

Date: January 21, 2026

To: Senator Joseph Baldacci, Senate Chair
 Representative Suzanne Salisbury, House Chair
 Members, Joint Standing Committee on State and Local Government

From: Bill Brown, Director of Actuarial and Legislative Affairs

Subject: LD 1383, An Act to Require State Divestment from Perpetrators of International Human Rights Violations

Good morning, Chair Baldacci, Chair Salisbury and the other distinguished members of the Joint Standing Committee on State and Local Government. I am Bill Brown, Director of Actuarial and Legislative Affairs for the Maine Public Employees Retirement System (MainePERS).

MainePERS is opposed to LD 1383, An Act to Require State Divestment from Perpetrators of International Human Rights Violations. We oppose LD 1383 because the bill, if enacted, would conflict with our duty to members and retirees under the Maine Constitution. However, we are here to provide information and to offer any assistance the committee may request regarding this bill.

MainePERS administers a \$22 billion dollar trust fund to pay retirement benefits earned by teachers and State, county, municipal, and other governmental employees, many of whom do not have Social Security coverage and rely only upon their MainePERS benefit. The money in the trust fund originated from employee contributions and contributions from hundreds of employers, along with earnings from prudent investments.

MainePERS takes very seriously the trust placed in it to invest the retirement funds of public employees. Article IX, Section 18, of the Maine Constitution establishes a fiduciary duty to hold, invest, and disburse MainePERS' pension trust funds solely in the best financial interest of the members as pension recipients. In fulfilling its fiduciary obligations, the Board of Trustees owes MainePERS' members, retirees and beneficiaries a duty of loyalty: to follow the "exclusive benefit rule" established in the Maine Constitution by acting solely in the interests of the members, retirees, and beneficiaries as recipients of retirement or related benefits. This duty obligates the Board to not use their position of trust either for personal gain or to advance other causes.

The "exclusive benefit rule" is also reflected in the federal statutes and regulations that qualify MainePERS' retirement plans for federal tax deferment. Under federal law, qualified retirement fund assets must not be "used for, or diverted to purposes other than the exclusive benefit of [the] employees or their beneficiaries." 26 U.S.C. § 401(a)(2). The "phrase 'purposes other than for the exclusive benefit of [the] employees or their beneficiaries' includes all objects or aims not solely designed for the proper satisfaction of all liabilities to employees or their beneficiaries covered by the trust." 26 C.F.R. § 1.401-2(a)(3).

LD 1383 as drafted is contrary to these constitutional and federal requirements because it would prohibit MainePERS from holding a broad range of investments to further another purpose.

The sponsor has proposed an amendment to address this problem. The amendment adds a condition that the investment restrictions apply only to the extent that they are consistent with “sound investment criteria” and “fiduciary obligations.” That may remove the direct constitutional conflict; however, the Legislature and proponents of this bill should understand that the amendment would result in MainePERS continuing to make investments pursuant to the “exclusive benefit rule” and not in a restricted manner. This would not be obstructionist, but in fulfilment of our constitutional obligation.

When the fossil fuel divestment bill was before the 130th Legislature, the Attorney General advised the Labor and Housing Committee that failing to include the “fiduciary obligations” condition was unconstitutional. The Attorney General continued with a warning that while adding the condition “arguably” avoids the constitutional conflict, doing so makes the investment restrictions “essentially hollow.” If the MainePERS Board is already following its fiduciary duty in investment decisions, the new statute would not result in changes. Copies of the Attorney General’s letter to the Labor Committee and a follow-up letter to MainePERS from the Attorney General’s Office are attached to this testimony.

An additional concern is that the proposed amendment’s description of the investment restrictions is both extremely vague and overly broad. Just determining what investments are covered would require determinations of whether a company or its affiliates have been accused, whether those accusations are “credible,” whether they have been made by a “credible” organization, whether support is “material,” whether violations are “gross,” and whether a right is “internationally recognized.” It would take vast resources to make these determinations, each of which would be open to dispute because of the vagueness of the definition. With respect to breadth, although the amendment refers to “arms manufacturer that contributes to genocide,” the definition does not require any connection to genocide. Thus, any company deriving more than 10% of its gross revenues from the manufacture or sale of weapons, weapon systems, ammunition, or military-grade surveillance technologies is within the scope of the restrictions, along with all of its affiliates.

