issues of fiduciary obligation and legal liability to have some familiarity with MPT. This is especially important because MPT provides the theoretical investment underpinnings of ERISA (which, as noted, pertains to pension and employee benefit plan trusts of private sector employees

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the Third Restatement, page 287. The American Bar Association endorsed the UPIA in 1995 as has the American Bankers Association.

[59] See § 2(a) of the UPIA.

[60] The text of the UPIA as codified by each of these seven states has been reproduced (with accompanying analyses) in this paper to help illustrate the comprehensive nature of the fiduciary duties of prudence that, when relevant in a particular situation and carried out prudently, assists trustees in living up to the UPIA's fiduciary standard of care.

[61] *Id*., Langbein.

[62] See Prefatory Notes to the UPIA and UMPERSA.

as well as Taft-Hartley union pension plan trusts), the Third Restatement and the UPIA[63] (both of which pertain to private family trusts) and UMPERSA (which pertains to public employee pension plan trusts).

The Prefatory Note to the UPIA states the fundamental, underlying premise of MPT: "The trade-off in all investing between risk and return is identified as the fiduciary's central consideration." Stated differently, the central consideration of an investment fiduciary is to determine the risk/return tradeoff of a portfolio. In whatever way this tradeoff is phrased, its goal is to maximize portfolio return for a given level of risk, or to minimize portfolio risk for a given level of return.[64]

The "central consideration" of a trustee under the UPIA was not conjured out of thin air. It was derived from the basic principles of MPT. And those principles came from the mind of Harry Markowitz, a 23-year old Ph.D. candidate in economics one day in 1950 as he was reading a book on finance in the library at the University of Chicago graduate school of business. (Markowitz later won a Nobel Prize in Economics and universal acknowledgment as the father of Modern Portfolio Theory.[65])

In his 1990 Nobel lecture,[66] Dr. Markowitz described his thinking that day: "The basic principles of portfolio theory [i.e., (a) the "expected return and risk" of (b) a "portfolio"] came to me one day while I was reading John Burr Williams, *The Theory of Investment Value* [published in 1938 and very influential at the time Markowitz read it]. Williams proposed that the value of a stock should equal the present value of its future dividend stream. But clearly dividends are uncertain." In the preceding sentence, Markowitz succinctly identified in five words the risk in Williams' equation: "But clearly dividends are uncertain." A future dividend stream is uncertain because it is just that - in the future – so rationally it cannot be used to establish the value of a stock today. This makes the current value of any given stock uncertain.[67] And that uncertainty implies risk.

Dr. Markowitz further noted in his Nobel lecture: "[S]o I took Williams' recommendation…to value a stock as the *expected value* [emphasis in the original] of its discounted future dividend stream. But if the investor is concerned only with the expected values of securities, the investor must also be only interested in the expected value of the portfolio…[Therefore] action based on expected return only (like action based on certainty of the future [only]) must be rejected as descriptive of actual or rational investment behavior. It seemed obvious that investors are concerned with [both] risk and return, and that these should be measured for the portfolio as a whole."[68]

After reading Williams' book, Markowitz concluded that Williams' approach to investing - based on a one-dimensional focus on return (i.e., "action based on expected return only") and his belief that the

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[63] Professor Langbein notes: "The Uniform Prudent Investor Act implements a tightly interconnected set of reforms. These adjustments to the legal regime [are the result of] profound changes in the understanding of investing, particularly Modern Portfolio Theory." *Id.,* Langbein.

[64] "Two objectives…are common to all investors for which the techniques of this [book] are designed: 1. They want 'return' to be high. The appropriate definition of 'return' may vary from investor to investor. But, in whatever sense is appropriate, they prefer more of it to less of it. 2. They want this return to be dependable, stable, not subject to uncertainty. No doubt there are security purchasers who prefer uncertainty, like bettors at a horse race who pay to take chances. The techniques in this [book] are not for such speculators." "Portfolio Selection" by Harry M. Markowitz (Oxford, UK: Blackwell Publishers Ltd, 1998), page 6.

[65] Dr. Markowitz, at age 95 in the summer of 2022, is writing a multi-volume work on Modern Portfolio Theory.

[66] "Foundations of Portfolio Theory," Nobel Lecture by Harry M. Markowitz, Oslo, Norway, December 7, 1990.

[67] When using this kind of security analysis.

[68] *Id.*, Markowitz.

unknowable is knowable (i.e., "action based on certainty of the future") - is not "rational investment behavior."[69]

What is rational investment behavior, according to Markowitz, is an approach to investing based on a two-dimensional focus on both risk and return (i.e., "It seemed obvious that investors are concerned with risk and return...") within the context of a portfolio (i.e., "It seemed obvious that [risk and return]…should be measured for the portfolio as a whole.").[70]

This approach is reflected in "[§ 2(b) of the UPIA which]…sounds the main theme of modern investment practice, sensitivity to the risk/return curve…Investment risk and return are strongly correlated"[71] and therefore inseparable. The phrases "high risk, high return" and "low risk, low return" capture the essence of this relationship. Those who wish to earn higher returns – which can only be expected, not guaranteed – must be prepared to hold a portfolio in which they must endure higher levels of risk.[72] It is not possible to earn high returns by investing in low-risk investments.[73]

Among other things, this means there is no "free lunch" in investing. And yet, that ironclad law of investing must immediately give way to its even greater ironclad exception: diversification, in fact, provides the only known, dependable free lunch in all of investing.[74] A portfolio that's both broadly diversified across asset classes that comprise financial markets and deeply diversified within each such asset class is the

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[69] *Id.*, Markowitz. Dr. Markowitz's conclusion, that investors concerned with the expected values of stocks must also be concerned with the expected value of a portfolio, is a reminder that the relevant unit of analysis in MPT is the portfolio. That's why, and not to put too fine a point on it, Dr. Markowitz is the father of Modern Portfolio Theory, not Modern Investment Theory.

[70] § 2(b) of the UPIA appears to mandate the use of a portfolio risk/return analysis: "A trustee's investment and management decisions respecting individual assets *must be* evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust." Emphasis added.

[71] See commentary to § 2 of the UPIA.

[72] For many, investing can be psychologically - and even physically - debilitating.

[73] Sometimes it seems that a low risk/high return relationship could exist. For example, in 1979-80 an investor could have invested in low-risk 30-year government bonds and earned a nominal (i.e., non-inflation adjusted) 13-15% annual return over the ensuing three decades (assuming the bonds were held to maturity). The problem, though, was that inflation at the time was running at an annual 20% rate. In order for that "low-risk" portfolio of government bonds to earn high returns over the next three decades, the 20% inflation rate had to subside quickly and significantly. But that was no sure thing – at the time of investing in such a portfolio and looking forward into the future. Further, it was always possible that inflation could have risen even higher than 20% and remained there for an extended period of time. In that event, a low risk investment such as a 30-year government bond would turn into a high risk investment if it failed to generate returns great enough to outstrip inflation. Perfectly rational arguments were offered at the time to support a myriad of predicted outcomes. As sophisticated as they appeared, though, at base they were simply guesses about the future. The inescapable problem is that some sort of action (e.g., picking particular investments for a particular portfolio) must be taken at some point in time. Before, and even after, that point, though, no one has the ability to know how the future will unfold. It's probably best at this time to defer to the collective wisdom of New York Yankees catcher Yogi Berra ("It's tough to make predictions, especially about the future"), movie mogul Samuel Goldwyn ("Never make predictions, especially about the future") and Danish physicist Niels Bohr, recipient of the 1922 Nobel Prize in Physics ("Prediction is very difficult, especially about the future").

[74] Dr. Markowitz observed in his Nobel lecture: "An investor who knew future returns with certainty would invest in only one security, namely the one with the highest future return…In no case would the investor actually prefer a diversified portfolio." However, since no investor can know today the unknowable - the future - diversification "is a common and reasonable investment practice. Why? To reduce uncertainty! Clearly, the existence of uncertainty is essential to the analysis of [optimizing] rational investment behavior." *Id.*, Markowitz.

most effective and efficient way to reduce the portfolio's volatility and, hence, its risk - more particularly, its "uncompensated" risk.[75]

The total risk in a portfolio can be separated into two kinds: uncompensated risk[76] and compensated risk.[77] These risks pertain to portfolio diversification.

Uncompensated risk, which comprises about 70% of the total risk in a portfolio,[78] is the possibility that economic (and non-economic) news may impact uniquely the market price of a particular stock. For example, the price of Tesla, Inc. stock may go down as a result of the unexpected departure of a key Tesla executive. An investor who holds only Tesla stock can protect itself against this risk by also owning stock in companies that are unaffected by the departure of Tesla executives.[79] Since an investor can eliminate much of the uncompensated risk in a portfolio by broadly and deeply diversifying it, financial markets won't reward the investor for failing to do so.[80]

Compensated risk, which comprises about 30% of the total risk in a portfolio,[81] reflects the economic (and non-economic) news that impacts the market price of many (or all) stocks. Since the prices of individual stocks are affected, more or less, by the risk of a general rise or fall in the value of the stock market itself, compensated risk is unavoidable by an investor that invests in the stock market. When investors bear compensated risk, however, they expect to be rewarded for doing so.[82]

The Third Restatement - and its antecedent, ERISA, as well as its progeny, the UPIA, UMPERSA, the UP&IA, the UTC and UPMIFA - incorporate a fundamental tenet of Modern Portfolio Theory by ordinarily mandating diversification of portfolios. This can be termed "rational" diversification, Dr. Markowitz's notion of diversification,[83] whereby much of the uncompensated risk in a portfolio can be eliminated. He notes: "We should diversify across industries because firms in different industries, especially industries with different economic characteristics, have lower covariances than firms within an industry."[84]

Commentary to the Third Restatement emphasizes that broader diversification is usually to be preferred in trust investing. That commentary even defines the broadest possible diversification: "The ultimate goal

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[75] Professor John Langbein notes: "One of the central findings of Modern Portfolio Theory [is] that … huge and essentially costless gains [can be obtained from] diversifying [a] portfolio thoroughly [which reduces its uncompensated risk]." "The Uniform Prudent Investor Act and the Future of Trust Investing" by John H. Langbein, *Iowa Law Review*, Volume 81, 1996, pages 641-69

[76] Also referred to as "non-market" risk or "diversifiable" risk.

[77] Also referred to as "market" risk or "non-diversifiable" risk.

[78] "An Introduction to Risk and Return from Common Stocks" by Richard A. Brealey (Cambridge, MA: MIT Press, second edition, 1983), page 117.

[79] There are many other sources of risk that can impact the value of a portfolio such as inflation risk and interest rate risk.

[80] Although concentrated ownership of founders' stock sometimes conveys fabulous riches on a fortunate few (e.g., Microsoft's Bill Gates), it's impossible to divine which firms will grow from unseasoned start-ups to Fortune 500 companies. While it's difficult to think so today, the odds were lottery-like in 1978 when Gates co-founded Microsoft that he would be a success at all - much less amass such tremendous wealth. In fact, it's reasonable to expect that a huge percentage of unseasoned firms will fail.

[81] *Id.*, Brealey.

[82] While investors may expect to be rewarded for bearing compensated risk, there's no certainty that they will be in any given situation. That's why risk can only be "expected," not guaranteed.

[83] "Portfolio Selection" by Harry Markowitz, *The Journal of Finance,* Volume 7, No. 1, March 1952, pages 77-91.

[84] *Id.*, Markowitz.

of diversification would be to achieve a portfolio with only the [compensated]…element of risk."[85] Commentary to § 3 of the UPIA adds: "The object of diversification is to minimize [the] uncompensated risk of having too few investments." The Reporter for the Third Restatement elaborates: "[T]he goal of diminishing uncompensated risk through diversification should be a pervasive consideration in prudent investment management and ordinarily applies even within specialized programs [e.g., those limited to assets of a particular type or having special characteristics] that may be incorporated into [the overall investment strategy of a trust portfolio]."[86]

Diversification of a portfolio reduces its uncompensated risk but - miraculously – not its expected return. This can be thought of as a "double-barreled" benefit for investors. When individual assets are combined together in a portfolio, "[the risk of the portfolio] is *less than* the weighted average of the risk of its individual [assets]. [The expected return of the portfolio], on the other hand, is [the *same as*] a weighted average of the expected returns of the individual assets."[87]

Another conclusion that Markowitz reached after reading Williams' book was that Williams' idea of investing failed to take into account the desirability of diversification of risk. Williams, as noted, focused solely on return while Markowitz focused on both risk and return and, based on an investor's personal preferences, the optimal tradeoff between those two factors in a portfolio.

This led Markowitz to suggest in his seminal 15-page paper on portfolio theory published in 1952[88] that his notion of diversification tended to promote "investment" behavior while Williams' notion of "diversification" (such as it was) tended to promote "speculative" behavior. Markowitz's paper was deemed so important it was later referred to as the "Big Bang" of all modern finance by Merton Miller, Markowitz's fellow Nobel laureate in Economics.[89]

Trustees who think only about return by investing solely in those stocks it is believed will generate maximum returns – without taking risk into consideration - are speculators, not investors. No trustee (or other fiduciary) responsible for the investment and management of assets for others should be a speculator.

Dr. Markowitz showed in a very compelling way that investors should consciously think about both risk and return.[90] This simple yet powerful idea, ranking as one of the most crucial investment insights of the 20th Century, led to the creation of an entire body of scholarly work known as Modern Portfolio Theory.

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[85] § 90 of the Third Restatement, comment g, page 311.

[86] "Trust Investment Law in the Third Restatement" by Edward C. Halbach, Jr., *Real Property, Probate and Trust Journal*, Volume 27, Fall 1992, pages 407-65. See § 90 of the Third Restatement, comment f, page 308: "Diversification is fundamental to the management of risk and is therefore a pervasive consideration in prudent investment management. So far as practical, the duty to diversify ordinarily applies even within a portion of a trust portfolio that is limited to assets of a particular type or having special characteristics."

[87] See General Note on Comments e through h of the Third Restatement, page 358. Emphasis added.

[88] "Portfolio Selection" by Harry Markowitz, *The Journal of Finance,* Volume 7, No. 1, March 1952, pages 77-91.

[89] "The History of Finance" by Merton H. Miller, *The Journal of Portfolio Management*, Summer 1999, pages 95-101.

[90] There's generally relatively little mention of risk when money managers make sales presentations to trustees who are responsible for the investment and management of trust assets. When it is mentioned, risk is usually confined to a few sentences in which trustees are assured that a manager has a proprietary system for "outperforming the market while taking less than market risk." Many trustees are given updates on how a portfolio is performing but fewer receive meaningful assessments of the underlying risk of the portfolio.

Although diversification has been used to reduce risk since time immemorial,[91] what was different on that day in 1950 after Markowitz finished reading Williams' book was that, from then on, investors would be able to mathematically create "efficient" (or rational) portfolios designed to minimize risk for a given level of return or maximize return for a given level of risk.[92] Without realizing it, Dr. Markowitz had set out on a course that would change the nature of investing forever.

MPT was at the root of the great reformation in the law governing the investment and management of trust assets in the 1990s.[93] Relevant text of the UPIA – extracting the essential principles, standards and duties of investment prudence set out in the Third Restatement some of which are based on the tenets of MPT as well as other notions of financial economics – has, as noted, been incorporated nearly verbatim into four other prudent investor uniform acts promulgated by the NCCUSL. These include the Uniform Management of Public Employee Retirement Systems Act,[94] the Uniform Principal and Income Act,[95] the Uniform Trust Code[96] and the Uniform Prudent Management of Institutional Funds Act.[97]

The following should give investors - including trustees responsible for investing and managing the assets of public employee retirement systems - a good overview of the interplay among prudent fiduciary conduct, risk and return, cost, uncertainty and diversification.[98]

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[91] Shakespeare seemed to understand the benefits of diversification: "My ventures are not in one bottom trusted/Nor to one place/Nor is my whole estate/Upon the fortune of this present year/Therefore, my merchandise makes me not sad." *The Merchant of Venice*, Act I, Scene I. See "The Early History of Portfolio Theory: 1600-1960" by Harry M. Markowitz, *Financial Analysts Journal*, July/August 1999, pages 5-16.

[92] This notion was reflected nearly 45 years later by the U.S. Department of Labor in 29 C.F.R. § 2509.94-1 Interpretive Bulletin which observed: "... [B]ecause every investment necessarily causes a plan to forego other investment opportunities, an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return."

[93] Today, MPT is accorded great respect in the academic community. In the real world of investing, its principles are applied by professional money managers to the investment and management of trillions of dollars around the globe.

[94] According to the NCCUSL, UMPERSA has been enacted into law by two states: Maryland and Wyoming.

[95] According to the NCCUSL, the UP&IA has been enacted into law by 32 states and the District of Columbia. As noted, the UP&IA was revised in 2018 as the Fiduciary Income and Principal Act which has been enacted into law by six states.

[96] According to the NCCUSL, the UTC has been enacted into law by 35 states and the District of Columbia. The UTC draws heavily from the Third Restatement to help incorporate modern notions of fiduciary investment conduct into the UTC.

[97] According to the NCCUSL, UPMIFA has been enacted into law by 49 states (except Pennsylvania) and the District of Columbia.

[98] Trustees should also have a good overview of the dynamics involved in the sales process (often initiated by a Request for Proposal) where (non-fiduciary) service providers such as a mutual fund company or brokerage firm seek to provide investment management services to (fiduciary) trustees of public employee pension plans or, say, 401(k) plans. Even in cases where trustees are responsible for retirement plans holding billions of dollars, many of them are no match for non-fiduciary salespersons who often have a substantial asymmetrical information advantage over the fiduciaries. The non-fiduciaries know where the bodies are buried - such as hidden costs and inherent conflicts of interest in certain investment assets - which, of course, benefits their side of the table – the side that doesn't include trustees or their beneficiaries. Trustees, who are supposed to be well-informed, prudent purchasers of products and services on behalf of their beneficiaries, are all too often hoodwinked - without even knowing it – by non-fiduciaries. It's often just not a fair fight. In such situations, non-fiduciaries have little to lose while trustees can lose a lot – or rather, their beneficiaries can.

- The fundamental, underlying problem faced by all investors is that selections of assets for a portfolio are decisions made under uncertainty[99]
- Uncertainty implies risk which is the principal factor at work in financial markets[100]
- The "central consideration" of a trustee is to determine the trade-off between risk and return in a portfolio[101]
- **Risk can be managed** in a portfolio by reducing it through diversification, the only known "free lunch" in all of investing[102]
- A trustee is required (ordinarily) to diversify a portfolio's assets to reduce its risk[103]
- The best way to increase a portfolio's (risk-adjusted) return is to reduce the portfolio's risk through diversification instead of trying to identify which assets will be future winners[104]

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[99] Any discussion of investing should begin with this observation: "portfolio selection involves making a decision under uncertainty." The father of Modern Portfolio Theory, Harry Markowitz, quoting G. M. Constantinides and A. G. Malliaris from "Handbooks in OR & MS," edited by R. Jarrow, et al., Volume 9, Amsterdam, Netherlands, Elsevier Science B.V., 1995, in "The Early History of Portfolio Theory: 1600-1960" by Harry M. Markowitz, *Financial Analysts Journal*, July/August 1999, pages 5-16. "Uncertainty is a salient feature of security investment. Economic forces are not understood well enough for predictions to be beyond doubt or error… Only the clairvoyant could hope to predict with certainty." "Portfolio Selection" by Harry M. Markowitz (Oxford, UK: Blackwell Publishers Ltd, 1998), page 4.
[100] "[There is] a growing awareness that uncertainty is the central factor at work in [financial markets] and that the management of risk, rather than its avoidance, is the primary task of the fiduciary." "Modern Investment Management and the Prudent Man Rule" by Bevis Longstreth (New York, NY: Oxford University Press, 1986), page 154.
[101] Prefatory Note to the UPIA. "The techniques [of this book] are for the investor who, other things being equal, prefers certainty to uncertainty…If portfolio A has both a higher likely return [i.e., expected return] and a lower uncertainty of return [i.e., risk] than portfolio B and meets the other requirements of the investor, it is clearly better than portfolio B." "Portfolio Selection" by Harry M. Markowitz (Oxford, UK: Blackwell Publishers Ltd, 1998), page 6.
[102] Compare the definition of the duty of diversification in ERISA, the Third Restatement, the UPIA and UMPERSA. § 404(a)(1)(C) of ERISA: A trustee must diversify the plan's investments "so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." § 90(b) of the Third Restatement: "In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so." § 3 of the UPIA: "A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." § 8(a)(2) of UMPERSA: "(a) In investing and managing assets of a retirement system pursuant to [§] 7, a trustee with authority to invest and manage assets…(2) shall diversify the investments of each retirement program or appropriate grouping of programs unless the trustee reasonably determines that, because of special circumstances, it is clearly prudent not to do so." In a case in which he served as an expert witness, the author of this paper opined that a one-stock portfolio held by members of a prominent family for over a century was prudent under the facts and circumstances of the case, and therefore required no diversification, much less broad and deep diversification. The opinion was aided by the explanatory comments, instructive illustrations and supporting authority in the Reporter's Notes of the Third Restatement which are geared towards helping restore the generality and flexibility of trust investing recognized by the *Harvard College* Prudent Man Rule. See "When Holding a Single Stock Isn't Imprudent" by W. Scott Simon, Morningstar, July 6, 2017. When Holding a Single Stock Isn't Imprudent | Fiduciary Experts (fiduciary-experts.com).
[103] Trustees are required (ordinarily) to diversify portfolios - preferably broadly and deeply to reduce risk - as part of a prudent process. This task may be made easier if a trustee adopts a prospective view of investment risk. That exercise involves – prior to fashioning a portfolio's asset allocation and implementing it with an investment strategy - a conscious recognition that portfolio selections are decisions made under uncertainty. See "Ignoring the Noise of Financial Markets" by W. Scott Simon, Morningstar, February 4, 2016. Ignoring the Noise of Financial Markets | Fiduciary Experts (fiduciary-experts.com).
[104] Even if there were no explicit requirement to diversify, there is still the requirement to consider the tradeoff between risk and return in a portfolio which implies diversification.

- While risk can be managed, **return cannot be managed** because returns are always impacted by future random, uncertain events[105]
- As a result, returns generated by an asset or portfolio cannot be known before they occur but only after they occur when they show up as "track records"[106]
- That's why returns can only be "expected," not guaranteed
- A trustee therefore is not legally required to identify today those assets that will turn out to be superior in the future[107]
- A trustee loses this legal defense,[108] though, if its investment and management conduct was imprudent at the time of its occurrence[109] resulting in poor asset and/or portfolio performance

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[105] Trustees must think consciously about risk (which they can manage by reducing it through diversification) – not just return (which they cannot manage since it's impacted by future random, uncertain events which, by definition, are unpredictable and therefore unknowable in advance of their occurrence). This renders successful efforts at stock picking, market timing, track record investing, et al. all too, well, random and uncertain. In this context, uncertainty results from the fact that there is really no way to know today which assets will turn out to have superior (or inferior) performances in the future. Many investment advisors such as stockbrokerage firms, banks, trust companies and others act as if this uncertainty doesn't exist. They believe that the way to "know" today which assets in the future will be superior (or inferior) performers is through "active investing," the purpose of which is to "beat the market." Active investing takes a number of different forms. One form - "track record investing" - focuses on the past. This involves attempts to correctly forecast which superior performing assets from the past will continue to be superior in the future. Other forms of active investing - "stock picking" and "market timing" - focus on the future. They involve attempts to correctly detect changes in price movements of stocks (and other assets) so that an investor can know today which assets will be superior (or inferior) performers in the future. Because the return of an asset (or portfolio) is subject to future random, uncertain events, attempts to find winning assets based on readings of the past or forecasts of the future are usually unsuccessful. Even when successful, luck – not investment skill - is often the cause.

