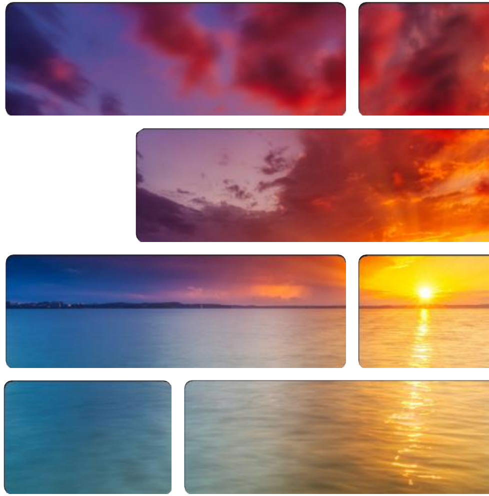
Fiduciary Duties & Sustainability Considerations



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VON HUGHES

Von Hughes is currently the Chief Executive Officer of Calvert Research and Management, a $40 billion investment management firm that specializes in responsible and sustainable investing across global capital markets. Calvert serves all types of investors through its family of mutual funds, ETFs, UCITS, and separate accounts. Von also serves as the President of Calvert's Mutual Fund Board. Prior to joining Calvert, Mr. Hughes was an Executive Committee member of PAAMCO Prisma, a global hedge fund solutions provider, where he built and headed the firm's $10B Global Strategic Advisory Group.

Mr. Hughes is the author of U.S. Public Pension Handbook: A Comprehensive Guide for Trustees and Investment Staff (McGraw-Hill 2019), which won a 2020 Axiom Business Book Medal and was a #1 new release on Amazon.com in four separate categories. He has also been an Adjunct Professor at Columbia Business School since 2021, teaching a course based on his book that he conceived and designed.

Mr. Hughes earned a BA graduating cum laude from Yale College. In addition, he earned a JD from Harvard Law School, where he was an editor on both the *Harvard Law Review* and the *Civil Rights and Liberties Law Review*, and an MPP from Harvard's Kennedy School of Government. Mr. Hughes is also a retired member of the New York State Bar.

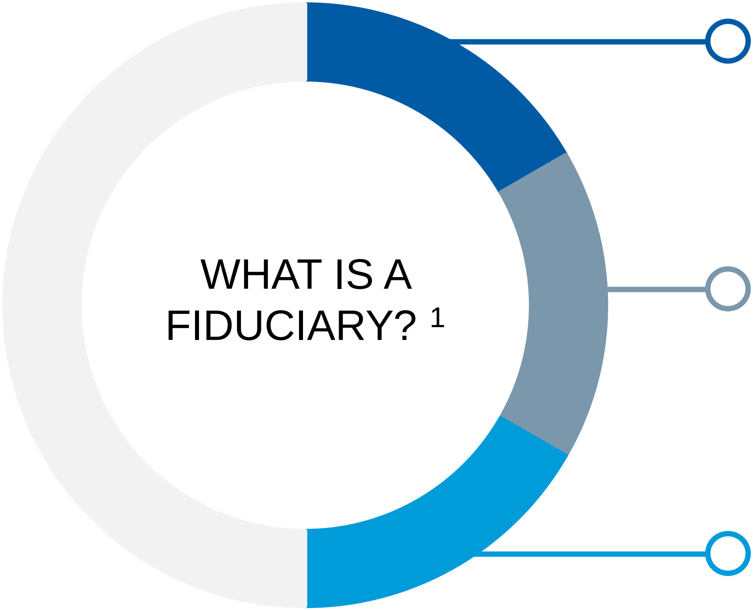
TIFFANY REEVES

Tiffany Reeves leads the Institutional Investor practice at Faegre Drinker. She is a trusted adviser to institutional investor clients in domestic and international private investments. Tiffany's experience extends to a broad range of alternative investment strategies, including buyouts, credit, venture, real estate, infrastructure, energy and natural resources. She also advises institutional investor clients on fiduciary, governance, legislative and general administration matters. Tiffany has significant experience advising institutional asset owners on best practices. She regularly advises clients on private equity fund due diligence, U.S. Regulatory developments, custody and securities lending matters, secondary transactions, sustainability and corporate governance.

Tiffany served as the chief legal officer and deputy executive director for a defined benefit public employee retirement fund, where she was responsible for a variety of investment matters including negotiation and review of private equity, private real estate and public market investments. Tiffany is active in several institutional investor groups, including the National Association of Public Pension Attorneys, the Council of Institutional Investors and the Intentional Endowment Network, among others.

Fiduciary Responsibility

Fiduciary Responsibility:



A fiduciary is any person or entity who makes, or has the authority to make, discretionary administrative or investment decisions related to the retirement plan

A fiduciary is any person or entity who is named in a retirement plan or trust document as a fiduciary

An entity or individual may be a fiduciary either by designation or by function:

Usually, a functional test to determine whether a person has the necessary discretion, authority, or control over the administration of the plan or management of the assets

