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ATTORNEY GENERAL

September 1, 2022

OFFICIAL OPINION 2022-3

The Honorable Eric Koch
Indiana Senate
200 W. Washington Street, Third Floor
Indianapolis, Indiana 46204

RE: Indiana Public Retirement System and ESG Investments

Dear Senator Koch:

You requested an opinion from the Indiana Office of the Attorney General (OAG) presenting several questions regarding the public retirement system and possible legal implications of using investment strategies guided or influenced by environmental, social, and governance (ESG) considerations.

QUESTIONS

1. Does Indiana law prohibit the Indiana Public Retirement System's (INPRS) board (Board) from choosing investments or investment strategies based on ESG considerations?
2. Does Indiana law prohibit the Board from exercising voting rights appurtenant to its investments based on ESG considerations?
3. Does Indiana law prohibit the Board from retaining investment advisors that make investments, set investment strategies, engage with portfolio companies, or exercise voting rights appurtenant to investments based on ESG considerations?

BRIEF ANSWERS

1. Yes. As trustees of various pension funds, the Board owes fiduciary duties to beneficiaries to "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," Ind. Code § 5-10.3-5-3, while also investing and managing trust assets "solely in the interest of the beneficiaries." Ind. Code § 30-4-3.5-5. Investing for other purposes, such as to further general environmental, social, or governance goals, violates these duties.

2. Yes. For the same reasons that the Board may not invest for reasons other than the financial interests of the fund beneficiaries, it may not exercise rights appurtenant to those investments based on extraneous considerations.
3. Yes. The Board is statutorily authorized to use Investment Managers, but those managers are required to act in the same manner as a trustee would owing a fiduciary duty to its beneficiaries.

BACKGROUND

Investment Managers and other agents delegated by INPRS assume the same statutory obligations and fiduciary duties as the Board. Therefore, when this Opinion refers to “the Board,” unless otherwise noted the term refers to INPRS and its agents. Additionally, this Opinion should not necessarily be construed as criticism of INPRS or how it has performed its fiduciary obligations to the State and its employees. An analysis of INPRS’ performance relative to the law is not within the scope of this particular Opinion.

The State of Indiana, particularly its employees and retirees, are fortunate that its pension funds are funded at a higher rate than many of its other state counterparts. At 89% funded (excluding the pre-’96 TRF [Teachers’ Retirement Fund] fund)¹, this is considered a “healthy” fund.² Everyone expects that global and national economic health is a key factor in the performance of these funds, and there are times when the market is better than others. Most stakeholders have historically assumed that investors – trustees, in the case of pension funds – are making investment decisions *solely* for their clients’ financial interest and to maximize financial return. However, a new form of activist investing that does not just focus on financial returns has gained popularity in recent years – Environmental, Social and Governance, or ESG investing.³

ESG is an investment strategy that focuses less on the financial health of a company and more on its social and environmental impacts, as well as how a company governs its own internal affairs regarding issues such as diversity.⁴ Environmental goals include the elimination of greenhouse gases, fossil fuels and driving to zero emissions, and also supports the enforcement of the Paris Accord.⁵ For example, as discussed in greater detail below, Climate Action 100+, a leading group of investors that integrate environmental policy into their decision making,

¹ According to the 2021 INPRS Annual Report: <https://www.in.gov/inprs/files/INPRSAnnualReportBook2021.pdf> (last accessed Aug. 11, 2022).

² INPRS Summary Annual Report 2021, <https://www.in.gov/inprs/about-us/inprs-summary-annual-report/> (last accessed Aug. 11, 2022).

³ ESG is also sometimes referred to as Corporate Social Responsibility impact investing, or CSR. While not entirely the same, they are similar in their focus of “socially conscious business practices.” However, ESG has more quantifiable measures by which to “rate” a business. <https://www.alva-group.com/blog/whats-the-difference-between-csr-and-esg/> (last accessed Aug. 12, 2022).

⁴ E. Napolitano and Benjamin Curry, *Environmental, Social, and Governance: What is ESG Investing?*, FORBES ADVISOR (Feb. 24, 2022, 10:15 a.m.), <https://www.forbes.com/advisor/investing/esg-investing/> .

⁵ <https://www.climateaction100.org/business-case/> (last accessed Aug. 12, 2022).

described its goal as “ensur[ing] the world’s largest corporate greenhouse gas emitters take necessary action on climate change” by “focus[ing] on 166 companies that are critical to the net-zero emissions transition.”⁶ Members do this by leveraging their investments in companies to coerce the companies to “[t]ake action to reduce greenhouse gas emissions across the value chain.”⁷ Similarly, the Glasgow Financial Alliance for Net Zero (GFANZ), an “industry-wide strategic alliance” of large financial services firms, markets itself as “[b]ringing together the financial sector to accelerate the transition to a net-zero economy.”⁸ ESG investors generally focus on having private companies align their operations with the goals of the Paris Climate Accord despite the fact that the Accord does not apply to private companies⁹ and has never been adopted by the United States Senate.¹⁰

Social goals of ESG investing include special focus on, among other things, “underprivileged social groups,”¹¹ and access to abortion.¹² Governance goals include things like board diversity quotas.¹³ The current campaign to enforce ESG includes pressure through financial institutions and federal regulatory mandates. To further illustrate, MSCI, an investment research and data analytics firm, describes its approach regarding ESG: “At MSCI, we define ESG Investing as the consideration of environmental, social and governance factors alongside financial factors in the investment decision-making process.”¹⁴

The proliferation of ESG investing has begun to affect state pension funds, because some major institutional investment managers now incorporate it into all investment strategies, even those not marketed as ESG funds. This makes it difficult to tease out what is an ESG fund and what is not. BlackRock, which as of May 4, 2022, was the sole manager of Indiana’s large cap

⁶ <https://www.climateaction100.org>. (last accessed Aug. 15, 2022).