[106] Virtually every reputable study of investment returns over more than a half century - going back to Michael Jensen's seminal study on mutual funds in 1968 - has found that there's no reliable way to know when - or which - or even if – investment winners from the past will win again in the future. (See "The Performance of Mutual Funds in the Period 1945-1964" by Michael C. Jensen, *The Journal of Finance*, Volume 23, No. 2, May 1968, pages 389-416. Among Jensen's findings: performances by individual mutual funds are no better than predicted by random chance.) Indeed, data from financial markets show the maddening tendency for many superior track records to be followed by inferior ones which makes track record investing especially frustrating for those that engage in it. This reality is reflected in the warning - "Past performance is no guarantee of future results" - required by the U.S. Securities and Exchange Commission in all mutual fund advertisements. While it's very easy to recognize past winners, it's very difficult (more likely impossible) to identify, today, future winners.

[107] At the time the opening bell of the New York Stock Exchange rings each morning, there is no way for anyone to know what the closing price will be for any listed asset such as a mutual fund, ETF, or individual stock or bond when the NYSE closes that afternoon. This is a fact, not an opinion. And yet, billions of dollars in marketing costs are spent by mutual fund companies, brokerage firms, insurance companies, et al. in efforts to convince individual investors and institutional investors such as trustees charged with investing and managing public and private pools of money that they know what those closing prices will be in order to make profits (or avoid losses). That, in a nutshell, is the premise of active investing.

[108] In some states, trustees of public employee retirement systems can be held liable for fraud or embezzlement while in other states, they may incur financial penalties. Fiduciaries of 401(k) plans are subject to personal liability to make good any losses to the plans that result from a breach of their fiduciary duties. See ERISA Interpretive Bulletin 96-1. ERISA allows the imposition of a jail sentence if the assets of a retirement plan have been grossly mishandled. See § 501 of ERISA. The DOL can refer criminal violations of ERISA to the U.S. Attorney General's office for prosecution under the Comprehensive Crime Control Act of 1984.

[109] See "9. Prudence Determined When Investments Made" at page 44 of this paper.

- Asset and portfolio **costs can be managed** by simply reducing them[110]

1997 - Uniform Management of Public Employee Retirement Systems Act[111]

The Prefatory Note to the UMPERSA reads, in part: "State and local retirement systems currently [in 1997] manage in excess of $1 trillion [$5.76 trillion at the end of Q12022[112]] in assets for the benefit of participants" such as employees of pubic retirement systems that are made available by states, counties, municipalities, special districts, school districts, healthcare districts, police and firefighter plans, and other public sector plans.[113]

UMPERSA's fiduciary standard of care reads: "A trustee 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…"[114]

Commentary to § 7 of UMPERSA observes: "A prudent trustee behaves as other trustees similarly situated would behave. The [fiduciary] standard [of care] is, therefore, objective rather than subjective…applying this objective standard requires comparison to a prudent person 'acting in a like capacity and familiar with those matters.' This language [in UMPERSA] comes from ERISA and stakes out a middle ground. On the

[110] § 404(a)(1)(A) of ERISA reads, in part: "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan…" § 90(c)(3) of the Third Restatement reads, in part: "…the trustee must…incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship…" Comment on Basic Duties of the Prudent Investor, b. Duty to conform to fiduciary standards, page 295 of the Third Restatement, reads, in part: "…Cost- conscious management is fundamental to prudence in the investment function..." § 7 of the UPIA reads: "In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee." Commentary to § 7 of the UPIA adds: "Wasting beneficiaries' money is imprudent. In devising and implementing strategies for the investment and management of trust assets, trustees are obliged to minimize costs." § 7(5) of UMPERSA reads: "A trustee or other fiduciary shall discharge duties with respect to a retirement system…incurring only costs that are appropriate and reasonable." While costs must be reasonable and appropriate, it's impossible for a trustee to make either determination if they fail to ferret out all costs that have an economic impact on their beneficiaries.

[111] The NCCUSL distinguishes between a uniform act such as the Uniform Management of Public Employee Retirement Systems Act (UMPERSA) and a model act such as the Model Management of Public Employee Retirement Systems Act (MMPERSA). A "uniform" act seeks to establish the same law on a subject among the various jurisdictions where there is substantial reason to anticipate enactment in a large number of jurisdictions, and uniformity of the provisions of the act among the various jurisdictions is a principal objective. With a "model" act, uniformity may be a desirable objective, though not a principal one, and the act may promote uniformity and minimize diversity even though a significant number of jurisdictions may not adopt the act in its entirety, or the purposes of the act can be substantially achieved even though it is not adopted in its entirety by every state. The author of this paper uses the most widely used term – UMPERSA – even though only a handful of states have adopted this Act. UMPERSA (a uniform act) and MMPERSA (a model act) are also known by a third name: the Management of Public Employee Retirement Systems Act (MPERS). Although their acronyms are different, the text of all three is identical.

[112] According to the National Association of State Retirement Administrators ("NASRA"), citing Federal Reserve data. NASRA is a non-profit association whose members are the directors of the nation's state, territorial, and largest state-wide public retirement systems.

[113] UMPERSA was approved by the American Bar Association in 1998.

[114] § 7(3) of UMPERSA.

one hand, it is not intended to impose a rigid 'prudent expert' rule. Retirement systems differ on a wide variety of parameters and the prudence standard is sensitive to factors such as the size, complexity, and purpose of each system. Fiduciaries should be evaluated, not against a single prudent expert, but in terms of the actions of prudent fiduciaries for other similar [public employee retirement] systems facing similar circumstances. At the same time, [UMPERSA's fiduciary standard of care] does not permit comparison to a prudent amateur. Fiduciaries will be held to no lower standard than that of others 'familiar with those matters.'"[115]

UMPERSA's fiduciary standard of care governs the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) in the state-wide PERS of Kentucky, New Hampshire, South Carolina[116] and Wyoming. In 2005, both Maryland and Wyoming enacted UMPERSA into law (to date, the only states to have done so) but Maryland chose to adopt ERISA's fiduciary standard of care - although the standards of ERISA and UMPERSA are worded virtually identically.

Two other states - North Carolina and Oregon - have each selected portions of UMPERSA's fiduciary standard of care (as well as portions of other standards) and incorporated them into their own standard that governs the conduct of trustees responsible for investing and managing assets held by the defined benefit plan(s) in their state-wide PERS.

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[115] See *Marshall v. Glass/Metal Ass'n & Glaziers & Glassworkers Pension Plan*, 507 F. Supp. 378, 384 (D. Haw. 1980) ("While there is flexibility in the prudence standard, it is not a refuge for fiduciaries who are not equipped to evaluate a complex investment") and *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir.), cert. denied, 469 U.S. 1072 (1984) ("A trustee's lack of familiarity with investments is no excuse...trustees are to be judged 'according to the standards of others acting in a like capacity and familiar with such matters'"). "[ERISA] and its 1979 regulations…reveal…a felt need for departures from traditional applications of the prudent-man rule of trust law. This is indicated in part through the U.S. Department of Labor regulations' recognition of modern portfolio theory and of more flexible concepts (for example, in delegation and in risk-return relationships). Heavy emphasis in the regulations on the duty of loyalty and prohibited transactions (even for otherwise prudent, profitable investments) is understandable in this context, as is the possibility of an interpretation that imposes a standard of skill in investment management different from that imposed by general trust law. See generally ERISA § 404, 29 U.S.C. § 1104, 29 C.F.R. § 2650.404a-1. (The possibly higher standard of skill here results from reference to a prudent person 'acting in a like capacity' and 'familiar with such matters' - language that has been interpreted to create not a standard of a 'prudent expert' but one of prudence fitting the particular trust. The quoted language has been picked up in the later California-Delaware-Georgia type of statute…in which an interpretation leading to a standard of skill higher or otherwise different than required at common law would be both undesirable from a policy viewpoint and unjustified by context and legislative purpose….)." Third Restatement, General Note, pages 343-344. In accord: "Although some commentators have suggested that section 404(a)(1)(B) imposes a 'prudent expert' standard, the better view is that the [ERISA Prudent Man Rule] is a restatement of the prudent [man] standard developed as part of the common law of trusts." *ERISA and the 401(K) Plan Fiduciary* by Thomas R. Hoecker, unpublished manuscript, 2006, page 2. "Thus, a fiduciary will be held to the standard of any prudent fiduciary who is skilled in carrying out and familiar with the duties with which he or she is charged." *Id.*, footnote 7. "[A] A review of the relevant history of Section 404…support[s] this view…it confirms that the emphasis of Section 404 is on flexibility." *Id.* "The duty of prudence or care prescribes the fiduciary's standard of conduct by establishing an objective 'prudence' or 'reasonableness' standard in which the meaning of prudence or reasonableness is informed by industry norms and practices." "Trust Law as Fiduciary Governance Plus Asset Partitioning" by Robert H. Sitkoff, *John M. Olin Center for Law, Economics, and Business, Harvard University,* Discussion Paper No. 711, September 2011.

[116] In 1998, South Carolina enacted a number of fiduciary provisions (including the standard of care) set forth in UMPERSA.

A highly-respected legal commentator observes: "[A review of economic history since *Harvard College* was decided in 1830] reveals a circular journey from [that case's awareness that risk is pervasive: 'Do what you will, the capital is at hazard'] through a long period [i.e., the ascendency of the Legal List Rule in state statutes] in which 'safe' investments were thought to exist and fiduciaries expected to find them, often with the help of labels affixed to specific products by commentators, courts, and legislatures, to the present era [i.e., ERISA, the Third Restatement, the UPIA and UMPERSA], in which safety as an investment concept has become an anachronism, emptied of meaning by a growing awareness that uncertainty is the central factor at work in [financial markets] and that the management of risk, rather than its avoidance, is the primary task of the fiduciary."[117]

Fiduciary Standards of Care Created from Amalgamations of Other Standards of Care

Some states have selected different portions of fiduciary standards of care from the 1942 Model Statute, ERISA, the Third Restatement, the UPIA, the UTC and UMPERSA, and incorporated them into their own standard. These amalgamations of standards govern the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) in the state-wide PERS of the following five states: (1) Kansas selected portions of the standards of care set forth in the 1942 Model Statute and ERISA, (2) Maine selected portions of the standards set forth in the UPIA and the UTC, (3) North Carolina selected portions of the standards of care set forth in the 1942 Model Statute, ERISA, the Third Restatement, the UPIA and UMPERSA, (4) Oregon selected portions of the standards set forth in the 1942 Model Statute, ERISA, the Third Restatement, the UPIA and UMPERSA and (5) Pennsylvania selected portions of the standards of care set forth in the 1942 Model Statute and ERISA. Four of these 5 states (with the exception of Maine) have selected portions of ERISA's standard to incorporate into their own standard.

Trust Investment Law Standard

The fiduciary standard of care that governs the conduct of trustees responsible for investing and managing assets held by the Employees' Retirement System of the State of Hawaii is the trust investment law standard. The basic principle of § 4 of UMPERSA is that the assets of public employee retirement systems must be held in trust.[118]

II. Ten Standards of Care Over Two Centuries of American Trust Investment Law

1830 - Prudent Man Rule (*Harvard College v. Amory*, Supreme Judicial Court of Massachusetts)

All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own

[117] See "Modern Investment Management and the Prudent Man Rule" by Bevis Longstreth (New York, NY: Oxford University Press, 1986), page 154. *Harvard College* established nearly two centuries ago that there is no such thing as a "safe" investment or investment strategy. "All investments, even the nominally excepted short-term U.S. Treasury securities, and all investment strategies involve some risk in the comprehensive sense of possible loss of real, inflation-adjusted value." § 90 of the Third Restatement, comment e(1), page 302. "…'Modern Portfolio Theory' offers an instructive conceptual framework for understanding and attempting to cope with [uncompensated] risk." § 90 of the Third Restatement, comment e(1), page 303. Since it is not possible to avoid portfolio risk, it becomes necessary to manage it through diversification – preferably broad and deep diversification of (uncompensated) risk.
[118] See commentary to § 4 of UMPERSA.

affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested**.**

1935 - Restatement of Trusts (§ 227)

In making investments of trust funds the trustee is under a duty to the beneficiary…to make such investments and only such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived...

1942 - Model Prudent Man Rule Statute (§ 1)

In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall exercise the judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

Adopted in 6 States: Iowa, Minnesota, Nevada, North Dakota, South Dakota and Texas

1959 - Restatement (Second) of Trusts (§ 227)

In making investments of trust funds the trustee is under a duty to the beneficiary…to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived...

1974 - Employee Retirement Income Security Act (§ 404(a)(1)(B))

[A] fiduciary shall discharge his duties with respect to a plan…with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

Adopted in 27 States and the District of Columbia: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, Ohio, Oklahoma, Rhode Island, Virginia, Washington and Wisconsin

1992 - Restatement (Third) of Trusts (Prudent Investor Rule) (§ 227)/2007 - Restatement (Third) of Trusts (§ 90)

The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust**.**

1994 - Uniform Prudent Investor Act (§ 2(a))

A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust**.**

__Adopted in 7 States__: Arkansas, Georgia, New Mexico, Tennessee, Utah, Vermont and West Virginia[119]

1997 - Uniform Management of Public Employee Retirement Systems Act (§ 7(3))

A trustee or other fiduciary shall discharge duties with respect to a retirement system…(3) 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…

__Adopted in 4 States__: Kentucky, New Hampshire, South Carolina and Wyoming

Fiduciary Standards of Care Created from an Amalgamation of Other Standards of Care

__Created in 5 States__: Kansas (the 1942 Model Statute and ERISA), Maine (the UTC and the UPIA), North Carolina (the 1942 Model Statute, ERISA, the Third Restatement, the UPIA and UMPERSA), Oregon (the 1942 Model Statute, ERISA, the Third Restatement, the UPIA and UMPERSA) and Pennsylvania (the 1942 Model Statute and ERISA)

Trust Investment Law Standard

"… all funds including any and all interest and earnings of the same, are and shall be held in trust by the board of trustees for the exclusive use and benefit of the system and for the members of the system and shall not be subject to appropriation for any other purpose whatsoever."

__Adopted in 1 State__: Hawaii

III. Fiduciary Standards of Care in the 50 States and the District of Columbia

1. Alabama: ERISA
2. Alaska: ERISA
3. Arizona: ERISA
4. Arkansas: UPIA
5. California: ERISA

[119] The text of the UPIA as codified by each of these seven states has been reproduced (with accompanying analyses) in the Appendix to this paper to help illustrate the comprehensive nature of the fiduciary duties of prudence that, when relevant in a particular situation and carried out prudently, assist trustees in living up to the UPIA's fiduciary standard of care.

6. Colorado: ERISA
7. Connecticut: ERISA
8. Delaware: ERISA
9. District of Columbia: ERISA
10. Florida: ERISA
11. Georgia: UPIA
12. Hawaii: Trust Investment Law Standard
13. Idaho: ERISA
14. Illinois: ERISA
15. Indiana: ERISA
16. Iowa: 1942 Model Statute
17. Kansas: An amalgamation of the 1942 Model Statute and ERISA
18. Kentucky: UMPERSA
19. Louisiana: ERISA
20. Maine: An amalgamation of the UPIA and the UTC
21. Maryland: ERISA
22. Massachusetts: ERISA
23. Michigan: ERISA
24. Minnesota: 1942 Model Statute
25. Mississippi: ERISA
26. Missouri: ERISA
27. Montana: ERISA
28. Nebraska: ERISA
29. Nevada: 1942 Model Statute
30. New Hampshire: UMPERSA
31. New Jersey: ERISA
32. New Mexico: UPIA
33. New York: ERISA
34. North Carolina: An amalgamation of the 1942 Model Statute, ERISA, the Third Restatement, the UPIA and UMPERSA
35. North Dakota: 1942 Model Statute
36. Ohio: ERISA
37. Oklahoma: ERISA
38. Oregon: An amalgamation of the 1942 Model Statute, ERISA, the Third Restatement, the UPIA and UMPERSA
39. Pennsylvania: An amalgamation of the 1942 Model Statute and ERISA
40. Rhode Island: ERISA
41. South Carolina: UMPERSA
42. South Dakota: 1942 Model Statute
43. Tennessee: UPIA
44. Texas: 1942 Model Statute
45. Utah: UPIA
46. Vermont: UPIA
47. Virginia: ERISA
48. Washington: ERISA
49. West Virginia: UPIA
50. Wisconsin: ERISA
51. Wyoming: UMPERSA

IV. Supplemental Fiduciary Duties of Prudence

This paper, thus far, has reviewed and analyzed the various fiduciary standards of care that govern the conduct of trustees responsible for investing and managing assets held by defined benefit plan(s) state-wide in the PERS of the 50 states and the District of Columbia.[120] Although trustees must meet the fiduciary standard that's applicable to them, they must also discharge – as relevant - the fiduciary duties that sometimes supplement a given standard. This paper classifies a standard of care not only as a standard but also as a fiduciary duty even though, analytically, it distinguishes between a given standard and any supplemental fiduciary duties that help implement it.

This paper has identified five current fiduciary standards of care (plus a number of standards created from amalgamations of other standards of care). ERISA's standard of care has been adopted in whole by 27 states and the District of Columbia. At the other end of the adoption spectrum, the Third Restatement's standard has not been embraced in whole by any state.[121] As noted, however, the Third Restatement's essential principles, standards duties of trust investment law that govern the conduct of trustees - as well as other fiduciaries such as guardians and conservators - responsible for the investment and management of trust assets have been extracted and codified by the UPIA and appear essentially verbatim in four other prudent investor uniform acts.[122] The UPIA's standard of care has been adopted by seven states and UMPERSA's standard by four states. The standard of care of the 1942 Model Statute has been adopted by six states but it has no supplemental fiduciary duties of prudence. Finally, the trust investment law standard has been adopted by only one state and it has no supplemental fiduciary duties.

The standards of care for the remaining five states comprise varying amalgamations of the preceding standards. Any analysis of the standards in those states will, necessarily, include evaluation of any pertinent supplemental fiduciary duties that may apply to one or more of the standards that comprise an amalgamated standard.

Based on the foregoing, the supplemental fiduciary duties of prudence supporting the standard of care for ERISA, the Third Restatement, the UPIA and UMPERSA covering, in total, 38 states and the District of Columbia will now be examined. The standards of care of the other 12 states will likely have any pertinent supplemental fiduciary duties of prudence imputed to them by the courts through reference to the Third Restatement in any relevant litigation.

Although the following four standards of care (as noted, also fiduciary duties) are relatively brief in wording,[123] each is part of an extended standard which includes supplemental fiduciary duties. This is true

[120] Although beyond the scope of this paper, the standard of care and supplemental fiduciary duties of prudence applicable to defined benefit plan(s) at the state level likely apply to county, municipal and other public employee retirement plans as well.

[121] Although North Carolina and Oregon have selected portions of the Third Restatement's standard of care for their own standard.

[122] The Third Restatement's principles, standards and duties of trust investment law have, as noted, been incorporated into the prudent investor uniform acts of (1) the 1994 Uniform Prudent Investor Act, (2) the 1997 Uniform Management of Public Employee Retirement Systems Act, (3) the 1997 Uniform Principal and Income Act (now the 2018 Uniform Fiduciary Income and Principal Act), (4) the 2000 Uniform Trust Code and (5) the 2006 Uniform Prudent Management of Institutional Funds Act.

[123] A comparison of these standards shows that the ERISA standard pertains to a "fiduciary" that is a "prudent man," the Third Restatement and the UPIA standards pertain to a "trustee" that is a "prudent investor" and the UMPERSA standard pertains to a "trustee or fiduciary" that is a "prudent person."

whether that more encompassing standard is set forth in federal law (ERISA), a legal treatise (the Third Restatement) or prudent investor uniform acts that have been enacted into law by virtually every state (the UPIA) or by just a few states (UMPERSA).

Four Standards of Care

ERISA. [A] fiduciary shall discharge his duties with respect to a plan…with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.[124]

Third Restatement. The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would in light of the purposes, terms, distribution requirements, and other circumstances of the trust.[125]

UPIA. A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust.[126]

UMPERSA. A trustee 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.[127]

Employee Retirement Income Security Act of 1974

As noted, ERISA's fiduciary standard of care has been adopted in whole (28 – ERISA), nearly identically (4 - UMPERSA) or partially (4 - amalgamated standards of care) by 36 (or 70%) of the 51 jurisdictions examined in this paper. This speaks to the enormous influence that the law of ERISA has had with respect to state (as well as county and municipal) public employee retirement systems across America.

§ 404(a)(1) of ERISA, despite its title (Prudent Man Standard of Care), encompasses not only that standard but also specifies four fiduciary duties (i.e., loyalty, the standard of care, diversification and adherence to plan documents consistent with the law of ERISA) as follows:

"(a) **Prudent Man Standard of Care**
(1) [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
(A) for the exclusive purpose of:
(i) providing benefits to participants and their beneficiaries; and
(ii) defraying reasonable expenses of administering the plan;

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[124] § 404(a)(1)(B) of ERISA (the Prudent Man Rule).
[125] § 90 of the Third Restatement. The measure of suitability for an investment strategy, technique or course of action for a particular trust is a function of the "purposes, terms, distribution requirements, and other circumstances of the trust" under the Prudent Investor Rule of the Third Restatement. See § 90 of the Third Restatement and § 2(a) of the UPIA.
[126] § 2(a) of the UPIA.
[127] § 7(3) of UMPERSA.

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]."

§ 404(a)(1)(A) expresses a fiduciary's duty of loyalty through the sole interest and exclusive purpose rules (i.e., duties). The sole interest rule requires a fiduciary to always place the interests of plan participants (and their beneficiaries) before their own interests or those of third parties. The exclusive purpose rule, in contrast, focuses on a fiduciary's duties to provide benefits to participants (and their beneficiaries) and to pay only reasonable expenses in administering a retirement plan.

§ 404(a)(1)(B) describes the prudent man standard of care as well as the interplay between the duties of loyalty and prudence. Commentary to § 5 (Loyalty) of the UPIA explains: "The concept that the duty of prudence in trust administration, especially in investing and managing trust assets, entails adherence to the duty of loyalty is familiar. ERISA § 404(a)(1)(B)…extracted in the Comment to Section 1 of [the UPIA], effectively merges the requirements of prudence and loyalty: 'a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and...with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims...' A fiduciary cannot be prudent in the conduct of investment functions if the fiduciary is sacrificing the interests of the beneficiaries."

§ 404(a)(1)(C) describes a fiduciary's duty (ordinarily) to diversify the investments of a plan.