1. Internal Revenue Code § 4975 (e)(3); ERSIA § 3(21)

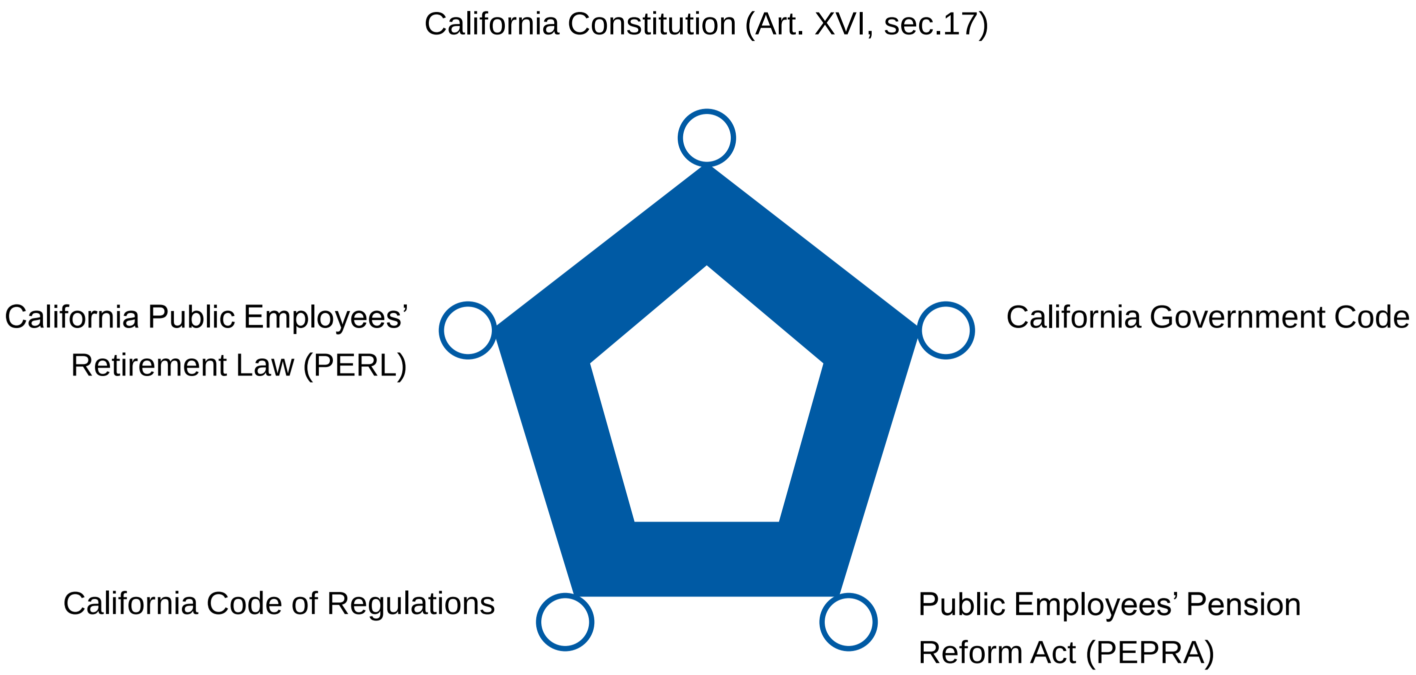
Fiduciary Responsibility: Who is Fiduciary?

- All Board members and trustees are fiduciaries, without exception, to each of the retirement plans they are responsible for administering
- Key internal executive staff are fiduciaries through Board delegation of responsibility:
  - CIO
  - Directors (Administration and Audit)
- Other internal staff can have delegated authority
- A person’s fiduciary duty is limited to the scope of their delegated responsibility
- External service providers who are usually fiduciaries:
  - Investment managers
  - Investment consultants, under ERISA rendering investment advice for a fee
- Custodian banks (for certain functions)
- But some external service providers (actuaries, attorneys, auditors, brokers, etc.) are not ordinarily considered fiduciaries
- Usually those performing ministerial tasks are not fiduciaries

Sources of Standards & Guidance

CA Constitution	CA Statutes & Regulations	Court decisions and common law of trusts	ERISA and other pension fund laws/regulatory guidance
Restatement of Trusts	Practices of other similar fiduciaries	Attorney General Opinions	Advice of legal counsel
Internal Revenue Code	Model Codes	Governance Policies	Code of Ethics and Conduct

Applicable California Laws



Fiduciary Responsibility: Primary Duties [1]

DUTY OF PRUDENCE	DUTY WITH RESPECT TO CO-TRUSTEES
DUTY OF LOYALTY	DUTY TO FURNISH INFORMATION TO BENEFICIARIES
DUTY OF IMPARTIALITY	DUTY TO SEGREGATE AND IDENTIFY TRUST PROPERTY
DUTY WITH RESPECT TO DELEGATION	DUTY TO FOLLOW LAW PLAN DOCUMENTS

1. As outlined in Restatement (Third) of Trusts (2003).

Fiduciary Responsibility: Prudence [1]

DUTY OF CARE	• Make reasonable effort and diligence in administering and monitoring the trust • Review relevant information • Conduct appropriate investigation concerning a particular action • “Do your homework” rule
DUTY OF SKILL	• Exercise the skill of an individual of ordinary intelligence • Understand the basic duties of prudent trusteeship • Possess the necessary skill or rely on competent guidance to satisfy the standard of care • Required to use the specialized skill (financial or legal) • “If you have it use it; if not, hire it” rule
DUTY OF CAUTION	• Exercise the caution of a prudent person managing similar assets for similar purposes • Level of caution considered reasonably appropriate, given the circumstances • “Proceed with caution in decision-making” rule

1. U.S. Public Pension Handbook: A Comprehensive Guide For Trustees and Investment Staff (McGraw- Hill 2019), p.316-318 discussing Restatement (Third) of Trusts (2003), §77 subsections (1) and (2).

Fiduciary Responsibility: Being Prudent

- Duty of prudence is a test of a trustee’s conduct, not the result of that conduct
  - Evaluated under the circumstances at the time of behaviour
  - Not with hindsight or by taking account of developments that occurred after the trustee action
- Depends on whether a trustee can demonstrate that he or she engaged in appropriate due diligence before acting

EXAMPLE 1	• Trustees found to have acted imprudently in a real estate purchase because they neither obtained a property valuation/appraisal nor participated in any of the negotiations (*U.S. v. Mason Tenders District Council of Greater, N.Y.,* 909 F. Supp. 882 (S.D.N.Y. 1995))
EXAMPLE 2	• Trustees acted imprudently in their attempts to commit 23% of the plan’s total assets in a single loan (*Marshall v. Glass/Metal Assoc.& Glaziers & Glassworkers Pension Plan*, 507 F. Supp. 378 (D. Haw. 1980))
EXAMPLE 3	• Imprudence cannot be established by evidence only of a loss in investment value of an asset (*White v. Martin*, 286 F. Supp. 2d 1029 (D. Minn. 2003))

Fiduciary Responsibility: The Prudent Investor Rule [1]

