



**THE HONORABLE CURTIS M. LOFTIS, JR.**  
State Treasurer

**December 7, 2011**

**Mr. Allen Gillespie, Chairman  
Retirement System Investment Commission  
1201 Main St., Ste. 1510  
Columbia, SC 29201**

**Mr. Chairman and fellow Commissioners:**

As you know, on December 2, 2011, Robert Borden submitted a letter of resignation from the Retirement System Investment Commission ("Commission"). This resignation was effective immediately. On December 5, 2011, I sent a letter to each of the members of the Commission stating that the Commission should meet on Friday, December 9, 2011, to address a number of issues and that I would send to the members of the Commission another letter detailing my thoughts and concerns.

I am now providing the letter detailing my thoughts and concerns and am renewing my earlier request for a Commission meeting on Friday, December 9. This meeting will afford the Commission the opportunity it needs to fulfill its statutory and fiduciary responsibilities regarding Bob's resignation and related matters.

An immediate meeting of the Commission is necessary for many reasons. Most importantly, Bob resigned immediately as chief investment officer ("CIO") and chief executive officer (CEO") per his December 2, 2011 letter. The Commission now needs to meet and take a wide range of actions including, but not limited to, acting formally on Bob's resignation, making interim appointments, establishing a search for permanent replacement(s), deciding whether to retain Bob to assist the Commission during the transition, addressing internal controls and any conflicts of interest, and otherwise ensuring that the retirement plans' assets and the participants and beneficiaries are protected.

Bob's resignation raises several important issues regarding interim appointments, permanent replacements, and retaining Bob during the transition period. These issues are primarily governed by the statutes that give the Commission the sole authority to hire a CIO, to

employee a replacement CEO, and to engage outside professionals. See S.C. Code Ann. §§ 9-16-315(G), 9-16-340(A). Since Bob has resigned, retaining him, whether as an employee of the Commission or as an outside advisor, requires Commission action. In addressing these issues, the Commission and each of its members have a fiduciary duty to the retirement system trust and to the plans' participants and beneficiaries. See S.C. Code Ann. §§ 9-16-10(4), 9-16-40; Op. S.C. Att'y Gen. (Nov. 16, 2011).

The Chairman, acting in "real time" on December 2, designated certain staff to fulfill Bob's roles as CIO and CEO on an interim basis. He had to act on December 2 to assure stability of operations. I commend him for his leadership in response to Bob's resignation.

The Commission, having sole authority for hiring a CIO/CEO, now needs to meet to either ratify the Chairman's actions and/or to make these or other interim appointments, to begin a search for permanent replacement(s), and to decide whether to retain Bob in some type of consulting role. Please see attached legal opinion for more information.

In addition, there are a number of very important considerations to be given to the transition by the Commission at our Friday Commission meeting and subsequently;

- Commission members need to receive and review a copy of Bob's employment contract and all amendments ASAP.
- Bob stated in his letter of resignation that he intends to offer his services for up to sixty (60) days, although he is starting a large investment management firm out of state. If the Commission should decide to retain Bob for an interim period in some capacity, the Commission should define with specificity any role that Bob may have, determine if Bob has the time to effectively serve the Commission, and determine whether Bob's resignation and his current and future activities to operate a large investment management firm create any conflicts of interest that may pose a harm to the retirement systems' assets or its participants or beneficiaries.

If retained, the Commission should require that Bob execute a confidentiality agreement regarding the Investment Commission's investment strategy, execution, practices, policies and all related matters and agree not to recruit any Commission staff for his new investment management firm.

Additionally, if Bob is retained, to the extent possible, the Commission should clearly outline its expectations, the term, to whom he reports, and any reporting requirements to the Commission and its members. I do not believe that a report every two weeks would be unreasonable. Any retention of Bob should be subject to termination at any time for any reason.

The Commission should consider whether Bob would have any conflicts of interest if he is retained for another sixty days. In order to do this, the Commission would likely need to know a great deal more about Bob's future plans, role, duties, clients, and investment partners.