§ 404(a)(1)(D) requires a fiduciary to follow plan documents and instruments unless they are inconsistent with the law of ERISA.

The law of ERISA specifies only the foregoing fiduciary duties of loyalty, care/prudence, diversification and adherence to plan documents.[128] In the case of *In re Enron Corporation, Securities, Derivatives & "ERISA" Litigation,*[129] the federal district court cited language from an array of cases to explain why. "'In some instances, [the common law of trusts] will offer only a starting point, after which courts must go on to as whether, or to what extent, the language of the [relevant ERISA] statute, its structure, or its purpose require departing from common-law trust requirements...'[130] '[R]ather than explicitly enumerating *all* [emphasis in the original] of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility...'[131] 'Thus a federal common law based on the traditional common law of trusts has developed and is applied to define the powers and duties of ERISA plan fiduciaries, at least in part, with modifications appropriate in light of the unique nature of the statutory employee benefit plans.'[132] '…For example, the traditional four overlapping fiduciary duties…are derived from the common law of trusts and

[128] See ERISA §§ 404(a)(1)(A) through 404(a)(1)(D).
[129] 284 F. Supp 2d 511 (S.D. Tex. 2003).
[130] *Varity Corp. v. Howe,* 516 U.S. 489, 497, 116 S. Ct. 1065 (1996).
[131] *Id.,* page 496; additional citations omitted.
[132] See *Pegram v. Herdrich*, 530 U.S. 211, 224, 120 S. Ct. 2143, 2156 (2000).

are imposed upon ERISA fiduciaries. At the same time, in contrast to the common law of trusts, under ERISA the plan fiduciary may have multiple roles and wear many hats; he may serve as an employer and as a plan fiduciary.'[133] The scope of the incorporation of the common law of trusts is not clearly defined, however, and different courts have frequently come to different conclusions about the extent of its application." [Citations omitted.]

Restatement (Third) of Trusts[134]

"**General Standard of Prudent Investment**
§ 90. The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would in light of the purposes, terms, distribution requirements, and other circumstances of the trust.
(a) This standard requires the exercise of reasonable care, skill, and caution [i.e., prudence], and is to be applied to investments not in isolation but in the context of the trust [portfolio] and as a part of an overall investment strategy, which should incorporate [risk and return] objectives reasonably suitable to the trust.
(b) In making and implementing investment decisions, the trustee has a duty to [diversify] the investments of the trust unless, under the circumstances, it is prudent not to do so.
(c) In addition, the trustee must: (1) conform to fundamental fiduciary duties of [loyalty] (§ 78) and [impartiality] (§ 79); (2) act with prudence in deciding whether and how to [delegate] authority and in the selection and supervision of agents (§ 80); and (3) incur only [costs] that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship (§ 88)…"[135]

The Restatement (Third) of Trusts' One "Fundamental Proposition" and 5 "Principles of Prudence"[136]

"In addition to the fundamental proposition that no investments or techniques are imprudent per se, there are a few principles of prudence set out in the Sections [of the Third Restatement] that follow. These principles instruct trustees and courts that: (1) sound diversification is fundamental to risk management and is therefore ordinarily required of trustees; (2) risk and return are so directly related that trustees have a duty to analyze and make conscious decisions concerning the levels of risk appropriate to the purposes, distribution requirements, and other circumstances of the trusts they administer; (3) trustees have a duty to avoid fees, transaction costs, and other expenses that are not justified by needs and realistic objectives of the trust's investment program;[137] (4) the fiduciary duty of impartiality in most trusts requires, at least under traditional principal-and-income rules, a balancing of the elements of return between production of current income and the

[133] *Id.*, *Varity Corp.*, page 497.
[134] The Third Restatement is comprised of four volumes. Volume 3 encompasses §§ 70-92. Chapter 17 of Volume 3 - titled Investment of Trust Funds (The "Prudent Investor Rule") - includes § 90 General Standard of Prudent Investment (pages 292-388) (the black letter law of the Third Restatement's fiduciary standard of care is found in § 90 (pages 292-293)), § 91 Investment Provisions of Statute or Trust (pages 388-404) and § 92 Duty with Respect to Original Investments (pages 404-423).
[135] In sum, then, the Third Restatement specifies a standard of care (§ 90) and seven other fiduciary duties relevant to the issues examined in this paper: portfolio strategy (§ 90(a)), risk/return objectives (§ 90(a)), diversification (§ 90(b)), loyalty (§ 90(c); see § 78), impartiality (§ 90(c); see § 79), delegation if necessary (§ 90(c); see § 80) and cost-consciousness (§ 90(c); see § 88).
[136] Introductory Note to the Third Restatement, page 290.
[137] A trustee is to "incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship." § 90(c)(3) of the Third Restatement.

protection of purchasing power; and (5) trustees may have a duty as well as having the authority to delegate as prudent investors would."[138]

Uniform Prudent Investor Act

"Standard of Care; Portfolio Strategy; Risk and Return Objectives[139]

(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

(1) general economic conditions;

(2) the possible effect of inflation or deflation;

(3) the expected tax consequences of investment decisions or strategies;

(4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;

(5) the expected total return from income and the appreciation of capital;

(6) other resources of the beneficiaries;

(7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and

(8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(e) A trustee may invest in any kind of property or type of investment consistent with the standards of [the UPIA].

(f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise."[140]

The UPIA's 5 "Fundamental Alterations in the Former Criteria for Prudent Investing"[141]

"[The] UPIA makes five fundamental alterations in the former criteria for prudent investing. All are to be found in the [Third Restatement]. (1) The standard of prudence is applied to any investment as part of the total portfolio, rather than to individual investments. In the trust setting the term 'portfolio' embraces all the trust's assets. UPIA § 2(b). (2) The tradeoff in all investing between risk and return is identified as the fiduciary's central consideration. UPIA § 2(b). (3) All categoric restrictions on types of investments have

[138] Introductory Note to the Third Restatement, page 290.

[139] § 2 of the UPIA.

[140] In sum, then, the UPIA specifies a standard of care (§ 2) and eight other fiduciary duties relevant to the issues examined in this paper: portfolio strategy (§ 2), risk and return objectives (§ 2), diversification (§ 3), loyalty (§ 5), impartiality (§ 6), cost-consciousness (§ 7), prudence determined when investments made (§ 8) and delegation if necessary (§ 9).

[141] Prefatory Note to the UPIA.

been abrogated; the trustee can invest in anything that plays an appropriate role in achieving the risk/return objectives of the trust and that meets the other requirements of prudent investing. UPIA § 2(e). (4) The long familiar requirement that fiduciaries diversify their investments has been integrated into the definition of prudent investing. UPIA § 3. (5) The much criticized former rule of trust law forbidding the trustee to delegate investment and management functions has been reversed. Delegation is now permitted, subject to safeguards. UPIA § 9."

Uniform Management of Public Employee Retirement Systems Act

[§] 6: Delegation of Functions

"[§] 7: General Fiduciary Duties
A trustee or other fiduciary shall discharge duties with respect to a retirement system:

(1) solely in the interest of the participants and beneficiaries;

(2) for the exclusive purpose of providing benefits to participants and beneficiaries and paying reasonable expenses of administering the system;

(3) 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;

(4) impartially, taking into account any differing interests of participants and beneficiaries;

(5) incurring only costs that are appropriate and reasonable…"

The preceding general fiduciary duties described in § 7 supplement the duties of a trustee investing and managing the assets of a retirement system as described in § 8.

"[§] 8 Duties of Trustee in Investing and Managing Assets of Retirement System

(a) In investing and managing assets of a retirement system pursuant to Section 7, a trustee with authority to invest and manage assets:

(1) shall consider among other circumstances:

(A) general economic conditions;

(B) the possible effect of inflation or deflation;

(C) the role that each investment or course of action plays within the overall portfolio of the retirement program or appropriate grouping of programs;

(D) the expected total return from income and the appreciation of capital;

(E) needs for liquidity, regularity of income, and preservation or appreciation of capital; and

(F) for defined benefit plans, the adequacy of funding for the plan based on reasonable actuarial factors;

(2) shall diversify the investments of each retirement program or appropriate grouping of programs unless the trustee reasonably determines that, because of special circumstances, it is clearly prudent not to do so;

(3) shall make a reasonable effort to verify facts relevant to the investment and management of assets of a retirement system;

(4) may invest in any kind of property or type of investment consistent with [UMPERSA]…"[142]

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[142] In sum, then, UMPERSA specifies a standard of care (§ 7(3) which is nearly identical to § 404(a)(1)(B)) of ERISA) and ten other fiduciary duties relevant to the issues examined in this paper: delegation if necessary (§ 6), the general fiduciary duties of § 7 (including sole interest, exclusive purpose, impartiality, cost-consciousness), the investment

UMPERSA's 5 "Generally Accepted Principles of Modern Fiduciary Investment Practice"[143]

"[UMPERSA] facilitates the incorporation of modern investment practices, in large part, by revising and clarifying the standards of prudent retirement fund investing. Five generally accepted principles of modern fiduciary investment practice are implemented. All are found in the [Third Restatement] and all derive from the [UPIA]: (1) The standard of prudence is applied to any investment as part of the total portfolio, rather than to individual investments. In the retirement system setting, the term portfolio embraces the assets of each retirement program or appropriate grouping of programs. [UMPERSA] § 10(2). (2) The tradeoff in all investing between risk and return is identified as the trustee's central investment consideration. [UMPERSA] § 10(2). (3) All categoric restrictions on types of investments have been abrogated; the trustee can invest in anything that plays an appropriate role in achieving the risk/return objectives of the program and that meets the other requirements of prudent investing. [UMPERSA] § 8(a)(4). (4) The long-familiar principle that trustees diversify their investments has been integrated into the definition of prudent investing. [UMPERSA] § 8(a)(2). (5) The power of a trustee to delegate investment and management functions is affirmed, clarified, and subjected to safeguards. [UMPERSA] § 6."

Specified Supplemental Fiduciary Duties of Prudence

1. DUTY TO DIVERSIFY

The duty to diversify supplements certain standards of care examined in this paper.

"The rule of diversification stems from the prudent investor rule, because today's prudent and knowledgeable investors generally invest based on 'modern portfolio theory.' In the context of a public retirement system, this typically means that the system should invest in assets with a range of risks to balance the potential for gains and losses. Typically, an investment with a higher expected rate of return has a greater risk of not meeting its target objectives. In addition, investing a high percentage of funds in a single investment may make a retirement fund too vulnerable to that entity's success or failure. The diversification rule ensures that a portfolio's potential for gains and losses is balanced—so that while the portfolio may not earn the highest possible return during an economic boom, the impact of catastrophic losses will be minimized during an economic downturn."[144]

ERISA. "[A] fiduciary shall discharge his duties with respect to a plan…by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so…"[145]

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and management duties of § 8 (including portfolio strategy, diversification, verification of facts and no investments imprudent per se) as well as prudence determined when investments made (§ 10).

[143] Prefatory Note to UMPERSA.

[144] "Basic Legal Protections Vary Widely for Participants in Public Retirement Plans," the Pew Charitable Trusts, November 2017, pages 10-11.

[145] § 404(a)(1)(C) of ERISA. The DOL Regulations note that fiduciaries diversify a plan's portfolio "as a mechanism for reducing the risk of large losses." See Preamble to DOL Regulation §2550.404a-1, 44 FR 37255 (June 25, 1979).

Third Restatement. "In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so..."[146] The duty to diversify is the first of the Third Restatement's five "principles of prudence" [which] "instruct[s] trustees and courts that: (1) sound diversification is fundamental to risk management and is therefore ordinarily required of trustees…"[147]

UPIA. "A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying."[148] The fourth of the UPIA's "five fundamental alterations in the former criteria for prudent investing" is: "The …[duty to]…diversify…has been integrated into the definition of prudent investing."[149]

UMPERSA. "A trustee shall diversify the investments of each retirement program or appropriate grouping of programs unless the trustee reasonably determines that, because of special circumstances, it is clearly prudent not to do so."[150] The fourth of UMPERSA's five "generally accepted principles of modern fiduciary investment practice" is: "The…[duty to]…diversify…has been integrated into the definition of prudent investing."[151]

2. DUTY TO INCORPORATE SUITABLE RISK AND RETURN OBJECTIVES

The duty to incorporate suitable risk and return objectives supplements certain standards of care examined in this paper.

ERISA. "…a determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio…to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or the investment course of action…"[152]

Third Restatement. **"**This standard [of § 90] requires the exercise of reasonable care, skill, and caution, and…should incorporate risk and return objectives reasonably suitable to the trust."[153] The duty to analyze risk is the second of the Third Restatement's five "principles of prudence" which "instructs trustees and courts that…(2) risk and return are so directly related that trustees have a duty to analyze and make conscious decisions concerning the levels of risk appropriate to the purposes, distribution requirements, and other circumstances of the trusts they administer…"[154]

UPIA. "A trustee's investment and management decisions respecting individual assets must be evaluated…as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust."[155] "[§ 2(b) of the UPIA]…sounds the main theme of modern investment practice, sensitivity to the risk/return curve…Returns correlate strongly with risk, but tolerance for risk varies greatly with the

[146] § 90(b) of the Third Restatement, page 292.
[147] Introductory Note to the Third Restatement, page 290.
[148] § 3 of the UPIA.
[149] Prefatory Note to the UPIA.
[150] § 8(a)(2) of UMPERSA.
[151] Prefatory Note to UMPERSA.
[152] 29 C.F.R. §2550.404a-1(b)(2)(A).
[153] § 90 of the Third Restatement, page 292.
[154] Introductory Note to the Third Restatement, page 290.
[155] § 2(b) of the UPIA.

financial and other circumstances of the investor, or in the case of a trust, with the purposes of the trust and the relevant circumstances of the beneficiaries…”[156] The second of the UPIA’s five “fundamental alterations in the former criteria for prudent investing” is: “The tradeoff in all investing between risk and return is identified as the fiduciary’s central consideration.”[157]

UMPERSA. “The trustee’s investment and management decisions must be evaluated…as a part of an overall investment strategy having risk and return objectives reasonably suited to the program or appropriate grouping of programs.”[158] “[When] read in conjunction with Section 10(2), [§ 8(a)(1) of UMPERSA] sounds the main theme of modern investment practice, sensitivity to the risk/return curve. Returns correlate strongly with risk, but tolerance for risk may vary with the circumstances of the retirement program or appropriate grouping of programs. A program that has a large proportion of its participants and beneficiaries near and beyond retirement age may have a lower risk tolerance than a program that has a large proportion of young participants.”[159] The second of UMPERSA’s five “generally accepted principles of modern fiduciary investment practice” is: “The tradeoff in all investing between risk and return is identified as the trustee’s central investment consideration.”[160]

3. DUTY OF COST-CONSCIOUSNESS

The duty of cost-consciousness supplements certain standards of care examined in this paper.

ERISA. “[A] fiduciary shall discharge his duties with respect to a plan…for the exclusive purpose of…(ii) defraying reasonable expenses of administering the plan[.]”[161]

Third Restatement. “In addition, the trustee must…incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship (§ 88).”[162] The duty to be cost-conscious is the third of the Third Restatement’s five “principles of prudence” which “instructs trustees and courts that…trustees have a duty to avoid fees, transaction costs, and other expenses that are not justified by needs and realistic objectives of the trust’s investment program…”[163]

[156] Commentary to § 2 of the UPIA.
[157] Prefatory Note to the UPIA. See § 2(b) of the UPIA.
[158] § 10(2) of UMPERSA.
[159] Commentary to § 8 of UMPERSA.
[160] Prefatory Note to UMPERSA. See § 10(2) of UMPERSA.
[161] § 404 (a)(1)(A) of ERISA. The importance that trustees of retirement plans such as 401(k) plans be cost-conscious was given renewed emphasis by the U.S. Supreme Court in *Tibble*. The court drew upon the Third Restatement in noting: “Implicit in a trustee’s fiduciary duties is a duty to be cost-conscious.” (§ 88 of the Third Restatement, comment a, page 256.) Further, a trustee is to “incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship.” (§ 90(c)(3) of the Third Restatement, page 293.) *Tibble* cited additional instructive language from the Third Restatement: “cost-conscious management is fundamental to prudence in the investment function” and should be applied “not only in making investments but also in monitoring and reviewing investments…” (§ 90, comment b, page 295.) *Tibble* also cited commentary to § 7 of the UPIA: “Wasting beneficiaries’ money is imprudent.” In devising and implementing strategies for the investment and management of trust assets, trustees are obliged to minimize costs.”
[162] § 90(c)(3) of the Third Restatement, page 293.
[163] Introductory Note to the Third Restatement, page 290.

UPIA. "In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee."[164]

UMPERSA. "A trustee or other fiduciary shall discharge duties with respect to a retirement system incurring only costs that are appropriate and reasonable."[165]

4. DUTY OF IMPARTIALITY[166]

The duty of impartiality supplements certain standards of care examined in this paper.

ERISA. The U.S. Supreme Court has explained that the duty of impartiality exists under ERISA: "[t]he common law of trusts recognizes the need to preserve assets to satisfy future, as well as present, claims and requires a trustee to take impartial account of the interests of all beneficiaries."[167]

Third Restatement. "In addition, the trustee must: (1) conform to [the] fundamental fiduciary [duty] of…[impartiality] (§ 79).[168] § 79 of the Third Restatement reads, in part: "A trustee has a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust, requiring that: (a) in investing, protecting, and distributing the trust estate, and in other administrative functions, the trustee must act impartially and with due regard for the diverse beneficial interests created by the terms of the trust…"[169] The duty of impartiality is the fourth of the Third Restatement's five "principles of prudence" which instructs trustees and courts that…"the fiduciary duty of impartiality in most trusts requires, at least under traditional principal-and-income rules, a balancing of the elements of return between production of current income and the protection of purchasing power…"[170]

UPIA. "If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries."[171]

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[164] § 7 of the UPIA.

[165] § 7(5) of UMPERSA.

[166] In fulfilling the duty of impartiality, a trustee seeks to balance the needs of different groups of plan participants. "Even though a [trustee] for a retirement plan must be loyal to all plan participants and [their] beneficiaries, different groups covered by the plan may at times have different interests. [Plan trustees] must be able to impartially consider potentially differing interests of [plan] participants and [their] beneficiaries, such as those that may arise between retirees and working members, younger and older participants, or long-term and short-term employees. Although [trustees] are required to consider the interests of various groups in making decisions regarding pension plans, they are not bound to make decisions that ensure absolute equality among competing interests." "Basic Legal Protections Vary Widely for Participants in Public Retirement Plans," the Pew Charitable Trusts, November 2017, page 8.

[167] See *Varity v. Howe,* 516 U.S. 489, at 514 (1996). "*Varity* recognizes that pension plan fiduciaries manage pension funds for multiple generations of participants. These different generations will become entitled to distributions at different times, so they are likely to have different risk tolerance levels and investment time horizons. Inter-generational obligations also raise the potential for uncompensated transfer of risks and returns across fund participant generations. The duty of impartiality mandates careful consideration and good faith efforts to reasonably balance these conflicts." "ERISA Regulations Should Address Evolving Nature of Prudence and Duty of Impartiality," Posted by Susan Gary, Keith Johnson and Tiffany Reeves on FinReg Blog, Duke Global Financial Markets Center, Duke University School of Law, March 15, 2022.

[168] § 90(c)(1) of the Third Restatement, page 292.

[169] The Third Restatement, page 127.

[170] Introductory Note to the Third Restatement, page 290.

[171] § 6 of the UPIA.

UMPERSA. "A trustee or other fiduciary shall discharge duties with respect to a retirement system impartially, taking into account any differing interests of participants and beneficiaries."[172]

5. DUTY TO DELEGATE IF NECESSARY

The duty to delegate, if necessary, supplements certain standards of care examined in this paper.

ERISA. In enacting ERISA, Congress knew that businesses were not particularly adept at running complex retirement plans (such as 401(k) plans) for their employees. As a result, the ERISA statutory scheme allows a plan sponsor to delegate many investment and operational/administrative duties to competent, independent third parties provided that such delegations are made in a prudent manner initially and they continue to be prudent through the sponsor's oversight and on-going monitoring. For example, a plan sponsor that wishes to outsource a significant number of important fiduciary responsibilities (and accompanying liabilities) can do so by delegating them to a "named fiduciary" pursuant to ERISA § 402(a). A § 402(a) named fiduciary oversees the selection, evaluation and monitoring of all plan fiduciaries[173] and service providers to a plan, assuming most of the duties of a plan sponsor. Consequently, all fiduciaries and service providers must report to it.[174] A § 402(a) named fiduciary becomes, in (legal) effect, a retirement plan's CEO. This helps ensure that "the buck stops here" with a § 402(a) named fiduciary – not the plan sponsor - in case of a fiduciary breach (unless one or more other plan fiduciaries and/or service providers engage in certain forms of dishonesty).[175]

Third Restatement. "In addition, the trustee must…act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents (§ 80)…"[176] The duty to delegate if necessary is the fifth of the Third Restatement's five "principles of prudence" which "instructs trustees and courts that…trustees may have a duty as well as having the authority to delegate as prudent investors would."[177]

UPIA. "A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:[178]

[172] § 7(4) of UMPERSA.

[173] The § 402(a) named fiduciary is a "discretionary" fiduciary with control over all other plan fiduciaries - whether a (non-§ 402(a)) named fiduciary including a trustee pursuant to ERISA § 403(a), an investment manager pursuant to ERISA § 3(38), or a plan administrator pursuant to ERISA § 3(16), a retained or appointed fiduciary, an advice-giving fiduciary (whether to a plan or to plan participants) or a functional fiduciary.

[174] The author of this paper has referred to an ERISA § 402(a) named fiduciary variously as the "Big Kahuna," "Head Honcho," "Main Man" and the "Mother of All Fiduciaries." See "The Different Flavors of ERISA Fiduciaries, Redux (Part 3)" by W. Scott Simon, Morningstar, May 6, 2010. https://fiduciary-experts.com/the-different-flavors-of-erisa-fiduciaries-redux-part-3-2/

[175] Few plan sponsors have ever heard of the tremendous benefits offered by a 402(a) named fiduciary. The reason why is that it's not in the interests of those selling retirement plans to inform sponsors of the benefits. If such salespersons were to fully disclose those benefits, they would lose the asymmetrical information advantage they typically have over sponsors which can lead to undisclosed conflicts of interest, unnecessarily costly plan investment options as well as other harmful economic impacts on plan participants (and their beneficiaries).

[176] § 90(c)(2) of the Third Restatement (page 293) and Introductory Note to the Third Restatement, page 290.

[177] Introductory Note to the Third Restatement, page 290.

[178] § 9 of the UPIA.

