

KANSAS BOARD OF REGENTS
Retirement Plan Committee
MINUTES
September 18, 2008

The September 18, 2008, meeting of the Kansas Board of Regents Retirement Plan Committee was called to order by Regent Boettcher (at the request of Chair Lykins) at 12:30 p.m. The meeting was held in Board offices at the Curtis State Office Building, 1000 S.W. Jackson, Suite 520, Topeka.

Members Participating:

Jerry Boettcher, Regent
Mike Barnett, FHSU
Dr. Dipak Ghosh, ESU
Theresa Gordzika, KU
President Ed Hammond, FHSU
Dr. Rick LeCompte, WSU
Gary Leitnaker, KSU
Rick Robards, KUMC
Michele Sexton, PSU
Madi Vannaman, KBOR

Regent Dan Lykins was unable to participate because of scheduling conflicts. Also present were Brad Tollander and Jerry Karlin with Deloitte Consulting, John O'Brien and Cindy Delfelder with ING and Theresa Bush, KBOR's associate general counsel.

Minutes

The March 11, 2008, RPC minutes were approved with revision to the word on page 3, item 1: "statute" was changed to "status."

RPC Committee Appointment

Regent Boettcher welcomed Theresa Gordzika as a new member to the RPC. As CFO for the University of Kansas, and KU's representative on the Council of Business Officers, Theresa brings a wealth of financial and historical knowledge to the RPC.

Deloitte's semi-annual review through June 30, 2008

1. Brad Tollander reviewed the most recent economic summary noting that we are in the midst of a credit crisis, with speed and ferocity heretofore unseen. Brad noted there has been a significant flight to quality in the past several days, with investors seeking return of principal when in the past they sought return on principal. Participants in the KBOR plan continue to have lots of assets in money market/stable value accounts, and TIAA-CREF and ING bond ratings remain strong and are not a concern at this time.

President Hammond asked if there is any danger with the two Mandatory Retirement Plan companies. Brad stated that it is important to separate the assets of plan participants from the company itself and if there is any concern it would be with the stable value accounts as they are the general account product of the company. Brad stated that credit rating agencies continue to reflect strong ratings for those stable value accounts.

2. ING

Brad stated that the ING Alliance Bernstein fund stood out and he will inform ING that the fund has been placed on watch status for the next six months. If the fund performance does not improve, then Deloitte will discuss with ING options to remove or replace the fund. The RPC noted this is one of three funds ING proposed replacing in 2008. The other two funds are rated “green.”

3. TIAA-CREF

Brad noted differences in performance reported by Deloitte and TIAA-CREF for the TIAA Traditional Annuity. Because TIAA uses a “vintage system, which means different rates are established for funds applied at different times,” and Deloitte uses a quarterly return rate, the performance information can differ. Deloitte will continue to reflect the TIAA vintage rate as well as the Deloitte performance rate in the KBOR information.

The RPC requested additional information be provided about the vintage system and the TIAA real estate funds at the spring 2009 meeting.

4. Benchmark Recommendations

Brad recommended changes to benchmarks used for these funds:

a. ING Solutions funds (lifecycle) – When initially rolled out, ING selected very broad, static indexes as benchmarks including Lehman Brothers Aggregate, S&P 500 and Russell 3000. Recently, ING switched to the Dow Jones Target Series Indexes as the new benchmark. Brad stated that the new benchmark is more consistent with the asset allocation ING uses for the funds. Although still not an ideal benchmark, it is a better comparative tool and is more representative than the generic ones used previously.

The RPC voted to recommend to the Board that the Investment Policy Statement be amended to utilize the Dow Jones Target Series Indexes as the new benchmark for the ING Solutions funds and requested that Deloitte continue to show both the old and new benchmarks in its KBOR reports for a year at which time the old benchmarks will no longer be reported unless further questions are raised.

b. TIAA-CREF and ING Treasury Inflation Protected Securities - Brad reported that the Plan currently does not evaluate the fund against a peer group of TIP’s funds and recommended that KBOR utilize the recently introduced Lipper TIP’s mutual fund peer group as another point of reference for trailing returns and risk adjusted performance.

