

2015 HOUSE GOVERNMENT AND VETERANS AFFAIRS

HB 1064

2015 HOUSE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee

Fort Union, State Capitol

HB 1064

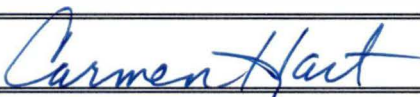
1/8/2015

21773

☐ Subcommittee

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to incorporation of federal law changes for the definition of salary eligibility for normal retirement benefits, benefit limitations, and withdrawal from fund under TFFR.

Minutes:

Attachments #1-3

Chairman Kasper opened the hearing on HB 1064.

Fay Kopp, Chief Retirement Officer, ND Teachers' Fund for Retirement, Deputy Executive Director, ND Retirement and Investment Office presented Testimony #1 attached. (1:00-5:53)

Chairman Kasper Would you provide copies of the material you just mentioned?

Fay Kopp You would like the letter from Segal (Attachment #2-3) as well as the letter from Ice Miller? Should I give it to Carmen?

Chairman Kasper Please give it to Carmen and she can distribute it to the committee.

Rep. Laning On Section 5 and 6 where they can buy years of service, what does that cost? I assume it is actuarially calculated to balance out with the state funds, etc. What does it cost to buy a year?

Fay Kopp The ability for active members of the plan to purchase service credit if they purchase previously refunded assessments. Let us say they were a member of the plan, refunded out, and came back. Within 5 years of returning to teach, the amount they would have to pay to purchase service credit would be the amount they took out plus 6% interest. Anything beyond that 5-year window or any purchases of additional types of service credit--out of state service credit, government agency teaching credit, or other types of credit that would be purchased is calculated at the actuarially equivalent which does vary by member. It takes their service credit, their age, their salary into consideration in order to determine what the actuarially equivalent cost would be to purchase that additional service credit.

Rep. Wallman As a former member of the Fargo School Board, it is often very difficult for teachers to find the time and make the time to read the statute and understand these things. I think it is in the best interest of the consumers to have these as clear as they possibly can. I have found when we use the language "as amended", it creates a lot of extra work on the part of the consumer to go and find the federal tax code. Is it quite a lot of work to have that language in here rather than saying "as amended" throughout? Is it labor intensive to include the information?

Fay Kopp It will include many additional pages to this bill every two years in order to list all of the sections that are referenced by these codes. While it can be done, it is a lot. What we are doing is referring to everything that is in the Internal Revenue Code. I believe the consumer is still going to have a hard time figuring out exactly what it is. I have paraphrased it and said what we are really talking about is the annual complement. You have to look further to find that. I believe it would be very difficult to only see that. What we had previously done was update it with new dates every two years but still did not show all of the varying potential errors of the Code. We would have to hire outside task counsel every two years to go through our complete Code to make every single thing that was affected would then also be referenced in our statute. There is both a cost element to it as well and certainly it is labor intensive.

Chairman Kasper Rep. Wallman and committee, I don't believe our State Code publishes the Federal language and laws in it. We are publishing State Code and state laws so the reference is probably needed because we are not going to have the IRS code in our State Code.

Rep. Steiner Do we have a definition of spouse in ND code and would that, for purposes of Federal tax law, the definition of spouse, would there be a conflict there?

Fay Kopp I can't respond to that as far as within ND Century Code. Within TFFR we do not have a definition for spouse. We refer to a beneficiary and a beneficiary may be a spouse or someone else. We refer to spouse as whatever is within state law. Obviously, for our purposes of administering the plan with the exception of Federal tax code, we view spouse as being only opposite gender partners.

No opposition.

The hearing was closed.

Rep. B. Koppelman Moved for a Do Pass.

Rep. Seibel Seconded.

A roll call vote was taken. 14 Yeas, 0 Nays.

Rep. Seibel is the carrier.

2015 HOUSE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee Fort Union, State Capitol

HB 1064
1/15/2015
22045

- ☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature

Carmen Hart

Explanation or reason for introduction of bill/resolution:

Relating to incorporation of federal law changes for the definition of salary eligibility for normal retirement benefits, benefit limitations, and withdrawal from fund under TFFR

Minutes:

Attachments 1-4

Chairman Kasper opened the discussion on HB 1064. It had some cleanup from the federal government requiring to do certain things, and we asked Fay Kopp to give us some additional information to substantiate things. (Attachments 1-4)

Rep. Seibel I went through the handouts, and I don't have any problem with what I read. There are certain things that the federal tax code requires, and there is nothing we can do about that. For this plan to remain to keep its status as a qualified governmental plan, I believe we have to do this.

Rep. B. Koppelman My question is with the qualified government plan and although they said they may not qualify anymore, what the hinge pin to that was and would it be qualified under a different type of plan if we didn't do this? There were two parts I was bringing up before. One was the part of same sex marriages that were done in another state that we don't recognize here and how that applied. I think she answered that question. The second piece was whether or not it was good practice if it is allowed, and she seems to think that it is allowed to adopt the IRS Code by reference.

Rep. Laning How significant are the consequences if we don't have a federally approved plan?

Chairman Kasper When you are dealing with retirement plans which have federal rules and regulations that have to be followed, I think it would be really significant. I had asked Carmen to hold the bill until we received the information from TFFR, and we did already take our vote. I will sign and it will be ready to go.

Rep. Seibel will carry the bill.

Date: 1-8-15
Roll Call Vote #: 1

2015 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1064

House Government and Veterans Affairs Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By B. Koppelman Seconded By Seibel

Representatives	Yes	No	Representatives	Yes	No
Chairman Jim Kasper	X		Rep. Bill Amerman	X	
Vice Chair Karen Rohr	X		Rep. Gail Mooney	X	
Rep. Jason Dockter	X		Rep. Mary Schneider	X	
Rep. Mary C. Johnson	X		Rep. Kris Wallman	X	
Rep. Karen Karls	X				
Rep. Ben Koppelman	X				
Rep. Vernon Laning	X				
Rep. Scott Louser	X				
Rep. Jay Seibel	X				
Rep. Vicky Steiner	X				

Total (Yes) 14 No 0

Absent 0

Floor Assignment B. Koppelman Seibel

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1064: Government and Veterans Affairs Committee (Rep. Kasper, Chairman)
recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).
HB 1064 was placed on the Eleventh order on the calendar.

2015 SENATE GOVERNMENT AND VETERANS AFFAIRS

HB 1064

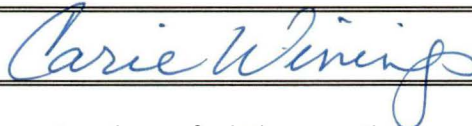
2015 SENATE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee Missouri River Room, State Capitol

HB 1064
3/13/2015
Job # 24810

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact subsection 10 of section 15-39.1-04, subsection 4 of section 15-39.1-10, sections 15-39.1-10.6 and 15-39.1-20, subsections 8 and 11 of section 15-39.1-24, and section 15-39.1-34 of the North Dakota Century Code, relating to the incorporation of federal law changes for the definition of salary, eligibility for normal retirement benefits, benefit limitations, and withdrawal from the fund under the teachers' fund for retirement.

Minutes:

Attachments 1

Chairman Dever: Opened the hearing in HB 1064.

Fay Kopp, Chief Retirement Officer, North Dakota Teachers' Fund for Retirement:
See Attachment #1 for testimony in support of the bill.

(4:05) Chairman Dever: There was no other testimony present and closed the hearing on HB 1064.

Senator Nelson: Moved a Do Pass.

Senator Poolman: Seconded.

A Roll Call Vote Was Taken: 7 yeas, 0 nays, 0 absent.

Motion Carried.

Senator Nelson will carry the bill.

3/13
Date:
Roll Call Vote #: 1

2015 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1064

Senate Government and Veterans Affairs Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Nelson Seconded By Poolman

Senators	Yes	No	Senators	Yes	No
Chairman Dever	✓		Senator Marcellais	✓	
Vice Chairman Poolman	✓		Senator Nelson	✓	
Senator Cook	✓				
Senator Davison	✓				
Senator Flakoll	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Nelson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1064: Government and Veterans Affairs Committee (Sen. Dever, Chairman)
recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).
HB 1064 was placed on the Fourteenth order on the calendar.