UMPERSA. "A trustee or administrator may delegate functions that a prudent trustee or administrator acting in a like capacity and familiar with those matters could properly delegate under the circumstances. The administrator shall exercise reasonable care, skill, and caution in:[179]

• selecting an agent[180]
• establishing the scope and terms of the delegation, consistent with the purposes and terms of the [**UPIA**: trust/**UMPERSA**: retirement program][181]
• periodically reviewing the agent's [**UPIA**: actions in order to monitor the agent's] performance and compliance with the terms of the delegation[182]
• In performing a delegated function, an agent owes a duty to the [**UPIA**: trust to exercise reasonable care to comply with the terms of the delegation/**UMPERSA**: retirement system and to its participants and beneficiaries to comply with the terms of the delegation and, if a fiduciary, to comply with the duties imposed by Section 7 [of UMPERSA]][183]
• A [**UPIA**: trustee/**UMPERSA**: trustee or administrator] who complies with the requirements of [**UPIA**: subsection (a)/**UMPERSA**: subsections (a) and (b)] is not liable to the [**UPIA**: beneficiaries or to the trust/**UMPERSA**: retirement system or to its participants or beneficiaries] for the decisions or actions of the agent to whom the function was delegated[184]
• By accepting the delegation of a trust function from the trustee [**UPIA**: of a trust that is subject to the law of this State/**UMPERSA**: or administrator], an agent submits to the jurisdiction of the courts of this State"[185]

The fifth of the UPIA's "five fundamental alterations in the former criteria for prudent investing" is:[186] "The much criticized former rule of trust law forbidding the trustee to delegate investment and management functions has been reversed. Delegation is now permitted, subject to safeguards."[187] The fifth of UMPERSA's five "generally accepted principles of modern fiduciary investment practice" is: "The power of a trustee to delegate investment and management functions is affirmed, clarified, and subjected to safeguards."[188]

6. DUTY TO INVEST IN A PORTFOLIO CONTEXT

The duty to invest in a portfolio context supplements certain standards of care examined in this paper.

ERISA. "To fulfill its duties to act prudently under ERISA §404(a)(1)(B), the fiduciary must give…appropriate consideration to those facts and circumstances that…the fiduciary knows or should know are relevant to the particular investment or investment course of action involved…[189] According to the DOL, 'appropriate consideration' includes the following: (i) A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio…to further the purposes of

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[179] § 6 of UMPERSA.
[180] §§ 9(a)(1) of the UPIA and 6(b)(1) of UMPERSA.
[181] §§ 9(a)(2) of the UPIA and 6(b)(2) of UMPERSA.
[182] §§ 9(a)(3) of the UPIA and 6(b)(3) of UMPERSA.
[183] §§ 9(b) of the UPIA and 6(c) of UMPERSA.
[184] §§ 9(c) of the UPIA and 6(d) of UMPERSA.
[185] §§ 9(d) of the UPIA and 6(e) of UMPERSA.
[186] Prefatory Note to the UPIA.
[187] Prefatory Note to the UPIA.
[188] Prefatory Note to UMPERSA.
[189] 29 C.F.R. § 2550.404a-1(b)(1)(A).

the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or the investment course of action…"[190]

Third Restatement. "This [General Standard of Prudent Investment of § 90]…is to be applied to investments not in isolation but in the context of the trust portfolio…"[191]

UPIA. "A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole…"[192] "The standard of prudence is applied to any investment as part of the total portfolio, rather than to individual investments."[193]

UMPERSA. "The trustee's investment and management decisions must be evaluated not in isolation but in the context of the trust portfolio as a whole…"[194]

UPIA. "Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:[195]

UMPERSA. "In investing and managing assets of a retirement system pursuant to Section 7, a trustee with authority to invest and manage assets shall consider among other circumstances:[196]

• general economic conditions[197]
• the possible effect of inflation or deflation[198]

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[190] 29 C.F.R. § 2550.404a-1(b)(2)(A). In other words, a trustee must assess individual investments within the context of a plan's portfolio as a whole. Such investments may well be "risky" on a stand-alone basis outside of a portfolio but when invested in a portfolio, the risk of the portfolio is reduced while its expected return is not reduced. That's the magic of diversification.
[191] § 90(a) of the Third Restatement, page 292.
[192] § 2(b) of the UPIA.
[193] Prefatory Note to the UPIA.
[194] § 10(2) of UMPERSA.
[195] § 2(c) of the UPIA.
[196] § 8(a)(1) of UMPERSA. § 8 of UMPERSA applies only to a "trustee" who "has *ultimate* authority to manage a retirement system or to invest or manage its assets." § 2(22) of UMPERSA; emphasis added. "[§ 8] specifies the fiduciary duties of trustees who have the ultimate responsibility for the investment and management of retirement system assets. Since a trustee covered by [§ 8] is also a fiduciary [see § 2(11) of UMPERSA], [the duties specified in § 8] supplement the general duties of Section 7." Commentary to § 8 of UMPERSA. "Delegates who invest and manage system assets are covered by Sections 6 and 7, but not [§ 8]." Commentary to § 8 of UMPERSA. § 7 of UMPERSA applies to trustees *and other fiduciaries*; emphasis added. § 2(11) of UMPERSA defines a "fiduciary" as a person who "(A) exercises any discretionary authority to manage a retirement system; (B) exercises any authority to invest or manage assets of a system; (C) provides investment advice for a fee or other direct or indirect compensation with respect to assets of a system or has any authority or responsibility to do so; or (D) is a trustee or a member of a board of trustees." Compare to § 3(21)(A) of ERISA: "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets [which the author terms a 'discretionary fiduciary decision-maker'], (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so [which the author terms a 'non-discretionary fiduciary advice-giver'] or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." ERISA § 3(21)(A)(iii).
[197] §§ 2(c)(1) of the UPIA and 8(a)(1)(A) of UMPERSA.
[198] §§ 2(c)(2) of the UPIA and 8(a)(1)(B) of UMPERSA.

• the role that each investment or course of action plays within the overall trust portfolio[199]
• the expected total return from income and the appreciation of capital[200]
• needs for liquidity, regularity of income, and preservation or appreciation of capital[201]
• a reasonable effort to verify facts relevant to the investment and management of [**UPIA:** trust assets/**UMPERSA:** assets of a retirement system][202]
• may invest in any kind of property or type of investment consistent with this [Act]."[203]

The first of the UPIA's "five fundamental alterations in the former criteria for prudent investing" is: "The standard of prudence is applied to any investment as part of the total portfolio, rather than to individual investments. In the trust setting the term 'portfolio' embraces all the trust's assets."[204] The first of UMPERSA's five "generally accepted principles of modern fiduciary investment practice" is: "The standard of prudence is applied to any investment as part of the total portfolio, rather than to individual investments."[205]

7. NO INVESTMENTS IMPRUDENT PER SE[206]

The duty to understand that no investments are imprudent per se supplements certain standards of care examined in this paper.

ERISA. In the Preamble to the regulations under ERISA § 404(a), the U.S. Department of Labor explains: "The [DOL] is of the opinion that…generally, the relative riskiness of a specific investment or investment course of action does not render such investment or investment course of action either per se prudent or per se imprudent…"[207]

Third Restatement. A "fundamental proposition" is that "no investments or techniques are imprudent per se…"[208]

[199] §§ 2(c)(4) of the PIA and 8(a)(1)(C) of UMPERSA.
[200] §§ 2(c)(5) of the UPIA and 8(a)(1)(D) of UMPERSA.
[201] §§ 2(c)(7) of the UPIA and 8(a)(1)(E) of UMPERSA.
[202] §§ 2(d) of the UPIA and 8(a)(3) of UMPERSA.
[203] §§ 2(e) of the UPIA and 8(a)(4) of UMPERSA.
[204] See Prefatory Note to the UPIA. "All [five alterations set forth by the UPIA] are to be found in the [Third] Restatement…" *Id*.
[205] Prefatory Note to UMPERSA.
[206] South Carolina, as noted, enacted the fiduciary portions of UMPERSA into state law. Although no investment or investment strategy is imprudent per se under UMPERSA, it appears that the South Carolina legislature shows a partiality towards passive investing - at least for equities. Title 9, Chapter 16, Article 1, § 9-16-330(A) and (C)(3) of the South Carolina Code of Laws provides, in part: "(A)…[A] retirement system [including the South Carolina Retirement System, Retirement System for Judges and Solicitors, Retirement System for Members of the General Assembly, National Guard Retirement System, and Police Officers Retirement System established pursuant to Chapters 1, 8, 9, 10 and 11 of this title [9] as listed in § 9-16-10] shall provide the [Retirement System Investment] commission…that data or other information needed to prepare the annual investment plan. (C) The annual investment plan must…include…the following component []: (3) investment strategies, which may include indexed or enhanced indexed strategies as the preferred or exclusive strategies for equity investing…"
[207] Preamble to the Regulations under § 404(a) of ERISA.
[208] Introductory Note to the Third Restatement, page 290.

UPIA. "A trustee may invest in any kind of property or type of investment consistent with the standards of [the UPIA].[209]

UMPERSA. "In investing and managing assets of a retirement system pursuant to Section 7, a trustee with authority to invest and manage assets…may invest in any kind of property or type of investment consistent with [UMPERSA]…"[210] "All categoric restrictions on types of investments have been abrogated; the trustee can invest in anything that plays an appropriate role in achieving the risk/return objectives of the program and that meets the other requirements of prudent investing."[211]

The third of the UPIA's "five fundamental alterations in the former criteria for prudent investing" is: "All categoric restrictions on types of investments have been abrogated; the trustee can invest in anything that plays an appropriate role in achieving the risk/return objectives of the trust and that meets the other requirements of prudent investing."[212] The third of UMPERSA's five "generally accepted principles of modern fiduciary investment practice" is: "All categoric restrictions on types of investments have been abrogated; the trustee can invest in anything that plays an appropriate role in achieving the risk/return objectives of the program and that meets the other requirements of prudent investing."[213]

8. DUTY OF LOYALTY

The duty of loyalty supplements certain standards of care examined in this paper.

ERISA. "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and… for the exclusive purpose of…providing benefits to participants and their beneficiaries…and defraying reasonable expenses of administering the plan."[214]

Third Restatement. "In addition, the trustee must…conform to [the] fundamental fiduciary [duty] of [loyalty] (§ 78)…"[215] "Except as otherwise provided in the terms of the trust, a trustee has a duty to administer the trust solely in the interest of the beneficiaries…"[216] "Except in discrete circumstances, the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests."[217]

[209] § 2(e) of the UPIA.
[210] § 8(a)(4) of UMPERSA.
[211] Prefatory Note to UMPERSA. See § 8(a)(4) of UMPERSA.
[212] Prefatory Note to UMPERSA. See § 2(e) of the UPIA.
[213] Prefatory Note to UMPERSA. See § 8(a)(4) of UMPERSA.
[214] § 404(a)(1)(A) of ERISA. The duty of loyalty with its ancient lineage is the most fundamental duty because it underlies all other fiduciary duties, requiring trustees to give undivided loyalty to plan participants (and their beneficiaries) through compliance with the "sole interest" and "exclusive purpose" rules of ERISA. "The exclusive benefit rule is meant to focus the fiduciary's attention on the reason for the plan or trust. Those responsible for management should not be influenced by motives other than accomplishing the plan's purpose. The rule allows fiduciaries to pay reasonable administrative expenses from a plan when necessary to benefit participants and [their] beneficiaries." "Basic Legal Protections Vary Widely for Participants in Public Retirement Plans," the Pew Charitable Trusts, November 2017, pages 6-7.
[215] § 90(c)(1) of the Third Restatement, page 292.
[216] § 78(1) of the Third Restatement, page 93.
[217] § 78(2) of the Third Restatement, pages 93-94.

UPIA. "A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries."[218]

UMPERSA. "A trustee or other fiduciary shall discharge duties with respect to a retirement system solely in the interest of the participants and beneficiaries."[219]

9. PRUDENCE DETERMINED WHEN INVESTMENTS MADE[220]

The duty to understand that prudent conduct is determined when investments are made supplements certain standards of care examined in this paper.

The prudence of a trustee's (or other fiduciary's) conduct is determined according to the facts and circumstances existing at the time the conduct occurred. Looking back in time with the benefit of 20/20 hindsight or by taking into account developments that occurred after the time of the trustee's conduct is not allowed in judging that conduct. For example, it is impermissible to look back in time and find a trustee's conduct imprudent because the performances of the assets or portfolios for which they were responsible turned out to be poor.[221] However, this "no hindsight" rule applies only if the conduct of the trustee was prudent at the time of its occurrence. If the conduct was imprudent, then the no hindsight rule is inapplicable, thereby subjecting the trustee to potential liability. For example, a trustee has the duty to know the costs of assets at the time they include them in a portfolio or as investment options on a retirement plan menu. This duty requires the costs to be "reasonable" and "appropriate." A trustee's failure to detect all such costs accurately at those times can have a negative impact on the performances of the assets. In such cases, looking back in time and finding a trustee liable for the poor performances of the assets could be permitted to the extent that the performances were negatively impacted by the unreasonably high costs of the assets that went undetected - although entirely detectable - by the trustee at the time they invested in them. In addition, a trustee could be liable for the poor performance of an asset if it had been ongoing for some period of time prior to when the trustee selected it, the trustee knew (or should have known) of the poor performance and yet in the face of that knowledge went ahead and selected the asset, and continued to hold it in the plan. Trustee liability could also ensue if the poor performance of an asset already held in a portfolio or included as an investment option on a plan menu continued to be held by the trustee for an unreasonable period of time due to the trustee's inattention to their managing/monitoring duty.

A corollary to the rule of not being permitted to look back in time with the benefit of 20/20 hindsight is the rule that looking forward in time is not required. That is, a trustee isn't expected to be clairvoyant so it's not required to know which assets will perform well (or poorly) in the future. Even though trustees (a) cannot be judged with the benefit of 20/20 hindsight and (b) are not required to see into the future with clairvoyance, they must engage in conduct that is prudent at the time of their investment and management decisions or actions in order to secure these two advantages. The analysis remains rooted in trustee conduct at the time of its occurrence.

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[218] § 5 of the UPIA. Commentary to § 5 notes: "The duty of loyalty is perhaps the most characteristic rule of trust law, requiring the trustee to act exclusively for the beneficiaries [which, in the retirement plan setting, are participants (and their beneficiaries)], as opposed to acting for the trustee's own interest or that of third parties."
[219] § 7(1) of UMPERSA.
[220] While a trustee's investment prudence is determined by reference to its conduct, the prudence of that conduct is determined in light of the facts and circumstances existing at the time of the trustee's decisions or actions.
[221] The reason why is that trustees are not required to be clairvoyant about the future performances of assets.

ERISA. "[A] fiduciary shall discharge his duties with respect to a plan…with the care, skill, prudence, and diligence under the circumstances then prevailing…"[222]

Third Restatement. "…The trustee's compliance with these fiduciary standards is to be judged as of the time the investment decision in question was made, not with the benefit of hindsight or by taking account of developments that occurred after the time of a decision to make, retain, or sell an investment."[223]

UPIA. "Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight."[224]

UMPERSA. "Compliance by the trustee or other fiduciary with Sections 6 through 8 must be determined in light of the facts and circumstances existing at the time of the trustee or fiduciary's decision or action and not by hindsight."[225]

10. DUTY TO MONITOR

The duty to monitor supplements certain standards of care examined in this paper.

ERISA. In a unanimous opinion in *Tibble v. Edison International*,[226] the U.S. Supreme Court noted the critical importance of the monitoring function in 401(k) plans and ERISA-governed 403(b) plans. A plan fiduciary has an ongoing duty under ERISA to monitor the investment options in a retirement plan. This duty is distinct from, and in addition to, the fiduciary's duty to be prudent when making the initial selection of plan investment options.[227] In support, the court cited the Third Restatement: "[A] trustee's duties apply not only in making investments but also in monitoring and reviewing investments, which is to be done in a manner that is reasonable and appropriate to the particular investments, courses of action, and strategies involved."[228] *Tibble* also referenced the UPIA which "confirms that '[m]anaging embraces monitoring,' that is, the trustee's continuing responsibility for oversight of the suitability of investments already made as well as the trustee's decisions respecting new investments."[229]

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[222] § 404(a)(1)(B) of ERISA.

[223] Comment on Basic Duties of the Prudent Investor, b. Duty to conform to fiduciary standards, pages 294-295 of the Third Restatement.

[224] § 8 of the UPIA. Commentary to § 8 of the UPIA explains: "Trustees are not insurers. Not every investment or management decision will turn out in the light of hindsight to have been successful. Hindsight is not the relevant standard. In the language of law and economics, the standard is ex ante, not ex post."

[225] § 10(1) of UMPERSA. Commentary to § 10 of UMPERSA explains: "Trustees are not insurers. Not every investment or management decision will turn out in the light of hindsight to have been successful. Hindsight is not the relevant standard. In the language of law and economics, the standard is ex ante, not ex post."

[226] 575 U.S. 523, 135 S. Ct. 1823 (2015).

[227] In another unanimous decision, the U.S. Supreme Court in *Hughes v. Northwestern University* (595 U.S. ___, 142 S. Ct. 737 (2022)), held that Northwestern University failed to monitor and control record-keeping fees which resulted in unreasonably high costs for plan participants.

[228] § 90 of the Third Restatement, comment b, page 295.

[229] Commentary to § 2 of the UPIA. ERISA does not explicitly require that monitoring criteria be defined by the plan sponsor. However, ERISA's overriding obligation that fiduciaries discharge their duties to employee benefit plans with care, skill, prudence, and diligence imposed by § 404(a) of ERISA requires fiduciaries to actively monitor plan investment managers and service providers. ERISA also obliges fiduciaries to maintain records of their monitoring activities. (See DOL Interpretive Bulletin 94-2.) "Legal Memorandums for Prudent Practices for Investment Stewards and Prudent Practices for Investment Advisors (U.S. Editions)" by Fred Reish and Bruce Ashton, Fiduciary360**,** 2006.

Third Restatement. "…In managing investments, as in other matters relating to the administration of the trust, the trustee must adhere to fundamental fiduciary standards…The trustee's duties apply not only in making investments but also in monitoring and reviewing investments, which is to be done in a manner that is reasonable and appropriate to the particular investments, courses of action, and strategies involved."[230]

UPIA. "Subsections (a) through (d) [of § 2] apply both to investing and managing trust assets. 'Managing' embraces monitoring, that is, the trustee's continuing responsibility for oversight of the suitability of investments already made as well as the trustee's decisions respecting new investments."[231]

UMPERSA. "This subsection [(a)(3)] [of § 8] follows Section 2(d) of the Uniform Prudent Investor Act [i.e., "A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets."]. In this subsection, and elsewhere, 'management' embraces monitoring, that is, the trustee's continuing responsibility for oversight of the suitability of investments already made, as well as the trustee's decisions respecting new investments."[232]

V. APPENDIX: Statutory Standards of Care and Supplemental Fiduciary Duties of Prudence in 51 American Jurisdictions

NOTE: Every effort has been made to ensure that the text of the following statutes is current. Nonetheless, it is prudent to double-check with sources in the relevant jurisdiction to ensure up-to-date accuracy.

ALABAMA[233]

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Employees' Retirement System of Alabama is the standard set forth in ERISA except that the word "man" is deleted and "person" is inserted in its place.

Code of Alabama
Title 36 - Public Officers and Employees.
Chapter 27 - State Employees' Retirement System.
Article 1 - General Provisions.
§ 36-27-25 - Funds for Assets of Retirement System - Management.
(a) The Board of Control shall be the trustees of the several funds of the Employees' Retirement System [of Alabama] created by this article [36] as provided in Section 36-27-24 and shall have full power to invest and reinvest the funds…with the care, skill, prudence, and diligence under the circumstances then

[230] § 90 of the Third Restatement, comment b, page 295.
[231] Commentary to § 2 of the UPIA.
[232] Commentary to § 8 of UMPERSA.
[233] Unlike the statutory scheme of the law of ERISA which is logical and well-organized (albeit complex), the statutes of many states concerning public employee retirement systems are organized in a very haphazard manner; information is scattered and statutes are often labelled in a misleading manner.

prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims…

ALASKA

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Public Employees' Retirement System of Alaska is the standard set forth in ERISA except that the word "man" is deleted and "person" is inserted in its place.

Alaska Statutes
Title 39. Public Officers and Employees
Chapter 35. Public Employees' Retirement System of Alaska
Article 10. Employees First Hired on or after July 1, 2006.
§ 39.35.990.(22) Definitions.

In AS [Alaska Statutes] [§§] 39.35.700 - 39.35.990, unless the context requires otherwise…(22) 'prudent investment standard' means the degree of care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims…

ARIZONA

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Arizona State Retirement System is the standard set forth in ERISA except that (1) the phrase "prudence, and diligence" is deleted and "caution" is inserted in its place, (2) the word "man" is deleted and "person" is inserted in its place, (3) the word "such" is deleted and "those" is inserted in its place, (4) the word "enterprise" is deleted and "activity" is inserted in its place and (5) the phrase "with like aims" is deleted and "purpose" is inserted in its place.

Arizona Revised Statutes
Title 38 - Public Officers and Employees
§ 38-848.04 Board fiduciary obligations and duties; enforcement; definitions

A. The [Arizona State Retirement System] board and any other fiduciary [as defined in ARS § 38-848.04(F)(1): "Fiduciary" means a person who does any of the following: (a) Exercises any discretionary authority to manage a retirement plan or system administered by the board. (b) Exercises any authority to invest or manage assets of a retirement plan or system administered by the board. (c) Provides investment advice for a fee or other direct or indirect compensation with respect to assets of the system or has any authority or responsibility to do so. (d) Serves as a trustee or member of the board] of the [Arizona State Retirement] system shall discharge their duties: 1. Solely in the interest of the members and beneficiaries. 2. For the exclusive purpose of providing benefits to members and beneficiaries and paying reasonable expenses in administering the plans and systems administered by the board. 3. With the care, skill and caution under the circumstances then prevailing that 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. 4. Impartially, taking into account any differing interests of members and beneficiaries. 5. Incurring only costs that are appropriate and reasonable...B. In investing and managing assets of the retirement plans and systems administered by the board, a trustee [as defined in ARS § 38-848.04(F)(2): "Trustee" means a person who has ultimate authority to manage a retirement system or plan or to invest or manage its assets] with authority to invest and manage assets: 1. Shall consider at least the following: (a) The general economic conditions. (b) The possible effect of inflation or deflation. (c) The role that each

investment or course of action plays within the overall portfolio of the retirement plans and systems administered by the board or appropriate grouping of plans or systems. (d) The expected total return from income and the appreciation of capital. (e) The needs for liquidity, regularity of income and preservation or appreciation of capital. (f) For defined benefit plans, the adequacy of funding for the plan based on reasonable actuarial factors. 2. Shall diversify the investments of the retirement plans and systems administered by the board or appropriate grouping of plans or systems unless the trustee reasonably determines that, because of special circumstances, it is clearly prudent not to do so. 3. Shall make a reasonable effort to verify facts relevant to the investment and management of assets of a retirement plan or system. 4. May invest in any kind of property or type of investment consistent with this article. 5. May consider benefits created by an investment in addition to investment return only if the trustee determines that the investment providing these collateral benefits would be prudent even without the collateral benefits...D. In evaluating the performance of a trustee or any other fiduciary of the plan or system: 1. Compliance with this section [38-848.04] must be determined in light of the facts and circumstances existing at the time of the trustee's or fiduciary's decision or action and not by hindsight.
2. The trustee's investment and management decisions must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the retirement plans and systems administered by the board or appropriate grouping of plans or systems…

ARKANSAS

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Arkansas Public Employees' Retirement System is the standard set forth in the UPIA except that the word "trustee" is deleted and "trustees" is inserted in its place.