Because of these concerns, we ask that you vote ought-not-to pass on LD 1383. Thank you for your consideration of this testimony. I am happy to take your questions and will be present for any work session.

AARON M. FREY
ATTORNEY GENERAL

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April 9, 2021

The Honorable Craig Hickman, Senate Chair
The Honorable Michael Sylvester, House Chair
Joint Standing Committee on Labor and Housing
Cross Building, Room 202
Augusta, ME 04333

Re: LD 99, *An Act to Require the State to Divest Itself of Assets Invested in the Fossil Fuel Industry*
LD 319, *An Act to Promote Socially Responsible Investing by the Maine Public Employees Retirement System by Prohibiting Investment in the Fossil Fuel Industry or For-profit Prisons*

Dear Senator Hickman and Representative Sylvester:

Thank you for your letter of March 9, 2021 on behalf of the Joint Standing Committee on Labor and Housing regarding LD 99 and LD 319 of the 130th Legislature. Your letter poses two questions:

1. Whether LD 99 and LD 319 as drafted are contrary to the Maine Constitution; and
2. Whether the fiduciary responsibility in the Maine Constitution requiring MainePERS to get the most optimal return for members creates a constitutional issue that would prohibit the Maine Legislature from requesting MainePERS to get the most optimal return for members within specific parameters set by the Legislature.

The short answer to both questions is “yes.” Enactment of a statute will not amend constitutional mandates. Article IX, Section 18 of the Maine Constitution reads as follows:

Section 18. Limitation on use of funds of Maine State Retirement System. All of the assets, and proceeds or income therefrom, of the Maine State Retirement System or any successor system and all contributions and payments made to the system to provide for retirement and related benefits shall be held, invested or disbursed as in trust for the exclusive purpose of providing for such benefits and

shall not be encumbered for, or diverted to, other purposes. Funds appropriated by the Legislature for the Maine State Retirement System are assets of the system and may not be diverted or deappropriated by any subsequent action.

The mandate that all MainePERS “assets be held, invested or disbursed as in trust for the exclusive purpose of providing for [retirement and related] benefits” effectively prevents the Legislature from dictating how these funds may be invested. By requiring the assets to be held “as in trust,” the Constitution creates the legal framework under which these funds are to be held and managed. Property held in trust is managed by a trustee who is subject to fiduciary duties. The Constitution also defines both the purpose of the fund management and to whom those fiduciary duties run, that is, for retirement and related benefits for MainePERS beneficiaries.

As a fiduciary of a pension trust, the MainePERS Board of Trustees (“the Trustees”) has a duty of loyalty to administer the trust solely in the interest of the beneficiaries and for the articulated purpose of the trust – providing retirement and related benefits. A trustee’s duty of loyalty is a fundamental principle of common law reflected in the Restatement (Third) of Trusts,¹ the Maine Uniform Trust Code,² and the Employee Retirement Income Security Act of 1974 (“ERISA”).³ The constitutional intent is clear. By requiring the funds be held as in trust for the exclusive purpose of providing retirement benefits, the Constitution is mandating that the Trustees manage these funds solely in the best interest of MainePERS members as pension recipients.

As drafted, both LD 99 and LD 319 would: (1) prohibit the Trustees from acquiring assets in certain industries;⁴ and (2) require the Trustees to divest of any currently held assets in those industries “in accordance with sound investment criteria and consistent with the board’s fiduciary obligations.” The first requirement conflicts with the constitutional mandate because it requires the Trustees to refrain from certain investment activity regardless of whether it would be in the best interests of the beneficiaries.⁵ The second requirement, although arguably not in conflict with the Trustees’ fiduciary duties, is essentially hollow. Unless a failure to divest an asset would be a

¹ “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.” Restatement (Third) of Trusts § 78 (2007).