2015 TESTIMONY

HB 1064

1-8-15

HB 1064

**House Government and Veterans Affairs Committee
January 8, 2015**

**Fay Kopp, Chief Retirement Officer – ND Teachers' Fund for Retirement
Deputy Executive Director - ND Retirement and Investment Office**

HB 1064 was submitted by the TFFR Board. The bill includes technical corrections which are required by federal tax law in order for TFFR to maintain its status as a qualified governmental plan. The bill does not make plan design changes, and was not submitted for funding improvement purposes.

In general, the bill removes all Internal Revenue Code (IRC) date references and adds "as amended" language to clearly indicate that future IRC changes are intended to be incorporated. According to TFFR's legal counsel from the Attorney General's Office and Legislative Council staff, Article X, Section 3, of the ND Constitution allows adoption by reference of federal income tax laws as amended in the future.

Section 1. NDCC 15-39.1-04 (10) Definitions: Eligible Retirement Salary

Provision relates to the maximum annual compensation limit that can be used in benefit calculations (\$265,000 in 2015). No active TFFR member currently has a salary large enough to be affected by this limit.

Section 2. NDCC 15-39.1-10(4) Eligibility for benefits

Provision relates to minimum distribution requirements requiring payment of retirement benefits at age 70.5 or termination of employment, whichever is later.

Section 3. NDCC 15-39.1-10.6 Benefit limitations

Provision relates to the Section 415 maximum annual benefit limit (\$210,000 in 2015). To date, no retiree's benefit has exceeded the annual benefit limit.

Section 4. NDCC 15-39.1-20 Withdrawal from Fund

Provision provides that a member or a member's beneficiary may elect to have an eligible rollover distribution paid to an eligible retirement plan as allowed under IRC regulations.

Sections 5 and 6. NDCC 15-39.1-24 (8) and (11) Purchase of additional credit

Provision provides for purchase of up to 5 years of nonqualified service credit and acceptance of eligible rollover distributions and transfers from eligible retirement plans as allowed under IRC regulations.

Section 7. NDCC 15-39.1-34 Internal Revenue Code compliance

Provision requires the board to administer the TFFR plan in compliance with various sections of the IRC and regulations as they apply to governmental plans.

Actuarial Consultant and Outside Tax Counsel Review

TFFR's actuarial consultant, Segal Company, has reviewed the bill. In their letter dated October 28, 2014, they noted the bill would not have a material actuarial cost impact on TFFR. They also stated the provisions of the bill do not appear to directly or significantly impact the benefits payable from TFFR.

Additionally, outside tax counsel (Ice Miller) was hired by TFFR to review plan statutes to determine whether any changes were necessary to comply with the U.S. Supreme Court ruling in *United States v. Windsor* relating to same-gender marriages and the definition of spouse for purposes of federal tax laws. Outside tax counsel advised TFFR that revising the IRC references to automatically update as the Code sections are amended was sufficient.

Summary

The Legislative Employee Benefits Programs Committee reviewed this bill (Bill Draft No. 140), and unanimously gave a favorable recommendation.

On behalf of the TFFR Board, we respectfully request that your Committee give a "do pass" recommendation on HB1064.

Thank you.



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HB 1064
#2
1-9-15

October 28, 2014

Senator Dick Dever, Chairman
Employee Benefits Program Committee
c/o Jennifer Clark
North Dakota Legislative Council
State Capitol
600 East Boulevard
Bismarck, ND 58505

Re: Technical Comments on Draft Bill No. 15.0140.02000

Dear Senator Dever:

As requested, we reviewed draft Bill No. 15.0140.02000, which proposes technical and administrative changes to the North Dakota Teachers' Fund for Retirement (TFFR). The following presents our analysis of such proposed changes found in the draft bill.

Summary: The proposed legislation automatically updates federal compliance provisions of the plan regarding Internal Revenue Code sections 401(a)(17), 401(a)(9), 401(a)(31), 402(c) and 415(b), (d) and (n), as such sections are amended, in various sections of the North Dakota Century Code (NDCC), chapter 15-39.1 (Sections 1, 2, 3 and 4). In addition, the proposed legislation automatically updates Internal Revenue Code sections relating to salary reduction or salary deferral amounts, including sections 125, 132(f), 401(k), 403(b), 414(h) and 457, as such sections are amended.

Actuarial Cost Analysis: This bill would have an immaterial actuarial cost impact on the TFFR.

Technical Comments: Our comments on the bill are as follows:

General Comments

The bill makes various provisions of the plan consistent with current federal income tax laws. The provisions of this bill do not appear to directly or significantly impact the benefits payable from the TFFR.

Compliance Issues

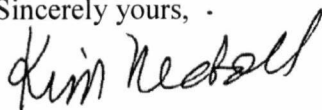
The bill amends various sections of the North Dakota Century Code, chapter 15-39.1 to change references under Internal Revenue Code section 401(a)(9), section 401(a)(17) (as well as Code references related to the definition of compensation under section 401(a)(17)), section 401(a)(31), section 402(c) and section 415(b), (d) and (n) from the Code language in effect on August 1, 2013 to instead be automatically updated as those Code sections are amended. No material changes have been made to these Internal Revenue Code sections since August 1, 2013, other than the statutory indexing of dollar amounts set forth in Code sections 401(a)(17) and 415(b).

It is our understanding that external legal counsel reviewed your statutes to determine whether any changes were necessary to comply with the Supreme Court ruling in *United States v. Windsor* relating to same-gender marriage and the definition of spouse for purposes of federal tax laws, and advised that revising the Internal Revenue Code references to be automatically updated as the Code sections are amended was sufficient for this purpose. Pursuant to IRS Notice 2014-19, any plan amendment necessary to comply with the *Windsor* decision must be effective June 26, 2013 (unless an earlier effective date is selected), and governmental plans must be amended no later than the close of the first legislative session of the legislative body with the authority to amend the plan that ends after December 31, 2014. The IRS Notice suggests that, even if a plan amendment is not required, a clarifying amendment may help ensure proper plan operations in the future.

The information contained in this letter is provided within our role as the plan's actuary and benefits consultant and is not intended to provide tax or legal advice. We recommend that you address all issues described herein with your legal counsel.

Please contact us if you have any questions or comments.

Sincerely yours, -



Kim M. Nicholl, FSA, EA, FCA
Senior Vice President & Actuary



Melanie Walker, JD
Vice President

cc: Fay Kopp
Matthew Strom

HB 1064
#3
1-9-15

MEMORANDUM

TO: Fay Kopp, Shelly Schumacher, Jan Murtha
CC: Sparb Collins
FROM: Mary Beth Braitman, Tiffany A. Sharpley, and Malaika Caldwell
DATE: August 18, 2014
RE: North Dakota TFFR Compliance With Respect to *U.S. v. Windsor*

This Memorandum focuses on our analysis of the impact of the U.S. Supreme Court's *U.S. v. Windsor* ("*Windsor*") decision and Rev. Ruling 2013-17, subsequently issued by the Internal Revenue Service ("IRS") on the North Dakota Teachers' Fund for Retirement ("TFFR").

BACKGROUND ON WINDSOR

In *Windsor*, the Supreme Court ruled that section 3 of the Defense of Marriage Act ("DOMA") was unconstitutional. The holding by the Supreme Court provided that same-sex spouses who were married in a state that recognizes same-sex marriage as well as in states that do not, must receive the same treatment as opposite-sex spouses for purposes of federal law. The primary effect of this decision for TFFR is that for federal tax purposes, a same-sex spouse must be treated the same as an opposite-sex spouse. The Supreme Court did not address section 2 of DOMA, which allows a state to continue to decline to recognize the validity of same-sex marriages legally performed in other states for limited state purposes. This means that North Dakota can continue to distinguish same-sex spouses from opposite-sex spouses for certain benefit design purposes. In Rev. Ruling 2013-17, the IRS has taken the position that for federal tax purposes, the terms "husband and wife," "husband," "wife," "spouse," and "marriage," wherever used in the Internal Revenue Code ("Code") must be interpreted to include both same-sex spouses and same-sex marriages. In its ruling, the IRS adopted a "place of celebration" test for determining the validity of same-sex marriage for federal tax purposes.