Arkansas Code Annotated
Title 24 - Retirement and Pensions
Chapter 2 - Public Employee Retirement Plans Generally
Subchapter 6 - State Retirement Systems Investments
§ 24-2-602. Investment authority and limitations — Permissible investments.

(a) The boards of trustees of the State Police Retirement System, the Arkansas Public Employees' Retirement System, the Arkansas Teacher Retirement System, the Arkansas State Highway Employees' Retirement System, and the Arkansas Judicial Retirement System shall have full power to invest and reinvest the moneys of the respective systems and to hold, purchase, sell, assign, transfer, or dispose of any of the investments so made as well as the proceeds of the investments and moneys. (b) However, the investments and reinvestments shall only be made in accordance with the prudent investor rule set forth in §§ 24-2-610 [to] 24-2-619.

§ 24-2-610. Prudent Investor Rule

(a) Except as otherwise provided in subsection (b) of this section, trustees who invest and manage trust assets owe a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in §§ 24-2-610 [to] 24-2-619. (b) (1) The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. (2) Trustees are not liable to a beneficiary to the extent that the trustees acted in reasonable reliance on the provisions of the trust.

§ 24-2-611. Standard of Care - Portfolio Strategy - Risk and Return Objectives

(a) Trustees shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the

trustees shall exercise reasonable care, skill, and caution.[234] (b) The trustees' investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. (c) Among circumstances that trustees shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries: (1) General economic conditions; (2) The possible effect of inflation or deflation; (3) The expected tax consequences of investment decisions or strategies; (4) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property; (5) The expected total return from income and the appreciation of capital; (6) Other resources of the beneficiaries; (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital; and (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one (1) or more of the beneficiaries. (d) Trustees shall make a reasonable effort to verify facts relevant to the investment and management of trust assets. (e) Trustees may invest in any kind of property or type of investment consistent with the standards of this subchapter. (f) Trustees who have special skills or expertise, or who are named trustees in reliance upon the trustees' representation that the trustees have special skills or expertise, have a duty to use their special skills or expertise.

§ 24-2-612. Diversification

Trustees shall diversify the investments of the trust unless the trustees reasonably determine that, because of special circumstances, the purposes of the trust are better served without diversifying.

§ 24-2-613. Duties at Inception of Trusteeship

(a) Within a reasonable time after accepting a trusteeship or receiving trust assets, trustees shall review the trust assets and make and implement decisions concerning the retention and disposition of assets in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust and with the requirements of this subchapter. (b) (1) Trustees shall develop an investment policy. This policy shall be a written statement of goals for the fund and rules to be followed to achieve those goals. (2) Trustees shall measure performance of the fund and shall measure each manager's performance against benchmarks jointly agreed upon by the trustees and managers.

§ 24-2-614. Loyalty

Trustees shall invest and manage the trust assets solely in the interest of the members and benefit recipients of the trust.

§ 24-2-615. Impartiality.

If a trust has two (2) or more beneficiaries, the trustees shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.

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[234] The sentence "In satisfying this standard, the trustees shall exercise reasonable care, skill, and caution" appears immediately after the fiduciary standard of care set forth in the Uniform Prudent Investor Act: "A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust." Seven states - Arkansas, Georgia, New Mexico, Tennessee, Utah, Vermont and West Virginia - have each enacted into law the entire text of the UPIA to govern the conduct of trustees responsible for investing and managing assets held by defined benefit plan(s) in their state-wide PERS.

§ 24-2-616. Investment Costs - Limitations on Investment Authority
(a) In investing and managing trust assets, trustees may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee. (b) Trustees may delegate investment functions to an agent that a prudent trustee of comparable skills could properly delegate as provided in § 24-2-618.

§ 24-2-617. Reviewing Compliance
Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of the trustees' decisions or actions and is not determined by hindsight.

§ 24-2-618. Delegation of Investment and Management Functions
(a) Trustees may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustees shall exercise reasonable care, skill, and caution in: (1) Selecting an agent; (2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and (3) Reviewing periodically the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation. (b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation. (c) Trustees who complied with the requirements of subsection (a) of this section are not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated. (d) By accepting the delegation of a trust function from the trustees of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state…

§ 24-2-619. Language invoking standard of subchapter.
The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this subchapter: (1) "Investments permissible by law for investment of trust funds"; (2) "Legal investments"; (3) "Authorized Investments"; (4) "Using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital"; (5) "Prudent man rule"; (6) "Prudent trustee rule"; (7) "Prudent person rule"; and (8) "Prudent investor rule".

CALIFORNIA
The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the California Public Employees' Retirement System is the standard set forth in ERISA except that (1) the word "man" is deleted and "person" is inserted in its place in both the Government Code and the state Constitution, (2) the word "such" is deleted and "those" is inserted in its place in the Government Code and (3) the word "such" is deleted and "these" is inserted in its place in the state Constitution.

California Code
Government Code – GOV
TITLE 2 - GOVERNMENT OF THE STATE OF CALIFORNIA
DIVISION 5 – PERSONNEL
PART 3 - PUBLIC EMPLOYEES' RETIREMENT SYSTEM
CHAPTER 2 - Administration of System
ARTICLE 3 - Fiduciary Duties

§ 20151. The [Board of Administration of the Public Employees' Retirement System] and its officers and employees shall discharge their duties with respect to this system solely in the interest of the participants and beneficiaries: (a) For the exclusive purpose of both of the following: (1) Providing benefits to members, retired members, and their survivors and beneficiaries. (2) Defraying reasonable expenses of administering this system. (b) Minimizing the employers' costs of providing benefits under this part. (c) By investing with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an enterprise of a like character and with like aims.

California Constitution
Article XVI - Public Finance
§ 17. Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system…(b)…shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty. (c)…shall discharge their duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims. (d)…shall diversify the investments of the system so as to minimize the risk of loss and to maximize the rate of return, unless under the circumstances it is clearly not prudent to do so.

<u>COLORADO</u>
The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Colorado Public Employees' Retirement Association is the standard set forth in ERISA except that (1) the word "under" is deleted and the phrase "in light of" is inserted in its place, and (2) the word "man" is deleted and "person" is inserted in its place.

Colorado Revised Statutes
Title 24 - Government – State
Public Employees' Retirement Systems
Article 51 - Public Employees' Retirement Association
Part 2 – Administration
§ 24-51-207. Standard of conduct.
(1) The trustees of the board [of the public employees' retirement association] shall be held to the standard of conduct of a fiduciary specified in subsection (2) of this section in the discharge of their functions… (2) (a) As fiduciaries, such trustees shall carry out their functions solely in the interest of the members and benefit recipients and for the exclusive purpose of providing benefits and defraying reasonable expenses incurred in performing such duties as required by law. The trustees shall act in accordance with the provisions of this article and with the care, skill, prudence, and diligence in light of the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims by diversifying the investments of the association so as to minimize the risk of large losses, unless in light of such circumstances it is clearly prudent not to do so**…**

CONNECTICUT
The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Connecticut State Employees Retirement System is the standard set forth in ERISA except that the word "man" is deleted and "person" is inserted in its place.

Connecticut General Statutes
Title 5 - State Employees
Chapter 66 - State Employees Retirement Act
§ 5-155a - Connecticut State Employees Retirement Commission. Membership. Powers and duties…
(c)…In conducting the business of the [state employees retirement system], including its oversight functions, the [Connecticut State Employees Retirement Commission] shall act: (1) With the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; (2) in accordance with strict fiduciary standards and responsibilities; and (3) in accordance with the provisions of the general statutes and applicable collective bargaining agreements.

DELAWARE
The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Delaware Public Employees' Retirement System is the standard set forth in ERISA except that (1) the word "man" is deleted and "person" is inserted in its place and (2) the phrase "in the conduct of an enterprise of a like character and with like aims" is deleted and the phrase "to attain the purposes of such plan" is inserted in its place.

Delaware Code
Title 29 - State Government
Chapter 83. Department of Finance
Subchapter I. General Provisions
§ 8308 Board of Pension Trustees.
(a) There is established a Board of Pension Trustees. The Board is subject to a standard of care in which the Board, its committees, and each of the committees' members shall discharge their duties with respect to each plan listed under subsection (b) of this section [including the State Employees' Pension Plan] solely in the interest of the participants and beneficiaries of such plans and for the exclusive purpose of providing plan benefits to participants and their beneficiaries, including defraying reasonable expenses of administering each plan, with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of such plan.

DISTRICT OF COLUMBIA
The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available district-wide under the District of Columbia Police Officers and Firefighters' Retirement Plan, the District of Columbia Teachers' Retirement Plan and the District of Columbia Judges' Retirement Plan is the standard set forth in ERISA except that the word "man" is deleted and "individual" is inserted in its place.

District of Columbia Code
Title 1 - Government Organization.

Chapter 7 - District of Columbia Employees Retirement Program Management.
Subchapter V - Fiduciary Responsibility...
§ 1–741. Fiduciary responsibilities.
(a)(1) The [District of Columbia Retirement Board], each member of the Board, and each person defined in § 1-702(20) shall discharge responsibilities with respect to a Fund [which, pursuant to § 1–702(10), includes the District of Columbia Police Officers and Fire Fighters' Retirement Fund established by § 1-712, the District of Columbia Teachers' Retirement Fund established by § 1-713 and the District of Columbia Judges' Retirement Fund established by § 1-714] as a fiduciary with respect to the Fund. The Board may designate one or more other persons who exercise responsibilities with respect to a Fund to exercise such responsibilities as a fiduciary with respect to such Fund. The Board shall retain such fiduciary responsibility for the exercise of careful, skillful, prudent, and diligent oversight of any person so designated as would be exercised by a prudent individual acting in a like capacity and familiar with such matters under like circumstances. (2) A fiduciary shall discharge his duties with respect to a Fund solely in the interest of the participants and beneficiaries and: (A) For the exclusive purpose of providing benefits to participants and their beneficiaries; (B) With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent individual acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; (C) By diversifying the investments of the Fund so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and (D) In accordance with the provisions of law, documents, and instruments governing the retirement program to the extent that such documents and instruments are consistent with the provisions of this chapter [7]…

<u>FLORIDA</u>
The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Florida Retirement System is the standard set forth in ERISA except that the word "man" is deleted and "person" is inserted in its place.

Florida Statutes
Title XIV - Taxation and Finance
Chapter 215 - Financial Matters: General Provisions
§ 215.47 – Investments…
Subject to the limitations and conditions of the State Constitution or of the trust agreement relating to a trust fund, moneys available for investments under [Florida Statutes, Title XIV - Taxation and Finance, Chapter 215 - Financial Matters: General Provisions, §§ 215.44-215.53] may be invested as follows:… (10) Investments made by the [Trustees of the] State Board of Administration [shall be invested in all the funds in the System Trust Fund, as defined in Florida Statutes, Title X - Public Officers, Employees, and Records, Chapter 121 - Florida Retirement System, § 121.021(36), and all other funds specifically required by law to be invested by the Board pursuant to Florida Statutes, Title XIV - Taxation and Finance, Chapter 215 - Financial Matters: General Provisions, §§ 215.44-215.53] shall be designed to maximize the financial return to the fund consistent with the risks incumbent in each investment and shall be designed to preserve an appropriate diversification of the portfolio. The board shall discharge its duties with respect to a plan solely in the interest of its participants and beneficiaries. The board in performing the above investment duties shall comply with the fiduciary standards set forth in the Employee Retirement Income Security Act of 1974 at 29 U.S.C. [§] 1104(a)(1)(A) through (C). [ERISA § 1104 (a)(1)(A) is the duty of loyalty which requires that plan fiduciaries discharge their duties "solely in the interest of the plan's beneficiaries" and "for the exclusive purpose" of providing them with benefits and defraying reasonable expenses of administering the plan; ERISA § 1104 (a)(1)(B) is the standard of conduct which requires that plan

fiduciaries discharge their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;" and ERISA § 1104 (a)(1)(C) is the duty of diversification which requires that fiduciaries diversify the plan's investments "so as to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so."] In case of conflict with other provisions of law authorizing investments, the investment and fiduciary standards set forth in this subsection shall prevail.

GEORGIA

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Employees' Retirement System of Georgia is the standard set forth in the UPIA except that the word "terms" is deleted and "provisions" is inserted in its place.

Georgia Code
Title 47 - Retirement and Pensions
Chapter 20 - Public Retirement Systems Standards
Article 1 - General Provisions
§ 47-20-5. Common law duties of trustees applicable

The duties of the boards of trustees of public retirement systems or pension plans [including the Board of Trustees of the Employees' Retirement System of Georgia] contained in this title [47] are in addition to, and not in limitation of, the common law duties of the trustee found in Title 53 except to the extent inconsistent with those within this title.

Georgia Code
Title 53 - Wills, Trusts, and Administration of Estates
Chapter 12 – Trusts
Article 16 - Trust Investments
Part 1 - Investments Generally
§ 53-12-340. Investment standard

a. A trustee shall invest and manage trust assets as a prudent investor would by considering the purposes, provisions, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. b. A trustee's investment and management decisions respecting individual assets shall be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. c. Among the factors that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries: 1. General economic conditions; 2. The possible effect of inflation or deflation; 3. Anticipated tax consequences; 4. The attributes of the portfolio; 5. The expected return from income and appreciation; 6. Needs for liquidity, regularity of income, and preservation or appreciation of capital; 7. An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries or to the settlor;
8. The anticipated duration of the trust; and 9. Any special circumstances. d. In investing and managing trust assets, the trustee may consider the personal values of the beneficiaries, including but not limited to a desire to engage in investing strategies that align with social, political, religious, philosophical, environmental, governance, or other values or beliefs of the beneficiaries. e. Any determination of liability for investment performance shall consider not only the performance of a particular investment but also the performance of the portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. f. A trustee shall make a reasonable effort to verify

facts relevant to the investment and management of trust assets. g. A trustee may invest in any kind of property or type of investment consistent with the standards of this article. h. A trustee who has special investment skills or expertise shall have a duty to use those special skills or expertise. A trustee who is named trustee in reliance upon such trustee's representation that such trustee has special investment skills or expertise shall be held liable for failure to make use of such degree of skill or expertise. i. In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee. j. A trustee that is a bank or trust company shall not be precluded from acquiring and retaining the securities of or other interests in an investment company or investment trust because the bank or trust company or an affiliate provides services to the investment company or investment trust as investment adviser, custodian, transfer agent, registrar, sponsor, distributor, manager, or otherwise and receives compensation for such services, if the costs are otherwise appropriate and reasonable in relation to the assets.

HAWAII

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Employees' Retirement System of the State of Hawaii is the trust investment law standard. The basic principle of § 4 of UMPERSA is that the assets of public employee retirement systems must be held in trust.[235] In addition, the phrase "for the exclusive use and benefit" located in Hawaii Revised Statutes, Title 7, § 88-127, indicates incorporation of ERISA's Exclusive Benefit Rule which is required by the Internal Revenue Service to ensure tax-favored status for the plans(s) of an employee retirement system.[236]

Hawaii Revised Statutes
Title 7. Public Officers and Employees
88. Pension and Retirement Systems
PART II. RETIREMENT FOR PUBLIC OFFICERS AND EMPLOYEES
D. Administration; Financing
§ 88-127 Guaranty.
… all funds of the [Employees' Retirement System of the State of Hawaii] including any and all interest and earnings of the same, are and shall be held in trust by the board of trustees [of the Employees' Retirement System of the State of Hawaii] for the exclusive use and benefit of the system and for the members of the system and shall not be subject to appropriation for any other purpose whatsoever.

IDAHO

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Public Employee Retirement System of Idaho is the standard set forth in ERISA except that the word "man" is deleted and "person" is inserted in its place.

Idaho Code
Title 59 - PUBLIC OFFICERS IN GENERAL
Chapter 13 - PUBLIC EMPLOYEE RETIREMENT SYSTEM
§ 59-1301 - PUBLIC EMPLOYEE RETIREMENT SYSTEM CREATED — PURPOSE — DUTIES OF

[235] See commentary to § 4 of UMPERSA.
[236] All states have adopted the Exclusive Benefit Rule in their statutes, constitutions or regulations because the Internal Revenue Code requires this rule to afford tax-favored status to the plan. See "Basic Legal Protections Vary Widely for Participants in Public Retirement Plans," Pew Charitable Trusts, November 2017, page 7.

FIDUCIARIES OF RETIREMENT FUND.
…(2)…With respect to the [Public Employee Retirement Fund] created in this chapter [13], the fiduciaries [i.e., Retirement Board] of the fund shall discharge their duties with respect to the fund solely in the interest of the members and their beneficiaries (a) for the exclusive purpose of: (i) providing benefits to members and their beneficiaries; and (ii) defraying reasonable expenses of administering the system; (b) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; (c) by diversifying the investments of the fund so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and (d) in accordance with the provisions of the Idaho Code governing the [Public Employee Retirement System of Idaho].

ILLINOIS
The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the State Employees' Retirement System of Illinois is verbatim to the standard set forth in ERISA.

Illinois Compiled Statutes
Chapter 40 - PENSIONS
40 ILCS 5/ - Illinois Pension Code.
Article 1A - Regulation of Public Pension Funds.
§ 40 ILCS 5/1-109 - Duties of Fiduciaries.
A fiduciary with respect to a retirement system or pension fund established under this [Illinois Pension] Code shall discharge his or her duties with respect to the retirement system or pension fund solely in the interest of the participants and beneficiaries and: (a) For the exclusive purpose of: (1) Providing benefits to participants and their beneficiaries; and (2) Defraying reasonable expenses of administering the retirement system or pension fund; (b) With the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims; (c) By diversifying the investments of the retirement system or pension fund so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and (d) In accordance with the provisions of the Article [1A] of the Pension Code governing the retirement system or pension fund.

INDIANA
The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Indiana Public Retirement System is the standard set forth in ERISA except that (1) the word "man" is deleted and "person" is inserted in its place and (2) the phrase "under the circumstances then prevailing" is deleted.

Indiana Code
Title 5. State and Local Administration
Article 10.3. The Public Employees' Retirement Fund
Chapter 5. Accounts; Investments
§ 5-10.3-5-3. Investments of assets; management agreements…
Sec. 3. (a) The board [of Trustees of the Indiana Public Retirement System] shall invest its assets with the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims. The board shall also diversify such investments in accordance with prudent investment standards…

IOWA

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Iowa Public Employees' Retirement System is the standard set forth in the 1942 Model Statute except that (1) the word "men" is deleted and "persons" is inserted in its place, (2) the phrase "in regard to" is deleted and "for the purpose of" is inserted in its place, (3) the word "in" is deleted and "with" is inserted in its place and (4) the word "their" is deleted and "the" is inserted in its place.

Iowa Code
Title III - PUBLIC SERVICES AND REGULATION
Chapter 97B - IOWA PUBLIC EMPLOYEES' RETIREMENT SYSTEM (IPERS)
§ 97B.7A - Investment and management of retirement fund — standards…

1. Investment and investment policy standards. In establishing the investment policy of the retirement fund and providing for the investment of the retirement fund, the [Iowa Public Employees' Retirement] system and [Investment] board [of the Iowa Public Employees' Retirement System] shall do the following:
a. Exercise the judgment and care, under the circumstances then prevailing, which persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not for the purpose of speculation, but with regard to the permanent disposition of the funds, considering the probable income, as well as the probable safety, of their capital. b. Give appropriate consideration to those facts and circumstances that the system and board know or should know are relevant to the particular investment or investment policy involved, including the role the investment plays in the total value of the retirement fund. c. For the purposes of this subsection, appropriate consideration includes, but is not limited to, a determination that the particular investment or investment policy is reasonably designed to further the purposes of the retirement system, taking into consideration the risk of loss and the opportunity for gain or income associated with the investment or investment policy and consideration of the following factors as they relate to the retirement fund: (1) The composition of the retirement fund with regard to diversification. (2) The liquidity and current return of the investments in the retirement fund relative to the anticipated cash flow requirements of the retirement system. (3) The projected return of the investments relative to the funding objectives of the retirement system. 2. Investment acquisitions. Within the limitations of the investment standards prescribed in this section, the system may acquire and retain every kind of property and every kind of investment which persons of prudence, discretion, and intelligence acquire or retain for their own account…

KANSAS

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Kansas Public Employees Retirement System is a combination of the standards set forth in the 1942 Model Statute and ERISA. (1) The phrases "shall exercise the judgment," "which persons of prudence, discretion and intelligence" and "not in regard to speculation but in regard to the permanent disposition of similar funds, considering the probable income as well as the probable safety of their capital" are drawn from the Model Statute's standard of care while (2) the phrases "care, skill, prudence and diligence under the circumstances then prevailing," "acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims" and "by diversifying the investments of the fund so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so" are drawn from ERISA's standard of care.

Kansas Statutes
Chapter 74 - State Boards, Commissions and Authorities

Article 49 - Public Employees Retirement Systems
§ 74-4921 Kansas public employees retirement fund, management and investment thereof; investment standards and objectives…
1. (1) …The [Kansas public employees retirement] fund is a trust fund and shall be used solely for the exclusive purpose of providing benefits to members and member beneficiaries and defraying reasonable expenses of administering the fund...(2) The [Kansas public employees retirement system board of trustees] shall…discharge the board's duties with respect to the fund solely in the interests of the members and beneficiaries of the [Kansas public employees retirement system] for the exclusive purpose of providing benefits to members and such member's beneficiaries and defraying reasonable expenses of administering the fund…(4) In investing and reinvesting moneys in the fund…the board shall exercise the judgment, care, skill, prudence and diligence under the circumstances then prevailing, which persons of prudence, discretion and intelligence acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims by diversifying the investments of the fund so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, and not in regard to speculation but in regard to the permanent disposition of similar funds, considering the probable income as well as the probable safety of their capital.

KENTUCKY

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Kentucky Employees Retirement System is the standard set forth in UMPERSA except that the word "which" is deleted and "that" is inserted in its place

Kentucky Revised Statutes
Chapter 61 - General provisions as to offices and officers - social security for public employees - employees retirement system
§ 61.650 Board trustee of funds - Investment committee - Standards of conduct…
(1)…(c) A trustee, officer, employee, employee of the Kentucky Public Pensions Authority, or other fiduciary shall discharge duties with respect to the [Kentucky Employees Retirement System]: 1. Solely in the interest of the members and beneficiaries; 2. For the exclusive purpose of providing benefits to members and beneficiaries and paying reasonable expenses of administering the system; 3. With the care, skill, and caution under the circumstances then prevailing that 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; 4. Impartially, taking into account any differing interests of members and beneficiaries; 5. Incurring any costs that are appropriate and reasonable; and 6. In accordance with a good-faith interpretation of the law governing the retirement system.

LOUISIANA

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Louisiana State Employees' Retirement System is the standard set forth in ERISA except that (1) the word "then" is deleted and (2) the word "man" is deleted and "institutional investor" is inserted in its place.