² “A trustee shall administer the trust solely in the interests of the beneficiaries.” 18-B M.R.S. § 802(1).

³ “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.” 29 U.S.C. § 1003(a)(1). “[A]t the heart of the fiduciary relationship is the duty of complete and undivided loyalty to the beneficiaries of the trust.” *Donovan v. Mazzola*, 716 F.2d 1226, 1238 (9th Cir. 1983) (quoting *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 639 (W.D. Wis. 1979)).

⁴ LD 99 would prohibit investment “in any stocks or other securities of any corporation or company within in the fossil fuel industry.” LD 319 would prohibit investment “in any stocks or other securities of any corporation or company within the fossil fuel industry or any corporation or company that owns or operates prisons for profit.”

⁵ One New Hampshire case appears to conflict with this conclusion because the court concluded that a provision in the New Hampshire Constitution similar to that of Maine’s did not render New Hampshire’s Sudan Divestment Act unconstitutional. *Bd. of Trustees of N.H. Judicial Ret. Plan v. Sec’y of State*, 7 A.3d 1166, 1174 (N.H. 2010). In that case, the court reached its result by construing the language in the underlying ballot initiative, which did not contain the material provisions found in either the New Hampshire or Maine Constitutions. *Id.* at 1173. The case was remanded to the trial court “to determine whether the Act impermissibly interferes with the trustee’s statutory or common law fiduciary duties.” *Id.* at 1174. Before the trial court ruled on this issue, the New Hampshire Legislature repealed the Act, purportedly because of the high cost of compliance with the Act’s mandates. 2011 N.H. Laws ch. 53:1 (eff. May 9, 2011).

breach of the Trustees' existing fiduciary duties (i.e., not in best interest of the members), any attempt to enforce the statutory requirement to divest would be meritless.

On the other hand, a resolution encouraging the Trustees to consider certain non-pecuniary factors (e.g., environmental impact) when making investment decisions may be helpful to the Trustees. Such a resolution may help insulate the Trustees from lawsuits alleging breach of fiduciary duty if the Trustees used such a non-pecuniary factor as a "tiebreaker" when choosing between investment alternatives of comparable risk and return. Although ERISA is not applicable to MainePERS, regulations recently adopted by the U.S. Department of Labor pertaining to ERISA plans indicate that using such factors for tiebreakers would not be inconsistent with a trustee's duty of loyalty.⁶

Although this letter is not a formal Attorney General Opinion pursuant to 5 M.R.S. § 195, I hope it will be helpful to you in the Joint Committee's work sessions.

Sincerely,



Aaron M. Frey
Attorney General

cc. Sandy Matheson, MainePERS Executive Director
Henry E. M. Beck, Esq., State Treasurer and Member, MainePERS Board of Trustees
Members, Joint Standing Committee on Labor and Housing

⁶ 29 C.F.R. § 2550.404(a-1)(c)(2) reads as follows:

Notwithstanding the [pecuniary basis only] requirements of paragraph (c)(1) of this section, when choosing between or among investment alternatives that the plan fiduciary is unable to distinguish on the basis of pecuniary factors alone, the fiduciary may use non-pecuniary factors as the deciding factor in the investment decision provided that the fiduciary documents:

- (i) Why pecuniary factors were not sufficient to select the investment or investment course of action;
- (ii) How the selected investment compares to the alternative investments with regard to the factors listed in paragraphs (b)(2)(ii)(A) through (C) of this section; and
- (iii) How the chosen non-pecuniary factor or factors are consistent with the interests of participants and beneficiaries in their retirement income or financial benefits under the plan.

Although this regulation became effective on January 12, 2021, the Department of Labor issued an enforcement statement on March 10, 2021, stating that until further notice it would not enforce the new regulation.