⁷ <https://www.climateaction100.org/approach/how-we-work/> (last accessed Aug. 15, 2022).

⁸ <https://www.gfanzero.com/> (last accessed Aug. 15, 2022)

⁹ “The Paris Agreement works on a five-year cycle of increasingly ambitious climate action *carried out by countries.*” <https://www.un.org/en/climatechange/paris-agreement> (last accessed Aug. 15, 2022) (emphasis added).

¹⁰ “The United States first entered the [Paris Climate] agreement in 2016, committing the country to cut emissions by 26-28% from 2005 levels by 2025. Then-President Barack Obama declined to submit the deal to the Senate for consent” “Republicans call for Senate review before U.S. re-enters Paris climate deal,” REUTERS, Jan. 20, 2021 (<https://www.reuters.com/article/us-usa-biden-climate-republicans-idUSKBN29P2WF>).

¹¹ <https://www2.deloitte.com/ce/en/pages/global-business-services/articles/esg-explained-1-what-is-esg.html> (last accessed Aug. 15, 2022).

¹² Patrick Temple-West, *Abortion and other ESG issues rise up the AGM agenda*, FINANCIAL TIMES (Jul. 2, 2022), <https://www.ft.com/content/669a758b-3341-4c2d-ac7a-7ff84050cd0c>.

¹³ “We look for boards to disclose how diversity is considered in board composition, including demographic characteristics that the company identifies as being relevant to its business and market context such as gender, race, ethnicity, and age.” BlackRock, “Our approach to engagement on board quality and effectiveness, Feb. 2022 (<https://www.blackrock.com/corporate/literature/publication/blk-commentary-engaging-on-board-quality.pdf>) (last accessed Aug. 15, 2022)).

¹⁴ <https://www.msci.com/esg-101-what-is-esg/>; attributed to Remy Briand, Managing Director, MSCI ESG Research (last accessed Aug. 11, 2022).

equity index fund¹⁵ as well as one of several managers of the state’s international equity fund,¹⁶ real estate assets,¹⁷ and public equity fund,¹⁸ has publicized that it has made a “firm-wide commitment to integrate ESG information into [its] investment processes,” to affect “all of BlackRock’s investment divisions and investment teams.”¹⁹

In January 2020, BlackRock joined Climate Action 100+. That same year, BlackRock began “asking companies to publish Sustainability Accounting Standards Board²⁰- and Task Force on Climate-Related Financial Disclosures-aligned disclosures”²¹ including a “company’s plan for operating under a scenario where the Paris Agreement’s goal of limiting global warming to less than two degrees is fully realized,” threatening “to vote against management when companies have not made sufficient progress.”²² “BlackRock’s initiatives are part of a broader push by Wall Street—institutional investors, money managers and banks—to wield influence through their investments.”²³

One key element of this broader push is the Climate Action 100+ initiative. Signatory investors and investor networks, overseen by a Global Steering Committee, target a focus list of companies with an explicit agenda to require compliance with net-zero emissions, impose climate change disclosures, require board-level oversight of climate issues, and secure greater disclosure on company risks.²⁴

Climate Action 100+ is transparent about its agenda with respect to carbon-intensive industries. In its *Net-Zero Company Benchmark*, the group assesses focus companies based on ten criteria, including whether the company has “set an ambition to achieve net-zero GHG [greenhouse gas] emissions by 2050 or sooner,” whether the “company’s decarbonisation strategy includes a commitment to ‘green revenues’ from low carbon products and services,” and, most pertinently,

¹⁵ [INPRS Large Cap Equity Fund Infographic, https://www.in.gov/inprs/files/INPRSLargeCapEquity.pdf](https://www.in.gov/inprs/files/INPRSLargeCapEquity.pdf). (last accessed Aug. 11, 2022).

¹⁶ INPRS International Equity Fund Infographic, <https://www.in.gov/inprs/files/INPRSIInternational.pdf> (last accessed Aug. 11, 2022).

¹⁷ INPRS 2020 Comprehensive Annual Financial Report, https://publicplansdata.org/reports/IN_IN-PERF-TRS_CAFR_2020_36_37.pdf (last accessed Aug. 11, 2022).

¹⁸ *Id.*

¹⁹ <https://www.blackrock.com/corporate/literature/continuous-disclosure-and-important-information/blackrock-2020-sasb-disclosure.pdf> (last accessed Aug. 11, 2022).

²⁰ “SASB Standards enable organizations to provide industry-based sustainability disclosures about risks and opportunities that affect enterprise value.” <https://www.sasb.org/standards/> (last accessed Aug. 12, 2022).

²¹ “The Financial Stability Board (FSB) created the TCFD to develop recommendations on the types of information that companies should disclose to support investors, lenders, and insurance underwriters in appropriately assessing and pricing a specific set of risks—risks related to climate change.” <https://www.fsb-tcfd.org/about/> (last accessed Aug. 12, 2022).

²² <https://www.blackrock.com/ca/investors/en/blackrock-client-letter> (last accessed Aug. 11, 2022).

²³ Dawn Lim, *BlackRock Starts to Use Voting Power More Aggressively*, WALL ST. J. (Apr. 30, 2021), <https://www.wsj.com/articles/blackrock-takes-aggressive-posture-on-esg-proxy-votes-11619775002>.