Louisiana Laws
Revised Statutes
Title 11 - Consolidated Public Retirement
PART II. GENERAL PROVISIONS
SUBPART I. FIDUCIARY AND INVESTMENT RESPONSIBILITIES

§ 263. Prudent-man rule…
A. The prudent-man rule shall be applied by the systems, funds, and plans [including the Assessors' Retirement Fund, Clerks of Court Retirement and Relief Fund, District Attorneys' Retirement System, Firefighters' Retirement System, Louisiana School Employees' Retirement System, Louisiana State Employees' Retirement System, Municipal Employees' Retirement System of Louisiana, Municipal Police Employees' Retirement System, Parochial Employees' Retirement System of Louisiana, Registrars of Voters Employees' Retirement System, Sheriffs' Pension and Relief Fund, Louisiana State Police Retirement System, Teachers' Retirement System of Louisiana and Harbor Police Retirement System] governed by this Subpart [I]. B. The prudent-man rule shall require each fiduciary of a retirement system and each board of trustees acting collectively on behalf of each system to act with the care, skill, prudence, and diligence under the circumstances prevailing that a prudent institutional investor acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. C. This standard requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation, but in the context of the trust portfolio, and as part of an overall investment strategy, which shall include an asset allocation study and plan for implementation thereof, incorporating risk and return objectives reasonably suitable to that trust. The asset allocation study and implementation plan shall include the examination of market value risk, credit risk, interest rate risk, inflation risk, counterparty risk, and concentration risk. The investment policy of each system, plan, or fund shall preserve and enhance principal over the long term and provide adequate liquidity and cash flow for the payment of benefits. The investments shall be diversified to minimize the risk of significant losses unless it is clearly prudent not to do so.

MAINE
The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Maine Public Employees Retirement System is a combination of the standards set forth in the Maine UTC and the Maine UPIA. These standards are the same except that (1) in the former, a trustee shall "administer the trust" and the word "distributional" is used while (2) in the latter, a trustee shall "invest and manage trust assets" and the word "distribution" is used.

Maine Revised Statutes
TITLE 5: ADMINISTRATIVE PROCEDURES AND SERVICES
Part 20: STATE RETIREMENT SYSTEM
Chapter 421: GENERAL PROVISIONS
Subchapter 4: FINANCING
Article 1: GENERAL PROVISIONS
5 § 17153. Board of trustees
…*2. Trustee of funds.* The members of the [Board of Trustees of the Maine Public Employees Retirement System] shall be the trustees of the several funds created by this Part [20]. *3. Investment of funds.* The board may cause the funds created by this Part to be invested and reinvested in accordance with the standards defined in Title 18-B, sections 802 to 807 [of the Maine Uniform Trust Code] and chapter 9 [comprising §§ 901-908 of the Maine Uniform Prudent Investor Act], subject to periodic approval of the investment program by the board.

Maine Revised Statutes
TITLE 18-B: TRUSTS
Part 1: MAINE UNIFORM TRUST CODE
Chapter 8: DUTIES AND POWERS OF TRUSTEE
§ 802. Duty of loyalty

1. Interests of beneficiaries. A trustee shall administer the trust solely in the interests of the beneficiaries.

§ 803. Impartiality
If a trust has 2 or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interests.

§ 804. Prudent administration
A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.

§ 805. Costs of administration
In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust and the skills of the trustee.

§ 806. Trustee's skills
A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

§ 807. Delegation by trustee
1. Delegation. A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill and caution in: A. Selecting an agent; B. establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and C. Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation. 2. Agent's duty to trust. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation. 3. Liability of trustee. A trustee who complies with subsection 1 is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.
4. Agent submits to jurisdiction. By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State.
5. Review of agent. Upon petition of a qualified beneficiary, after notice to all qualified beneficiaries, the trustee and the agent of the trustee, the court may review the employment of any agent by the trustee and the reasonableness of the agent's compensation. Any agent who is found to have received excess compensation from a trust may be ordered to make appropriate refunds."

Maine Revised Statutes
TITLE 18-B: TRUSTS
Part 1: MAINE UNIFORM TRUST CODE
Chapter 9: MAINE UNIFORM PRUDENT INVESTOR ACT
§ 901. Prudent investor rule
1. Duty to comply. Except as otherwise provided in section 902, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this chapter [9]…

§ 902. Standard of care; portfolio strategy; risk and return objectives
1. Consideration of purposes, terms, distribution requirements and other circumstances. A trustee shall invest and manage trust assets, as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust. In satisfying this standard, the trustee

shall exercise reasonable care, skill and caution. 2. Overall investment strategy. A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. 3. Relevant circumstances to consider. Among circumstances that a trustee shall consider in investing and managing trust assets are all of the following that are relevant to the trust or its beneficiaries: A. General economic conditions; B. The possible effect of inflation or deflation; C. The expected tax consequences of investment decisions or strategies; D. The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property and real property; E. The expected total return from income and the appreciation of capital; F. Other resources of the beneficiaries, to the extent the other resources are known to the trustee; G. Needs for liquidity, regularity of income and preservation or appreciation of capital; and H. An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries. 4. Reasonable effort to verify facts. A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets. 5. Kind of property; type of investment. A trustee may invest in any kind of property or type of investment consistent with the standards of this chapter.

§ 903. Diversification
A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

§ 904. Duties at inception of trusteeship
Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements and other circumstances of the trust and with the requirements of [the Maine Uniform Prudent Investor Act].

§ 905. Reviewing compliance
Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

§ 906. Language invoking standard of chapter
The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this chapter: "investments permissible by law for investment of trust funds"; "legal investments"; "authorized investments"; "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital"; "prudent man rule"; "prudent trustee rule"; "prudent person rule"; or "prudent investor rule."

§ 907. Uniformity of application and construction
This chapter [9] must be applied and construed to effectuate its general purposes to make uniform the law with respect to the subject of the Uniform Prudent Investor Act among the states enacting it.

§ 908. Short title
This chapter [9] may be known and cited as the "Maine Uniform Prudent Investor Act."

MARYLAND

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Employees' Pension System of the State of Maryland and the Employees' Retirement System of the State of Maryland is the standard set forth in ERISA except that the word "man" is deleted and "person" is inserted in its place.

Maryland Code
State Personnel and Pensions
Division II – Pensions
Title 21 - State Retirement and Pension System
Subtitle 2 - Fiduciary Responsibilities
§ 21-203. Standards of care

A fiduciary shall discharge the fiduciary's duties with respect to the several systems [including the Employees' Pension System of the State of Maryland and the Employees' Retirement System of the State of Maryland as well as other systems specified in § 21–102] solely in the interest of the participants and as follows: (1) for the exclusive purposes of providing benefits to the participants and for reasonable expenses of administering the several systems; (2) with the care, skill, prudence, and diligence under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; (3) by diversifying the investments of the several systems so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; (4) in accordance with the laws governing the several systems; and (5) in accordance with the documents and instruments governing the several systems to the extent that the documents and instruments are consistent with this subtitle [2].

MASSACHUSETTS

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Massachusetts State Employees' Retirement System is the standard set forth in ERISA except that the word "man" is deleted and "person" is inserted in its place.

Massachusetts General Laws
Part I - Administration of the Government
Title IV - Civil Service, Retirements and Pensions
Chapter 32 - Retirement Systems and Pensions
§ 23 - Management of Funds

…(3) Fiduciary Standards. — A fiduciary as defined in section one [which is "any person who exercises any discretionary authority or discretionary control respecting management of the funds of any retirement system [such as the state employees' retirement system] or exercises any authority or control respecting management or disposition of its assets"…] shall discharge his duties for the exclusive purpose of providing benefits to members and their beneficiaries with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims and by diversifying the investments of the system so as to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so…

MICHIGAN

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Michigan State Employees' Retirement System is the standard set forth in ERISA except that (1) the word "same" is added, (2) the word "man" is deleted and "person" is inserted in its place, (3) the word "like" is deleted and "similar" is inserted in its place, (4) the word "such" is deleted and "those" is inserted in its place and (5) the phrase "a like character and with like aims" is deleted and "a similar enterprise with similar aims" is inserted in its place.

Michigan Compiled Laws
Chapter 38 - Civil Service and Retirement
Act 314 of 1965 Public Employee Retirement System Investment Act (38.1121 - 38.1141)
§ 38.1133 Investment Authority; Investment Fiduciary...

…(3) An investment fiduciary [defined as "a person other than a participant directing the investment of the assets of his or her individual account in a defined contribution plan who does any of the following: (a) Exercises any discretionary authority or control in the investment of a system's assets…(b) Renders investment advice for a system for a fee or other direct or indirect compensation"] shall discharge his or her duties solely in the interest of the participants and the beneficiaries, and shall do all of the following: (a) Act with the same care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a similar capacity and familiar with those matters would use in the conduct of a similar enterprise with similar aims. (b) Act with due regard for the management, reputation, and stability of the issuer and the character of the particular investments being considered. (c) Make investments for the exclusive purposes of providing benefits to participants and participants' beneficiaries, and of defraying reasonable expenses of investing the assets of the system. (d) Give appropriate consideration to those facts and circumstances that the investment fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the system's investments for which the investment fiduciary has responsibility; and act accordingly. For purposes of this subsection, "appropriate consideration" includes, but is not limited to, a determination by the investment fiduciary that a particular investment or investment course of action is reasonably designed, as part of the investments of the system, to further the purposes of the system, taking into consideration the risk of loss and the opportunity for gain or other return associated with the investment or investment course of action; and consideration of the following factors as they relate to the investment or investment course of action: (i) The diversification of the investments of the system. (ii) The liquidity and current return of the investments of the system relative to the anticipated cash flow requirements of the system. (iii) The projected return of the investments of the system relative to the funding objectives of the system…

MINNESOTA

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Minnesota State Retirement System is the standard set forth in the 1942 Model Statute except that (1) the phrase "that degree of" is added, (2) the phrase "which men" is deleted and "that persons" is inserted in its place, (3) the word "would" is added, (4) the phrase "in regard to" is deleted and "for" is inserted in its place and (5) the phrase "but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital" is deleted and "considering the probable safety of the plan capital as well as the probable investment return to be derived from the assets" is inserted in its place.

Minnesota Statutes

Chapters 352 - 356B — Retirement
Chapter 356A — Public Pension Fiduciary Responsibility
§ 356A.04 — General Standard of Fiduciary Conduct.
…Subd. 2. Prudent person standard. A fiduciary identified in section 356A.02 [including any member of the governing board of a covered pension plan, the chief administrative officer of a covered pension plan or of the Minnesota State Board of Investment, any member of the State Board of Investment and any member of the Investment Advisory Council] shall act in good faith and shall exercise that degree of judgment and care, under the circumstances then prevailing, that persons of prudence, discretion, and intelligence would exercise in the management of their own affairs, not for speculation, considering the probable safety of the plan capital as well as the probable investment return to be derived from the assets.

MISSISSIPPI
The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Public Employees' Retirement System of Mississippi is the standard set forth in ERISA except that the word "man" is deleted and "investor" is inserted in its place.

Mississippi Code
Title 25 - Public Officers and Employees; Public Records
Chapter 11 - Social Security and Public Employees' Retirement and Disability Benefits
Article 3 - Additional State Retirement and Disability Benefits.
§ 25-11-121. Investments
…(10) The [Board of Trustees of the Public Employees' Retirement System of Mississippi], the executive director [of the Public Employees' Retirement System of Mississippi] and employees shall discharge their duties with respect to the investments of the system solely for the interest of the system with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent investor acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, including diversifying the investments of the system so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.

MISSOURI
The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Missouri State Employees' Retirement System is the standard set forth in ERISA except that (1) the word "same" is added, (2) the word "man" is deleted and "person" is inserted in its place, (3) the word "like" is deleted and "similar" is inserted in its place, (4) the word "such" is deleted and "those" is inserted in its place and (5) the phrase "an enterprise of a like character and with like aims" is deleted and "a similar enterprise with similar aims" is inserted in its place.

Missouri Revised Statutes
Title VIII - Public Officers and Employees, Bonds and Records
Chapter 105 - Public Officers and Employees — Miscellaneous Provisions
§ 105.688 Investment fiduciaries, duties.
…An investment fiduciary [defined as "a person who either exercises any discretionary authority or control in the investment of a public employee retirement system's assets or who renders for a fee advice for a public employment retirement system"] shall discharge his or her duties in the interest of the participants in the system [defined as "a public employee retirement system established by the state or any political subdivision of the state"] and their beneficiaries and shall: (1) Act with the same care, skill, prudence, and

diligence under the circumstances then prevailing that a prudent person acting in a similar capacity and familiar with those matters would use in the conduct of a similar enterprise with similar aims; (2) Act with due regard for the management, reputation, and stability of the issuer and the character of the particular investments being considered; (3) Make investments for the purposes of providing benefits to participants and participants' beneficiaries, and of defraying reasonable expenses of investing the assets of the system; (4) Give appropriate consideration to those facts and circumstances that the investment fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role of the investment or investment course of action plays in that portion of the system's investments for which the investment fiduciary has responsibility. For purposes of this subdivision, “appropriate consideration” shall include, but is not necessarily limited to a determination by the investment fiduciary that a particular investment or investment course of action is reasonably designed, as part of the investments of the system, to further the purposes of the system, taking into consideration the risk of loss and the opportunity for gain or other return associated with the investment or investment course of action; and consideration of the following factors as they relate to the investment or investment course of action: (a) The diversification of the investments of the system; (b) The liquidity and current return of the investments of the system relative to the anticipated cash flow requirements of the system; and (c) The projected return of the investments of the system relative to the funding objectives of the system; (5) Give appropriate consideration to investments which would enhance the general welfare of this state and its citizens if those investments offer the safety and rate of return comparable to other investments available to the investment fiduciary at the time the investment decision is made.

MONTANA

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Montana Public Employee Retirement System is the standard set forth in ERISA except that (1) the word “man” is deleted and “person” is inserted in its place, (2) the phrase “with the same resources” is added, (3) the word “such” is deleted and “like” is inserted in its place and (4) the phrase “would use” is deleted and “exercises” is inserted in its place.

Montana Code Annotated
Title 17. State Finance
Chapter 6. Deposits and Investments
Part 2. Investments
§ 17-6-201. Unified investment program -- general provisions

(1) The unified investment program directed by Article VIII, section 13, of the Montana constitution to be provided for public funds [and public retirement system fund assets] must be administered by the board of investments in accordance with the prudent expert principle, which requires an investment manager to: (a) discharge the duties with the care, skill, prudence, and diligence, under the circumstances then prevailing, that a prudent person acting in a like capacity with the same resources and familiar with like matters exercises in the conduct of an enterprise of a like character with like aims; (b) diversify the holdings of each fund within the unified investment program to minimize the risk of loss and to maximize the rate of return unless, under the circumstances, it is clearly prudent not to do so; and (c) discharge the duties solely in the interest of and for the benefit of the funds forming the unified investment program.

NEBRASKA

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Nebraska

Public Employees' Retirement System is the standard set forth in ERISA except that (1) the word "man" is deleted and "person" is inserted in its place and (2) the article "a" (between the words "in" and "like") is deleted.

Nebraska Revised Statutes
Chapter 72 - Public Lands, Buildings, and Funds
§ 72-1239.01. Council; duties and responsibilities.
(1)(a) The appointed members of the [Nebraska Investment Council] shall have the responsibility for the investment management of the assets of the retirement systems [including those provided for in the County Employees Retirement Act, the Judges Retirement Act, the Nebraska State Patrol Retirement Act, the School Employees Retirement Act, and the State Employees Retirement Act] administered by the Public Employees Retirement Board as provided in section 84-1503…the appointed members shall be deemed fiduciaries with respect to the investment of the assets of the retirement systems…and shall be held to the standard of conduct of a fiduciary specified in subsection (3) of this section. (b) As fiduciaries, the appointed members of the council and the state investment officer shall discharge their duties with respect to the assets of the retirement systems…solely in the interests of the members and beneficiaries of the retirement systems…for the exclusive purposes of providing benefits to members, members' beneficiaries, participants, and participants' beneficiaries and defraying reasonable expenses incurred within the limitations and according to the powers, duties, and purposes prescribed by law. (3) The appointed members of the council shall act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims by diversifying the investments of the assets of the retirement systems…and state funds so as to minimize risk of large losses, unless in light of such circumstances it is clearly prudent not to do so…

NEVADA

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Public Employees' Retirement System of Nevada is a portion of the standard set forth in the 1942 Model Statute.[237] The Nevada Constitution makes clear that the Nevada public employees' retirement system is subject to the standard of trust law.

Nevada Revised Statutes
Chapter 286 - Public Employees' Retirement
NRS § 286.682 - Authorized investments: "Prudent person" standard.
The [Public Employees' Retirement Board] may invest the money in its funds in every kind of investment which persons of prudence, discretion and intelligence acquire or retain for their own account.

Nevada Constitution
Article IX
§ 2

[237] Compare the 1942 Model Statute "…a fiduciary shall exercise the judgment and care, under the circumstances then prevailing, which *men of prudence, discretion and intelligence* exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital" to Nevada Revised Statutes § 286.682: …"may invest the money in its funds in every kind of investment which *persons of prudence, discretion and intelligence* acquire or retain for their own account." (Emphases added.)

…Trust Funds for…Public Employees' Retirement System…2. Any money paid for…the purpose of funding and administering a public employees' retirement system, must be segregated in proper accounts in the state treasury, and such money must never be used for any other purposes, and they are hereby declared to be trust funds for the uses and purposes herein specified.

NEW HAMPSHIRE

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the New Hampshire Retirement System is verbatim to the standard set forth in UMPERSA.

New Hampshire Revised Statutes
Title VI - Public Officers and Employees
Title 100-A - New Hampshire Retirement System
§ 100-A:15 - Management of Funds.

I-a. (a) A trustee, independent investment committee member, or other fiduciary shall discharge duties with respect to the [New Hampshire Retirement System]: (1) Solely in the interest of the participants and beneficiaries; (2) For the exclusive purpose of providing benefits to participants and beneficiaries and paying reasonable expenses of administering the system; (3) 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; (4) Impartially, taking into account any differing interests of participants and beneficiaries; (5) Incurring only costs that are appropriate and reasonable; and (6) In accordance with a good-faith interpretation of the law governing the retirement system. (b) In investing and managing assets of the retirement system pursuant to subparagraph (a), a trustee or independent investment committee member with authority to invest and manage assets: (1) Shall consider among other circumstances: (A) General economic conditions; (B) The possible effect of inflation or deflation; (C) The role that each investment or course of action plays within the overall portfolio of the retirement system; (D) The expected total return from income and the appreciation of capital; (E) Needs for liquidity, regularity of income, and preservation or appreciation of capital; and (F) The adequacy of funding for the system based on reasonable actuarial factors; (2) Shall diversify the investments of the retirement system unless the trustee or independent investment committee member reasonably determines that, because of special circumstances, it is clearly prudent not to do so; (3) Shall make a reasonable effort to verify facts relevant to the investment and management of assets of a retirement system; and (4) May invest in any kind of property or type of investment consistent with this section.

NEW JERSEY

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Public Employees' Retirement System of New Jersey is the standard set forth in ERISA except that the word "man" is deleted and "person" is inserted in its place.

New Jersey Revised Statutes
Title 52 - State Government, Departments and Officers
§ 52:18A-89 - Limitations, conditions, restrictions continued; authorization of investments.

b. In investing and reinvesting any and all money and property committed to the…investment discretion [of the Director of the Division of Investments in the Department of the Treasury] from any source whatsoever, and in acquiring, retaining, selling, exchanging and managing investments, the Director of the Division of Investment…shall exercise the care, skill, prudence and diligence under the circumstances

then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims [on behalf of the Consolidated Police & Firemen's Pension Fund, the Judicial Retirement System, the Police & Firemen's Retirement System, the Prison Officers Pension Fund, the Public Employees' Retirement System, the State Police Retirement System and the Teachers' Pension & Annuity Fund]. In making each investment, the director may, depending on the nature and objectives of the portfolio, consider the whole portfolio, provided that, in making each investment, the director shall act with the reasonable expectation that the return on each investment shall be commensurate with the risk associated with each investment. The director shall be under a duty to manage and invest the portfolio solely in the interests of the beneficiaries of the portfolio and for the exclusive purpose of providing financial benefits to the beneficiaries of the portfolio.

NEW MEXICO

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the New Mexico Public Employees Retirement Association is verbatim to the standard set forth in the UPIA.

New Mexico Statutes
Chapter 10 - Public Officers and Employees
Article 11 - Retirement of Public Officers and Employees Generally
§ 10-11-133 - Investment of funds; prudent investor standard; conditions.

…B. The [New Mexico Public Employees] retirement board [provided for in the Public Employees Retirement Act] shall invest and manage the funds administered by the retirement board in accordance with the Uniform Prudent Investor Act [§§ 45-7-601 to 45-7-612 NMSA 1978].

New Mexico Statutes
Chapter 45 - Uniform Probate Code
Article 7 - Trust Administration
Part 6 - Uniform Prudent Investor Act
§ 45-7-601 - Short title.

Sections 45-7-601 through 45-7-612 NMSA 1978 may be cited as the "Uniform Prudent Investor Act".

§ 45-7-602 - Prudent investor rule.

A. Except as otherwise provided in Subsection B of this section, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in the Uniform Prudent Investor Act [45-7-601 to 45-7-612 NMSA 1978]. B. The prudent investor rule, a default rule, may be expanded, restricted, eliminated or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

§ 45-7-603 - Standard of care; portfolio strategy; risk and return objectives.

A. A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution. B. A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. C. Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries: (1) general economic conditions; (2) the possible effect of inflation or deflation; (3) the expected tax consequences

of investment decisions or strategies; (4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interest in closely held enterprises, tangible and intangible personal property and real property; (5) the expected total return from income and the appreciation of capital; (6) other resources of the beneficiaries; (7) needs for liquidity, regularity of income and preservation or appreciation of capital; and (8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries. D. A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets. E. A trustee may invest in any kind of property or type of investment consistent with the standards of the Uniform Prudent Investor Act…F. A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

§ 45-7-604 – Diversification.
A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

§ 45-7-605 – Duties at inception of trusteeship.
Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements and other circumstances of the trust, and with the requirements of the Uniform Prudent Investor Act [§§ 45-7-601 to 45-7-612 NMSA 1978].

§ 45-7-606 - Loyalty.
A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.

§ 45-7-607 - Impartiality.
If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.

§ 45-7-608 - Investment costs.
In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust and the skills of the trustee.

§ 45-7-609 - Reviewing compliance.
Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

§ 45-7-610 - Delegation of investment and management functions.
A. A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill and caution in: (1) selecting an agent; (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation. B. In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation. C. A trustee who complies with the requirements of Subsection A of this section is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the

function was delegated. D. By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

§ 45-7-611 - Language invoking standard.
The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under the Uniform Prudent Investor Act [§§ 45-7-601 to 45-7-612 NMSA 1978]: "investments permissible by law for investment of trust funds", "legal investments", "authorized investments", "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital", "prudent man rule", "prudent trustee rule", "prudent person rule" and "prudent investor rule".