- The Prudent Investor Rule is the practical application of the duty of prudence to the investing activity
- The Prudent Investor Rule established and codified three key provisions in Restatement (Third):
  - First, the Rule replaced the ordinary prudence standard of the Restatement (Second) with a “prudent investor” standard
  - Second, the Rule created a positive duty to diversify the investments of the trust
  - Third, the Rule imposed additional affirmative duties on trustees, requiring “ongoing duty to monitor investments and to make portfolio adjustments if and as appropriate”
- One of the most significant developments of trust law and public pension portfolio management

NOTE: **Under Article XVI, Section 17, of the California Constitution** a fiduciary must “diversify the investments of the system so as to minimize the risk of loss and to maximize the rate of return, unless under the circumstances it is clearly prudent not to do so.” **Under ERISA***, the “duty to diversify is not measured by hard and fast rules or formulas. Congress has instructed that ‘[t]he degree of investment concentration that would violate this requirement to diversify cannot be stated as a true percentage, because a prudent fiduciary must consider the facts and circumstances of each case.’” (In re Unisys Sav. Plan Litig., 74 F.3d 420, 438 (3d Cir. 1996) (citing 1974 U.S. Code Cong. & Admin News 5038, 5085).)

1. U.S. Public Pension Handbook: A Comprehensive Guide For Trustees and Investment Staff (McGraw-Hill 2019), p.366-367 discussing Restatement (Third) of Trusts (2003), §90.

California = Prudent Expert Standard [1]

PERL § 20151(c)

- The board and its officers and employees shall discharge their duties with respect to this system solely in the interest of the participants and beneficiaries…[b]y investing with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an enterprise of like character and with like aims
- Article XVI, Section 17, a fiduciary must discharge its duties:
- With the care, skill, prudence, and diligence then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims

1. As interpreted by case law.

Interpreting Prudence: Additional Case Law Guidance

- Courts have interpreted the duty of prudence to be a “prudent fiduciary with experience” standard
- The question is whether the fiduciary, at the time it made the decision, employed the appropriate methods. (California Ironworkers Field Pension Trust v. Loomis Sayles & Company, 259 F.3d 1036, 1043 (9th Cir. 2001).)

Skill required of trustees

- The “prudence standard is ‘not that of a prudent lay person, but rather that of a prudent fiduciary with experience dealing with a similar enterprise’.” Whitfield v. Cohen, 682 F. Supp. 188, 194 (S.D.N.Y. 1998) (quoting Marshall v. Snyder, 1 Empl.Ben. Cases (BNA) 1878, 1886 (E.D.N.Y. 1979))
- A fiduciary need not be the expert, but may need to consult an expert. When using experts, the fiduciary may take into consideration the advice of experts; however, the fiduciary retains ultimate liability for those responsibilities (including the selection and monitoring of the expert). (Donovan v. Mazzola, 716 F.2d 1226, 1235 (9th Cir. 1983).)

Fiduciary Principle: Prudence (Cont'd)

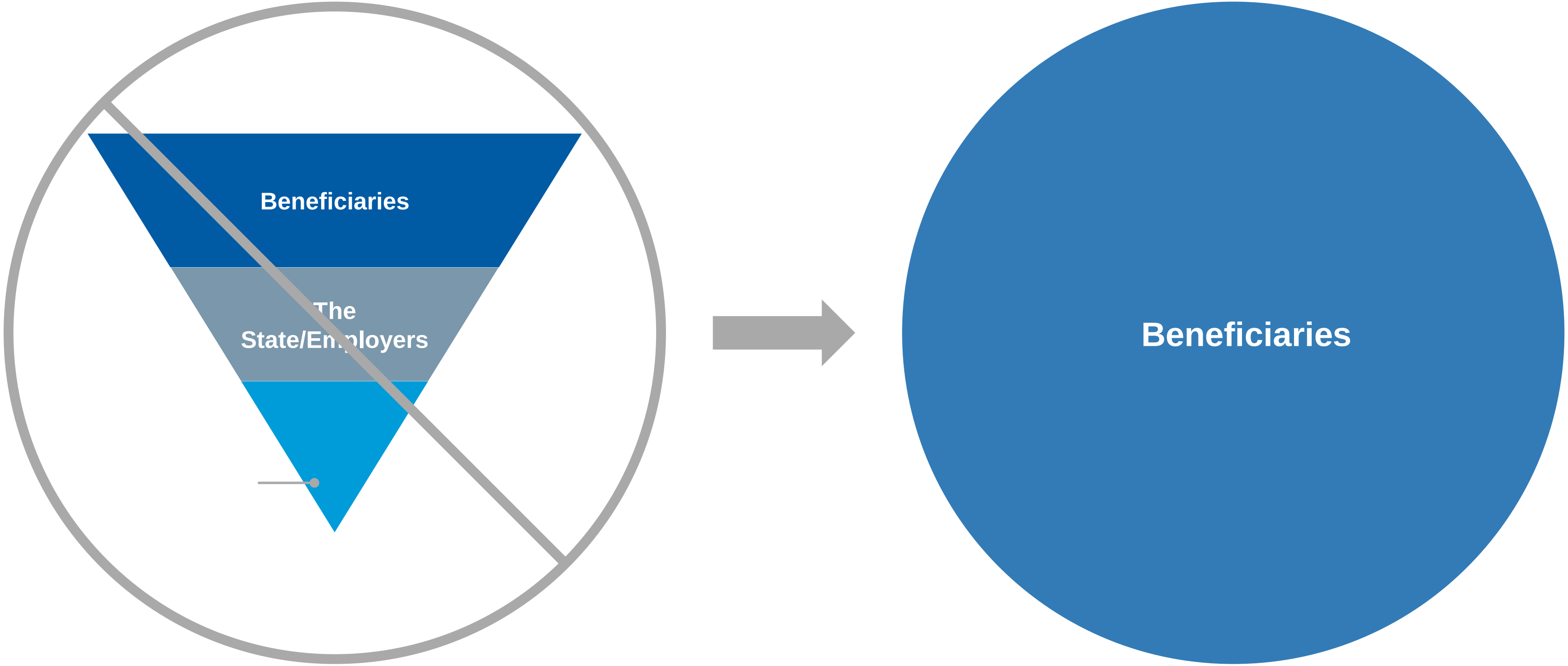
Peer practices serve as a reference point but are not dispositive. Mindless herding around similar practices should be avoided.

