BOARD OF HIGHER EDUCATION

REQUEST FOR COMMITTEE AND BOARD ACTION

COMMITTEE: Fiscal Affairs and Administrative Policy **NO**.: FAAP 13-38

COMMITTEE DATE: March 5, 2013

BOARD DATE: March 12, 2013

ADOPTION OF THE MASSACHUSETTS OPTIONAL RETIREMENT PROGRAM AMENDMENT

MOVED: In accordance with the applicable provisions of Chapter 15A, Section 40, of the Massachusetts General Laws, as amended, the Board of Higher Education adopts Amendment No. 2 to the 2010 restatement of the Optional Retirement Program, represented by Attachment A, to be effective retroactively to January 1, 2012.

Authority: Massachusetts General Laws Chapter 15A, Section 40

Contact: Sean Nelson, Deputy Commissioner for Administration and Finance

Background– Plan Documentation

The Optional Retirement Program ("ORP" or "Plan") is a defined contribution retirement plan available to nearly all employees at the State University campuses; the Community Colleges; the University of Massachusetts; and the Department of Higher Education. The Plan became effective on October 30, 1995, and currently covers approximately 3,100 Active Participants (contributing to the Plan) and more than 3,000 Participants who hold assets in the ORP but do not receive contributions.

During the Plan's early years, documentation of its provisions, features and operational policies was represented by a variety of documents. These included the ORP's enabling legislation; booklets summarizing the Plan's key features for employees; and Provider product contracts (*e.g.* annuity contracts).

In 2004, the Board of Higher Education employed the Segal Company, a nationally known benefits consulting firm, to draft a formal plan document; organizing the ORP's provisions and features in a single, authoritative "source document". The Board amended this plan document in 2007, and again in 2008.

The Board adopted a full restatement of the Plan in November, 2010; incorporating the 2007 and 2008 amendments. Since that restatement, the Commissioner, acting within the powers assigned to him under the Board vote in 2010, amended the Plan to incorporate several technical matters required by the Internal Revenue Service as a condition of their issuing a favorable Letter of Determination for the restatement. The Letter of Determination was issued in 2011. This Amendment No. 1 became effective as of January 1, 2010.

Amendment No. 2 has been prepared to incorporate a wide variety of items affecting the Plan. These include codification of the Department's administrative practices; a new IRS requirement relating to phased retirement; language enabling greater use of electronic media in operating the Plan; and provisions reflecting current business practices in managing Providers and their revenue generated by investment fund fees.

Attachment

Attachment A: Amendment No. 2 to the Massachusetts Optional Retirement Program (with notes)

Attachment B: Amendment No. 2 to the Massachusetts Optional Retirement Program

Proposed Amendment No. 2 to the
Massachusetts Optional Retirement Program
Annotated-- With Summary Notes

IN WITNESS WHEREOF, the Massachusetts Board of Higher Education (the "Board") herein amends the Massachusetts Optional Retirement Program (the "Plan"), as follows:

Preamble:

1. *Adoption and effective date of amendment*. This amendment any attachments thereto are adopted to clarify certain provisions of the Plan. Except as otherwise provided herein, this amendment shall be effective as of January 1, 2012.

2. *Supersession of inconsistent provisions*. This amendment and any attachment thereto shall supersede the provisions of the Plan to the extent those provisions are inconsistent with the provisions of this amendment.

Plan Provisions:

1. Article 1: Purpose of the Plan

Section 1.2: Add the following text to the last sentence of the first paragraph:

"……; and operated as a governmental plan under Code Section 414(d)."

Purpose: Adding this brief text codifies that the Plan is a "governmental plan" under the Internal Revenue Code, in anticipation of new regulations defining such plans from the IRS, and ensuring the Commonwealth continues benefiting from the moratorium on discrimination testing for this retirement plan.

2. Article 2: Definitions

For purposes of this Amendment, it is implied that the addition and removal of terms under Article 2 will result in the appropriate re-numbering of all terms defined herein.