²⁴ <https://www.climateaction100.org/about/> (last accessed Aug. 11, 2022).

whether the “company is working to decarbonise its future capital expenditures”—a factor that specifically looks to whether the company plans to cut future investment (and thus production).²⁵ This “Capital Assessment Indicator” analyzes companies’ “capital expenditures (CapEx) and output relative to a range of future climate change scenarios.”²⁶ To satisfy this criterion, companies must “explicitly commit[] to align future capital expenditures with the Paris Agreement’s objective of limiting global warming to 1.5 Celsius.” With respect to utility companies specifically, Climate Action 100+ is even more candid; it asserts that “[b]oth coal and gas fired generation *must be phased out* to achieve global net-zero emissions by mid-century,”²⁷ and, as such, requires companies to publish a “coal and natural gas-generation retirement schedule consistent with a credible climate scenario” and a “retirement date assigned to each coal or gas unit.”²⁸ (emphasis added). The claimed justification for all this activism is to mitigate “investment exposure to climate risk.”²⁹

Like Climate Action 100+, the Net Zero Asset Managers Initiative seeks to proliferate ESG goals throughout the global asset management system.³⁰ It asserts on its own website that its members have over \$61 trillion in assets under management. Blackrock notes that “As a signatory of the Net Zero Asset Managers Initiative, we are one of 100+ asset managers committed to aligning the financial sector and supporting the goals of the Paris Agreement.”³¹

The goals of ESG investing inherently conflict with the duties owed by investment advisers and pension fiduciaries under state and federal law. Significantly, membership in groups such as Climate Action 100+ may be *prima facie* evidence that an asset manager is acting for reasons other than the financial interests of plan beneficiaries.

ANALYSIS

Relevant Statutes

29 CFR § 2550.404a-1(a) provides:

Section 404(a)(1)(A) and 404(a)(1)(B) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act) provide, in part, that a

²⁵ <https://www.climateaction100.org/net-zero-company-benchmark/> (last accessed Aug. 11, 2022).

²⁶ <https://www.climateaction100.org/wp-content/uploads/2020/12/CA100-Progress-Report.pdf> (last accessed Aug. 11, 2022).

²⁷ *Id.* (emphasis added).

²⁸ *Id.*

²⁹ *Supra*, note 5.

³⁰ These are just two of myriad groups working to integrate ESG considerations into every aspect of the financial system. For example, the Net Zero Banking Alliance also seeks to impose ESG goals upon the world’s financial institutions. It asserts on its own website that its members represent 40% of the global banking assets. JP Morgan Chase asserts that as a member of the Net Zero Banking Alliance, it intends to align its lending and underwriting decisions in chosen sectors to work towards achieving its portfolio targets.

³¹ BlackRock, “From ambition to action – the path to net zero,” <https://www.blackrock.com/us/individual/about-us/road-to-net-zero> (last accessed Aug. 15, 2022).

fiduciary shall discharge that person's duties with respect to the plan solely in the interests of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan, and 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.

Ind. Code § 5-10.2-2-1.5 reads, in relevant part:

Each retirement fund covered by this article shall satisfy the qualification requirements in Section 401 of the Internal Revenue Code, as applicable to each retirement fund. In order to meet those requirements, each fund is subject to the following provisions, notwithstanding any other provision of the retirement fund law:

- (1) The board shall distribute the corpus and income of the fund to members and their beneficiaries in accordance with the retirement fund law.
- (2) No part of the corpus or income of a fund may be used for or diverted to any purpose other than the *exclusive benefit* of the members and their beneficiaries. (*emphasis added*)

Ind. Code § 5-10.3-5-3(a) (Public Employees' Retirement Fund, or PERF) provides:

The board 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.

Ind. Code § 5-10.4-3-10(a) (TRF) provides, in relevant part:

The board 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 also shall diversify investments in accordance with prudent investment standards . . .

Ind. Code § 5-10.5-2-1 provides:

On July 1, 2011, the Indiana public retirement system is established.

Ind. Code § 5-10.5-2-5 provides:

The system shall be managed and administered by a board of trustees established under IC 5-10.5-3.

Ind. Code § 5-10.5-5-1 reads, in relevant part:

The board has the powers, duties, restrictions, limitations, and penalties in connection with the board's investment and management of the assets of the public pension and retirement funds of the system under the following provisions: [previous TRF, PERF, and other pension board powers, duties, and limitations].

Ind. Code § 5-10.5-7-2(a) provides:

- (a) All powers, duties, liabilities, property, equipment, records, rights, and contracts of the:
 - (1) board of trustees of the public employees' retirement fund; and
 - (2) board of trustees of the teachers' retirement fund;are transferred to or assumed by the board on July 1, 2011.

Ind. Code § 30-4-3-3(c) provides, in relevant part:

In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property for any trust, the trustee thereof shall exercise the judgment and care required by IC 30-4-3.5. [...]

Ind. Code § 30-4-3.5-2 provides:

- (a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms of the trust, 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 those of the following that 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.

- (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.

Ind. Code § 30-4-3.5-5 provides:

A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.

Ind. Code § 30-4-3.5-9 provides, in relevant part:

- (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) reviewing the agent's actions periodically 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.

Fiduciary Duty

First and foremost, as a matter of general trust law, a trustee must act in the sole interest of its beneficiaries. These interests include the “core duties” of loyalty and care.³² “The duty of loyalty regulates potential conflicts of interest and proscribes misappropriation, while the duty of care establishes a professional benchmark for ‘reasonableness’ and ‘prudence.’”³³ For more than a century, courts have held that relative to investment funds, the “interest” of the beneficiary a trustee must guard is the client’s *financial* interest.³⁴ Investors and trustees have a duty to act in the beneficiaries’ or clients’ sole interests, which in this case means “maximiz[ing] return given a

³² Shlomit Azgad-Tromer, *Corporations and the 99%: Team Production Revisited*, 21 FORDHAM J. CORP. & FIN. L. 163, 206, 206-07 (2016).