- I suggest that the Commission look at the Commission's by-laws and any other governing documents adopted by the Commission to ensure that they are adequate for this circumstance and not in contravention to prudent judgment and to shore them up as necessary during this process so that we are best prepared as we proceed.
- The Commission may want to seek the opinion of other large public pension funds, and perhaps even appropriate federal regulators, regarding exactly what should be done to fully protect the assets of the Retirement System during this period.
- The Commission may wish to consider requiring all Commission staff to adhere to a strict code of ethics that requires employees (and possibly contractors) to report contacts with the Commission's current investment advisors or other partners that may create a conflict of interest because, for instance, an employee is seeking a personal benefit (e.g., a job) from a current advisor to the Commission.
- The Commission may wish to charge the new interim CIO with the task of assessing the current portfolio and promptly advise the Commission of any recommended adjustments. Contracts and funding commitments already undertaken and approved should be permitted to move forward if the interim CIO believes they can be properly managed without Bob's direct involvement.
- During this transition process, the Commission's task will be facilitated by periodic, weekly or bi-weekly meetings among the interim CIO and the Chairman, with an invitation extended to all other members of the Commission to join by phone or otherwise. Those meetings should simply be used for communication, exchange of information and ideas, and to keep a finger on the pulse on the daily activities. The regular Commission meetings would still be the forum in which the Commission makes decisions; however, during this interim period it may be necessary to call several special Commission meetings.
- All fiduciaries, including the members of the Commission, the Budget & Control Board and the State Treasurer, may need to receive more information from the Commission and its staff during the transition period.
- The Commission will want to create a transparent and accountable system to recruit and hire the next permanent CIO. Input should be sought from all parties who have a fiduciary responsibility with respect to the Retirement System funds.

- A search committee should be formed immediately and begin the search quickly. The Commission would carefully consider salary, which is a subject that should be tackled fairly early in the process. The incentive component will need to be finalized quickly. I believe the Commission should take a new and fresh look at compensation and not assume that the present compensation and incentive structure is the proper place to start. The Commission may need outside assistance to responsibly address CIO/CEO compensation.

I look forward to working together with you and with other stakeholders in these matters. Hopefully these thoughts will be helpful to the Commission and its members as we work together to assure a successful transition and to continue to protect and preserve the trusts' assets.

Yours very truly,



Curtis M. Loftis, Jr.  
State Treasurer

CMLjr/afw  
Enclosure

cc: Mr. Reynolds Williams, Vice Chairman  
Mr. Edward Giobbe  
Mr. James Powers  
Mr. Travis Pritchett  
Mr. Robert Feinstein, RSIC Chief Legal Officer  
Members, Budget & Control Board



THE HONORABLE CURTIS M. LOFTIS, JR.  
State Treasurer

**MEMORANDUM**

**To:** Curtis Loftis, State Treasurer  
**From:** Bill Condon, General Counsel  
**Date:** December 6, 2011  
**Re:** Issues Raised by the Resignation of Robert Borden

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The recent resignation of Robert L. Borden as Chief Investment Officer ("CIO") of the Retirement System Investment Commission ("Commission") raises several issues. These issues include, but are not limited to, the following:

1. Who hires Mr. Borden's successor?
2. Who has the authority to appoint an interim CIO?
3. Who can retain Mr. Borden to assist with the transition to a new CIO?

A few preliminary matters should be stated before addressing these issues. First, Mr. Borden submitted a letter of resignation dated December 2, 2011, to Chairmen Gillespie. Mr. Borden's letter of resignation began as follows: "Please accept this letter as my formal resignation. I have accepted a position in the private sector, and I will offer my continued services for 60 days at the pleasure of the Commission. I look forward to working diligently during this time to ensure a smooth and orderly transition." Mr. Borden further states that his new "firm expects to launch in February of 2012 with 30 professionals and approximately \$1 billion of assets under advisement."

Second, the Commission was created by legislation in 2005. The Commission is composed of six members. S.C. Code Ann. § 9-16-315(A). The Commission has the exclusive authority, with some limitations, to invest and manage the assets of the South Carolina retirements systems. S.C. Code Ann. § 9-16-20(A); *see also* S.C. Code Ann. §§ 9-1-1310(A), 9-16-315(G).

Third, in exercising its authority to invest and manage the retirement systems' assets, the six-member Commission may hire employees and engage outside professionals. "To assist the commission in its investment function, it shall employ a chief investment officer, who under the direction and supervision of the commission, and as its agent, shall develop and maintain annual

investment plans and invest and oversee the investment of retirement funds. The chief investment officer serves at the pleasure of the commission . . . . The commission may employ the other professional, administrative, and clerical personnel it deems necessary . . . .” S.C. Code Ann. § 9-16-315(G). Additionally, “[t]he commission may employ or retain administrators, agents, consultants, or other advisors it considers necessary with respect to making investments.” S.C. Code Ann. § 9-16-340(A).

Finally, the Commission, its individual members, and other parties have a fiduciary duty to the retirement systems’ assets and to the plans’ participants and beneficiaries. The South Carolina Attorney General recently issued an opinion stating that the Commission, the Budget and Control Board, and the State Treasurer are co-fiduciaries regarding the assets of the retirement systems. Op. S.C. Att’y Gen. (Nov. 16, 2011); *see also* S.C. Code Ann. §§ 9-16-10(4), 9-16-40. In addition, each of the six members of the Commission is a fiduciary regarding these assets. S.C. Code Ann. § 9-16-10(4)(c). These fiduciary duties may be triggered, or have been triggered, by Mr. Borden’s resignation and the events leading up to it, by internal controls and policies and procedures being implemented during the transition period to a new CIO and/or CEO, and by the hiring or appointing of interim or permanent replacements.