A. Beneficiary: Delete the present definition of "Beneficiary" and replace it with the following text:

> **Beneficiary** means a person who is receiving or entitled to receive benefits from the Plan because of designation for such benefits in writing or in another form acceptable to the Plan Administrator, by a Participant or because of the provisions of the Plan.

Purpose: Inserting this brief language allows use of electronic beneficiary designations under the Plan; supporting greater use of technology in the Plan's operation and administration.

B. Compensation: Add the following text to the last sentence of the first paragraph:

> "……..;except that upon the re-employment of a former ORP participant on or after January 1, 2011 who has been hired into an ORP-eligible position and whose previous employment occurred prior to January 1, 2011 and who did not incur a Break in Participation, compensation for such participant will not exceed that amount prescribed under Code Section 401(a)(17); and also except that upon the re-employment of a former member of the Massachusetts Employees' Retirement System (MSERS) on or after January 1, 2011 in an ORP-eligible position and whose previous employment occurred prior to January 1, 2011 and who did not withdraw his member contributions to the MSERS, compensation for such new ORP participant will not exceed that amount prescribed under Code Section 401(a)(17)."

Purpose: Expansion of this text codifies the effect of a Break in Participation on the applicability of the federal definition of compensation.

C. Distribution Date: Insert the following definition after "Custodial Account":

> **Distribution Date** means the earliest date that payments from the Plan may be made to either participants or beneficiaries. The Distribution Date shall be after the termination of employment with the Commonwealth or death of the participant, but not sooner than the first pay period following the last contribution made to the Plan.

Purpose: This new term codifies use of a delayed date in making distributions from the Plan, which reflects administrative practice; helps ensure that final contributions have been remitted before payment is made; and also helps obviate ruses where a participant terminates employment for the sole purpose of drawing an immediate lump sum from the Plan, exhausting their account to use the funds for purposes other than retirement, and then being rehired and resuming participation in the Plan.

D. Election Period: Delete the present definition of "Election Period" and replace it with the following:

> **Election Period** means the period during which newly eligible employees may choose to participate in the Plan, under the terms set forth in Section 3.3.

Purpose: Replacement of the original text allows for a brief description of the term here, and for the enumeration of expansive issues relating to the effects of a Break in Participation on "Election Period" later in the document (see the insertion of Section 3.3 below).

E. Other Terms: Add the following to the section "Other Terms":

"g. Election Period - 3.3"; and

"h. Employee Contribution Rate - 4.2"

Purpose: These insertions indicate that detailed information about the meaning of these terms is found in other parts of the document. Note that both references relate to the impact of a Break in Participation on these two features.

3. Article 3: Eligibility and Participation

A. Section 3.1: replace the last bullet point of Section 3.1a (2), as amended by Amendment No. 1, with the following text:

"- except that students within the meaning of Code Section 3121(b)(10) are not Eligible Employees;"

Purpose: Replacement of the original text aligns the document with the IRS' approach to excluding certain students who may also be employees of an institution, from plan participation. Directly citing the Internal Revenue Code draws on the Service's own approach to distinguishing students who are (incidentally) employees, from employees who are (incidentally) students.

B. Section 3.3: Insert the following new Section 3.3 and re-number the remaining Sections accordingly:

3.3 Election Period

Each newly eligible employee shall be provided an Election Period during which to select their retirement plan coverage as provided by the Employer.

Prior to February 16, 2012, the Election Period was comprised of ninety (90) calendar days, beginning with the first day that the Eligible Employee is actively at work, performing their duties for compensation from the Employer.

For employees who are newly eligible to participate in the Plan on or after February 16, 2012, the Election Period is comprised of one hundred and eighty (180) calendar days.

Start Date: Effective July 1, 2013, the Election Period shall begin with the last day of the pay period during which an employee is first recorded on their respective payroll system as an Eligible Employee.