The RPC voted to recommend to the Board that the Investment Policy Statement be amended to utilize the Lipper TIP’s mutual fund peer group for the CREF Inflation-Linked Bonds and the PIMCO Real Return Bond

c. TIAA-CREF Social Choice fund – TIAA-CREF recently updated the benchmark for this fund, changing it from 60% S&P 500/ 40% Lehman Brothers Aggregate to 47% Russell 3000/13% MSCI EAFE+Canada/40% Lehman Brothers Aggregate. Brad recommended that KBOR use the new benchmark as international exposure is not captured in the S&P but is captured in EAFE. Additionally, the Social Choice fund is able to invest across the domestic market capitalization spectrum. The Russell 3000 Index captures approximately 98% of the US equity market cap making it a more appropriate benchmark relative to the S&P 500 which captures approximately 75% of the U.S. market capitalization.

The RPC voted to recommend to the Board that the Investment Policy Statement be amended to utilize the new benchmark for the CREF Social Choice Fund and requested that Deloitte continue to show both the old and new benchmarks in its KBOR reports for a year at which time the old benchmarks will no longer be reported unless further questions are raised.

5. KBOR specific Plan demographic data

Brad reported that he had just received from TIAA-CREF the accumulation information by campus and age brackets. He will compare that with information previously received from ING and will provide the RPC with the data. Brad will also work with the providers to make sure the data is provided on a semi-annual basis to coincide with the RPC meetings.

6. Regent Boettcher asked about the number of fund options available under the Mandatory Plan and whether an optimum number could be determined. Brad responded that for a company the average would be 17 options, but the number available under the KBOR plan is in line with other universities. Brad stated that the KBOR plan does not duplicate within the same asset class although the correlation between asset classes can be tight and it would be difficult to pare down the offerings now that they have been made available.

KBOR Draft Plan Document – Mandatory and Voluntary Retirement Plans

1. Loans under the Mandatory Plan

Staff recommendation: The loan provision in the Mandatory Plan, which is only available for Phased Retirees, should be removed because loans have not been utilized by these employees. Also, Phased Retirees can access up to 99% of their Mandatory Plan annuity funds, and at age 59 ½ can access up to 99% of their custodial account funds. Eliminating loans from the Mandatory Plan will minimize a potential area of abuse and non-compliance under the 403(b) regulations.

Deloitte supported this recommendation and stated that drafting and following a written plan loan policy with respect to Voluntary Plan loans would provide the necessary controls to facilitate compliance with the plan loan requirements, because one of the difficulties associated with administering any loan program is the coordination among the various vendors to implement the necessary controls to prevent violations of IRC Section 72(p).

KBOR will utilize planwise (pwe) to administer disbursements from the KBOR Mandatory and Voluntary Retirement Plans and, under the service agreement, pwe will administer the loan provision in accordance with the IRC.

The RPC voted unanimously to recommend to the Board that the Mandatory Retirement Plan eliminate the loan provision.

2. Eligibility to Participate in the KBOR Mandatory Plan for KBOR participants on leave to serve in an executive branch position

Staff recommendation: Remove this provision from the KBOR Mandatory Plan because the final 403(b) regulations do not allow employees in this situation to participate in the KBOR 403(b) plans. Additionally, next legislative session, the statute should be revised to remove this provision.

Deloitte stated it agreed “with Ice Miller’s conclusion that such unpaid leave of absence does not satisfy the eligibility requirements of a 403(b) plan under the Final Regulations or under the final regulations promulgated under IRC section 415 defining “includible compensation”.”

The RPC voted, with one dissent, to recommend to the Board that the Plan Document remove this provision and that the statute be modified next legislative session.