³³ *Id.*

³⁴ *See, e.g., Dodge v. Ford Motor Co.*, 204 Mich. 459 (1919) (holding that a corporation is “organized and carried on primarily for the profit of the stakeholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.”); *see also* Dept. of Labor, *Financial Factors in Selecting Plan Investments*, 85 FR 72846-01 (adopting amendments to the “investment duties” regulation under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), requiring plan fiduciaries to select investments and investment courses of action based solely on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action.) (hereinafter “Dept. of Labor Rule”); Kasey Wang, *Why Institutional Investors Support ESG Issues*, 22 U.C. DAVIS BUS. L.J. 129, 149 (2021).

certain risk tolerance.”³⁵ “Financial interest” and maximizing return means safeguarding the financial well-being of the beneficiary rather than the social interests of the beneficiary or the trustee; if it meant otherwise, the beneficiary would be left to the whims of the trustee and its socio-political motivations.

Moreover, a trustee must not work towards its own motives. It must consider *solely* the advantage any action or decision will provide to the beneficiaries of the trust.³⁶ This duty of loyalty is at the heart of trust law, since “all powers held in the capacity of trustee must be exercised . . . in accordance with the trustee’s fiduciary obligations.”³⁷ If trustees were free to act in a manner that was not solely in the interests of the trust beneficiaries, the beneficiaries would need to constantly monitor the trustees, which would undermine one of the primary purposes of a trust and destroy their utility. For this reason, a trustee or investment manager may not be influenced by its own interests or the interests of a third party, or by motives other than accomplishing the purposes of the trust.³⁸

Investment management presents many potential conflicts of interest. For example, investment managers may have an incentive to pursue ESG policies to market their firm to millennials, who are projected to inherit \$50 trillion.³⁹ Similarly, they may have an incentive to make ESG commitments to increase their business with blue-state and European pension funds that start climate initiatives.⁴⁰ None of these conflicts are new. The sole-interest standard was developed in anticipation of such mixed-motives, and has even extended to a trustee’s (or CEO’s) desire for self “aggrandizement” or “favor.” See *In re Estate of Rothko*, 372 N.E.2d 291, 294-96 (N.Y. 1977). In Indiana, trustees are required to invest and manage trust *assets* “solely in the interests of the beneficiaries.” (emphasis added) Ind. Code § 30-4-3.5-5. “Invest” necessarily implies a financial connotation, so it follows that the sole interest is a financial interest, and will be discussed in further detail, *infra*.

The Board’s fiduciary obligations

As trustees of the state public retirement system, the Board must act consistent with the fiduciary duties imposed by law. In 2011, Indiana’s various retirement funds were brought under one umbrella into INPRS to be managed by the Board. See Ind. Code §§ 5-10.5-2-1 and -2. Ind. Code § 5-10.5-3-1 requires the Board to manage each fund in accordance with the statutes that established each system and the retirement law applicable to each public pension or retirement fund, but Ind. Code § 5-10.5-4-1(2) permits the Board to employ others to transact the business of

³⁵ Wang, *supra* note 34 at 149; Dept. of Labor Rule, *supra* note 34.

³⁶ RESTATEMENT (SECOND) OF TRUSTS § 170.

³⁷ 3 RESTATEMENT (THIRD) OF TRUSTS § 70 cmt. a (AM. LAW INST. 2007).

³⁸ RESTATEMENT (THIRD) OF TRUSTS § 78(1) cmt. f.

³⁹ <https://www.goldmansachs.com/our-commitments/sustainability/sustainable-finance/index.html> (last accessed Aug. 17, 2022).

⁴⁰ <https://www.calstrs.com/calstrs-fellow-investors-influence-meaningful-change-through-climate-action-100> (last accessed Aug. 17, 2022).

the funds. To this end, the Board has determined that most “investment of Retirement Fund assets will be delegated to Investment Managers.”⁴¹

Indiana law makes the Board the trustee for INPRS funds, which constitute trusts per Ind. Code § 5-10.5-2-5. *See also Good v. Indiana Tchrs. Ret. Fund*, 31 N.E.3d 978, 983 (Ind. Ct. App. 2015); 1983-84 Ind. Op. Att’y Gen. 4 (1983). These trusts are to be administered for the exclusive benefit of their members. A trustee such as the Board, “bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties.” *Living Tr. Agmt. Morningstar v. Fortunka et al.*, 136 N.E.3d 1136, 1154 (Ind. Ct. App. 2019) (quoting *Amax*, 453 U.S. at 329); *see also* Restatement (Second) of Trusts § 170 cmt. d.

The Board, like all Indiana trustees, is also subject to the requirements of the Indiana Trust Code, Ind. Code ch. 30-4-3, and the Prudent Investor Rule, Ind. Code ch.30-4-3.5. The Indiana Trust Code generally requires the Board to act with loyalty and care for the beneficiaries. These statutes, consistent with the specific statutory provisions creating and governing the Board, require that the Board “shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms of the trust, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.” Ind. Code § 30-4-3.5-2(a).

The Board must also “make a reasonable effort to verify facts relevant to the investment and management of trust assets.” Ind. Code § 30-4-3.5-2(d). This requirement, known as the Prudent Investor Rule, requires that the Board employ “an overall investment strategy having risk and return objectives reasonably suited to the trust.” Ind. Code § 30-4-3.5-2(b).⁴² Put another way, a trustee can use its reasoned judgment in making investment decisions, but that judgment must always be informed by the purposes of the trust. And the purposes of the Indiana retirement funds are *only* financial in nature. *See, e.g.,* Ind. Code § 56-10.3-2-1(a) (“The public employees’ retirement fund of Indiana . . . is established to pay benefits to officers and employees of the state and its political subdivisions. . . . The purpose of the fund is to promote economy and efficiency in the administration of state and local government by providing an orderly way for members to be retired without prejudice and without inflicting hardship on the retired member.”). Choosing an investment strategy that is not reasonably calculated to maximize the risk adjusted return of trust assets would, by definition, be imprudent.