Fiduciary Responsibility: Duty of Loyalty [1]

UNDIVIDED LOYALTY	• Heart of the fundamental relationship between trustee and beneficiary • A trustee must act “solely in the interest of the members and beneficiaries” • A trustee is required to put beneficiary interest before self • “It’s all about the beneficiaries” rule
FAIR DEALING	• Trustees required to deal with beneficiaries fairly • Communicate to beneficiaries all material facts on matters • Applies to all trustee/beneficiary interaction, including personal or outside of scope of trust relationship • At issue is the trustee’s position of influence/ability to exert influence over beneficiary • “Don’t hustle the beneficiaries” rule
NO SELF DEALING	• No transactions involving trust property, or affecting trust property, if the transaction is for the trustee’s personal benefit • Avoid conflicts of fiduciary duty and personal interest • Must avoid transactions that may cause future conflict between fiduciary duty and personal gain • “Trusteeship is not for personal gain” rule

1. U.S. Public Pension Handbook: A Comprehensive Guide For Trustees and Investment Staff (McGraw- Hill 2019), p.318–320 discussing Restatement (Third) of Trusts (2003), §78.

Duty of Loyalty – To Whom?



Fiduciary Responsibility: Duty of Impartiality [1]

IMPARTIALITY	• Administer trust in a manner impartial to the various beneficiaries in a trust • Guide to manage the unavoidable conflicting duties to beneficiaries with potentially competing economic interests • Requires a balancing that shows due regard for, and is consistent with, terms and purposes of trust • Applies to consulting and communicating with beneficiaries • Prevents personal favoritism (or animosity) toward individual beneficiaries in decision-making • “No beneficiary favoritism” rule
INCOME PRODUCTIVITY	• Must invest and administer trust to produce income reasonably appropriate to the present and future interest of beneficiaries • Duty not to retain or purchase unproductive or underproductive property causing inadequate income yield • Duty applies to whole trust portfolio, not individual assets • “Invest for today’s and tomorrow’s beneficiaries” rule
EXAMPLES	• Duty of impartiality breached by adopting a pension plan amendment that was drafted by a union representative with no independent review that conferred benefit primarily to that union (Deak v. Masters, Mates & Pilot Pension Plan, 821 F.2d 572 (11th Cir. 1987)) • Duty of impartiality not breached when trustees approved benefit increases greater for employees still working than those already retired and receiving a pension. Court reasoned there could be a good business and actuarially sound reason for the proposed increase (Mahoney v. Bd. of Trs., 973 F.2d 968 (1st Cir. 1992))

1. U.S. Public Pension Handbook: A Comprehensive Guide For Trustees and Investment Staff (McGraw-Hill 2019), p.320–321, discussing Restatement (Third) of Trusts (2003), §79.

Duty of Impartiality = Balancing Act

The common law of trusts [made applicable to ERISA §§404, 409] recognizes the need to preserve assets to satisfy future, as well as present, claims and requires a trustee to take impartial account of the interest of all beneficiaries.

Varity v. Howe, 516 U.S. 489 (1996)

Fiduciary Responsibility: Summary [1]

PRIMARY DUTY	SPECIFIC OBLIGATIONS	"SHORT HAND" RULE
I. DUTY OF PRUDENCE		**"Prudence is paramount"**
	i. Duty of Care	"Do your homework" rule
	ii. Duty of Skill	"If you have the skill, use it; if not, hire it" rule
	iii. Duty of Caution	"Proceed with caution in decision-making" rule
II. DUTY OF LOYALTY		**"Loyalty is a must"**
	i. Duty of Undivided Loyalty	"It's all about the beneficiaries" rule
	ii. Prohibition Against Self-dealing	"Trusteeship is not for personal benefit" rule
	iii. Duty of Fair Dealing	"Don't hustle your beneficiaries" rule
III. DUTY OF IMPARTIALITY		**"No beneficiary favoritism"**
	i. Duty of Income Productivity	"Invest for today's and tomorrow's beneficiaries" rule
IV. DUTY WITH RESPECT TO DELEGATION		"Trustees need to help too"
	i. Duty of Prudent Delegation	"Delegation requires prudence" rule
	ii. Duty to Monitor and Supervise	"Watch your agents" rule
V. DUTY WITH RESPECT TO CO-TRUSTEES		**"Trusteeship is a team sport"**
	i. Duty and Right to Active Participation	"Participate and don't exclude" rule
	ii. Duty of Reasonable Cooperation	"Can we all just get along" rule
	iii. Duty to Prevent Co-Trustee Breach	"I am my brother's keeper" rule
VI. DUTY TO FURNISH INFORMATION TO BENEFICIARIES		**"Keep beneficiaries in the know"**
	i. Duty to Keep Records and Provide Reports	"Keep, report, and then report again" rule
VII. DUTY TO SEGREGATE AND IDENTIFY TRUST PROPERTY		**"Keep trust property separate"**
VIII. DUTY TO FOLLOW THE LAW AND PLAN DOCUMENTS		**"Be by the book" rule**

1. U.S. Public Pension Handbook: A Comprehensive Guide For Trustees and Investment Staff (McGraw-Hill 2019), p.315 .

Sustainability Considerations

Defining Sustainable Investing

Sustainable Investing is a spectrum of practices that uses environmental, social and governance (ESG) information and criteria to inform investment decision making and drive investment performance alongside improved sustainability practices and outcomes.