President Hammond voted against this recommendation as it potentially will disadvantage the KBOR participant, the KBOR state university and State of Kansas government if talented and qualified KBOR participants are not allowed to take a leave from the university to work in the executive branch and remain participants in the KBOR 403(b) plan. Additional information was requested from ING and Deloitte.

a. If the KBOR participant is placed on leave of absence from the state university and is employed and compensated by a non-KBOR state agency (executive branch position), will he/she be allowed to participate in the 457 mandatory retirement plan that is available for some positions on the Governor’s staff? Cindy Delfelder, ING, will provide information about that 457 plan eligibility.

b. Can the two state agencies enter into a professional services agreement that would permit the non-KBOR agency to pay the KBOR state university for the employee’s services resulting in the employee receiving compensation from the KBOR state university and participating in the KBOR Mandatory Retirement Plan? Are there other means by which a KBOR participant could remain in the KBOR Mandatory Retirement Plan while working for the executive branch? The issue that the RPC, and particularly Dr. Hammond, would like to resolve is if there is some lawful way for a university to “loan” an employee to the executive branch for some period of time and still allow that employee to participate in the KBOR retirement plan, without running afoul of the 403(b) regulations. Jerry Karlin, Deloitte, was asked these questions and to provide additional information about “performing services for a public school of the State,” “includable compensation” and whether this arrangement would qualify because “a person occupying an elective or appointive public office is not an employee performing services for an educational institution unless such office is one to which an individual is elected or appointed only if he has received training, or is experienced, in the field of education.”

3. Eligibility to Participate in the KBOR Mandatory Plan for KBOR participants who serve in the State Legislature

Staff recommendation: Based on information from Ice Miller, this provision can be retained to allow these individuals to be eligible to participate in the KBOR Mandatory Plan because it is “legal and reasonable.”

Deloitte stated “to the extent that such leaves of absence are temporary in nature and the participant essentially provides services to KBOR for part of the year then we agree that they may continue to participate in the plan and additionally, to the extent that their actual income received as includible compensation during the plan year exceeds the amount actually contributed to the plan on their behalf. Note that the draft Mandatory Plan currently provides for an employer contribution based upon the employees annual compensation in effect at the point immediately preceding their leave of absence, rather than actual compensation earned during the plan year, which we presume was intentional.” (Staff note: The contribution language was intentional, as the 8.5% will be paid based

upon that employee's compensation rate at the time the employee goes on leave of absence to serve in the state legislature.)

The RPC voted unanimously to recommend to the Board that the Plan Document retain the language allowing KBOR participants who serve in the State Legislature the option to remain in the KBOR Mandatory Retirement Plan.

4. Eligibility to Participate in the KBOR Mandatory Plan -KBOR Office Employees

Staff requested that Deloitte Consulting provide information and guidance on this topic so that an informed recommendation can be determined.

Deloitte stated "Therefore, to the extent that the Indirect Employees are considered to be providing services indirectly to an educational institution as determined pursuant to Final Regs and the Revenue Rulings cited..., which it appears they do, then such employees and staff are properly includible as eligible employees in the Plan and contributions made to the Plan on their behalf are properly excluded from their gross income."

The RPC voted to recommend to the Board that the Plan Document continue to reflect that KBOR Office employees are eligible to participate in the KBOR 403(b) plans.

5. Accessing KBOR Mandatory Plan funds when no longer employed by a KBOR state university/Board Office but employed with another State of Kansas agency

Staff recommendation: Allow these participants to access their KBOR Mandatory Plan funds because this flexibility is now permissible under the final 403(b) regulations.