AARON M. FREY
ATTORNEY GENERAL



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December 8, 2022*

Dr. Rebecca M. Wyke
MainePERS Chief Executive Officer
P.O. Box 349
Augusta, ME 04332-0349

Dear Dr. Wyke,

You asked this Office for advice on how to interpret certain provisions of 5 M.R.S. §§ 1957 and 1958. Together, these statutes direct the Board of Trustees (“the Board”) of the Maine Public Employees Retirement System (“the System”) to (1) cease future investment in fossil fuel companies and for-profit prisons and (2) divest any such current holdings by January 1, 2026. Notably, these directives are subject to a limitation that they be accomplished “in accordance with sound investment criteria and consistent with fiduciary obligations.”¹

As I understand your request, your concerns are whether and to what extent these statutes may affect the Board’s exercise of its fiduciary duties and whether and to what extent the Board must adhere to the directives if ceasing to invest or divesting would be inconsistent with sound investment criteria or fiduciary obligations, such as the duty of loyalty or the prudent investor rule.

The subject statutes do not affect the Board’s exercise of its fiduciary duties. And they do not require the Board to either cease investing in or divest such holdings unless sound investment criteria and fiduciary obligations require such actions. Both statutes specifically condition their directives on “accordance with sound investment criteria” and “consistent with fiduciary obligations.” As such, they reiterate rather than modify the Board’s fiduciary obligations as a trustee—both constitutional² and statutory.³

* This version corrects a typographical error that appeared in the original letter.

¹ As an example, section 1957(2) reads in pertinent part: “The board, *in accordance with sound investment criteria and consistent with fiduciary obligations*, may not invest the assets of any state pension or annuity fund in the stocks, securities or other obligations of any fossil fuel company or any subsidiary, affiliate or parent of any fossil fuel company.” 5 M.R.S. § 1957(2) (emphasis added). Sections 1957(3) and 1958(2) and (3) contain the same emphasized language.

² All the assets of the System “shall be held, invested or disbursed as in trust for the exclusive purpose of providing [retirement and related] benefits.” Me. Const. art. IX, § 18.

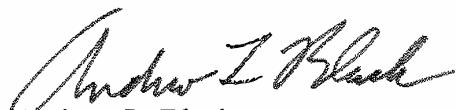
³ “The members of the board shall be the trustees of the several funds created by this Part [20 of Title 5].” 5 M.R.S. § 17153(2). “The board may cause the funds created by this Part to be invested and reinvested in accordance with

Dr. Rebecca M. Wyke
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Chiefly relevant in this context are the Board's duty of loyalty and its obligation to adhere to the prudent investor rule. Its duty of loyalty requires it to "administer the trust solely in the interests of the beneficiaries."⁴ The prudent investor rule requires it to "invest and manage trust assets, as a prudent investor would"⁵ and evaluate and make investment decisions "as part of an overall investment strategy having risk and return objectives reasonably suited to the trust."⁶ If adherence to sound investment criteria and fiduciary obligations prevents achievement of the investment and divestiture objectives of sections 1957 and 1958, failure to achieve those objectives is not a violation of the directives in those statutes. In short, the Board's focus should remain on adhering to sound investment criteria and fulfilling its fiduciary obligations. However, if the Board encounters a situation where the application of sound investment criteria and its fiduciary obligations neither favors nor disfavors either of two potential investment options, the Board shall pursue the option that more closely complies with the directives of sections 1957 and 1958.

Although this is not a formal Attorney General Opinion pursuant to 5 M.R.S. § 195, I hope it is of assistance to you.

Sincerely,



Andrew L. Black
Assistant Attorney General
Chief, PFR Division

cc: Aaron M. Frey, Attorney General

the standards defined in Title 18-B, sections 802 to 807 and chapter 9," 5 M.R.S. §17153(3), which provisions of the Maine Uniform Trust Code (sections 802 to 807) delineate the fiduciary duties of trustees and provisions of the Maine Uniform Prudent Investor Act (chapter 9) require adherence to the prudent investor rule.

⁴ 18-B M.R.S. § 802(1).

⁵ 18-B M.R.S. § 902(1).

⁶ 18-B M.R.S. § 902(2).