Sustainable Investing Approaches

Typically Implemented in Combination Across a Portfolio

MINIMIZE NEGATIVE IMPACT → MAXIMIZE TARGET IMPACT

RESTRICTION SCREENING	ESG INTEGRATION	THEMATIC INVESTMENTS	IMPACT INVESTING
Intentionally avoiding investments in certain sectors or issuers based on values or risk based criteria	Considering ESG criteria alongside financial analysis to identify risks and opportunities throughout the investment process, which may lead to decisions to avoid, include or size certain investments	Tilting investments toward certain themes and sectors positioned to solve global sustainability-related challenges	Allocating to funds or enterprises intentionally structured to deliver a specific and measurable set of positive social and/or environmental impacts alongside the potential for market-rate financials returns

COMPANY/ISSUER ENGAGEMENT

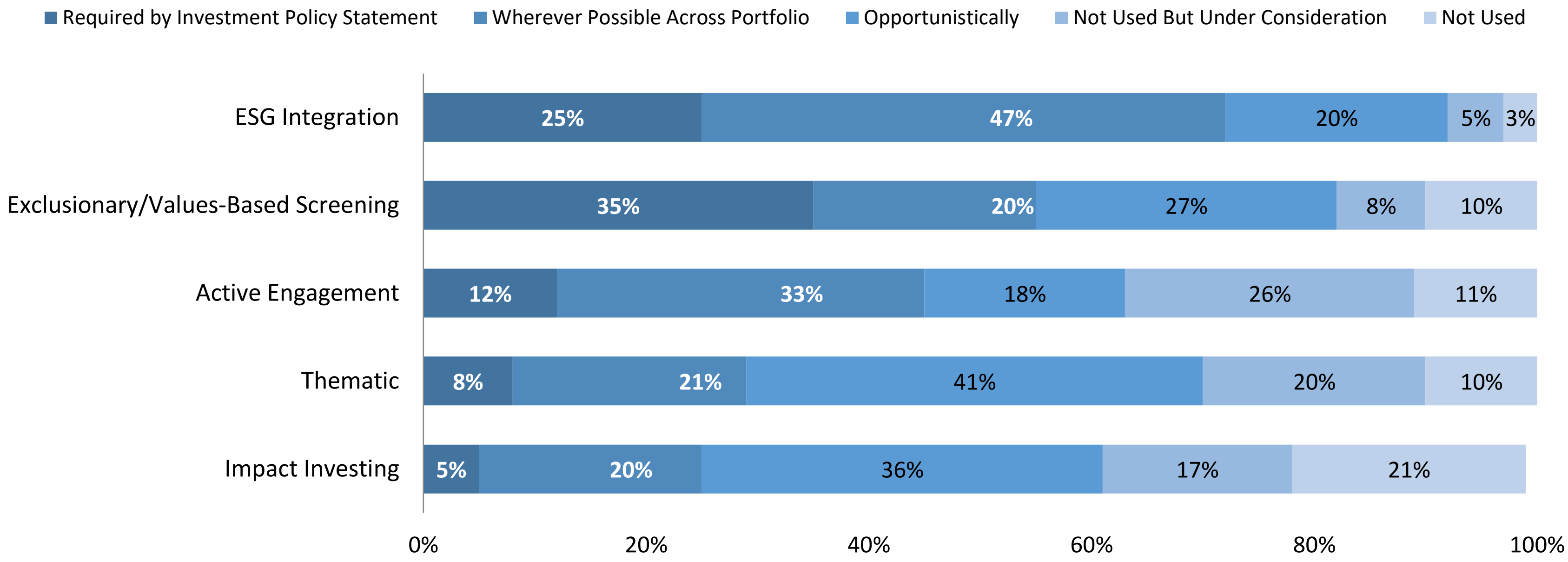
Seeking to drive improvement in ESG activities or outcomes through proxy voting and/or active dialogue with invested companies/issuers

APPROACHES TO SUSTAINABLE INVESTING	MANAGE DOWNSIDE RISK/VOLATILITY	MANAGE & IMPROVE ESG QUALITY	CAPTURE UPSIDE OPPORTUNITY
Restriction Screening	✓	✓	
ESG Integration	✓	✓	✓
Thematic Investments		✓	✓
Impact Investing			✓
Company/Issuer Engagement	✓	✓	✓

Source: Morgan Stanley, Crafting a Dynamic Sustainable Investing Strategy, September 2020

No ‘One-Size-Fits-All’ Approach to Sustainable Investing*

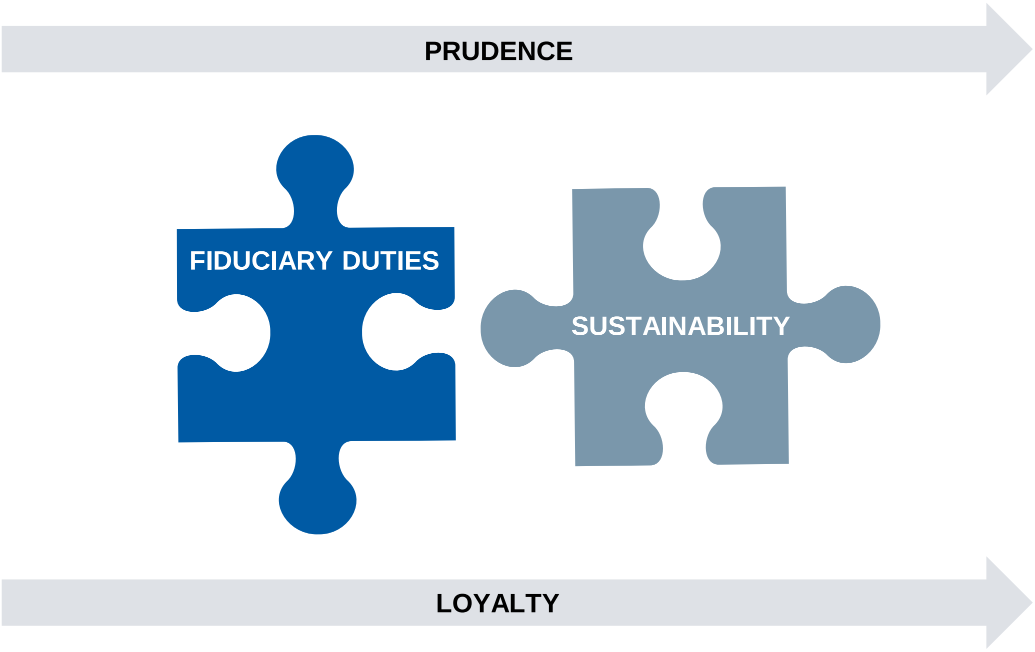
Global Institutions Pursuing Sustainable Investing See Opportunities Across Implementation Approaches



*Institutional investors are diverse groups that are subject to different fiduciary and legal requirements and other guardrails that may restrict or prohibit certain approaches to sustainable investing.