Deloitte stated: "The Final Regulations provide that severance from employment is an allowable distribution event, and define severance from employment as the date on which an employee ceases to be an employee of an eligible employer. While we did not find the basis for Ice Miller's position that an employer may adopt a more restrictive definition, it appears that the KBOR preference is to adopt the definition in the Final Regulations. In KBOR's case, this would permit a distribution upon a severance of employment with any KBOR institution, even if they ultimately are employed by an other state agency which is, by definition not an entity eligible to sponsor a 403(b) arrangement. With respect to the 30 day waiting period questions, we do not believe that the Final Regulations would prevent KBOR from waiting 30 days to make a distribution in the case of a severance of employment to be consistent with other retirement plans. However, we do not see any compelling reason for KBOR to require a participant to sign a "no expectation of reemployment" form for any compliance or control purpose."

a. The RPC voted unanimously to recommend to the Board that access to KBOR Mandatory Retirement Plan funds be allowed when the participant is no longer employed by a KBOR state university/Board Office even if the participant is employed elsewhere, including another State of Kansas agency.

b. The RPC voted, with one dissent, to recommend to the Board that the Plan Document not impose a 30 day wait before funds can be accessed and that the Plan Document include information that the funds can be accessed as soon as "administratively feasible" (i.e., as soon as the separation

Retirement Plan Committee Minutes

September 18, 2008

Page 6

from employment information is electronically interfaced by the KBOR state university, received by planwith ease and the participant applies for distribution).

Rick Robards voted against the motion stating that this issue overlaps with the bona fide retirement issue that will be discussed at a spring 2009 RPC meeting, and decisions should be made at the same time on both topics.

c. The RPC voted unanimously to recommend to the Board that the Plan Document not impose a requirement that the participant indicate whether there is an expectation of pending re-employment with a KBOR state university or KBOR office.

6. In-service distributions while still employed at a KBOR state university or Board Office – when taking a temporary position (student or non-benefits eligible position)

Staff recommendation: After initially thinking these distributions should continue to be permitted, staff now agrees with both Ice Miller and Deloitte to disallow these distributions. Both Ice Miller and Deloitte questioned whether these were necessary, asked how frequently they occurred and cautioned that they would create the potential for abuse.

Deloitte stated: “The Mandatory Plan provided for in-service distributions when an employee either entered the Phased Retirement Program, takes a student position or takes a non-benefits eligible position, and that flexibility is retained in the draft Mandatory Plan document. We agree that the Final Regulations permit an in-service distribution of employer contributions held in annuity contracts upon the occurrence of a prior stated event. While these events are not permissible distribution events for purposes of custodial accounts or elective deferral events, it appears that they may be stated events for purposes of amounts contributed to an annuity contract. The draft Mandatory Plan language tracks these distribution events. However, to further augment Ice Miller’s comments, these distribution events do appear to impose additional administrative effort as well as present the opportunity for abuse on the part of participants. To the extent that these are not widely used by participants it would seem that it may be the better practice to eliminate these distribution events.”

The RPC voted unanimously to recommend to the Board that the Plan Document disallow in-service distributions while still employed at a KBOR state university or Board Office for those who take a temporary position (student or non-benefits eligible position).

After the changes delineated in 1-6 above were discussed and voted on, the RPC affirmed that the revised Plan Documents are ready to be placed on the Board of Regents agenda for consideration and approval. RPC recommendations that will change provisions in the current Plan Document will be presented to the Board.

7. The RPC agreed to review the following items at the next RPC meeting and requested that Deloitte provide information about these topics.

a. Aggregating retirement plan contributions and limits – if this topic has not been resolved before the next RPC meeting, it will be placed on the agenda.

The Mandatory Plan document states that "the Board shall determine which entities are Related Employers based on a reasonable, good faith standard and taking into account the special rules

applicable under Notice 89-23, 1989-1 C.B. 654." Ice Miller indicates that the compensation limits under Code Sections 402(g), 401(a)(16), 401(a)(17) and 415 are the areas that should be of concern for KBOR. Ice Miller states that it would be *"helpful if KBOR could determine whether or not it believes a controlled group exists between the Employers (private physician groups, athletic corporations)."*

Theresa Bush, KBOR's Associate General Counsel, has asked the state university General Counsels to gather information about "controlled groups," and to determine if additional assistance will be needed to make final determinations. If necessary, Deloitte will be asked to provide information and guidance to help the RPC on this topic.

b. Bona Fide Retirement

Whether a retirement is considered "bona fide" for IRS purposes is an issue that was discussed at the Advisory Committee on Retirement and Benefits (ACORB), comprised of HR and Benefits directors from the KBOR state universities. It was raised independently by Ice Miller during the Plan document review. It is presented to the RPC for a determination whether it should be further investigated: should KBOR be concerned if individuals are permitted to "retire" when there is a pre-arranged understanding or agreement to rehire the person?