We were asked to consider how the federal tax rules have changed in ways which impact TFFR. TFFR is required to follow federal tax law in order to maintain its status as a qualified governmental plan.

TFFR'S TAX QUALIFICATION

The primary advantages in TFFR retaining this status under Code Section 401(a) are that:

- Employer contributions are not taxable to members as they are made (or even vested); taxation only occurs when plan distributions occur;
- Earnings and income are not taxed to the trust of the member (until distribution);

- Certain favorable tax treatment may be available to members when they receive plan distributions, e.g., ability to rollover eligible distributions;
- Employers and members do not pay employment taxes (even if the positions are Social Security covered) when contributions are made or when benefits are paid.
- TFFR is currently exempt from many costly and cumbersome Employee Retirement Income Security Act of 1974 ("ERISA") nondiscrimination testing requirements;
- TFFR may "pick up" employee contributions so that they are pre-tax when made; and
- TFFR has favorable grandfathering and transitional rules under much IRS guidance.

BASIS FOR OUR *WINDSOR* REPORT

We prepared our Report and analysis using the North Dakota materials provided by Ms. Murtha on July 3, 2014. For TFFR, this included the following:

- North Dakota Constitution, Article X, Section 12(1);
- N.D.C.C. ("Century Code") Chapter 15-39.1;
- N.D.A.C. Article 82-05;
- AG Letter Opinion 2013-L-06; and
- N.D.C.C. Sections 14-03-01 through 14-03-08.

Our Report entailed an analysis of the impact of *Windsor* on the following TFFR plan provisions. Each of these provisions involved situations where North Dakota law provides for certain benefits or rights for spouses of members of TFFR. In each case, we were looking for scenarios in which the provision could remain as it is currently, versus when it was affected by federal tax law, and thus by the *Windsor* decision.

- Beneficiary Designation Rules;
- Plan Rollovers;
- Benefit Limitations under Code Section 415;
- Record Confidentiality;
- Survivor & Death Benefits;
- Qualified Domestic Relations Orders (QDROs); and
- Required Minimum Distributions (RMDs).

I. Areas of Immediate Compliance

During our review of these area, we broke our analysis down into three types of provisions – those governed by: (i) pure federal law; (ii) pure North Dakota state law; and (iii) a combination of both federal and state law. This review identified the need for TFFR to make few **immediate** compliance changes. However, as you may be aware, there are court cases pending in all circuits that raise certain issues that we will not address here, because these issues have not been decided by the U.S. Supreme Court. There are areas described in our review that may need to be revisited depending on the outcome of pending litigation cases. These are not discussed further in this memorandum. Our recommendations identify only those areas for the TFFR Board to consider for immediate action.

A. Rollovers

N.D.C.C. § 15-39.1-20 – Withdraw from Fund. We recommend the last line of this provision be revised to remove the date at the end of the provision which appears to limit the reference to the Internal Revenue Code section regarding rollovers to a specific date and time, which could raise questions since that date predates the *Windsor* decision.

A member or beneficiary of a member may elect, at the time and under rules adopted by the Board, to have any portion of an eligible rollover distribution paid in a direct rollover to an eligible retirement plan specified by the member or the beneficiary to the extent permitted by Section 401(a)(31) of the Internal Revenue Code ~~in effect on August 1, 2011.~~

Under the current language, all spouses would not have broad rollover rights. *Windsor* requires those broad rollover rights to be made available to same-sex spouses as of the effective date of the *Windsor* decision, as well as opposite-sex spouses.

B. Benefit Limitations

N.D.C.C. § 15-39.1-10.6 – Benefit Limitations. We recommend a revision to the following provision to remove the date references, which appears to limit the reference to the Internal Revenue Code section to a specific date and time, which could raise questions since that date is after the effective date imposed by *Windsor*.

Benefits with respect to a member participating under former chapter 15-39 or chapter 15-39.1 or 15-39.2 may not exceed the maximum benefits specified under section 415 of the Internal Revenue Code [26 U.S.C. 415] ~~in effect on August 1, 2013,~~ for governmental plans. The maximum dollar benefit applicable under section 415(b)(1)(A) of the Internal Revenue Code must reflect any increases in this amount provided under section 415(d) of the Internal Revenue Code ~~subsequent to August 1, 2013.~~ . .

Windsor requires that the benefit limitations be administered to treat all spouses the same for purposes of applying these limits.

C. Required Minimum Distributions

N.D.C.C § 15-39.1-10 . . . We recommend a revision to the provision to remove the date reference, which appears to limit the reference to the Internal Revenue Code section to a specific date and time, which could raise questions since that date is after the effective date imposed by *Windsor*.

(4) . . . payment of minimum distributions must be made in accordance with Section 401(a)(9) of the Internal Revenue Code ~~in effect on August 1, 2013,~~ and the regulations issued under that section as applicable to governmental plans.

The minimum distribution rules require distributions from a qualified plan to be made at certain times. Those times vary depending on whether the benefit is payable to a spouse or a non-spouse. *Windsor* requires that all spouses (both same-sex and opposite-sex) be treated the same for this timing issue.

ADDITIONAL COMMENTS

In addition to the immediate areas of compliance described above, we also identified several administrative tools that TFFR may want to consider revising. These include potential changes to 415 testing, tax notices, retirement and survivor forms, and QDRO forms.

Jan 15, 2015

H31064

#1

**LETTER OPINION
2013-L-06**

December 12, 2013

Mr. Richard J. Riha
Burleigh County State's Attorney
514 E Thayer Ave
Bismarck, ND 58501-4413

Dear Mr. Riha:

Thank you for your letter raising several questions relating to the effects a same-sex marriage, legally valid and entered in another state, has on an individual seeking a marriage license in North Dakota, where such a union is not recognized. You first ask whether a county recorder may issue a marriage license to an individual who had previously entered into a same-sex marriage which was valid in another state, did not obtain a divorce, and is now seeking to enter into a marriage legally recognized in North Dakota. You further ask whether such an individual would be committing a criminal violation by signing a marriage application, under oath, stating that he or she is "Single/Never Married." Finally, you ask whether the individual risks violating another state's bigamy statute if that individual obtains a marriage license in North Dakota, and moves back to a state in which the previous, same-sex marriage is valid and recognized.

For the reasons discussed below, it is my opinion because explicitly prohibited by state constitution and statutes, an individual's previously valid same-sex marriage in another state is not legally recognized in North Dakota and he or she may be issued a valid marriage license here. Further, it is my opinion that since the North Dakota Constitution prohibits the recognition of such a union, the individual would not be committing a criminal violation in this state by indicating he or she was "Single/Never Married" on a signed marriage application. Finally, I decline to opine on the interpretation of another state's law and defer to state legislatures to resolve this unique issue.

ANALYSIS

I.

I first address your question of whether a county recorder may issue a North Dakota marriage license to an individual who previously entered into a same-sex marriage, valid in another state, when that marriage is not recognized in this state, and our license application requires legal dissolution of a prior marriage.¹

In order to answer this question, I first turn to North Dakota's Constitution explicitly defining "marriage" to be between one man and one woman:

Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.²

State statute contains similar restrictions:

Marriage is a personal relation arising out of a civil contract between one man and one woman to which the consent of the parties is essential. The marriage relation may be entered into, maintained, annulled, or dissolved only as provided by law. A spouse refers only to a person of the opposite sex who is a husband or a wife.³

North Dakota also prohibits recognition of a same-sex marriage that is valid in the jurisdiction in which it was contracted. North Dakota's recognition of foreign marriages is governed by N.D.C.C. § 14-03-08, which states:

Except when residents of this state contract a marriage in another state which is prohibited under the laws of this state, all marriages contracted outside this state, which are valid according to the laws of the state or country where contracted, are valid in this state. This section applies only to a marriage contracted in another state or country which is between one man and one woman as husband and wife.⁴

¹ N.D.C.C. § 14-03-06 "A marriage contracted by a person having a former husband or wife living, if the former marriage has not been annulled or dissolved, is illegal and void from the beginning unless such former husband or wife was absent and believed by such person to be dead for a period of five years immediately preceding such marriage."