Source: Morgan Stanley Institute for Sustainable Investing and Morgan Stanley Investment Management, “Sustainable Signals: Asset Owners See Sustainability as Core to the Future of Investing,” 2020.

How Sustainability Fits



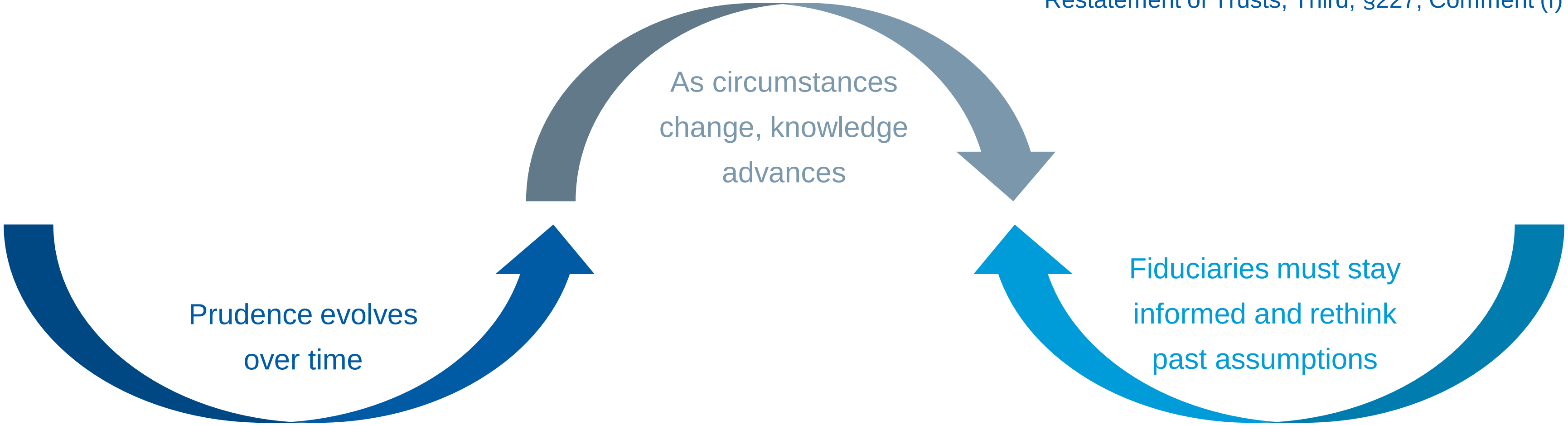
"Trust investment law should reflect and accommodate current knowledge and concepts. It should avoid repeating the mistake of freezing its rules against future learning and developments."

Restatement of Trusts, Third, §227, Introduction

“

There are no universally accepted and enduring theories of financial markets or prescriptions for investment that can provide clear and specific guidance to trustees and courts.

Restatement of Trusts, Third, §227, Comment (f)



Shifting Regulatory Guidance

1994	2008	2015	2016	2018	2020	2021	2022
“All things being equal” test	A fiduciary cannot subordinate the interests of its participants in favor of unrelated objectives	ESG factors are proper components of the fiduciary’s primary analysis of the economic merits of competing investment choices	ESG factors factors must present material business risk or opportunities	Sole focus economic considerations that have a material effect on risk and return over appropriate time horizons	No subordination of returns in favor of non-pecuniary goals	The current administration announced that it will not enforce ESG investment regulations adopted near the end of the prior administration	**The final rule permits fiduciaries to consider the economic effects of climate change and other ESG factors where relevant to the risk-return analysis**

1. While federal private pension and mutual fund regulatory actions do not apply directly to public pension plans, which are primarily governed by state and local law, federal regulations can be persuasive for interpretation of public pension law.

2022 Final Rule:

Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights

Clarifies the application of ERISA's fiduciary duties of prudence and loyalty

Investment decisions or investment courses of action must:

- Be based on factors reasonably determined to be relevant to risk and return
- Use appropriate time horizons consistent with the plan's investment objectives and accounting for its funding policy

Risk and return factors may include the economic effects of climate change and other ESG factors

The weight given to any factor should appropriately reflect an assessment of its impact on risk and return

Financial Materiality

A risk or opportunity that is likely to affect the financial condition or performance of a business or its competitive positioning over a long-term investment horizon.