§ 45-7-612 - Application to existing trusts.
The Uniform Prudent Investor Act…applies to trusts existing on and created after its effective date. As applied to trusts existing on its effective date, the Uniform Prudent Investor Act governs only decisions or actions occurring after that date.

NEW YORK
The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the New York State and Local Retirement System is the standard set forth in ERISA except that the word "man" is deleted and "person" is inserted in its place.

New York Laws
RSS - Retirement and Social Security Law
Article 4-A - Investments of Public Pension Funds
§ 177 - Eligible Investments

In addition to the powers contained in any other provision of law…the trustee or trustees of a fund [which, pursuant to RSSL (Retirement and Social Security Law) § 176(1), is "…any public retirement system or pension fund which grants retirement or pension benefits to employees of the city of New York, employees of the state of New York, employees of any department or agency of the city of New York or the state of New York, and employees of any municipality or other participating employer participating in the New York state and local employees' retirement system or the New York state and local police and fire retirement system…"] shall have the power to invest the moneys thereof in: 1. Such securities in which the trustees of a savings bank may invest the moneys deposited therein as provided by law, subject, however, to the following limitations…9. Investments, which do not qualify or are not permitted under any other subdivision of this section, notwithstanding any other provision of law, provided…(b) such investments shall be for the exclusive benefit of the participants and beneficiaries, and the trustee or trustees of a fund shall make such investments with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims…

General Investment Policies for the New York State Common Retirement Fund, revised April 7, 2021, page 3: ADMINISTRATIVE AND OPERATIONAL BACKGROUND. The Comptroller, as Trustee of the CRF [Common Retirement Fund] and as Administrative Head of the Retirement System, is responsible for the investment of all CRF assets and is bound by prudent investing standards and the exclusive benefit provisions set out

in the Retirement and Social Security Law (RSSL section 177[9]) and the Regulations of the New York State Department of Financial Services (DFS[;] formerly the Insurance Department) (11 NYCRR part 136-2). RSSL section 177(9)(b) reads, in part: Such investments shall be for the exclusive benefit of the participants and beneficiaries, and the trustee or trustees of a fund shall make such investments with the care, skill, prudence and diligence under circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. The language of the fiduciary duty standards in the RSSL and the DFS Regulations is based upon well-developed common law principles of trust law and is similar to the language describing fiduciary duty standards in Section 404(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA). As a government plan, the Retirement System is not subject to ERISA. However, as a matter of policy, the CRF voluntarily looks for guidance to ERISA and the US Department of Labor interpretations provided thereunder, where relevant and appropriate. The CRF also may draw upon common law principles of trust and fiduciary duty in analyzing investments as well as current best practice in institutional fund management. Compliance with the "exclusive benefit" rule also assures the Retirement System's continued status as a tax-exempt qualified plan under the Internal Revenue Code. The Comptroller is expressly permitted to invest the assets of the CRF in specific types of investments enumerated in section 235 of the State Banking Law and several sections of the RSSL, including sections 13, 313, and 177. These statutory sections also contain limitations on the amount and quality of investments the CRF may hold in certain asset categories. These investments are the so-called "legal list" investments. In addition to the foregoing, section 177(9) of the RSSL contains a provision that currently provides that up to 25 percent of the CRF's assets may be invested in investments not specifically authorized by any other statute (the "basket clause"). In making investments under Section 177(9), the Comptroller is subject to the specific prudent investing and exclusive benefit provisions noted above…

NORTH CAROLINA

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under The Teachers' and State Employees' Retirement System of North Carolina, The Consolidated Judicial Retirement System of North Carolina, The North Carolina Firefighters' and Rescue Squad Workers' Pension Fund, The Legislative Retirement System of North Carolina and the North Carolina National Guard Pension Fund is a combination of the standards set forth in UMPERSA, the UPIA, the Third Restatement, ERISA and the 1942 Model Statute. The phrase (1) "[w]ith the care, skill, and caution" is drawn from the UMPERSA standard of care, (2) versions of the phrase "that a prudent investor would use" are drawn from the standards of care in ERISA, the Third Restatement, the UPIA and UMPERSA, (3) versions of the phrase "after considering the purposes, distribution requirements, and other circumstances" are drawn from the standards of care in the Third Restatement and the UPIA and (4) versions of the phrase "then prevailing" are drawn from the standards of care in the Model Statute, ERISA and UMPERSA.

North Carolina General Statutes
Chapter 147 - State Officers
Article 6 - Treasurer.
§ 147-69.7 - Discharge of duties to funds.

(a) The State Treasurer shall discharge his or her duties with respect to each fund or investment program held by the State Treasurer, including each of the funds, enumerated in G.S. 147-69.2 [including the Teachers' and State Employees' Retirement System of North Carolina, The North Carolina Local Governmental Employees' Retirement System, The Consolidated Judicial Retirement System of North Carolina, The North Carolina Firefighters' and Rescue Squad Workers' Pension Fund, The Legislative Retirement System of North Carolina, and the North Carolina National Guard Pension Fund as well as

nearly 30 other special funds] as follows: (1) Solely in the interest of the intended beneficiaries of the fund, if any. (2) For the exclusive purpose of carrying out the purpose of the fund, including providing benefits to participants and beneficiaries, and paying reasonable expenses of administering the fund. (3) With the care, skill, and caution that a prudent investor would use after considering the purposes, distribution requirements, and other circumstances then prevailing. (4) Impartially, taking into account any differing interests of participants and beneficiaries. (5) Incurring only costs that are appropriate and reasonable. (6) In accordance with a good-faith interpretation of the provisions of G.S. 147-69.2 and any other applicable law governing the fund. (b) In investing and managing assets of the fund pursuant to subsection (a) of this section, the State Treasurer: (1) Shall consider the following circumstances: a. General economic conditions. b. The possible effect of inflation or deflation. c. The role that each investment or course of action plays within the overall portfolio of the fund. d. The expected total return from income and the appreciation of capital. e. Needs for liquidity, regularity of income, and preservation or appreciation of capital. f. With respect to the Retirement Systems defined in G.S. 147-69.2(d) and any other pension plans, the adequacy of funding for the Retirement Systems based on reasonable actuarial factors. g. The purpose of the fund, if established. (2) Shall diversify the investments of the fund unless the State Treasurer reasonably determines that, because of special circumstances, including applicable investment restrictions, it is clearly prudent not to do so. (3) Shall make a reasonable effort to verify facts relevant to the investment and management of assets of the funds. (4) Shall invest only in those investments authorized by law consistent with the provisions of Article 6 of Chapter 146 of the General Statutes. (5) May consider benefits created by an investment in addition to investment return only if the State Treasurer determines that the investment providing these collateral benefits would be prudent even without collateral benefits. (c) Compliance by the State Treasurer with this section must be determined in light of the facts and circumstances existing at the time of the Treasurer's decision or action and not by hindsight. (d) The State Treasurer's investment and management decisions must be evaluated not in isolation but in the context of the portfolio of the fund as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the fund…

NORTH DAKOTA

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the North Dakota Public Employees Retirement System is the standard set forth in the 1942 Model Statute except that (1) the word "institutional" is added, (2) the phrase "which men of" is deleted and "that an institutional investor of ordinary" is inserted in its place, (3) the phrase "exercise in the management of their own affairs" is deleted and "exercises in the management of large investments entrusted to it" is inserted in its place and (4) the phrase "their funds, considering the probable income as well as the probable safety of their capital" is deleted and "funds, considering probable safety of capital as well as probable income" is inserted in its place.

North Dakota Century Code
Title 21 Governmental Finance
Chapter 21-10 State Investment Board
21-10-07. Legal investments.

The [North Dakota] state investment board shall apply the prudent investor rule in investing for funds under its supervision [including the fund for the public employees retirement system]. The "prudent investor rule" means that in making investments the fiduciaries shall exercise the judgment and care, under the circumstances then prevailing, that an institutional investor of ordinary prudence, discretion, and intelligence exercises in the management of large investments entrusted to it, not in regard to speculation but in regard to the permanent disposition of funds, considering probable safety of capital as

well as probable income. The retirement funds belonging to the teachers' fund for retirement and the public employees retirement system must be invested exclusively for the benefit of their members and in accordance with the respective funds' investment goals and objectives.

OHIO

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Ohio Public Employees Retirement System is the standard set forth in ERISA except that (1) the word "man" is deleted and "person" is inserted in its place and (2) the word "such" is deleted and "these" is inserted in its place.

Ohio Revised Code
Title [1] I STATE GOVERNMENT
Chapter 145 - PUBLIC EMPLOYEES RETIREMENT SYSTEM
§ 145.11 - Investment powers and fiduciary duties of board.

(A)… The [members of the public employees retirement] board and other fiduciaries [defined in § 145.01(BBB) as "a person who does any of the following: (1) Exercises any discretionary authority or control with respect to the management of the system or with respect to the management or disposition of its assets; (2) Renders investment advice for a fee, direct or indirect, with respect to money or property of the system; (3) Has any discretionary authority or responsibility in the administration of the system"] shall discharge their duties with respect to the funds [including the employees' savings fund, the employers' accumulation fund, the annuity and pension reserve fund, the income fund, the survivors' benefit fund, the defined contribution fund and the expense fund] solely in the interest of the participants and beneficiaries; for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the public employees retirement system; with care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims; and by diversifying the investments of the system so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.

OKLAHOMA

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Oklahoma Public Employees Retirement System is the standard set forth in ERISA except that the word "man" is deleted and "person" is inserted in its place.

Oklahoma Statutes
Title 74. State Government
§ 74-909.1. Duties of Board…

A. The Oklahoma Public Employees Retirement System Board of Trustees shall discharge their duties with respect to the [Oklahoma Public Employees Retirement] System solely in the interest of the participants and beneficiaries and: 1. For the exclusive purpose of: a. providing benefits to participants and their beneficiaries, and b. defraying reasonable expenses of administering the System; 2. With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; 3. By diversifying the investments of the System so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and 4. In accordance with the laws, documents and instruments governing the System.

OREGON

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Oregon Public Employees Retirement System is a combination of the standards set forth in the 1942 Model Statute, ERISA, the Third Restatement, the UPIA and UMPERSA. (1) The phrase "as a prudent investor would" is drawn from the standards of conduct in the Third Restatement and the UPIA, (2) the phrase "under the circumstances then prevailing" is drawn from the standards of conduct in the Model Statute, ERISA and UMPERSA and (3) the phrase "in light of the purposes, terms, distribution requirements and laws governing each investment fund" is drawn from the Third Restatement except that the phrase "laws governing each investment fund" is added.

Oregon Revised Statutes
Volume: 07 - Public Facilities and Finance
Chapter 293 - Administration of Public Funds
§ 293.726 - Standard of judgment and care in investments; investment in corporate stock.

(1) The investment funds [including the Public Employees Retirement Fund per ORS 238.660] shall be invested and the investments of those funds managed as a prudent investor would do, under the circumstances then prevailing and in light of the purposes, terms, distribution requirements and laws governing each investment fund. (2) The standard stated in subsection (1) of this section requires the exercise of reasonable care, skill and caution, and is to be applied to investments not in isolation but in the context of each investment fund's investment portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the particular investment fund. (3) In making and implementing investment decisions, the Oregon Investment Council [which shall invest the assets of the Oregon Public Service Retirement Plan as a part of the Public Employees Retirement Fund] and the investment officer have a duty to diversify the investments of the investment funds unless, under the circumstances, it is not prudent to do so. (4) In addition to the duties stated in subsection (3) of this section, the council and the investment officer must: (a) Conform to the fundamental fiduciary duties of loyalty and impartiality; (b) Act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents; and (c) Incur only costs that are reasonable in amount and appropriate to the investment responsibilities imposed by law. (5) The duties of the council and the investment officer under this section are subject to contrary provisions of privately created public trusts the assets of which by law are made investment funds. Within the limitations of the standard stated in subsection (1) of this section and subject to subsection (6) of this section, there may be acquired, retained, managed and disposed of as investments of the investment funds every kind of investment which persons of prudence, discretion and intelligence acquire, retain, manage and dispose of for their own account. (6) Notwithstanding subsection (1) of this section, not more than 50 percent of the moneys contributed to the Public Employees Retirement Fund or the Industrial Accident Fund may be invested in common stock…

PENNSYLVANIA

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Pennsylvania State Employees' Retirement System is a combination of the standards set forth in the 1942 Model Statute and ERISA. (1) The phrase (a) "exercise of that degree of judgment, skill and care under the circumstances then prevailing which persons of prudence, discretion and intelligence" is drawn from the 1942 Model Statute's standard of conduct except that the phrase "of that degree of" is deleted and "the" is inserted in its place, (b) the word "skill" is deleted, (c) the word "men" is deleted and "persons" is inserted in its place, (d) the phrase "exercise in the management of their own affairs not in regard to speculation, but in regard to the permanent disposition of the funds" is verbatim to the 1942 Model

Statute except that the word “their” (between “of” and “funds”) is deleted and “the” is inserted in its place and (e) the phrase “considering the probable income to be derived therefrom as well as the probable safety of their capital” is drawn from the 1942 Model Statute except that the phrase “to be derived therefrom” is added while (2) the phrase “who are familiar with such matters” is drawn from ERISA’s standard of conduct except that the phrase “who are” is deleted.

Pennsylvania Consolidated Statutes
Title 71 - STATE GOVERNMENT
PART XXV. RETIREMENT FOR STATE EMPLOYEES AND OFFICERS
Chapter 59 - Administration, Funds, Accounts, General Provisions
Subchapter C. State Employees’ Retirement Fund and Accounts
§ 5931 - Management of fund and accounts
(a) Control and management of fund.--The members of the [State Employees’ Retirement] board shall be the trustees of the [State Employees’ Retirement] fund…the trustees shall have exclusive control and management of the said fund and full power to invest the same in accordance with the provisions of this section [5931], subject, however, to the exercise of that degree of judgment, skill and care under the circumstances then prevailing which persons of prudence, discretion and intelligence, who are familiar with such matters, exercise in the management of their own affairs not in regard to speculation, but in regard to the permanent disposition of the funds, considering the probable income to be derived therefrom as well as the probable safety of their capital.

RHODE ISLAND

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Employees’ Retirement System of Rhode Island is the standard set forth in ERISA except that (1) the word “man” is deleted and “person” is inserted in its place and (2) the word “such” is deleted and “these” is inserted in its place.

Rhode Island General Laws
Title 35 - Public Finance
Chapter 35-10 State Investment Commission
§ 35-10-6 Investment of funds not immediately required.
(b)…the [State Investment] commission is authorized and empowered to execute the disposition and investment of the funds [including the general fund, rotary funds, sinking funds, special revenue funds, trust and agency funds, veterans’ home fund, permanent school fund, employees’ retirement fund, Touro Jewish synagogue fund [and] the Rhode Island temporary disability insurance reserve fund] which are within its control in accordance with the prudent person standard as defined in this subsection…For purposes of this subsection [b], the prudent person standard shall be that standard of care employed solely in the interest of the participants and beneficiaries of the funds and: (1) For the exclusive purpose of: (i) Providing benefits to participants and their beneficiaries; and (ii) Defraying reasonable expenses of administering the funds; (2) With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims; and (3) By diversifying the investments of the fund so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.

SOUTH CAROLINA

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the South Carolina Retirement System is verbatim to the standard set forth in UMPERSA. According to the NCCUSL, South Carolina has not enacted UMPERSA; only two states have done so, both in 2005: Maryland[238] and Wyoming. Nonetheless, South Carolina incorporated the fiduciary sections of UMPERSA as part of its Code of Laws (SCCL) in 1998, a year after publication of UMPERSA. These sections include establishment of trust (UMPERSA § 4 codified as SCCL § 9-16-20), delegation of functions (UMPERSA § 6 codified as SCCL § 9-16-30), general fiduciary duties (UMPERSA § 7 codified as SCCL § 9-16-40), duties of trustee in investing and managing assets of retirement system (UMPERSA § 8 codified as SCCL § 9-16-50), reviewing compliance (UMPERSA § 10 codified as SCCL § 9-16-60), fiduciary liability (UMPERSA § 11 codified as SCCL § 9-16-70), open or public meetings and records (UMPERSA § 12 codified as SCCL § 9-16-80) and annual disclosure of financial and actuarial status (UMPERSA §§ 17(13), 17(14), 17(15) and 17(16), codified, respectively, as SCCL §§ SCCL 9-16-90(A)(2)(a), SCCL 9-16-90(A)(2)(b), SCCL 9-16-90(A)(2)(c) and SCCL 9-16-90(A)(2)(e)).

South Carolina Code of Laws
Title 9 - Retirement Systems
Chapter 1 - South Carolina Retirement System
ARTICLE 11 Management of Funds
§ 9-1-1310. Trustee of retirement system; investment of funds.

(A) The South Carolina Public Employee Benefit Authority and the Retirement System Investment Commission are cotrustees of the assets of the retirement system as "assets" [are defined in Section 9-16-10(1) to include "all funds, investments, and similar property of the retirement system"] and [a "retirement system" is defined in Section 9-16-10(8) to include "the South Carolina Retirement System, Retirement System for Judges and Solicitors, Retirement System for Members of the General Assembly, National Guard Retirement System, and Police Officers Retirement System established pursuant to Chapters 1, 8, 9, 10 and 11 of this title [9]"]. Notwithstanding any other provision of law, any reference in law to the trustee of the assets of the Retirement System must be construed to conform to the cotrusteeship as provided in this subsection. The Public Employee Benefit Authority shall hold the assets of the Retirement System in a group trust as provided in Section 9-16-20. The Retirement System Investment Commission shall invest and reinvest the assets of the Retirement System, subject to all the terms, conditions, limitations, and restrictions imposed by Section 16, Article X of the South Carolina Constitution, 1895, subsection (B) of this section, and Chapter 16 of this title [9].

South Carolina Code of Laws
Title 9 - Retirement Systems
Chapter 1 - South Carolina Retirement System
ARTICLE 11 Management of Funds
Section 9-1-1320. Custodian of assets of the Retirement System.

The board [of directors of the South Carolina Pubic Employee Benefit Authority acting as trustee of the retirement system] is the custodian of the assets of the Retirement System as "assets" " [are defined in Section 9-16-10(1) to include "all funds, investments, and similar property of the retirement system"] and [a "retirement system" is defined in Section 9-16-10(8) to include "the South Carolina Retirement System, Retirement System for Judges and Solicitors, Retirement System for Members of the General Assembly,

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[238] Although Maryland enacted UMPERSA, it chose to adopt ERISA's standard of care even though the two standards are very similar.

National Guard Retirement System, and Police Officers Retirement System established pursuant to Chapters 1, 8, 9, 10 and 11 of this title [9]”].

South Carolina Code of Laws
Title 9 - Retirement Systems
Chapter 16 - Retirement System Funds
ARTICLE 1 Duties of the Trustee, Fiduciaries, Agents
§ 9-16-20. Investment and management authority of commission…
(A) All assets of a retirement system are held in trust. The [Retirement System Investment Commission] has the exclusive authority, subject to this chapter [16] and Section 9-1-1310, to invest and manage those assets.

§ 9-16-30. Delegation of functions by commission; standard of care; agent’s duty and submission to jurisdiction.
(A) The [Retirement System Investment Commission] may 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 to invest cannot be delegated. (B) The commission shall exercise reasonable care, skill, and caution in: (1) selecting an agent; (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the retirement program; and (3) periodically reviewing the agent’s performance and compliance with the terms of the delegation. (C) In performing a delegated function, an agent owes a duty to the retirement system and to its participants and beneficiaries to comply with the terms of the delegation and, if a fiduciary, to comply with the duties imposed by Section 9-16-40. (D) A commission member who complies with subsections (A) and (B) is not liable to the retirement system or to its participants or beneficiaries for the decisions or actions of the agent to whom the function was delegated. (E) By accepting the delegation of a function from the commission, an agent submits to the jurisdiction of the courts of this State. (F) The commission may limit the authority of an agent to delegate functions under this section. (G) The commission shall cast shareholder proxy votes that are in keeping with its fiduciary duties that are consistent with the best interest of the trust fund and most likely to maximize shareholder value.

§ 9-16-40. Standards for discharge of duty.
A trustee [including the Board of Directors of the South Carolina Public Employee Benefit Authority], commission member [of the Retirement System Investment Commission], or other fiduciary shall discharge duties with respect to a retirement system: (1) solely in the interest of the retirement systems, participants, and beneficiaries; (2) for the exclusive purpose of providing benefits to participants and beneficiaries and paying reasonable expenses of administering the system; (3) 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; (4) impartially, taking into account any differing interests of participants and beneficiaries; (5) incurring only costs that are appropriate and reasonable; and (6) in accordance with a good faith interpretation of this chapter [16].

§ 9-16-50. Investment and management considerations by trustee; diversification; verification of facts; statement of investment objectives and policies.
(A) In investing and managing assets of a retirement system pursuant to Section 9-16-40, the [Retirement System Investment Commission]: (1) shall consider among other circumstances: (a) general economic conditions; (b) the possible effect of inflation or deflation; (c) the role that each investment or course of action plays within the overall portfolio of the retirement system; (d) needs for liquidity, regularity of

income, and preservation or appreciation of capital; and (e) the adequacy of funding for the plan based on reasonable actuarial factors; (2) shall diversify the investments of the retirement system unless the commission reasonably determines that, because of special circumstances, it is clearly prudent not to do so; (3) shall make a reasonable effort to verify facts relevant to the investment and management of assets of a retirement system; (4) may invest in any kind of property or type of investment consistent with this chapter and Section 9-1-1310; (5) may consider benefits created by an investment in addition to investment return only if the commission determines that the investment providing these collateral benefits would be prudent even without the collateral benefits. (B) The commission shall adopt a statement of investment objectives and policies for the retirement system. The statement must include the desired rate of return on assets overall, the desired rates of return and acceptable levels of risk for each asset class, asset-allocation goals, guidelines for the delegation of authority, and information on the types of reports to be used to evaluate investment performance. At least annually, the commission shall review the statement and change or reaffirm it. The relevant portion of this statement may constitute parts of the annual investment plan required pursuant to Section 9-16-330.

§ 9-16-60. Evaluation of fiduciary's compliance with law not to be hindsight; decision-making evaluated in context of whole portfolio.

(A) Compliance by the trustee, commission, or other fiduciary with Sections 9-16-30, 9-16-40, and 9-16-50 must 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. (B) The commission's investment and management decisions must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the retirement system.

§ 9-16-70. Liability for breach of duty; insurance by retirement system or fiduciary; disclosure of terms and conditions.

(A) A commission member or other fiduciary who breaches a duty imposed by this chapter is personally liable to the retirement system for any losses resulting from the breach and any profits resulting from the breach or made by the commission member or other fiduciary through use of assets of the system by the commission member or other fiduciary. The commission member or other fiduciary is subject to other equitable remedies, as the court considers appropriate, including removal. (B) An agreement that purports to limit the liability of a trustee or other fiduciary for a breach of duty under this chapter is void. (C) The retirement system may insure a trustee, commission member, fiduciary, or itself against liability or losses occurring because of a breach of duty under this chapter. (D) A trustee, commission member, or other fiduciary may insure against personal liability or losses occurring because of a breach of duty under this chapter if the insurance is purchased or provided by the individual trustee, commission member, or fiduciary, but a fiduciary who obtains insurance pursuant to this chapter must disclose all terms, conditions, and other information relating to the insurance policy to the retirement system.