Prudent investment standards do not require complete risk avoidance, but proper and appropriate risk management.⁴³ This means accounting for “all hazards that may follow” from inflation, a volatile market, and so on.⁴⁴ After considering and balancing the risks and possible gains with the information at hand, only then should the investment manager make the appropriate

⁴¹ INPRS Investment Policy Statement, https://www.in.gov/inprs/files/INPRS_IPS.pdf (last accessed Aug. 11, 2022).

⁴² It does not appear as though the Indiana Supreme Court has interpreted this specific provision of the Prudent Investor Act.

⁴³ RESTATEMENT (THIRD) OF TRUSTS §90 cmt. e(1).

⁴⁴ *Id.*

investment decision that is in the sole financial interest of the client.⁴⁵ Not included in these factors for consideration is the investment manager’s personal views or desire to advance a social or political agenda; that should never be an influencing factor in the investment manager’s decision-making.⁴⁶

The relevant statutory provisions also impose a duty of loyalty on the Board. “One of the most fundamental duties of the trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the beneficiary, and must exclude all selfish interest and all consideration of the interests of third persons.” *Massey v. St. Joseph Bank & Tr. Co.*, 411 N.E.2d 751, 754 (Ind. Ct. App. 1980) (quoting Bogert, *Trusts & Trustees* § 543, pp. 197-98 (2d ed. 1978)). The Prudent Investor Rule creates special obligations for the investment of trust assets. Investments can be made “solely in the interests of the beneficiaries.” Ind. Code § 30-4-3.5-5. A fiduciary breaches this duty merely by having a mixed motive:

Under the sole interest rule, a trustee violates the duty of loyalty—even in the absence of self-dealing—if the trustee has any motive or rationale for undertaking an action other than the “sole interest” or “exclusive benefit” of the beneficiary. A trustee who is influenced by his own or a third party’s interests is disloyal, because the trustee is no longer acting solely in the interest of the beneficiaries.

* * *

[T]he sole interest rule imposes a categorical prohibition, with “no further inquiry” into whether a conflicted transaction was fair.⁴⁷

Further, Indiana law requires that the Board, and by extension those Investment Managers acting on behalf of the Board, must act solely in the *financial* interests of the plan beneficiaries. The United States Supreme Court has interpreted analogous provisions of federal law governing the “exclusive purpose” of management of a pension plan to be “understood to refer to the sort of financial benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust’s beneficiaries.” *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014). That logic applies equally here, as the entire purpose of the retirement system overseen by the Board is to provide for the financial wellbeing of public employees during their retirement.

Financial and economic considerations must be a trustee’s sole consideration

As stated *supra*, Indiana law mandates that the “relevant” circumstances that trustees “shall consider in investing and managing trust assets” are financial and economic in nature. Ind. Code § 30-4-3.5-2(c). While the Indiana Supreme Court has not opined on the rule in this precise context, doctrines of statutory construction indicate that “relevant” circumstances for these

⁴⁵ *Id.* cmts. f, d.

⁴⁶ *Id.* cmt. c.

⁴⁷ Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 401 (2020) (citing in part 3 RESTATEMENT (THIRD) OF TRUSTS § 78(1)-(2) cmt. b).

purposes relate only to financial and economic issues. Here, the statute identifies eight specific factors that are “among circumstances” to be considered by a trustee when making an investment decision. All eight relate to financial or economic issues, such as “general economic conditions” and “expected tax consequences.” The doctrine of *ejusdem generis* “requires that the general words [of a statute] be construed as embracing only such persons, places, and things as are of like kind or class to those designated by the specific words, unless a contrary intention is clearly shown by the statute.” *Loparex, LLC v. MPI Release Techs., LLC*, 964 N.E.2d 806, 819 (Ind. 2012) (cleaned up) (quoting *Thompson v. Thompson*, 286 N.E.2d 657, 662–63 (1972)).⁴⁸ This shows that the only circumstances a trustee should consider when making investment decisions are economic and financial in nature, and not related to greater social issues such as diversity or environmental issues.

Pursuant to Ind. Code § 5-10.5-5-1, the Board has all the powers, duties, and limitations in connection with the Board’s investment and management of the assets of the public pension and retirement funds of the system. For example, Ind. Code § 5-10.3-5-3 (PERF), requires the Board to “invest its assets with the care, skill, prudence, and diligence” and diversify investments. The TRF has a similar provision at Ind. Code § 5-10.4-3-10(a).

Ind. Code § 5-10.2-2-1.5 subjects the funds to § 401 of the Internal Revenue Code and requires the Board to “distribute the corpus and income of the fund to members and their beneficiaries in accordance with the retirement fund law.” Ind. Code § 5-10.2-2-1.5(1). It also prohibits the Board from using any part of the fund “to any purpose other than the exclusive benefit of the members and their beneficiaries.” Ind. Code § 5-10.2-2-1.5(2).

The statutory requirements are clear: the Board must make prudent investments that take into account only relevant financial considerations, and must make those investments solely in the interests of plan beneficiaries. Investing based on ESG principles does not comport with these requirements.

ESG investments are not prudent because they do not maximize economic return

ESG investments are not prudent because they are not reasonably calculated to maximize the risk adjusted return of trust assets. To compensate for this deficiency, ESG proponents make sweeping predictions of economy-wide transformations to justify categorical commitments. For example, asset managers try to justify ESG investments focused on environmental issues based on the premise that the “coming energy transition” is a *fait accompli*, and companies must act in anticipation of this transition or suffer financial consequences.⁴⁹ But this assumption does not survive scrutiny. Governments are not implementing policies to require net zero. As the

⁴⁸ While not structured the same as other statutes where *ejusdem generis* is used, with a general term following a list of specific examples, the statutory language here is similar enough that interpretation should be guided by the doctrine. The list of items is representative of the circumstances to be considered, but not exhaustive, just like the typical *ejusdem generis* case.