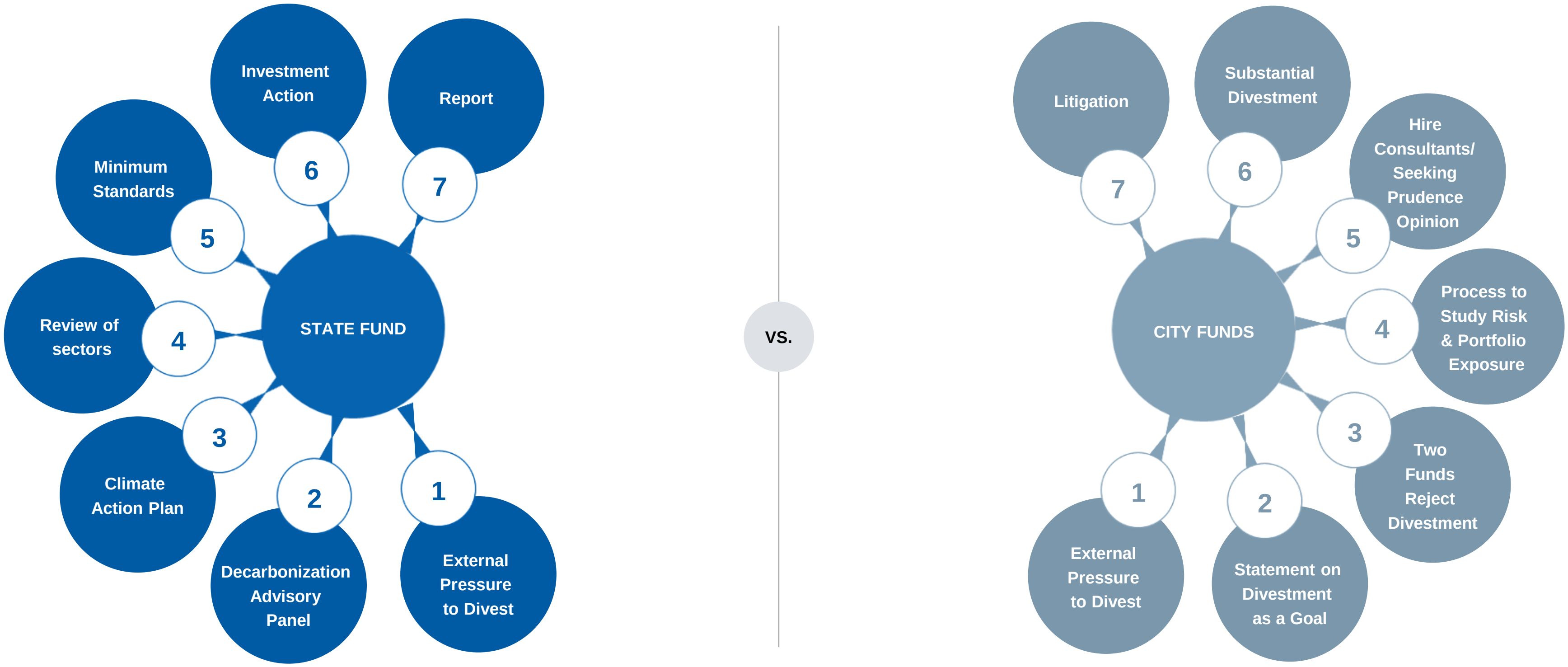
Operational Impact	Issue that will impact the financial condition of the issuer's business or its competitive advantage within its industry
Legal or Regulatory Risk	Issue that will raise legal or regulatory risk for the business
Reputation and Brand Value	Issue that will impact the value of intangible assets such as consumer trust or ability to attract workers

"The omission or misstatement of an item in a financial report is material if, in the light of surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasonable person relying upon the report would have been changed or influenced by the inclusion or correction of the item."[1]

1. FASB, Statement of Financial Accounting Concepts No. 2, Qualitative Characteristics of Accounting Information ("Concepts Statement No. 2"), 132 (1980). See also Concepts Statement No. 2, Glossary of Terms - Materiality.

What | **Why** | **How**

Fiduciaries should treat ESG factors the same way that they treat any other relevant risk and return factors


STATE FUND
1
External Pressure to Divest
2
Decarbonization Advisory Panel
3
Climate Action Plan
4
Review of sectors
5
Minimum Standards
6
Investment Action
7
Report
VS.
CITY FUNDS
1
External Pressure to Divest
2
Statement on Divestment as a Goal
3
Two Funds Reject Divestment
4
Process to Study Risk & Portfolio Exposure
5
Hire Consultants/ Seeking Prudence Opinion
6
Substantial Divestment
7
Litigation

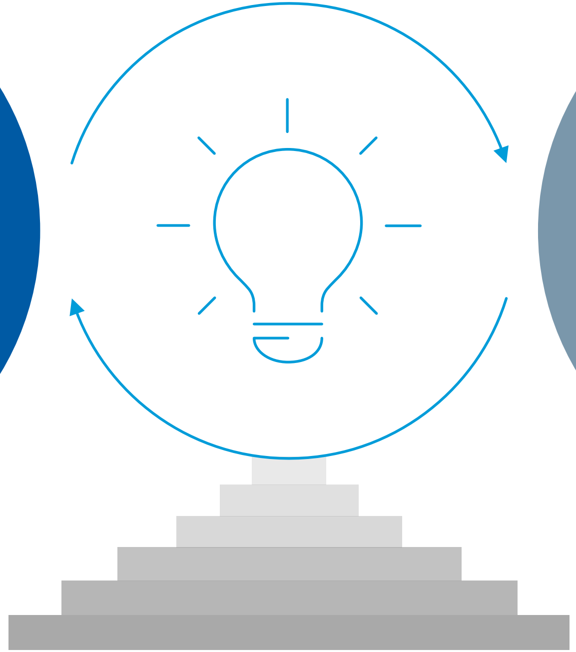

Strategy
Structure Optimization
Select & Instruct Delegates
Oversight
Independent Reassurance
Process & Diligence
Consulting Outside Experts
Objectives & Policies
Framework for Fiduciary Process

Key Attributes of Leading Peer Practices

- ESG / Sustainability Beliefs
- Informed Priorities
- Integrated, Multi-Dimensional & Adaptive Strategies
- Transparency & Accountability

INVESTMENT PROCESS & BELIEFS

- Principles
- People
- Objectives & Goals
- Policies
- Priorities
- Strategies



INFORMED BY

- Research
- Education
- Diligence & Evaluation
- Qualified Experts
- Macro Trends/ Developments
- Peer Practices vs. Fit
- Collaboration
- Laws/Regulations

What Questions/Comments do You Have?