Ice Miller indicates that if the employee knows they will be rehired then it is not a bona-fide retirement and there technically is no distributable event. Ice Miller indicates that although the IRS has never defined what constitutes "separation from service," based on case law and private letter rulings which are based on facts and circumstances, this "wink-wink type of retirement" is not bona fide. And although the IRS has never provided a time frame for bona fide retirement, many states/institutions have used 30 days; if the person terminates employment with no expectation of reemployment in 30 days, distribution of funds has been allowed even if that individual is later rehired.

Deloitte was asked to provide information and guidance to help the RPC determine whether a recommendation should be made on this topic, including what adverse impact, if any, there would be to the participant and/or to KBOR if the retirement is not deemed bona fide.

c. In-service distributions while still employed at a KBOR state university or Board Office – at a certain age

A financial representative with a company not currently approved by KBOR, who indicates he is working with KBOR plan participants, inquired about in-service distributions on or after age 59 ½ as they are permitted under the IRS 403(b) regulations. Historically, the KBOR plan has always required that a separation from service occur before funds can be accessed (with exceptions for Phased Retirement participants).

Although this issue may appear to be straight-forward on its face, it is complex and will impact other facets of the KBOR Retirement Plan (long term disability and whether KBOR would be required to provide on-going evaluation, monitoring and semi-annual review of the providers and funds for the KBOR Mandatory Plan).

Deloitte was asked to provide information and guidance to help the RPC on this topic.

d. Approved KBOR Voluntary Retirement Plan companies – the RPC will review the companies that remain on the KBOR approved listing to determine what, if anything, should be recommended about the number of companies remaining. Agents have been contacting KBOR asking about adding companies to the list.

Planwithease implementation

Cindy Delfelder and John O'Brien provided information about the status of planwithease, the third party administrator contracting with KBOR for 403(b) administration for regulatory compliance.

Cindy reviewed a color coded chart that showed the progress with the 50 403(b) companies that are part of the KBOR Voluntary Retirement Plan and their status: i) agreed to all of the data sharing requirements, ii) on-going discussions continue, iii) going out of the 403(b) business, or iv) have provided incomplete information or have not responded to two mailings from KBOR about data sharing requirements. Cindy will continue to proactively reach out to various 403(b) companies to finalize their status in the KBOR plan.

Although KBOR participants may have accumulations with non-approved companies, those companies will not share data through planwithease. Therefore, if participants want to take a loan, make a hardship withdrawal or otherwise access their funds, the KBOR state universities will have to develop a manual process to coordinate and ensure distributions from non-approved companies meet IRS requirements. Because the KBOR state universities will not have information about all of the participant's Plan assets, and that information cannot be self-certified by the participant, we will not be able to ensure that loans and hardship withdrawals meet IRS 403(b) compliance requirements.

Cindy Delfelder and John O'Brien recommended that stringent parameters be applied to non-approved companies. The RPC agreed to recommend to the Board that accumulations with non-approved companies have the following restrictions while the participant is actively employed with a KBOR state university or Board Office:

- a. accumulations can remain with the non-approved companies,
- b. accumulations can be moved from a non-approved company only to an approved KBOR 403(b) company,
- c. loans and hardship withdrawals will NOT be permitted,
- d. distributions at age 59 ½ or later will NOT be permitted, and
- e. distributions based on QDRO's will be permitted.

When the participant separates from service from the KBOR state university and/or Board Office, access to the funds will be authorized and the last employing state university/Board Office will certify to the non-approved company that the participant has separated from service and is authorized to access plan accumulations.

Next RPC meeting:

The next RPC meeting is scheduled for February 12, 2009, at 12:30 pm.