² N.D. Const. art. XI, § 28 (emphasis added).

³ N.D.C.C. § 14-03-01 (emphasis added).

⁴ N.D.C.C. § 14-03-08 (emphasis added).

In interpreting this statute prior to the 1997 amendment, the Supreme Court of North Dakota held that marriages validly entered in other territories would be recognized in North Dakota unless expressly prohibited by law.⁵ North Dakota Constitution art. XI, § 28 and N.D.C.C. § 14-03-01, expressly prohibit a marriage between persons of the same-sex, and therefore North Dakota does not recognize a same-sex marriage, as codified in N.D.C.C. § 14-03-08.

The extent to which North Dakota must recognize the laws of another state is governed by the Full Faith and Credit Clause ("Clause") of the United States Constitution. The Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof."⁶ The United States Supreme Court, however, in applying the Full Faith and Credit Clause, made clear it "does not require a State to apply another State's law in violation of its own legitimate public policy." Nevada v. Hall, 440 U.S. 410, 422 (1979) (citing Pacific Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493 (1939)). The Court recognized marriage "has always been subject to the control of the legislature." Maynard v. Hill, 125 U.S. 190, 205 (1888). Thus, the Clause does not require one state to recognize and abide by the legislative judgments of another state concerning the recognition and validity of marriage if doing so would be contrary to its own "public policy."

North Dakota's public policy to limit "marriage" to one man and one woman and prohibit recognition of same-sex marriages is articulated in, and supported by, the legislative history of N.D.C.C. §§ 14-03-01 and 14-03-08 and N.D. Const. art. XI, § 28.

In 1997, the Fifty-fifth Legislative Assembly amended state marriage statutes defining the relationship as being between one man and one woman.⁷ Amendments were passed defining spouse as being a person of the opposite sex who is a husband or wife.⁸ Further

⁵ See Johnson v. Johnson, 104 N.W.2d 8 (N.D. 1960) (North Dakota Supreme Court recognized a marriage valid and legally entered in another state, when such a marriage was not prohibited by the laws of North Dakota). See also, Pearson v. Person, 606 N.W.2d 128, 131 (N.D. 2000) (although common law marriage cannot be entered into in North Dakota, such a marriage validly entered into in Canada may be entitled to recognition in North Dakota under N.D.C.C. § 14-03-08, because North Dakota law does not expressly prohibit such a marriage). Since same-sex marriages are expressly prohibited and not recognized in North Dakota, a same-sex marriage validly entered into in another state is not afforded recognition under N.D.C.C. § 14-03-08.

⁶ U.S. Const. art. IV, § 1; see also 28 U.S.C. § 1738.

⁷ 1997 N.D. Sess. Laws ch. 145, § 1.

⁸ Id.

amendment of state statute regulating what foreign marriages this state will recognize was made:

14-03-08. Foreign marriages recognized – Exception. All Except when residents of this state contract a marriage in another state which is prohibited under the laws of this state, all marriages contracted outside of this state, which are valid according to the laws of the state or country where contracted, are valid in this state. ~~This section does not apply when residents of this state contract a marriage in another state which is prohibited under the laws of North Dakota. This section applies only to a marriage contracted in another state or country which is between one man and one woman as husband and wife.~~⁹

The legislature even went so far as to add the following effective date to the amendments:

If the legislature of another state enacts a law under which a marriage between two individuals, other than between one man and one woman, is a valid marriage in that state or the highest court of another state holds that under the law of that state a marriage between two individuals, other than between one man and one woman, is a valid marriage, the governor of this state shall certify that fact to the legislative council. The certification must include the effective date of the other state's legislation or the date of the court decision. Sections 1 and 2 of this Act are effective as of the earlier of the effective date of that law or the date of that decision.¹⁰

In a letter to the Senate Judiciary Committee, a Senate bill sponsor wrote:

This bill is needed in our State to combat recognition of marriages other than between a man and woman now happening in other states - - the most obvious, Hawaii.¹¹

A state Representative also testified before the committee:

This bill is a definition-of-marriage bill, not a gay-bashing bill. It would define marriage and spouse in Century Code for use in interpreting and applying laws. It would also allow the state to recognize marriages only between one man and one woman as husband and wife.

⁹ Id. § 2.

¹⁰ Id. § 3.

¹¹ Hearing on S.B. 2230 Before the S. Comm. on the Judiciary, 1997 N.D. Leg. (Feb. 5) (Statement of Sen. Watne).

This would specify the type of union that the state would recognize as a marriage and would eliminate platonic relationships being recognized as such. Seventeen states have passed similar legislation.¹²

An additional Senate bill sponsor gave the following testimony before the House Judiciary Committee:

As sponsor, I want to emphasize that the goal of this legislation is to treat people who may move here the same way we treat our own citizens --- the same way we have always treated our own citizens.

Our law, going way back to our early statehood, says we will not recognize marriages in North Dakota that are not between one man and one woman. Furthermore, if a resident leaves the state to enter into some other type of marriage, we will not recognize it. Since they made that clear, I am confident that it was the will of our founders that other types of marriages not be recognized if the partners are just moving here.

I do not consider our founders, who originated this section of law, to be homophobes or bigots. They had never even heard of aids [sic]. They wrote this section of law because they recognize the importance and sanctity of the institution of marriage and they recognized that the institution of marriage is a cornerstone of the type of orderly society that has been in North Dakota for over 100 years.¹³

It is clear the legislators' intent at the time of these amendments was to limit the state's recognition of foreign marriages to those between one man and one woman. The statutory language has remained unchanged. Further, the people of North Dakota voted in the general election of 2004 to add article XI, § 28 to the Constitution, which states, "[m]arriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." The amendment placed into our state constitution language makes it clear no other type of union can be recognized or given any legal effect.¹⁴

¹² Hearing on S.B. 2230 Before the S. Comm. on the Judiciary, 1997 N.D. Leg. (Feb. 5) (Statement of Rep. Sandvig).

¹³ Hearing on S.B. 2230 Before the H. Comm. on the Judiciary, 1997 N.D. Leg. (Mar. 11) (Statement of Sen. Christmann).

¹⁴ N.D. Const. art. XI, § 28.

Other federal law is relevant in my analysis. Congress, in enacting the federal Defense of Marriage Act¹⁵ (DOMA) legislatively addressed the issue of inter-state recognition of same-sex marriages. DOMA Section 2 provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.¹⁶

As DOMA articulates, there is no mandate under federal law for one state to recognize the same-sex marriage formed in another state.

With no federal mandate requiring North Dakota to recognize a same-sex marriage performed in another state, and a clear public policy of "marriage" being as between one man and one woman embedded into our state constitution, it is my opinion that, under the law, the State of North Dakota does not recognize a same-sex marriage legally performed in another state, and that non-recognition is not in violation of the Full Faith and Credit Clause.

Accordingly, under these facts, it is my opinion that, even if not legally dissolved, the individual's previous marriage cannot be recognized in the State of North Dakota and a county recorder may issue a valid marriage license in accordance with N.D.C.C. ch. 14-03.

II.

Next, you question whether the individual in these facts would, when filling out a North Dakota marriage license application, states that he/she is "Single/Never Married" and signs that application under oath, be committing a criminal violation.

The answer to your first question is determinative of the answer to your second question. As previously discussed, state law explicitly does not recognize any marriage other than one between one man and one woman, nor does it recognize any rights associated with the union. While the marriage may be valid elsewhere, the North Dakota Constitution and

¹⁵ Pub. L. 104-199, 110 Stat. 2419 (Sept. 21, 1996).