⁴⁹ See, e.g., BlackRock, *Climate risk and the global energy transition*, Feb. 2022, available at: <https://www.blackrock.com/corporate/literature/publication/blk-commentary-climate-risk-and-energy-transition.pdf>

International Energy Agency has noted, “[i]n many cases, pledges have not yet been backed up by the strong and credible near-term policies needed to make them a reality.”⁵⁰ Furthermore, “the pledges themselves – even if implemented in full – do not yet put the world on track for a 1.5 °C stabilisation in global average temperatures.”⁵¹ ESG investors must be aware that governments are not living up to their pledges because groups such as GFANZ call on governments to adopt policies requiring net zero, and to live up to their pledges.⁵²

Recent events in global energy markets have shown how imprudent these assumptions are. For example, based on its assumption about the “energy transition,”⁵³ BlackRock committed to divest from coal by the middle of 2020.⁵⁴ In mid-2020, coal was around \$50/ton. Recently, the price of coal has exceeded \$400/ton, a nearly eight times increase.⁵⁵ Because of BlackRock’s ESG commitment, the opportunity to profit from this change was likely lost, meaning gains that could have been compounded for decades were foregone. Similarly, California’s pension funds estimate that their commitment to divest from tobacco cost that state \$8 billion.⁵⁶ Sweeping assumptions of highly uncertain government-led economic transformation are insufficient to overcome an absence of evidence that committing to a principle other than risk adjusted return will improve returns.

ESG investments focused on social or board quotas issues fare no better. For example, the state of California was unable to find academic studies to substantiate its contention that there is “a causal connection between women on corporate boards and corporate governance,” leading to a court finding the state’s gender mandate unconstitutional.⁵⁷

A focus on risk-return for investments must be grounded in a reasonable, objectively-based investigation that carefully considers material economic conditions, including factors such as inflation, energy prices, geo-political conflict, and the opportunistic purchase of non-net zero compliant assets when doing so increases returns. Broad and potentially speculative predictions

⁵⁰ <https://iea.blob.core.windows.net/assets/4ed140c1-c3f3-4fd9-acae-789a4e14a23c/WorldEnergyOutlook2021.pdf>

⁵¹ *Id.*

⁵² See, e.g., Glasgow Financial Alliance for Net Zero, *Call to Action*, Oct. 11, 2021 (available at <https://www.gfanzero.com/press/call-to-action/>) (“The Call to Action includes specific policy requests including economy-wide net-zero targets aligned to 1.5C; reform of financial regulations to support the net zero transition; phase-out of fossil fuel subsidies; pricing carbon emissions; mandatory net zero transition plans and climate reporting for public and private enterprises by 2024; unlocking the trillions of climate finance required to support developing economies meet the transition to net zero; working with farmers and businesses to stop illegal deforestation, provide viable alternatives and promote sustainable regenerative agricultural practices; support for a just transition.”).

⁵³ BlackRock, *Sustainability as BlackRock’s New Standard for Investing*, available at: <https://www.blackrock.com/corporate/investor-relations/2020-blackrock-client-letter> (justifying plan to divest from thermal coal in active management portfolio because it is “highly exposed to regulation because of its environmental impacts.”).

⁵⁴ <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/investment-giant-blackrock-marks-a-major-milestone-in-coal-divestment-movement-56669181>.

⁵⁵ <https://tradingeconomics.com/commodity/coal>.

⁵⁶ <https://www.calpers.ca.gov/docs/forms-publications/calpers-and-divestment.pdf>.

⁵⁷ See *Crest v. Padilla*, No. 19STCV27561 (Cal. Super. Ct. May 13, 2022), <https://s.wsj.net/public/resources/documents/Crest-et-al-v-Padilla-05-13-2022.pdf>.

of future environmental impacts or governance policies (especially those that have been repeatedly rejected or disregarded) does not form an adequate basis for prudent investment decisions. A truly return-focused investment strategy cannot categorically exclude investment or assets for lack of alignment with net-zero emissions or the Paris Agreement, or force businesses to alter their operations to achieve those goals.⁵⁸ Unless amended by our citizens through their elected representatives, the only commitment an Investment Manager can make with pension funds under Indiana law is to focus on financial return, not whether the underlying asset is dirty, clean, popular, or unpopular.

Similarly, other ESG commitments are not made solely in the financial interests of plan beneficiaries. Under the sole interest standard, there can be no commitments or directives to follow ESG principles. Fiduciaries cannot use pension funds to accelerate the net zero transition, impose board quotas, or force companies to take action on climate change, or commit to any course of action except making a profit for beneficiaries. ESG commitments are invariably couched in language about reducing carbon emissions, and meeting Paris Climate Accord goals, or fostering equity and a “just transition.” All of these are motivations other than acting in the financial interests of beneficiaries. As one recent academic paper plainly put it, “a trustee’s use of ESG factors, if motivated by the trustee’s own sense of ethics or to obtain collateral benefits for third parties, violates the duty of loyalty.”⁵⁹

Application to Board’s voting rights, retained investment advisors, and duty to supervise

The Board also has the authority to contract with others, such as investment advisors, to assist with its investment decisions. Ind. Code §§ 5-10.4-3-10; 30-4-3-3.5-9. As discussed, *infra*, the Board has elected to do so, engaging firms such as BlackRock to manage fund assets. As part of its management responsibilities, on behalf of the Board, BlackRock exercises authorities appurtenant to security ownership, such as proxy voting. As agents of the Board, BlackRock and other Investment Managers owe a duty of reasonable care, Ind. Code § 30-4-3.5-9, and, like the Board, may only act in the sole interest of the plan beneficiaries.⁶⁰ Therefore, in exercising the proxy voting authority delegated to it by the Board, each Investment Manager is to vote the proxies for the exclusive benefit of the system’s members and beneficiaries. Just as the Board may not select or decline investments based on ESG considerations, it may not (nor delegate its authority to) exercise voting rights based on ESG considerations apart from the exclusive benefit of the system’s participants.⁶¹

⁵⁸ The facts may show that much of the concern about “climate risk” is circular. Ostensibly, investments are at risk of losing value due to the “coming energy transition,” so asset managers must take action to accelerate “the coming energy transition.” If so, this would not be the reasoned analysis of prudent investors, but the *post hoc* justification of individuals using their positions of trust to further their own agendas.

