

NCPERS Persist - September 2013

SEC Clarifies Municipal Financial Advisor Regulation;  
Colorado Defines Duty of Loyalty for Trustees

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In two separate forums, trustees' duties have recently been clarified and defined. In one instance, the Securities and Exchange Commission retreated from an over broad definition of municipal financial advisors. In a Colorado Appeals Court, a trustee was criticized for using his position of trust to further a political motive through the misuse of information available only to plan fiduciaries. Both situations reveal the continuing dynamic of public pension regulation.

**SEC REVISES MUNICIPAL FINANCIAL ADVISOR RULES TO EXCLUDE TRUSTEES**

Section 975 of the Dodd Frank Act requires municipal financial advisors to register with the Securities and Exchange Commission. The law required the SEC to issue rules implementing this (and numerous other provisions) of the statute. In 2010, the SEC issued an interim rule which had the effect of encompassing trustees of retirement boards.

The original rule excluded municipal entities and employees of municipal entities, but did not apply the exemption to appointed officials, which included trustees. This left trustees with the dilemma of registering with the SEC or risk being in violation of federal securities law.

During the comment period, the SEC was inundated with letters from retirement systems as well as a concerted effort by NCPERS to clarify the issue and extend the registration exemption to boards administering retirement systems. It was pointed out to the SEC that pension boards of trustees are actually consumers of financial advice, not givers of such advice. This 700 plus page regulatory clarification ends three years of confusion concerning SEC regulatory authority over pension boards of trustees.

## COLORADO COURT DENIED RECORDS REQUESTED FOR NON FIDUCIARY PURPOSE

In a recent decision, the Colorado Court of Appeals upheld the state retirement system's board of trustees refusal to give the state treasurer, himself a co-trustee, unfettered access to member records otherwise made confidential by statute.

The state treasurer requested information concerning the top 20% of pension beneficiaries, including place of employment, salary, and Zip Code of residence. No purpose related to the efficient administration of the system or any other identifiable fiduciary purpose was articulated as a basis for the information request. As a result, the Board of Trustees denied the request. Even after outside counsel opined that release of the information would be a breach of fiduciary duty, the treasurer persisted in his request by filing suit against the Board for breach of fiduciary duty. The Board counter claimed for a declaration that its records policy was consistent with its fiduciary duty.

A state trial court ruled against the treasurer. On appeal, the Colorado Court of Appeals affirmed the decision, finding that unfettered access to member financial records for reasons unrelated to the members' best interests was contrary to the duty of a fiduciary and the Board correctly acted to preserve the statutory privacy rights of members. This decision is an important analysis of the often conflicting interests of statutory ex officio trustees who may view their political offices as taking precedence over their duties as trustees to the retirement plan. In ruling for the Board, the Court made it clear that pension trustees must act in all instances in the best interests of plan participants to the exclusion of any other office or political goal.

The decision is *Stapleton v. PERA*, \_\_\_P. 3d\_\_\_, 2013 WL 3943272 (Colo. App. 8/1/13).