¹⁶ 28 U.S.C.A. § 1738C. I note that in United States v. Windsor, 133 S.Ct. 2675 (2013), the United States Supreme Court struck down Section 3 of DOMA which defined for federal purposes "marriage" as a legal union between one man and one woman and "spouse" as a person of the opposite sex who is a husband or a wife. Section 2 was not challenged and was not addressed by the Court.

statutes prohibit its legal recognition. As such, it is my opinion the individual would not be committing a criminal violation in this state by indicating he or she was "Single/Never Married" on a signed marriage application.

III.

Finally, you pose a scenario where the newly-married opposite-sex couple returns to a state that recognizes same-sex marriage and question whether the individual then risks violating that state's bigamy statute. As Attorney General of North Dakota, it would be inappropriate in a legal opinion to interpret the laws of other states.

Sincerely,

Wayne Stenehjem
Attorney General

nrm/slv/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.¹⁷

¹⁷ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

Jan 15, 2015

HB1064

2

MEMORANDUM

**TO: Fay Kopp, NDRIO Deputy Executive Director and NDTFFR Chief
Retirement Officer and Janilyn Murtha, Assistant Attorney General, State of
North Dakota**

FROM: Mary Beth Braitman and Tiffany A. Sharpley, Ice Miller LLP

DATE: January 14, 2015

**RE: North Dakota Teachers' Fund for Retirement (TFFR) – Proposed Legislation
Regarding Effective Date and Compliance Provisions**

This Memorandum is provided subject to the attorney/client privilege. To maintain that privilege, you should share its contents only with officials or employees involved in making decisions on the matters discussed herein.

This memorandum is in response to your request of January 9, 2014, and our discussions this week. In order to alleviate the state legislature from having to continuously update federal statute references, many states chose to use one of several different approaches, instead of placing a specific date in the statutory language with respect to federal tax law compliance. We understand that specific state drafting protocols and statutory interpretations are critical to considering an appropriate approach. For example, due to those, we understand you cannot use one approach that some states use – simply to have the code number, since that would then become tied to the date of the bill, which would not work in almost any case.

We have discussed below three examples of other alternative approaches used by the states:

- **Option One:** Have code cite with "as amended."
 - For example: "Internal Revenue Code 401(a)(17), as amended."
 - The virtue of simply adding "as amended" is to eliminate the need to annually change the statutory language. Code Section 401(a)(17) is an IRS limit that is indexed. In the last 10 years it has been adjusted accordingly by the IRS eight (8) times. The "as amended" clause would have removed the need to do eight (8) amendments over the last 10 years.
 - See Utah example.
- **Option Two:** Have code cite with a time phrase.
 - For example: "limit on compensation established from time-to-time under § 401(a)(17) of the Internal Revenue Code."
 - See Maryland example.

- **Option Three:** Have history of increase or of changes.

This alternative is not as popular as it once was. Over the last decade, the frequency of IRS changes (sometimes due to federal law changes, sometimes due to indexed amounts that are being triggered almost every year, sometimes due to new federal law guidance that changes positions) have made tracking those changes in a statute increasingly burdensome, complex and time consuming. This approach would likely still end up requiring some annual changes.

- For example: "The plan must comply with the limit under Section 401(a)(17) of the Internal Revenue Code (26 U.S.C. 401(a)(17)(B) as follows: "\$200,000 effective as of August 1, 2002, \$205,000 as of August 1, 2004, \$210,000 as of August 1, 2005, \$220,000 as of August 1, 2006, \$225,000 as of August 1, 2007, \$230,000 as of August 1, 2008, \$245,000 as of August 1, 2009, \$250,000 as of August 1, 2012, \$255,000 as of August 1, 2013, \$260,000 as of August 1, 2014, and \$265,000 as of August 1, 2015." [**Note:** We have only tracked what was immediately available – this would have to go back to 1993.]

EXAMPLES OF COMPLIANCE LANGUAGE APPROACHES

House Bill No. 1064 - Section 1

Topic	Federal Citation	"As Amended" Language	Comments
Salary – Annual Salary– Maximum	26 U.S.C. 401(a)(17)(B)	See below.	There are at least three ways of amending to handle annual changes.

Comments

As noted above, there are three alternative approaches.

Option One: Simply add "as amended" and strike "in effect on August 1, 2013." The virtue of simply adding to "as amended" is to eliminate the need to annually change the statutory language. Code Section 401(a)(17) is an IRS limit that is indexed. In the last 10 years it has been adjusted accordingly by the IRS eight (8) times. In many states, the "as amended" clause would have removed the need to do eight (8) amendments.

Option Two: Simply add "as adjusted from time-to-time under Section 401(a)(17) of the Internal Revenue Code" and strike "in effect on August 1, 2013" and "as adjusted for increases in the cost of living in accordance with 26 U.S.C. 401(a)(17)(B) in effect on August 1, 2013."

Option Three: Add entire section as follows:

The plan must comply with the limit under Section 401(a)(17) of the Internal Revenue Code (26 U.S.C. 401(a)(17)(B) as follows: "\$200,000 effective as of August 1, 2002, \$205,000 as of August 1, 2004, \$210,000 as of August 1, 2005, \$220,000 as of August 1, 2006, \$225,000 as of August 1, 2007, \$230,000 as of August 1, 2008, \$245,000 as of August 1, 2009, \$250,000 as of August 1, 2012, \$255,000 as of August 1, 2013, \$260,000 as of August 1, 2014, and \$265,000 as of August 1, 2015." Then strike extraneous language in third sentence of 15-39.1-04-10. [Note: We simply picked up as far back as was readily available.]

House Bill No. 1054 – Section 4

Topic	Federal Citation	"As Amended" Language	Comments
Rollover rights	26 U.S.C. 401(a)(31)	See below.	The virtue of simply referring to "as amended" is to eliminate the need to frequently change the statutory language.

Comments

Option One: Simply add "as amended" and strike "in effect on August 1, 2013" in last sentence of 15.39.1-20.

Option Two: Simply add "as amended from time-to-time under Section 401(a)(31) of the Internal Revenue Code" and strike "in effect on August 1, 2013" in last sentence of 15-39.1-20.

Option Three: Strike "in effect on August 1, 2013." This would require adding significant amount of language because of numerous federal law changes. Included would be the following:

"Eligible retirement plan" means any of the following that accepts the distributee's eligible rollover distribution:

- (1) an individual retirement account described in section 408(a) of the Internal Revenue Code,
- (2) an individual retirement annuity described in section 408(b) of the Internal Revenue Code,
- (3) an annuity plan described in section 403(a) of the Internal Revenue Code,
- (4) a qualified trust described in section 401(a) of the Internal Revenue Code,
- (5) effective January 1, 2002, an annuity contract described in section 403(b) of the Internal Revenue Code,
- (6) effective January 1, 2002, a plan eligible under section 457(b) of the Internal Revenue Code that is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or a political subdivision of a state that agrees to separately account for amounts transferred into that plan from the retirement system, or
- (7) effective January 1, 2008, a Roth IRA described in section 408A of the Internal Revenue Code."

"Eligible rollover distribution" means any distribution of all or any portion of the balance to the credit of the distributee, except that an eligible rollover distribution does not include:

(1) any distribution that is one of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or the life expectancy) of the distributee or the joint lives (or joint life expectancies) of the distributee and the distributee's designated beneficiary, or for a specified period of ten years or more;

(2) any distribution to the extent such distribution is required under section 401(a)(9) of the Internal Revenue Code;

(3) the portion of any distribution that is not includible in gross income; provided, however, effective January 1, 2002, a portion of a distribution shall not fail to be an eligible rollover distribution merely because the portion consists of after-tax employee contributions that are not includible in gross income, but such portion may be transferred only:

(A) to an individual retirement account or annuity described in section 408(a) or (b) of the Internal Revenue Code or to a qualified defined contribution plan described in section 401(a) of the Internal Revenue Code that agrees to separately account for amounts so transferred (and earnings thereon), including separately accounting for the portion of the distribution that is includible in gross income and the portion of the distribution that is not so includible;

(B) on or after January 1, 2007, to a qualified defined benefit plan described in section 401(a) of the Internal Revenue Code or to an annuity contract described in section 403(b) of the Internal Revenue Code, that agrees to separately account for amounts so transferred (and earnings thereon), including separately accounting for the portion of the distribution that is includible in gross income and the portion of the distribution that is not so includible; or

(C) on or after January 1, 2008, to a Roth IRA described in section 408A of the Internal Revenue Code; and

(4) any other distribution which the Internal Revenue Service does not consider eligible for rollover treatment, such as certain corrective distributions necessary to comply with the provisions of section 415 of the Internal Revenue Code or any distribution that is reasonably expected to total less than \$200 during the year.