#### Hiring Mr. Borden’s Successor

Mr. Borden has served as the Commission’s CIO. His letter states that he also served as the Chief Executive Officer (“CEO”) of the Commission. On December 2, 2011, he resigned from both positions. Mr. Borden’s letter of resignation began as follows: “Please accept this letter as my formal resignation. I have accepted a position in the private sector, and I will offer my continued services for 60 days at the pleasure of the Commission. I look forward to working diligently during this time to ensure a smooth and orderly transition.” From this language it seems clear that Mr. Borden’s resignation was immediate, and he will offer to assist the Commission for up to sixty days. The question arises who has the authority to hire Mr. Borden’s successor.

As stated above, the Commission hires the CIO and may employ other necessary personnel. *See* S.C. Code Ann. § 9-16-315(G). Based on this simple rule, the Commission has the exclusive authority to hire a CIO and to employ other personnel, including a CEO. Therefore, since Mr. Borden’s resignation was immediate, the Commission must take action to search for and hire appropriate personnel on a permanent basis.

#### Appointing Interim Replacements

Since Mr. Borden’s resignation was immediate and he has accepted another position which will clearly require some (or most) of his time, one or more persons must perform the tasks previously performed by Mr. Borden as CIO and CEO. Per Chairman Gillespie’s memorandum dated December 5, 2011, interim appointments to these positions have been made.

Because the Commission hires the CIO and employs other personnel, *see* S.C. Code Ann. § 9-16-315(G), the Commission has the statutory responsibility to make interim appointments to these positions. Assuming that the Commission has not properly delegated that appointment responsibility, the Commission must act to make or confirm the interim appointments.

### Retaining Mr. Borden for Sixty Days

As stated above, in his letter of resignation, Mr. Borden resigned and intends to offer his “continued services for 60 days at the pleasure of the Commission.” Mr. Borden further states that he will be working as a managing partner of a new firm with thirty professionals and approximately \$1 billion of assets under management and this firm will not be located in South Carolina. Mr. Borden states that he expects that his new firm will launch in February 2011. Mr. Borden’s new firm, FTA Partners, LLC, is an existing limited liability company that was organized in Delaware and is authorized to do business in North Carolina.

Some major issues exist regarding the retention of Mr. Borden. Based on the facts provided, Mr. Borden will clearly have much to do during the next sixty days to launch his new firm. He must employ and manage thirty professionals, obtain clients and arrange to have approximately \$1 billion of assets placed under his management, and establish banking and brokerage relationships with financial institutions, some of which may be the same financial institutions being used by the Commission. Additionally, as the new firm will not be located in South Carolina and will have an office on the West Coast of the United States, his availability to the Commission and its staff during the transition period may be limited. Finally, if Mr. Borden continues to serve the Commission as he launches his new investment management firm, certain conflicts of interest may exist.

In Chairman Gillespie’s memorandum dated December 5, 2011, he stated, “Mr. Borden will be given the title of Senior Advisor effective immediately,” although the full Commission has not taken any action regarding the retention of Mr. Borden. Additionally, it is unclear in what role Mr. Borden appears to have been retained, who retained Mr. Borden, and under what authority such person(s) retained Mr. Borden.

The Commission is charged with the hiring of all employees and outside professionals. *See* S.C. Code Ann. §§ 9-16-315(G), 9-16-340(A). Therefore, after his resignation and assuming that the Commission has not previously delegated this authority, only the Commission has the statutory authority to retain Mr. Borden as an employee or as an independent contractor. In fact, Mr. Borden appears to recognize the Commission’s statutory authority when stated that he intended to offer to assist for up to sixty days “at the pleasure of the Commission.” Accordingly, the apparent retention of Mr. Borden as a Senior Advisor is without merit, and the Commission should meet, discuss, and decide whether to retain Mr. Borden.

Additionally, if the Commission discusses retaining Mr. Borden in any role and for any period of time, the Commission and each of its members, as fiduciaries, should identify Mr. Borden’s role with specificity, determine if Mr. Borden has the time to perform the assigned tasks, and determine if any conflicts of interest may exist and how to control those potential conflicts. The Commission owes “the highest of fiduciary duties [] to the Retirement System trust.” *Op. S.C. Att’y Gen.* (Nov. 16, 2011). The Commission “must have the protection and preservation of that trust uppermost in mind and action.” *See Op. S.C. Att’y Gen.* (Nov. 16, 2011). Accordingly, the Commission and its members must act “with the care, skill, and caution under the circumstances then prevailing which a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an activity of like character and purpose.” S.C. Code Ann. § 9-16-40(3).