



ADVISORY COMMITTEE COMMUNICATION

AGENDA ITEM NO. 5

November 15, 2018

Board Governance & Legal Proposals

Background

At the September Board meeting, the Board discussed nine potential administrative / operational changes to the TMRS Act. At the October meeting, the Board preliminarily agreed to propose legislation that would include these nine “priority items”.

The nine items can be categorized into Board Governance, Legal, City-related, and Administrative proposals. This communication item provides a description of and reasons for the five Board Governance and Legal proposals.

Topics of Proposals:

1. Board Meetings

The proposed changes would provide more flexibility for the Board to hold meetings and discuss certain sensitive topics in closed session.

Proposed Changes

- Give the Board more flexibility in scheduling meetings
- Clarify that meetings may be closed to the extent allowed by applicable law
- Include optional provisions relating to meetings by teleconference and videoconference
- Allow for closed meetings for certain investment related discussions, certain audit related matters, Board self-evaluations, and evaluations of Board consultants
- Clarify that the TOMA requirements do not apply to Board members’ attendance at educational events if the Board does not discuss or take action on TMRS business or policy matters at the event

Reason(s) for Changes

- Enhance meeting flexibility and efficiency
- Meetings by phone or videoconference could help:
 - meet or keep quorum requirements when Trustees not able to physically attend or need to leave a meeting early
 - make it easier to have “one topic” meetings, if/when needed
- Having authority for executive sessions for these topics could help:
 - Enhance Board’s ability to receive information and discuss topics that are sensitive or confidential in nature but are extremely important to TMRS’ operations

- Potentially improve the investment contract negotiation process, as Legal staff often encounters resistance when addressing the TOMA requirements due to the investment managers' concerns regarding confidential information becoming public if discussed in open meeting

2. Immunity and Liability Protection

These proposed changes would provide statutory immunity and liability protections to the Board and staff.

Proposed Changes

- Expressly provide the TMRS Board and staff with immunity protection in the TMRS statutes, rather than relying on common law. The new language is based on the language found in the TCDRS, ERS and TRS statutes since 2007.

Reason(s) for Changes

- Sovereign, governmental, and official immunity exist but are concepts developed under common law
 - as such, in a dispute against a retirement system, it is not uncommon for questions to arise as to whether various parties are or are not entitled to immunity – often resulting in unnecessary expenditures of time, effort and expense in defending their rights to immunity
- Including provisions in the TMRS Act provides more clear protections for trustees and employees
 - Over time, TMRS' operations and investments have become more complex, and codifying the immunity protections into the TMRS Act can help better protect trustees and employees in the event of disputes and litigation
- Would be consistent with statutory immunity protections provided to the 3 other statewide systems

3. Legal Advisor

The proposal would remove the requirement that the Board-appointed attorney represent TMRS in all litigation and authorizes employment of other attorneys for other purposes.

Proposed Changes

- Remove language requiring that the Board appointed attorney shall represent the System in all litigation; and
- Adding language to clarify that the System may employ attorneys, in addition to the Board appointed attorney, to represent TMRS in litigation and provide advice on fiduciary and legal matters.

Reason(s) for Changes

- Amend to modernize the statute and provide more flexibility in the event of litigation
 - The existing provision was written before TMRS had any in-house counsel (first one appointed in 2001)
 - Provision does not distinguish between the Board's fiduciary counsel and the TMRS in-house counsel
 - It also requires "the attorney" to represent TMRS in all litigation
 - Counsel, including litigation counsel, should be selected based on the expertise needed for the particular matter at hand

- Currently the Board appoints the General Counsel and the external Fiduciary Counsel; other counsel utilized by TMRS are selected by staff

4. Confidential Information / Audit Working Papers

The proposed changes would place language into the TMRS Act to authorize the System to protect the confidentiality of member, retiree, and beneficiary information from open records requests without the need to obtain an Attorney General ruling, which is currently provided through provisions of the Texas Public Information Act (TPIA) . It would also place language in the TMRS Act that would exempt audit working papers from public disclosure, an exemption that is available to other agencies and localities but does not currently exist in the TMRS Act.

Proposed Changes

- Defines the terms “audit” and “audit working papers” (855.107);
- Includes language regarding the Board’s authority to initiate various types of audits in addition to the annual financial audit; and provide that audit working papers are confidential and not open to the public. A final audit report, when accepted by the Board, is subject to disclosure unless made confidential under other law
- Expands the Section 855.114 provision to provide that former members, retirees, annuitants, beneficiaries, and alternate payees, in addition to the “members” already covered by this section, can be required to provide information needed for the proper administration of TMRS
- Amends the CONFIDENTIAL INFORMATION provisions (855.115) to read more like TCDRS, ERS, TRS & the TPIA with regard to the System’s ability to protect participant information from disclosure, without the need to seek a ruling from the Attorney General’s office

Reason(s) for change:

- Member Information Proposed Changes
 - Could help provide more protection for TMRS members and retirees from identity theft, as well as maintain efficiency for the System
 - Technology has made it easier to take isolated pieces of information from different sources and utilize them to commit identity theft
 - Would make TMRS Act consistent with the confidentiality provisions of the 3 other statewide systems in place for over 10 years, and with similar TPIA provisions passed in 2011 (HB 2460), regarding the ability of retirement systems to protect confidential member and retiree information from disclosure without having to request an AG ruling
 - Although the TMRS Act has long contained confidentiality provisions protecting member information, prior to the 2011 TPIA changes TMRS was required to request an AG ruling to be able to withhold it from disclosure under the TPIA
 - AG ruling requests involve very short deadlines and a significant amount of staff resources to prepare and submit
 - TMRS has previously requested AG rulings on withholding member information that TMRS believed was protected under the TMRS Act, and the AG ruled against TMRS and ordered disclosure
- Audit and Risk Proposed Changes
 - Add protections for audit working papers and other risk related documents that the 3 other statewide retirement systems and other state or government agencies clearly have under their own statutes or the TPIA

- TMRS Act does not have this specific protection, so on a case-by-case basis TMRS must try to invoke protection under TPIA §552.116

5. Investment of Assets – Definition of Security

The proposed change would modify the definition of “securities” to better reflect the various types of securities that TMRS has invested in as it has diversified its portfolio over time.

Proposed Changes

- Modify the definition of “securities” to reflect the various types of securities and investment structures allowed for investment as TMRS has diversified its portfolio over time,
- Add provisions clarifying that the Board:
 - may delegate discretionary investment authority to external managers; and
 - may contract with external investment advisers and consultants.

Reason(s) for change:

To update the definition of “securities” to reflect the diversification of TMRS’ portfolio since the definition was originally adopted in 2003 and to reflect the changes in the use of investment managers, advisers and consultants.

Executive Director Approval:



David Gavia

Date: November 12, 2018