A beneficiary further includes a nonspouse beneficiary who is a designated beneficiary as defined by section 401(a)(9)(E) of the Internal Revenue Code. However, a nonspouse beneficiary may only make a direct rollover to an

individual retirement account or individual retirement annuity established for the purpose of receiving the distribution, and the account or annuity shall be treated as an "inherited" individual retirement account or annuity."

Additional language changes would also be necessary.

Attachments

Amendment Notes. — The 2007 amendment, effective April 30, 2007, in Subsection (1)(c), added "who may delegate the decision to the deputy director" and in Subsection (1)(d), added "or deputy director."

The 2008 amendment by ch. 252, effective May 5, 2008, added (1)(e) and, in (2)(c), added

"relevant to a decision, including facts."

The 2008 amendment by ch. 382, effective May 5, 2008, updated references to conform to the recodification of Title 63.

This section has been reconciled by the Office of Legislative Research and General Counsel.

NOTES TO DECISIONS

ANALYSIS

Due process.
Estoppel.
Judicial review.
—Exhaustion of remedies.

Due process.

Because petitioner did not file for reconsideration within ten days of the state retirement board's decision, the board did not review the hearing officer's decision in light of petitioner's specific objections; the board complied with the statutory scheme and its own internal rules in issuing the decision against petitioner and petitioner was not denied due process. *Terry v. Retirement Bd.*, 2007 UT App 87, 157 P.3d 862.

Estoppel.

There is nothing in this section that would bar application of estoppel against the board to prevent a grave injustice to an employee who reasonably relied on the board's representation that he did not have to purchase six years of pre-1961 county service in order to receive retirement credit for them. *Eldredge v. Utah State Retirement Bd.*, 795 P.2d 671 (Utah Ct. App. 1990).

Judicial review.

—Exhaustion of remedies.

Former employees of city hospital, who did not appeal to the retirement board an administrative determination concerning the disposition of employer contributions upon the city hospital's becoming a private entity and terminating its affiliation with the state retirement system, failed to exhaust their administrative remedies and were not entitled to judicial review of the administrative determination. *Johnson v. Utah State Retirement Office*, 621 P.2d 1234 (Utah 1980) (decided under predecessor to this section).

Insured seeking declaratory judgment to foreclose the subrogation rights of the Utah Public Employees Health Program (PEHP) was required first to exhaust his administrative remedies under this section. The issues in the case were not outside the agency's statutory authority, so the insured was not relieved of the exhaustion requirement on that basis. *Gunn v. Utah State Ret. Bd.*, 2007 UT App 4, 155 P.3d 113, cert. denied, 2007 Utah LEXIS 83 (2007 Utah LEXIS 83).

49-11-614. Vesting on termination of system or plan.

If any system or the Utah Governors' and Legislators' Retirement Plan is terminated, the accrued benefits of each member in the terminated system or plan shall immediately become vested and nonforfeitable.

History: C. 1953, 49-1-613, enacted by L. 1990, ch. 273, § 6; renumbered by L. 2002, ch. 250, § 37.

49-11-615. Election to grandfather — Applicability of provisions.

(1) Notwithstanding any other provision of this title, the allowance payable to any person who becomes a member of any system administered by the board on or after January 1, 1990, may not exceed the limitation imposed by Section 415 of the Internal Revenue Code of 1986, as amended, which is incorporated by reference.

(2) This constitutes an election of the grandfather provision under Section 415(b)(10)(C) of the Internal Revenue Code.

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§ 20-207

ANNOTATED CODE OF MARYLAND

(2) to compute average final compensation.

(g) *Retention of credit by specified State employees.* — A State employee who came into the State system while retaining sick leave and annual leave benefits under a county system and who came under the provisions of Chapter 423 of the Acts of 1971 shall be entitled to the same full credit toward retirement as provided by this section. (An. Code 1957, art. 73B, §§ 1-101; 2-302, 3-302, 4-302, 5-302, 6-302, 7-302, 8-302, 10-213; 1994, ch. 6, § 2; 1995, ch. 438, § 3; 2005, ch. 493, § 1.)

Elected officials. — Elected officials are entitled to sick leave; and if they opt for membership in the employees' retirement system, they are entitled to retirement credit for their unused sick leave in accordance with and subject to the limitations of this section, 65 Op. Att'y Gen. 392 (1980).

§ 20-207. Limit on amount used to determine retirement allowance.

(a) *Applicability of section.* — This section does not apply to an individual who is a member of a State system on or before June 30, 1996.

(b) *Compensation limit.* — Notwithstanding any other provision of law, for plan years beginning on or after July 1, 1996, the annual compensation that may be taken into account when determining the retirement allowance payable to a member of a State system, may not exceed the compensation limit under § 401(a)(17)(B) of the Internal Revenue Code and regulations adopted thereunder. (1996, ch. 608; 2002, ch. 375.)

§ 20-208. Allowance in excess of limit on benefit accruals prohibited.

(a) *In general.* — Notwithstanding any other provision of law, the Board of Trustees may not pay an allowance that exceeds the limit on benefit accruals established from time to time under § 415 of the Internal Revenue Code.

(b) *Reduction of allowances.* — Subject to subsections (c) and (d) of this section, the Agency shall reduce:

(1) an allowance to the extent that it exceeds the dollar limit on an annual benefit established from time to time under § 415(b) of the Internal Revenue Code and the regulations adopted thereunder; and

(2) the contributions and other additions to any defined contribution plan maintained by the Board of Trustees to the extent that they exceed the limit on annual additions established from time to time under § 415(c) of the Internal Revenue Code and the regulations adopted thereunder.

(c) *Dollar limit on an annual benefit.* — (1) The dollar limit on an annual benefit is the amount set forth in § 415(b) of the Internal Revenue Code, as adjusted by the Commissioner of Internal Revenue under § 415(d) of the Internal Revenue Code as of January 1 of each calendar year.

(2) The dollar limit for a calendar year applies to a State system's fiscal year ending within that calendar year.

(d) *Postretirement adjustments.* — (1) Except as provided in paragraph (2) of this subsection, the Agency shall pay a participant whose allowance was

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reduced under subsection (b) of this section any postretirement adjustment if payment of the postretirement adjustment does not exceed the dollar limit on benefits.

(2) The postretirement adjustment may not exceed a participant's basic allowance as increased by any postretirement adjustments allowable under the applicable State system.

(e) *Participants in additional aggregating retirement or pension systems.* — If an individual participates in any other retirement or pension system that must be aggregated with the State system administered by the Board of Trustees, the individual's annual benefit accrual or annual addition shall first be reduced by the other retirement or pension system to the extent necessary to comply with the requirements of § 415 of the Internal Revenue Code and the regulations adopted thereunder before any reduction is made by the Board of Trustees.

(f) *Applicability; limitation on purchase of prior service credit.* — (1) This subsection does not apply to an individual who is a member of a State system on or before June 30, 1999.

(2) Notwithstanding any other provision of law, the Agency may not allow a member to purchase prior service credit other than in accordance with the limitations and conditions set forth in § 415(n) of the Internal Revenue Code.

(g) *Prior service credit.* — A member may purchase prior service credit using funds from any fund source that is not specifically prohibited by the Internal Revenue Code. (1999, ch. 148; 2002, ch. 375.)