§ 9-16-80. Investment meetings of board or commission as executive sessions exempt from disclosure; records of meetings.

(A) Meetings by the board while acting as trustee of the retirement system, or meetings of the commission, or by its fiduciary agents to deliberate about, or make tentative or final decisions on, investments or other financial matters may be in executive session if disclosure of the deliberations or decisions would jeopardize the ability to implement a decision or to achieve investment objectives. (B) A record of the board, or commission, or of its fiduciary agents that discloses deliberations about, or a tentative or final decision on, investments or other financial matters is exempt from the disclosure requirements of Chapter 4 of Title 30, the Freedom of Information Act, to the extent and so long as its

disclosure would jeopardize the ability to implement an investment decision or program or to achieve investment objectives.

SOUTH DAKOTA

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the South Dakota Retirement System is the standard set forth in the 1942 Model Statute except that (1) the word “institutional” is added, (2) the phrase “which men of” is deleted and “that an institutional investor of ordinary” is inserted in its place, (3) the phrase “exercise in the management of their own affairs” is deleted and “exercises in the management of large investments entrusted to it” is inserted in its place and (4) the phrase “their funds, considering the probable income as well as the probable safety of their capital” is deleted and “funds, considering probable safety of capital as well as probable income” is inserted in its place.

South Dakota Codified Laws
Title 3 - Public Officers and Employees
Chapter 12C - South Dakota Retirement System
§ 3-12C-223 Investment of assets by investment council--Pooling of funds--Standards for investment…

The State Investment Council as provided in § 4-5-12 is responsible for the investment of the assets of the [South Dakota Retirement] system. The Investment Council may pool the several [public employees’] retirement funds for investment purposes and the investment of such funds is…governed by the provisions of § 4-5-27.

South Dakota Codified Laws
Title 4 - Public Fiscal Administration
Chapter 05 - Custody and Investment of State Funds
§ 4-5-27 Prudent-man standard required in investments.

Any investments under the provisions of §§ 4-5-12 to 4-5-39 [which together comprise the Investment of State Funds Law], inclusive, shall be made with the exercise of that degree of judgment and care, under circumstances then prevailing, which persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not for speculation but for investment, considering the probable safety of their capital as well as the probable income to be derived.

TENNESSEE

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Tennessee Consolidated Retirement System is verbatim to the standard set forth in the UPIA.

Tennessee Code
Title 8 - Public Officers and Employees
Chapter 37 - Retirement—financing and Funds
Part 1 - Custody and Management of Funds—investment
§ 8-37-104. Power of investment…

(a) The board of trustees [of the Tennessee Consolidated Retirement System] shall invest and manage assets solely in the interest of the beneficiaries of the [Tennessee Consolidated] retirement system in a manner consistent with § 35-14-107 [i.e., the duty of loyalty – “A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries” - under the Tennessee Uniform Prudent Investor Act (TN UPIA)], the prudent investor rule [of the TN UPIA] pursuant to § 35-14-103 [“(a) Except as otherwise

provided in subsection (b), a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this chapter [14]…[and] the standard of care pursuant to § 35-14-104 [under the TN UPIA: "(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. (b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. (c) Among circumstances that a trustee may consider in investing and managing trust assets the following are relevant to the trust or its beneficiaries: (1) General economic conditions; (2) The possible effect of inflation or deflation; (3) The expected tax consequences of investment decisions or strategies; (4) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property; (5) The expected total return from income and the appreciation of capital; (6) Other resources of the beneficiaries; (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital; and (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one (1) or more of the beneficiaries. (d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets. (e) In addition to the permissible investments listed in §§ 35-3-102 - 35-3-111, a trustee may invest in any kind of property or type of investment consistent with the standards of this chapter. (f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise. (g) The powers granted by this section to trustees, guardians and other fiduciaries shall be in addition to the powers existing under other provisions of this code authorizing investments by fiduciaries"], and the exercise of reasonable care in delegation of investment and management functions pursuant to § 35-14-111.

TEXAS

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Employees Retirement System of Texas is the standard set forth in the 1942 Model Statute except that in article XVI, section 67 of the state Constitution of Texas (1) the phrase "which men of prudence" is deleted and "that persons of ordinary prudence" is inserted in its place and (2) the word "therefrom" is added.

Texas Statutes
Government Code
Title 8 - Public Retirement Systems
Subtitle B - Employees Retirement System of Texas
Chapter 815 – Administration
Subchapter D. Management of Assets
§ 815.307. Duty of Care

The assets of the [Employees] retirement system [of Texas] shall be invested and reinvested without distinction as to their source in accordance with Section 67, Article XVI, Texas Constitution. A determination of whether the board of trustees [of the Employees Retirement System of Texas] has exercised prudence with respect to an investment decision must be made taking into consideration the investment of all assets of the trust or all assets of the collective investment vehicle, as applicable, over which the board has management and control, rather than considering the prudence of a single investment of the trust or the collective investment vehicle, as applicable.

Texas Constitution
Article XVI
§ 67
(3) Each statewide benefit system [including the Employees Retirement System of Texas] must have a board of trustees to administer the system and to invest the funds of the system in such securities as the board may consider prudent investments. In making investments, a board shall exercise the judgment and care under the circumstances then prevailing that persons of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income therefrom as well as the probable safety of their capital.

UTAH
The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Utah Retirement Systems is verbatim to the standard set forth in the UPIA.

Utah Code
Title 49 - Utah State Retirement and Insurance Benefit Act
Chapter 11 - Utah State Retirement Systems Administration
Part 3 - Investment Fund
§ 303 - Fund investment standard -- Prudent investor rule.
The [Utah State Retirement Investment Fund created as a common trust fund under § 49-11-301] shall be invested [by the Utah State Retirement Board established under § 49-11-202] [for the benefit of the individual retirement systems created by Chapter 12 (of Title 49 of the Utah Code), Public Employees' Contributory Retirement Act, Chapter 13, Public Employees' Noncontributory Retirement Act, Chapter 14, Public Safety Contributory Retirement Act, Chapter 15, Public Safety Noncontributory Retirement Act, Chapter 16, Firefighters' Retirement Act, Chapter 17, Judges' Contributory Retirement Act, Chapter 18, Judges' Noncontributory Retirement Act, and Chapter 19, Utah Governors' and Legislators' Retirement Act, the defined benefit portion of the Tier II Hybrid Retirement System under Chapter 22, Part 3, Tier II Hybrid Retirement System, and the defined benefit portion of the Tier II Hybrid Retirement System under Chapter 23, Part 3, Tier II Hybrid Retirement System] in accordance with the prudent investor rule established in Title 75, Chapter 7, Part 9, Utah Uniform Prudent Investor Act [comprised of §§ 75-7-901 to 75-7-907].

Utah Code
Title 75 - Utah Uniform Probate Code
Chapter 7 - Utah Uniform Trust Code
Part 9 - Utah Uniform Prudent Investor Act
§ 75-7-901. Prudent investor rule.
(1) Except as otherwise provided in Subsection (2), a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this chapter. If a trustee is named on the basis of a trustee's representations of special skills or expertise, the trustee has a duty to use those special skills or expertise. (2) The prudent investor rule is a default rule and may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

§ 75-7-902. Standard of care -- Portfolio strategy -- Risk and return objectives.

(1) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. (2) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. (3) Among circumstances that a trustee shall consider in investing and managing trust assets are the following which may be relevant to the trust or its beneficiaries: (a) general economic conditions; (b) the possible effect of inflation or deflation; (c) the expected tax consequences of investment decisions or strategies; (d) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property; (e) the expected total return from income and the appreciation of capital; (f) other resources of the beneficiaries; (g) needs for liquidity, regularity of income, and preservation or appreciation of capital; and (h) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries. (4) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets. (5) A trustee may invest in any kind of property or type of investment consistent with the standards of this chapter [7].

§ 75-7-903. Diversification.
A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

§ 75-7-904. Duties at inception of trusteeship.
Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this chapter.

§ 75-7-905. Reviewing compliance.
Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight. This section does not require a specific outcome in investing.

§ 75-7-906. Investment direction.
(1) For purposes of this section, "investment direction" means a direction that is binding on the trustee, except for an investment direction given by a settlor as described in Subsection (2) to do any of the following with respect to an investment: (a) retention; (b) purchase; (c) sale; (d) exchange; (e) tender; or (f) any other transaction affecting ownership in the investment. (2) (a) During the time period that a trust is revocable, the trustee may follow any investment direction of the settlor, including an investment direction that: (i) is manifestly contrary to the terms of the trust; or (ii) seriously breaches a fiduciary duty to the beneficiaries. (b) The trustee is not liable for any loss resulting from following an investment direction described in Subsection (2)(a). (3) If the terms of a trust authorize a person to give investment direction to the trustee, the person authorized to give investment direction: (a) is presumptively a fiduciary only with respect to an investment direction that the person gives to the trustee; (b) is required to act in good faith with regard to: (i) the purposes of the trust; and (ii) the interests of the beneficiaries; and (c) is liable for any loss that results from breach of the fiduciary duty only with respect to an investment direction that the person gives to the trustee. (4) Except in cases of willful misconduct or gross negligence, a trustee is not liable for any loss that results from following an investment direction if: (a) the

terms of a trust authorizes a person to give the investment direction to the trustee; and (b) the trustee acts in accordance with the investment direction given by a person described in Subsection (4)(a). (5) If the terms of a trust require another person's approval or consent to an investment decision of the trustee: (a) the person from whom approval or consent is required: (i) is presumptively a fiduciary; (ii) is required to act in good faith with regard to: (A) the purposes of the trust; and (B) the interests of the beneficiaries; and (iii) is liable for any loss that results from breach of the fiduciary duty; and (b) except in cases of willful misconduct or gross negligence, the trustee is not liable for any loss resulting from any act not taken as a result of the person' failure to respond to a request for approval or consent.

§ 75-7-907. Language invoking standard of chapter.
The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this chapter: "investments permissible by law for investment of trust funds," "legal investments," "authorized investments," "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital," "prudent man rule," "prudent trustee rule," "prudent person rule," and "prudent investor rule."

VERMONT
The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Vermont Employees' Retirement System is verbatim to the standard set forth in the UPIA.

Vermont Statutes
Title 3 – Executive
Chapter 16 - Vermont Employees' Retirement System
Subchapter 1: Generally
§ 472. Investments; interest rate; disbursements
(a) The members of the Vermont Pension Investment Committee established in chapter 17 of this title [3] shall be the trustees of the Funds created by this subchapter [1] [Vermont State Retirement Fund], 16 V.S.A. chapter 55 [Vermont Teachers' Retirement Fund], and 24 V.S.A. chapter 125 [Vermont Municipal Retirement Fund], and with respect to them may invest and reinvest the assets of the Fund, and hold, purchase, sell, assign, transfer, and dispose of the securities and investments in which the assets of the Fund have been invested and reinvested. Investments shall be made in accordance with the standard of care established by the prudent investor rule under [14A V.S.A. § 902].

Vermont Statutes
Title 14A – Trusts
Chapter 9 - Uniform Prudent Investor Act and Unitrusts
Subchapter 1: Generally
§ 902. Standard of care; portfolio strategy; risk and return objectives
(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. (b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. (c) Among circumstances that a trustee shall consider in

investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries: (1) general economic conditions; (2) the possible effect of inflation or deflation; (3) the expected tax consequences of investment decisions or strategies; (4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property; (5) the expected total return from income and the appreciation of capital; (6) other resources of the beneficiaries; (7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and (8) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries. (d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets. (e) A trustee may invest in any kind of property or type of investment consistent with the standards of this chapter [9].

VIRGINIA

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Virginia Retirement System is the standard set forth in ERISA except that the word "man" is deleted and "person" is inserted in its place.

Code of Virginia
Title 51.1 - Pensions, Benefits, and Retirement
Chapter 1 - Virginia Retirement System
Article 3.1. Investments
§ 51.1-124.30. Board as trustee of funds; investments; standard of care; liability for losses
C. The Board [of Trustees of the Virginia Retirement System] shall discharge its duties with respect to the [Virginia] Retirement System solely in the interest of the beneficiaries thereof and shall invest the assets of the Retirement System with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. The Board shall also diversify such investments so as to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so.

WASHINGTON

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Washington Public Employees' Retirement System is the standard set forth in ERISA except that (1) the word "reasonable" is added, (2) the word "the" is deleted, (3) the word "that" is deleted and "which" is inserted in its place, (4) the word "man" is deleted and "person" is inserted in its place, (5) the phrase "enterprise of a like character and with like aims" is deleted and "activity of like character and purpose" is inserted in its place.

Revised Code of Washington
Title 43 - State Government—Executive
Chapter 43.33A - State Investment Board.
§ 43.33A.140 Investments—Standard of investment and management.
The [Washington] state investment board shall invest and manage the assets entrusted to it with reasonable care, skill, prudence, and diligence under circumstances then prevailing which a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an activity of like character and purpose. The board shall: (1) Consider investments not in isolation, but in the context

of the investment of the particular fund as a whole and as part of an overall investment strategy, which should incorporate risk and return objectives reasonably suited for that fund; and (2) Diversify the investments of the particular fund unless, because of special circumstances, the board reasonably determines that the purposes of that fund are better served without diversifying…

WEST VIRGINIA

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the West Virginia Public Employees Retirement System is verbatim to the standard set forth in the UPIA.

West Virginia Code
Chapter 12. Public Moneys and Securities
Article 6. West Virginia Investment Management Board
§ 12-6-11. Standard of Care and Investment Requirements…

(a) Any investments made under this article [6] [by the West Virginia Investment Management Board for the benefit of public employees covered by the Public Employees Retirement System, Teachers Retirement System, West Virginia State Police Retirement System, Death, Disability and Retirement Fund of the Division of Public Safety, Judges' Retirement System and Deputy Sheriffs Retirement System] shall be made in accordance with the provisions of the Uniform Prudent Investor Act [set forth in WV Code § 44-6C-1 to -15]… and is further subject to the following requirements: (1) Trustees shall discharge their duties with respect to the 401(a) plans for the exclusive purpose of providing benefits to participants and their beneficiaries; (2) Trustees shall diversify fund investment so as to minimize the risk of large losses unless, under the circumstances, it is clearly prudent not to do so; (3) Trustees shall defray reasonable expenses of investing and operating the funds under management; (4) Trustees shall discharge their duties in accordance with the documents and instruments governing the trusts or other funds under management insofar as the documents and instruments are consistent with the provisions of this article…

West Virginia Code
Chapter 44. Administration of Estates and Trusts
Article 6C. Uniform Prudent Investor Act
§ 44-6C-1. Prudent Investor Rule

(a) Except as otherwise provided in subsection (b) of this section, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this article. (b) The prudent investor rule, a default rule, may be expanded, restricted, eliminated or otherwise altered by the provisions of a trust instrument. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust instrument.

§ 44-6C-2. Standard of Care; Portfolio Strategy; Risk and Return Objectives

(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill and caution. (b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust. (c) Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries: (1) General economic conditions; (2) The possible effect of inflation or deflation; (3) The expected tax consequences of investment decisions or strategies; (4) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in

closely held enterprises, tangible and intangible personal property and real property; (5) The expected total return from income and the appreciation of capital; (6) Other resources of the beneficiaries; (7) Needs for liquidity, regularity of income and preservation or appreciation of capital; and (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries. (d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets. (e) A trustee may invest in any kind of property or type of investment consistent with the standards of this article. (f) A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise. (g) (1) Unless otherwise directed by the terms of the trust instrument, the duties of a trustee of an irrevocable life insurance trust with respect to acquiring or retaining a contract of insurance upon the life of the grantor, or the lives of the grantor and the grantor's spouse, do not include a duty: (A) To determine whether the contract is or remains a proper investment; (B) To exercise policy options available under the contract in the event the policy lapses or is terminated due to failure to pay premiums; or (C) To diversify the contract. (2) A trustee is not liable to the beneficiaries of the trust or to any other party for any loss arising from the absence of those duties upon the trustee.

§ 44-6C-3. Diversification
A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

§ 44-6C-4. Duties at Inception of Trusteeship
Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements and other circumstances of the trust, and with the requirements of this article [6c].

§ 44-6C-5. Loyalty
A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.

§ 44-6C-6. Impartiality
If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.

§ 44-6C-7. Investment Costs
In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, the purposes of the trust and the skills of the trustee.

§ 44-6C-8. Reviewing Compliance
Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

§ 44-6C-9. Delegation of Investment and Management Functions
(a) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill and caution in: (1) Selecting an agent; (2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and (3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation. (b) In performing a

delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation. (c) A trustee who complies with the requirements of subsection (a) of this section is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated. (d) By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state. (e) The delegating trustee is not responsible for the decisions, actions or inactions of the trustee to whom those duties and powers have been delegated if the delegating trustee has exercised reasonable care, skill and caution in establishing the scope and specific terms of the delegation and in reviewing periodically the performance of the trustee to whom the duties and powers have been delegated and the trustee's compliance with the scope and specific terms of the delegation.

§ 44-6C-10. Language Invoking Standard of Article

The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this article: "investments permissible by law for investment of trust funds", "legal investments", "authorized investments", "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital", "prudent man rule", "prudent trustee rule", "prudent person rule" and "prudent investor rule".

§ 44-6C-11. Application to Existing Trusts

This article [6C] applies to trusts existing on and created after its effective date. As applied to trusts existing on its effective date, this article governs only decisions or actions occurring after that date.

§ 44-6C-12. Uniformity of Application and Construction

This article [6C] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among the states enacting it.

§ 44-6C-13. Short Title

This article [6C] may be cited as the "West Virginia Uniform Prudent Investor Act".

§ 44-6C-14. Severability

If any provision of this article [6C] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

§ 44-6C-15. Effective Date

This article [6C] takes effect on July 1, 1996.

WISCONSIN

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Wisconsin Retirement System is the standard set forth in ERISA except that (1) the word "man" is deleted and "person" is inserted in its place, (2) the word "like" is deleted and "similar" is inserted in its place, (3) the phrase "with the same resources" is added, (4) the word "such" is deleted and "like" is inserted in its place and (5) the phrase "would use" is deleted and "exercises" is inserted in its place.

Wisconsin Statutes & Annotations
Chapter 25. Trust funds and their management.
§ 25.15 Board; purpose and standard of responsibility.
…(2)…the standard of responsibility applied to the [State of Wisconsin Investment Board] when it manages money and property [for the Wisconsin Retirement System, the State Investment Fund and the assets of other Wisconsin state agencies and programs] shall be all of the following: (a) To manage the money and property with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a similar capacity, with the same resources, and familiar with like matters exercises in the conduct of an enterprise of a like character with like aims. (b) To diversify investments in order to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, considering each trust's or fund's portfolio as a whole at any point in time. (c) To administer assets of each trust or fund solely for the purpose of ensuring the fulfillment of the purpose of each trust or fund at a reasonable cost and not for any other purpose.

WYOMING

The fiduciary standard of care governing the conduct of trustees responsible for the investment and management of assets held by the defined benefit plan(s) made available state-wide under the Wyoming Retirement System is verbatim to the standard set forth in UMPERSA.

Wyoming Statutes
Title 9 - Administration of the Government
Chapter 3 - Compensation and Benefits
Article 4 – Retirement
§ 9-3-435 - Scope. UMPERSA doesn't apply to (a) annuity contracts or (b) 403(b) custodial accounts.???
(a) This act [i.e., the Uniform Management of Public Employee Retirement Systems (MPERS) Act] applies to all retirement programs and retirement systems [including the Wyoming Retirement System], except [an unfunded retirement program that is maintained by a public employer solely for the purpose of providing deferred compensation to a select group of management employees, a retirement program consisting solely of annuity contracts or custodial accounts satisfying the requirements of Internal Revenue Code (IRC) section 403(b), an individual retirement account or individual retirement annuity within the meaning of IRC section 408 as well as other enumerated exceptions in Section 9-3-435].

Wyoming Statutes
Title 9 - Administration of the Government
Chapter 3 - Compensation and Benefits
Article 4 – Retirement
§ 9-3-433 - Short Title.
This act [WY Statutes §§ 9-3-433 to 9-3-452] may be cited as the Uniform Management of Public Employee Retirement Systems (MPERS) Act.

9-3-438. Delegation of functions.
(a) A trustee or administrator may delegate functions that a prudent trustee or administrator acting in a like capacity and familiar with those matters could properly delegate under the circumstances. (b) The trustee or administrator shall exercise reasonable care, skill and caution in: (i) Selecting an agent; (ii) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the retirement program; and (iii) Periodically reviewing the agent's performance and compliance with the terms of the delegation. (c) In performing a delegated function, an agent owes a duty to the retirement system and to its participants and beneficiaries to comply with the terms of the delegation and, if a

fiduciary, to comply with the duties imposed by W.S. 9-3-439. (d) A trustee or administrator who complies with subsections (a) and (b) of this section is not liable to the retirement system or to its participants or beneficiaries for the decisions or actions of the agent to whom the function was delegated. (e) By accepting the delegation of a function from the trustee or administrator, an agent submits to the jurisdiction of the courts of this state. (f) A trustee may limit the authority of an administrator to delegate functions under this section.

§ 9-3-439 - **General Duties of Trustee and Fiduciary.**
(a) A trustee or other fiduciary shall discharge duties with respect to a retirement system: (i) Solely in the interest of the participants and beneficiaries; (ii) For the exclusive purpose of providing benefits to participants and beneficiaries and paying reasonable expenses of administering the system; (iii) 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; (iv) Impartially, taking into account any differing interests of participants and beneficiaries; (v) Incurring only costs that are appropriate and reasonable; and (vi) In accordance with a good-faith interpretation of the law governing the retirement program and system.

§ 9-3-440 - Duties of Trustee in Investing and Managing Assets of Retirement System.
(a) In investing and managing assets of a retirement system pursuant to W.S. 9-3-439, a trustee with authority to invest and manage assets: (i) Shall consider among other circumstances: (A) General economic conditions; (B) The possible effect of inflation or deflation; (C) The role that each investment or course of action plays within the overall portfolio of the retirement program or appropriate grouping of programs; (D) The expected total return from income and the appreciation of capital; (E) Needs for liquidity, regularity of income and preservation or appreciation of capital; and (F) For defined benefit plans, the adequacy of funding for the plan based on reasonable actuarial factors. (ii) Shall diversify the investments of each retirement program or appropriate grouping of programs unless the trustee reasonably determines that, because of special circumstances, it is clearly prudent not to do so; (iii) Shall make a reasonable effort to verify facts relevant to the investment and management of assets of a retirement system; (iv) May invest in any kind of property or type of investment consistent with this act…

§ 9-3-442 - Reviewing Compliance.
(a) Compliance by a trustee or other fiduciary with W.S. 9-3-438 through 9-3-440 shall be determined in light of the facts and circumstances existing at the time of the trustee or fiduciary's decision or action and not by hindsight. (b) A trustee's investment and management decisions shall be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the program or appropriate grouping of programs.