⁵⁹ Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 381 (2020).

⁶⁰ The Board’s investment policy explicitly recognizes that “all external parties who perform investment-related services for the System or Retirement Funds, including . . . Investment Managers” must act “consistent with their fiduciary responsibility to invest the assets solely in the interests of the System’s members and beneficiaries.” *Supra*, note 41, at 2, 8.

⁶¹ To the extent that an investment advisor or manager is also acting as a custodian for the INPRS, it is also required to act in a fiduciary capacity. *See, e.g.*, Ind. Code §§ 5-10.3-5-5 and 5-10.4-3-13.

Likewise, the Board may not retain Investment Managers or other agents who would make decisions for the system that are not based exclusively on the financial interest of system participants. As noted *infra*, the sweeping assumptions underlying ESG strategies are imprudent, and have a purpose to benefit third parties, showing a motive that is inconsistent with fiduciary duties that bind the Board and its agents. All the reasons discussed above explaining why the Board itself cannot consider these factors apply equally, if not more so, to investment advisors and investment managers. If Hoosier pensioners and beneficiaries of the retirement system desire for their fiduciaries to pursue the investment firm’s own social goals with Indiana taxpayer dollars, there will need to be a legislative change. However, as discussed *infra*, and as reflected by current law, an investment or investment strategy that specially selects or declines investments based on adherence to ESG criteria, or casts shareholder votes, or encourages companies to act based on such criteria, will conclusively result in managerial mixed motives and violations of its fiduciary duty. *Morningstar*, 136 N.E.3d at 1154 (“A fiduciary cannot contend that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one.”) (quoting *NLRB v. Amax Coal Co., a Div. of Amax, Inc.*, 453 U.S. 322, 330 (1981)).

Special consideration of Investment Managers who have joined global climate initiatives

Given the above conclusion that both the Board and Investment Managers and advisors with which the Board contracts may not consider ESG factors in making investment decisions or exercising rights appurtenant to ownership of securities, the next question is whether the Board is allowed to contract with an investment manager or investment advisor that has previously joined a global climate initiative such as Climate Action 100+ or GFANZ, and therefore previously pledged to integrate certain ESG factors into all aspects of its business, including engaging with companies in which it invests and proxy voting.

The Board cannot hire an Investment Manager or investment advisor that has previously joined a global climate initiative that involves integrating ESG factors into the management of beneficiaries’ assets. Asset managers, of course, remain free to act however they wish with their own assets. Determining whether to use an asset manager who makes ESG commitments with its own resources would be a facts and circumstances analysis about whether the asset manager had sufficiently bifurcated its approaches to properly focused on risk-return for the management of beneficiaries’ assets.

Climate Action 100+ claims that it does not “require or seek collective decision-making or action with respect to acquiring, holding, disposing and/or voting of securities” and leaves voting decisions and “scope of participation in Climate Action 100+” to the “discretion of individual signatories.”⁶² But other public-facing language indicates a greater degree of centralized coordination. Climate Action 100+ openly states that investor signatories are “required to . . . liaise with relevant network staff and/or lead investors to ensure engagement priorities and

⁶² <https://www.climateaction100.org/wp-content/uploads/2021/03/Climate-Action-100-Company-Assessments-Version-1.5.xlsx>. This will download an Excel file containing the information. (last accessed Aug. 11, 2022)

ambition are aligned with the goals of the initiative, as well as with the overall collaborative approach.”⁶³ One such goal, prominently listed on the initiative’s webpage as one of “The Three Asks,” seeks “to reduce greenhouse gas emissions across the value chain.”⁶⁴

Similarly, members of the Net Zero Asset Managers Initiative have committed to, among other things “implement a stewardship and engagement strategy, with a clear escalation and voting policy, that is consistent with our ambition for all assets under management to achieve net zero emissions by 2050 or sooner . . . Engage with actors key to the investment system including credit rating agencies, auditors, stock exchanges, proxy advisers, investment consultants, and data and service providers to ensure that products and services available to investors are consistent with the aim of achieving global net zero emissions by 2050 or sooner . . . [and] Ensure any relevant direct and indirect policy advocacy we undertake is supportive of achieving global net zero emissions by 2050 or sooner.”⁶⁵ No mention is made of maximizing returns on invested assets or ensuring that actions taken are consistent with the fiduciary duties owed to investors.⁶⁶

Membership in a global climate initiative potentially implicates a fiduciary’s duty of prudence

The first question is whether entities that are committed to “ensur[ing] the world’s largest corporate greenhouse gas emitters take necessary action on climate change” like members of Climate Action 100+, or “to accelerate the transition to a net-zero economy” like members of GFANZ, are acting with the “care, skill, prudence, and diligence” required of an Indiana fiduciary. ESG investments do not always improve long-term financial value, and research is indeterminate on the net positive outcome for clients; the long-term value is also “difficult to measure,” making them potentially risky or higher-risk investments.⁶⁷ Additionally, the actions of global climate initiatives to reduce the production of fossil fuels likely harms companies and consumers in myriad ways, including through increased energy costs. If ESG investments harm the portfolios in the short-term and/or long-term, pursuing them is inconsistent with any number of duties, including the duties to invest prudently and preserve trust property.⁶⁸ Because members of these initiatives pledge to take certain actions regardless of financial or economic effect on their investments and without regard for the interests of the beneficiaries on whose behalf they manage assets, it is reasonable to conclude that actions consistent with their commitments violate the duty of prudence.