Jan 15, 2015

HB 1064

#3

From: Murtha, Janilyn K.
Sent: Tuesday, January 13, 2015 2:33 PM
To: Kopp, Fay L.
Subject: 1064 amendment question

Fay,

Please accept this email in response to your question of whether the Legislature could adopt future amendments to the internal revenue code, by reference, as presented in H.B. 1064. As noted in the attached Attorney General Opinion N.D.A.G. 2004-L-66, "(n)umerous courts, including the North Dakota Supreme Court, have held that a statute attempting to incorporate future changes of another statute, code, regulation, standard, or guideline is an unconstitutional delegation of legislative power to the entity publishing the referenced item." There is, however, an exception to this prohibition found under N.D. Const. art. X, § 3 which permits the Legislature to adopt future amendments to federal income tax laws by reference. (See N.D. Const. art. X, § 3; N.D.A.G. 2004-L-66, footnote 3; and 2015 North Dakota Legislative Drafting Manual, p. 92).

H.B. 1064 seeks to adopt future amendments to the internal revenue code provisions referenced in North Dakota Century Code Ch. 15-39.1, relating to the Teachers' Fund for Retirement (hereinafter TFFR), by replacing effective date language with the words "as amended". All of the internal revenue code provisions referenced in H.B. 1064 can be found under various subchapters of Chapter 1. (Normal Taxes and Surtaxes) of Subtitle A. (Income Taxes) of Title 26 (Internal Revenue Code) of the United States Code, and impose the requirements of those provisions on the plan as administered by TFFR. Therefore, the federal code references in H.B. 1064 appear to qualify for the exception found under N.D. Const. art. X, § 3 because they are federal income tax laws implemented by TFFR in its administration of the plan.

Please let me know if you have any questions or would like to discuss this matter further.

Janilyn K. Murtha

**LETTER OPINION
2004-L-66**

October 29, 2004

Mr. Dale L. Frink, P.E.
State Engineer
900 E Boulevard Ave
Bismarck, ND 58505-0850

Dear Mr. Frink:

Thank you for your letter asking whether a county, city, or township may adopt an ordinance that incorporates future amendments to the relevant federal flood insurance study and rate map. It is my opinion that a county, city, or township may not adopt an ordinance that incorporates future revisions of a document such as the flood insurance study and rate map except through re-enactment of the ordinance to adopt a version of the map in existence at the time the amendment is adopted.

ANALYSIS

Cities, counties, and townships having authority to zone are authorized to enter into a program of flood plain management with the state engineer and to participate in the National Flood Insurance Program¹ sponsored by the federal government. N.D.C.C. §§ 61-16.2-03, 61-16.2-04.² Each participating community must adopt a flood plain management ordinance pursuant to the National Flood Insurance Program. N.D.C.C. § 61-16.2-05. The ordinance must first be submitted to the state engineer who will review it for compliance with N.D.C.C. ch. 61-16.2 and federal program requirements. Id. Participating communities benefit by having federal flood insurance made available to their citizens in special flood hazard areas identified in the federal flood insurance study and flood insurance rate map which are part of the ordinance. Section 3.2 of the State Model Flood Plain Management Ordinance. See also 44 C.F.R. § 59.22(a)(3) (requiring a community to submit flood plain management ordinance to qualify for flood insurance).

¹ See Generally, 42 U.S.C. § 4001 et seq.

² Communities eligible to participate are any political subdivisions that have the authority to zone. N.D.C.C. § 61-16.2-02(2). Counties have authority to zone under N.D.C.C. ch. 11-33, cities have authority to zone under N.D.C.C. ch. 40-47, and townships have authority to zone under N.D.C.C. ch. 58-03.

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LETTER OPINION 2004-L-66

October 29, 2004

Page 2

You ask whether a county, city, or township may adopt an ordinance intended to allow the automatic adoption of revisions to the community's flood insurance study and flood insurance rate map.

Numerous courts, including the North Dakota Supreme Court, have held that a statute attempting to incorporate future changes of another statute, code, regulation, standard, or guideline is an unconstitutional delegation of legislative power to the entity publishing the referenced item. McCabe v. Workers Compensation Bureau, 567 N.W.2d 201, 204 (N.D. 1997). A state statute may adopt by reference the laws or regulations of another entity that are in existence at the time of the enactment of the adopting state statute without creating an unlawful delegation of legislative power. State v. Julson, 202 N.W.2d 145, 151 (N.D. 1972). If the state statute that adopts by reference the other entity's law or regulation provides that it is adopting the law or regulation "as amended," that adoption will be interpreted to mean the act or regulations as amended at the time of the enactment of the state statute, and will not include changes made subsequent to the enactment of the state statute. Id.³ This rule includes adoption by reference of federal laws or regulations. Id.

Rules of statutory construction apply to ordinances. City of Fargo v. Ness, 551 N.W.2d 790, 792 (N.D. 1996). Consequently, an ordinance that attempts to adopt subsequent modifications of a law, rule, guideline, etc., will also be unconstitutional. See Professional Houndsmen of Missouri, Inc. v. County of Boone, 836 S.W.2d 17, 21 (Mo. 1992); City of Salem v. Jungblut, 732 P.2d 919, 920 (Or. 1987).

Therefore, it is my opinion that a county, city, or township ordinance may adopt by reference a flood insurance study and flood insurance rate map that is in existence at the time of enactment, but may not adopt subsequent revisions except by amending the ordinance.⁴

Sincerely,

Wayne Stenehjem
Attorney General

eee/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

³ There is an exception under N.D. Const. art. X, § 3 which allows the Legislature to adopt future amendments to federal income tax laws.

⁴ A community participating in the National Flood Insurance Program has six months to adopt a new flood insurance study and flood insurance rate map after new data is submitted to the community by the Federal Insurance Administrator. 44 C.F.R. § 59.24(a).

Jan 15, 2015

HB1064

#4

MEMORANDUM

TO: Fay Kopp, Shelly Schumacher, Jan Murtha
CC: Sparb Collins
FROM: Mary Beth Braitman, Tiffany A. Sharpley, and Malaika Caldwell
DATE: August 18, 2014
RE: North Dakota TFFR Compliance With Respect to *U.S. v. Windsor*

This Memorandum focuses on our analysis of the impact of the U.S. Supreme Court's *U.S. v. Windsor* ("Windsor") decision and Rev. Ruling 2013-17, subsequently issued by the Internal Revenue Service ("IRS") on the North Dakota Teachers' Fund for Retirement ("TFFR").

BACKGROUND ON WINDSOR

In *Windsor*, the Supreme Court ruled that section 3 of the Defense of Marriage Act ("DOMA") was unconstitutional. The holding by the Supreme Court provided that same-sex spouses who were married in a state that recognizes same-sex marriage as well as in states that do not, must receive the same treatment as opposite-sex spouses for purposes of federal law. The primary effect of this decision for TFFR is that for federal tax purposes, a same-sex spouse must be treated the same as an opposite-sex spouse. The Supreme Court did not address section 2 of DOMA, which allows a state to continue to decline to recognize the validity of same-sex marriages legally performed in other states for limited state purposes. This means that North Dakota can continue to distinguish same-sex spouses from opposite-sex spouses for certain benefit design purposes. In Rev. Ruling 2013-17, the IRS has taken the position that for federal tax purposes, the terms "husband and wife," "husband," "wife," "spouse," and "marriage," wherever used in the Internal Revenue Code ("Code") must be interpreted to include both same-sex spouses and same-sex marriages. In its ruling, the IRS adopted a "place of celebration" test for determining the validity of same-sex marriage for federal tax purposes.

We were asked to consider how the federal tax rules have changed in ways which impact TFFR. TFFR is required to follow federal tax law in order to maintain its status as a qualified governmental plan.