Appendix

Fiduciary Duty: Delegation [1]

PRUDENT DELEGATION	• Trustee must perform his/her responsibilities personally, except as a prudent person of comparable skill might delegate those responsibilities to others • Prudent delegation is a matter of fiduciary judgment and discretion • Prudence may actually require trustee delegation • Trustee action based on consultation with and/or advice from others is not delegation • Limitations on delegation do not apply to delegation among and between trustees • “Delegation requires prudence” rule
MONITOR AND SUPERVISE	• A post-delegation responsibility • Requires same fiduciary discretion in monitoring and supervising of a trustee’s delegate (agent) as was used in the decision to delegate • “Watch your agents” rule
EXAMPLES	• Trustee violated duty to properly delegate by delegating Authority for the management of a real estate fund to a trust officer with neither the experience nor expertise in managing real estate (Krug v. Krug, 838 S.W. 2d 197 (Tenn. App. 1992)) • Trustees abused discretion in delegating the responsibility to monitor an investment fund to internal staff when that staff was without sufficient size or expertise to effectively monitor. Court concluded that delegation to external assistance with necessary expertise would have been necessary to satisfy duty (Harley v. Minnesota Mining & Mfg., 42 F. Supp. 2d 898 (D. Minn. 1999))

1. U.S. Public Pension Handbook: A Comprehensive Guide For Trustees and Investment Staff (McGraw-Hill 2019), p.321–324, discussing Restatement (Third) of Trusts (2003), §78.

Fiduciary Responsibility: Prudent Delegation

- Trustees delegate the performance of specific duties, functions, or powers of trusteeship
- Common forms of trustee delegation:
  - Internal investment staff
  - Internal administrative staff
  - External investment managers
- Five parameters of prudent delegation: [1]
  - FIRST, certain functions cannot be delegated, must still be personally done
  - SECOND, prudent only if would have been a prudent decision by someone of comparable skill
  - THIRD, delegation may be an affirmative duty
  - FOURTH, must exercise reasonable care, skill, and caution in selecting agents and determining the terms/scope of delegation
  - FIFTH, must act with prudence in supervising and monitoring agent's performance and compliance
- Pension evolution will turn on how pensions address the duty of prudent delegation within the context of increasing plan size and portfolio complexity

1. U.S. Public Pension Handbook: A Comprehensive Guide For Trustees and Investment Staff (McGraw-Hill 2019), Chapter Fifteen "Delegation and Pension Evolution," p.365–378.

Fiduciary Responsibilities: Co-Trustees [1]

ACTIVE PARTICIPATION	• Both a duty and a right • Requires active trustee participation in affairs of the trust • Prevents a trustee from being excluded from decision-making • “Participate and not exclude” rule
REASONABLE COOPERATION	• Maintenance of effective trustee working relationship a must • Establishes a need for basic levels of civility and decorum among trustees • “Can we all just get along” rule
CO-TRUSTEE BREACH	• Prevents knowingly allow a co-trustee to breach that co-trustee’s fiduciary responsibility • If breach occurs, trustee must take reasonable steps to compel co-trustee to remedy breach • “I am my brother’s keeper” rule
EXAMPLE	• Court found that co-trustees should conduct themselves so as to “foster a spirit of mutual trust, confidence, and cooperation to the extent possible” (Ball v. Mills, 376 So.2d 1174 (Fla. App. 1979))

1. U.S. Public Pension Handbook: A Comprehensive Guide For Trustees and Investment Staff (McGraw-Hill 2019), p.324–325 discussing Restatement (Third) of Trusts §81.

Fiduciary Responsibility: Information & Property Segregation [1]

INFORMATION TO BENEFICIARIES	• Must promptly inform fairly representative beneficiaries of basic trust information, their status (and any changes) as beneficiaries, and any other information material to their interests • "Fairly representative beneficiary" means cross-section of beneficiaries reflecting diverse interests and concerns • Must promptly respond to beneficiary requests for information • Must keep and maintain clear, complete, and accurate books regarding trust property (periodic reporting) • Must permit beneficiaries to inspect trust document, records, and holdings • "Keep beneficiaries in the know" rule
SEGREGATION & PROPERTY IDENTIFICATION	• Must segregate, and not commingle, trust property from the trustee's own property and other property not subject to the trust • Identification requirement is primarily for fraud protection • Requiring identification focuses on making trustee misconduct or abuse easier to detect • "Keep trust property separate" rule
EXAMPLES	• Court found that a trustee who invested plan employee benefit assets without separating the investments from his own breached duty to segregate (Rodrigues v.Herman, 121 F.3d 1352(9th Cir.1997)) • Trustees violated duty to segregate when trustees misused assets of one trust for the fees and operating expenses of another trust (unauthorized and undocumented cross-usage of funds) (In Re Will of Crabtree, 865 N.E. 2d 1119(2003))

1. U.S. Public Pension Handbook: A Comprehensive Guide For Trustees and Investment Staff (McGraw-Hill 2019), p.325–27, discussing Restatement (Third) of Trusts §82 and §84 .

Fiduciary Responsibilities: Law and Plan Documents

- "The Trustee has a duty to administer the trust diligently and in good faith, in accordance with the terms of the trust and applicable law" (Restatements (Third) §76)
  - Commonly the duty to follow the law and plan documents
- An affirmative duty: breach of trust for improperly failing to act or improperly exercising the powers of trusteeship
- Other state and federal laws and regulations may be applicable (IRS Code, securities law related to investing, disclosure requirement, open meeting and records law, etc...)
- Plan documents may also include other documents that the Board has formally adopted or are issued by an entity that has jurisdiction over the Board:
  - Governance Policy
  - Code of Ethics and Conduct
  - Policies and procedure (i.e., Investment Policy Statement)
  - DC Plan documents
- "Be by the book" rule

Fiduciary Responsibility: Trustee Liability [1]

- In general, trustee will not be held liable for investment loses if he or she fulfills their fiduciary obligations
- Common breaches involve misconduct in which:
  - Trustee performed an act not empowered to perform, by law or terms of trust
  - Trustee exercised power inconsistent with standards of fiduciary conduct
- Personal liability for breach of fiduciary duty:
  - Restore to the plan any losses resulting from a breach of fiduciary duty
  - Restore to the plan any profits made by fiduciary through use of plan assets
  - Other equitable or remedial relief as a court may deem appropriate
- May be liable for a co-fiduciary’s breach of fiduciary duty if a fiduciary enables another fiduciary to commit the breach, knowingly participates in or conceals the breach, or discovers the breach but does not take steps to remedy
- Will trustee liability cause changes in governance?

1. U.S. Public Pension Handbook: A Comprehensive Guide For Trustees and Investment Staff (McGraw-Hill 2019), p.327, discussing trustee liability.