

DATE: April 20, 2023

TO: Senator Michael Tipping, Chair  
Representative Amy Roeder, Chair  
Members, Joint Standing Committee on Labor and Housing

FROM: Michael J. Colleran, Chief Operating Officer and General Counsel

SUBJECT: Testimony on L.D. 1562 – An Act to Protect the Retirement of State Employees and Teachers by Establishing Standards for Fiduciary Responsibility

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Good afternoon, Senator Tipping, Representative Roeder, and members of the Joint Standing Committee on Labor and Housing. My name is Michael Colleran, and I am the Chief Operating Officer and General Counsel for the Maine Public Employees Retirement System.

MainePERS is testifying in opposition to L.D. 1562 because the bill is unnecessary to the extent that it aligns with the Maine Constitution and would be unenforceable to the extent it is inconsistent with the Constitution.

The Maine Constitution and federal and state laws and regulations already clearly outline the fiduciary responsibilities of the MainePERS Board of Trustees.

The Maine Constitution protects the retirement benefit of MainePERS members by establishing a fiduciary duty to hold, invest, and disburse pension trust funds solely in the best financial interest of members as pension recipients. Article IX, Section 18, of the Constitution states:

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.

This “exclusive benefit rule” is also reflected in the Maine Uniform Trust Code, which applies to the MainePERS Board of Trustees and states, “A trustee shall administer the trust solely in the interests of the beneficiaries.” 18-B M.R.S. § 802(1); see also 5 M.R.S. §17153(3). The exclusive benefit rule is further 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). Additionally, the MainePERS Board of Trustees must comply with the Maine Uniform Prudent Investor Act, which requires the Board to "invest and manage trust assets, as a prudent investor would, by considering the purposes, terms, distribution requirements and other circumstances of the trust." 18-B M.R.S. §902(1).

These existing legal requirements provide clear and sufficient guidance to the MainePERS Board, and further requirements are unnecessary.

Following the existing requirements, the Board has adopted policies that require Trustees to act solely in the interest of members as beneficiaries of pension and related benefits, including a policy that requires MainePERS to vote its proxies solely for that purpose. MainePERS publishes all of its proxy votes on its web site, something L.D. 1562 would unnecessarily require.

L.D. 1562 has language that appears to conflict with the Board's fiduciary duty under the Maine Constitution. For example, the bill would define environmental, social, and governance factors as "nonpecuniary" and restrict or prohibit consideration of these factors in investment decisions. However, these factors can affect the long-term value of investments, and to the extent they do, the constitutional fiduciary duty requires that they be considered.

The bill also appears to restrict or prohibit consideration of risks that are general, systemic or highly uncertain. However, the Constitution and the Maine Uniform Prudent Investor Act require the Board to consider all relevant risks.

L.D. 1562 is unnecessary and potentially conflicts with the Maine Constitution.

Thank you for your consideration of this testimony. I would be happy to answer your questions and will be available for the work session.