TFFR'S TAX QUALIFICATION

The primary advantages in TFFR retaining this status under Code Section 401(a) are that:

- Employer contributions are not taxable to members as they are made (or even vested); taxation only occurs when plan distributions occur;
- Earnings and income are not taxed to the trust of the member (until distribution);

- Certain favorable tax treatment may be available to members when they receive plan distributions, e.g., ability to rollover eligible distributions;
- Employers and members do not pay employment taxes (even if the positions are Social Security covered) when contributions are made or when benefits are paid.
- TFFR is currently exempt from many costly and cumbersome Employee Retirement Income Security Act of 1974 ("ERISA") nondiscrimination testing requirements;
- TFFR may "pick up" employee contributions so that they are pre-tax when made; and
- TFFR has favorable grandfathering and transitional rules under much IRS guidance.

BASIS FOR OUR *WINDSOR* REPORT

We prepared our Report and analysis using the North Dakota materials provided by Ms. Murtha on July 3, 2014. For TFFR, this included the following:

- North Dakota Constitution, Article X, Section 12(1);
- N.D.C.C. ("Century Code") Chapter 15-39.1;
- N.D.A.C. Article 82-05;
- AG Letter Opinion 2013-L-06; and
- N.D.C.C. Sections 14-03-01 through 14-03-08.

Our Report entailed an analysis of the impact of *Windsor* on the following TFFR plan provisions. Each of these provisions involved situations where North Dakota law provides for certain benefits or rights for spouses of members of TFFR. In each case, we were looking for scenarios in which the provision could remain as it is currently, versus when it was affected by federal tax law, and thus by the *Windsor* decision.

- Beneficiary Designation Rules;
- Plan Rollovers;
- Benefit Limitations under Code Section 415;
- Record Confidentiality;
- Survivor & Death Benefits;
- Qualified Domestic Relations Orders (QDROs); and
- Required Minimum Distributions (RMDs).

I. Areas of Immediate Compliance

During our review of these area, we broke our analysis down into three types of provisions – those governed by: (i) pure federal law; (ii) pure North Dakota state law; and (iii) a combination of both federal and state law. This review identified the need for TFFR to make few **immediate** compliance changes. However, as you may be aware, there are court cases pending in all circuits that raise certain issues that we will not address here, because these issues have not been decided by the U.S. Supreme Court. There are areas described in our review that may need to be revisited depending on the outcome of pending litigation cases. These are not discussed further in this memorandum. Our recommendations identify only those areas for the TFFR Board to consider for immediate action.

A. Rollovers

N.D.C.C § 15-39.1-20 – Withdraw from Fund. We recommend the last line of this provision be revised to remove the date at the end of the provision which appears to limit the reference to the Internal Revenue Code section regarding rollovers to a specific date and time, which could raise questions since that date predates the *Windsor* decision.

A member or beneficiary of a member may elect, at the time and under rules adopted by the Board, to have any portion of an eligible rollover distribution paid in a direct rollover to an eligible retirement plan specified by the member or the beneficiary to the extent permitted by Section 401(a)(31) of the Internal Revenue Code ~~in effect on August 1, 2011.~~

Under the current language, all spouses would not have broad rollover rights. *Windsor* requires those broad rollover rights to be made available to same-sex spouses as of the effective date of the *Windsor* decision, as well as opposite-sex spouses.

B. Benefit Limitations

N.D.C.C § 15-39.1-10.6 – Benefit Limitations. We recommend a revision to the following provision to remove the date references, which appears to limit the reference to the Internal Revenue Code section to a specific date and time, which could raise questions since that date is after the effective date imposed by *Windsor*.

Benefits with respect to a member participating under former chapter 15-39 or chapter 15-39.1 or 15-39.2 may not exceed the maximum benefits specified under section 415 of the Internal Revenue Code [26 U.S.C. 415] ~~in effect on August 1, 2013,~~ for governmental plans. The maximum dollar benefit applicable under section 415(b)(1)(A) of the Internal Revenue Code must reflect any increases in this amount provided under section 415(d) of the Internal Revenue Code ~~subsequent to August 1, 2013.~~ . .

Windsor requires that the benefit limitations be administered to treat all spouses the same for purposes of applying these limits.

C. Required Minimum Distributions

N.D.C.C. § 15-39.1-10 . . . We recommend a revision to the provision to remove the date reference, which appears to limit the reference to the Internal Revenue Code section to a specific date and time, which could raise questions since that date is after the effective date imposed by *Windsor*.

(4) . . . payment of minimum distributions must be made in accordance with Section 401(a)(9) of the Internal Revenue Code ~~in effect on August 1, 2013,~~ and the regulations issued under that section as applicable to governmental plans.

The minimum distribution rules require distributions from a qualified plan to be made at certain times. Those times vary depending on whether the benefit is payable to a spouse or a non-spouse. *Windsor* requires that all spouses (both same-sex and opposite-sex) be treated the same for this timing issue.

ADDITIONAL COMMENTS

In addition to the immediate areas of compliance described above, we also identified several administrative tools that TFFR may want to consider revising. These include potential changes to 415 testing, tax notices, retirement and survivor forms, and QDRO forms.

HB 1064**Testimony to Senate Government and Veterans Affairs Committee
March 13, 2015****Fay Kopp, Chief Retirement Officer – ND Teachers' Fund for Retirement
Deputy Executive Director - ND Retirement and Investment Office**

HB 1064 was submitted by the TFFR Board. The bill includes technical corrections which are required by federal tax law in order for TFFR to maintain its status as a qualified governmental plan. The bill does not make plan design changes, and was not submitted for funding improvement purposes.

In general, the bill removes all Internal Revenue Code (IRC) date references and adds "as amended" language to clearly indicate that future IRC changes are intended to be incorporated. According to TFFR's legal counsel from the Attorney General's Office and Legislative Council staff, Article X, Section 3, of the ND Constitution allows adoption by reference of federal income tax laws "as amended" in the future.

Section 1. NDCC 15-39.1-04 (10) Definitions: Eligible Retirement Salary

Provision relates to the maximum annual compensation limit that can be used in benefit calculations (\$265,000 in 2015). No active TFFR member currently has a salary large enough to be affected by this limit.

Section 2. NDCC 15-39.1-10(4) Eligibility for benefits

Provision relates to minimum distribution requirements requiring payment of retirement benefits at age 70.5 or termination of employment, whichever is later.

Section 3. NDCC 15-39.1-10.6 Benefit limitations

Provision relates to the Section 415 maximum annual benefit limit (\$210,000 in 2015). To date, no retiree's benefit has exceeded the annual benefit limit.

Section 4. NDCC 15-39.1-20 Withdrawal from Fund

Provision provides that a member or a member's beneficiary may elect to have an eligible rollover distribution paid to an eligible retirement plan as allowed under IRC regulations.

Sections 5 and 6. NDCC 15-39.1-24 (8) and (11) Purchase of additional credit

Provision provides for purchase of up to 5 years of nonqualified service credit and acceptance of eligible rollover distributions and transfers from eligible retirement plans as allowed under IRC regulations.

Section 7. NDCC 15-39.1-34 Internal Revenue Code compliance

Provision requires the board to administer the TFFR plan in compliance with various sections of the IRC and regulations as they apply to governmental plans.

Actuarial Consultant and Outside Tax Counsel Review

TFFR's actuarial consultant, Segal Company, has reviewed the bill. In their letter dated October 28, 2014, they noted the bill would not have a material actuarial cost impact on TFFR. They also stated the provisions of the bill do not appear to directly or significantly impact the benefits payable from TFFR.

Additionally, outside tax counsel (Ice Miller) was hired by TFFR to review plan statutes to determine whether any changes were necessary to comply with the U.S. Supreme Court ruling in *United States v. Windsor* relating to same-gender marriages and the definition of spouse for purposes of federal tax laws. Outside tax counsel advised TFFR that revising the IRC references to automatically update as the Code sections are amended was sufficient.

Summary

During the interim, the Legislative Employee Benefits Programs Committee reviewed this bill (Bill Draft No. 140), and unanimously gave a favorable recommendation.

On behalf of the TFFR Board, we respectfully request that your Committee give a "do pass" recommendation on HB1064.

Thank you.