Membership in a global climate initiative potentially implicates a fiduciary’s duty of loyalty

⁶³ <https://www.climateaction100.org/approach/engagement-process/> (last accessed Aug. 11, 2022).

⁶⁴ <https://www.climateaction100.org/approach/the-three-asks/> (last accessed Aug. 11, 2022).

⁶⁵ <https://www.netzeroassetmanagers.org/commitment/> (last accessed Aug. 15, 2022).

⁶⁶ The Net Zero Asset Manager Initiative does contemplate potential conflict between the commitments and “mandates agreed with clients and clients’ and managers’ regulatory environments,” as well as “legal duties to clients.” *Id.* But, rather than agreeing to honor the wishes of clients and following legal requirements, the members simply commit to “overcome the constraints we face.”

⁶⁷ Wang, *supra*, note 34, at 153.

⁶⁸ See generally Richard A. Posner & John H. Langbein, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72, 96 (1980) (concluding that “social investing is contrary to trust law and its statutory counterparts”).

The intention to coordinate⁶⁹ with other asset managers to achieve non-financial goals with beneficiaries' assets is sufficient to establish a non-financial motive that violates the duty of loyalty. Because any non-financial motive in the management of beneficiary assets is sufficient to violate the duty of loyalty, the presence of disclaimers and qualifiers cannot “cleanse” a commitment to achieve non-financial goals such as reducing greenhouse gas emissions.⁷⁰ Even if an asset manager had no intention of following through on its public commitments, its desire to be perceived as using client assets to achieve a social goal would be sufficient to demonstrate a mixed motive that violates the duty of loyalty. To the extent investment decisions are motivated even in part by ESG concerns, rather than the exclusive financial interests of system participants and beneficiaries, an ESG investment strategy would contradict the Board's fiduciary duty of loyalty. See *Morningstar*, 136 N.E.3d at 1154 (internal quotation provided *supra*). The citizens of Indiana have chosen to focus asset managers exclusively on beneficiaries' financial interest, and their wishes must be respected.

When the investment manager has committed to ESG goals across all assets under its management, the manager is acting with mixed motives and not in the beneficiaries' sole interest.⁷¹ Provided a commercially viable alternative exists, the Board should avoid these investment managers altogether.⁷²

CONCLUSION

In summary, Indiana law prohibits the Board or its contracted Investment Managers from choosing investments or investment strategies based on ESG considerations. The Board must act consistent with its fiduciary duties of loyalty and prudence. Various chapters and sections within Ind. Code arts. 5-10.2, -10.3, -10.4, and -10.5 mandate fiduciary and other statutory responsibilities to the Board and other agents to which it may delegate any investment authority. Investing based on ESG considerations is inconsistent with these duties. For the same reasons, the Board cannot exercise any rights appurtenant to its investment, such as proxy voting rights, based on ESG considerations nor can it retain investment advisors that make investments, set investment strategies, or exercise voting rights by proxy appurtenant to investments based on ESG considerations.

⁶⁹ Although not directly implicated by the question posed, such coordination that has the effect of restricting the supply or increasing the price of goods and service may implicate our antitrust laws.

⁷⁰ *Supra*, note 45. Membership in global climate initiatives show a motive other than financial benefit of trust beneficiaries: the purpose of these initiatives is to affect public policy and change corporate conduct to achieve the goals of the Paris Climate Accord (which has no expressed concern for financial returns).

⁷¹ UNIFORM PRUDENT INVESTOR ACT § 5 cmt. (1994): “No form of so-called ‘social investing’ is consistent with the duty of loyalty [as expressed in the ‘sole interest’ formulation] if the investment activity entails sacrificing the interests of trust beneficiaries—for example, by accepting below-market returns—in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause.”; Schanzenbach & Sitkoff, *supra*, note 47, at 401 (“Acting with mixed motives triggers an irrebuttable presumption of wrongdoing, full stop.”).

⁷² RESTATEMENT (THIRD) OF TRUSTS §§ 80, 78(2) (“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.”) and § 78 cmt. e (“A trustee's fiduciary transactions with third parties” may create “a risk of future conflicts between the trustee's fiduciary and personal interest.”).

The state of Indiana, comparatively speaking, has a highly-funded state retirement system. Some asset managers have widely publicized their efforts to integrate ESG information into their investment processes and strategies; since Indiana is a client of such asset managers, including BlackRock, this would affect the state. Asset managers' compliance with the expectations of initiatives like Climate Action 100+, or GFANZ, organizations committed to the phasing out of fossil fuels and achieving a net-zero emissions, is inconsistent with the fiduciary duty of care required in the management of Indiana assets.

Furthermore, committing to initiatives like Climate Action 100+, GFANZ and others demonstrates a mixed motive inconsistent with a fiduciary duty of loyalty to act for the exclusive financial benefit of system participants. An asset manager's fiduciary duty is to the sole financial interest of beneficiaries. A fiduciary cannot justify its ESG commitments by asserting that they were made subject to its fiduciary duty. The term "sole" means the fiduciary is permitted only one motivation – Hoosiers' financial interest. Any other commitment or stated purpose is unlawful. Unless laws are amended through the legislative process, the only commitment an Investment Manager can make with pension funds is to focus on financial return, not other socio-political concerns. A fiduciary truly motivated to act in Hoosiers' financial interest would never need to use the term "ESG," and would instead merely describe its purpose as maximizing risk-adjusted return, regardless of future economic or government policy changes.

Sincerely,

A handwritten signature in black ink that reads "Todd Rokita". The signature is fluid and cursive, with the first name "Todd" being larger and more prominent than the last name "Rokita".

Todd Rokita
Attorney General of Indiana

John Walls, Chief Counsel, Advisory
William H. Anthony, Asst. Chief Counsel, Advisory
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