A. Re-employment of a former ORP participant in an ORP-eligible position

Such newly eligible employee must be provided an Election Period upon re-employment if they incurred a Break in Participation.

B. Re-employment of a former member of the Massachusetts State Employees' Retirement System (MSERS) in an ORP-eligible position

Such newly eligible employee must be provided an Election Period upon re-employment if they withdrew their Member Contributions from the MSERS.

Additionally, in cases where the re-employed member of the MSERS had not previously held a position that was eligible for ORP participation they must be provided an Election Period without regard to the status of their Member Contributions under the MSERS

Purpose: Insertion of this text allows the document to address the following topics with greater detail than should be accommodated in a simple definition of the term; reflecting a change in state law, and the Department's administrative practices:

- the extension of the Election Period from 90 to 180 days;

- the starting date of the Election Period;

- the effect of a Break in Participation on Election Periods.

4. Article 4: Contributions and Allocations

Section 4.2: Insert the following new Section 4.2 and re-number the remaining Sections accordingly:

4.2 Employee Contribution Rate

Section 4.1 of this document notwithstanding, the rate of Employee Plan Contribution upon reemployment of an employee shall be determined as follows.

A. Re-employment of a former ORP participant in an ORP-eligible position

If such newly eligible employee incurred a Break in Participation, then he shall contribute to the Plan at the rate equal to that which he would otherwise make under the Massachusetts State Employees' Retirement System (MSERS) that is in effect for new members of that plan at the time of the re-employment.

If such newly eligible employee has not incurred a Break in Participation, then he shall contribute to the Plan at a rate equal to that which he last contributed to the Plan.

B. Re-employment of a former member of the Massachusetts State Employees' Retirement System (MSERS) in an ORP-eligible position

If such newly eligible employee withdrew their member contributions from the MSERS, then he shall contribute to the Plan at a rate equal to which he would otherwise make under the MSERS that is in effect for new members of that plan at the time of the re-employment.

If such newly eligible employee did not withdraw their member contributions from the MSERS, then he shall contribute to the Plan at a rate equal to that which he last contributed to the MSERS.

Purpose: Insertion of this text reflects the effects of a Break in Participation on the rate of Employee Plan Contributions.

5. Article 5: Provider Accounts

A. Section 5.3: Insert the following new Section 5.3 and re-number the remaining Sections accordingly:

5.3 Provider Status

Providers under the Plan shall exist with one of the following statuses under the Plan, and operate with these conditions:

(a) ***Contract Provider*** holds a valid Commonwealth Standard Contract form and may:

- enroll newly eligible employees;

- receive Plan Contributions under Article 4 of this document;

- accept Trustee –to – Trustee transfers into the Plan under Section 5.5;

- make intra-plan transfers of Plan assets to other Contract Providers;

- accept intra-plan transfers of Plan assets from other Contract Providers and Legacy Providers;

- distribute assets from the Plan at the direction of the Employer; and

- perform all other duties and requirements as prescribed under this document and M.G.L. Ch 15A Section 40 for Providers.

(b) ***Legacy Provider*** holds a valid Commonwealth Standard Contract form and may:

- receive Plan Contributions under Article 4 of this document;

- make intra-plan transfers of Plan assets to Contract Providers;

- distribute assets from the Plan at the direction of the Employer.

Legacy Providers may not:

- enroll newly eligible employees or otherwise establish accounts for participants except at the direction of the Plan Administrator;

- accept Trustee –to – Trustee transfers into the Plan under this Article 5;

- accept intra-plan transfers of Plan assets from Contract and other Legacy Providers;

- accept rollovers into the Plan under Article 4 of this document;

- establish Retiree Incomes under the Plan except when directed to do so by the Plan Administrator.

(c) ***Former Provider***: held a State Standard Contract form with the Commonwealth at some time in the past. Former Providers may not:

- hold any plan assets;

- perform any of the duties and requirements prescribed under this document and M.G.L. Ch 15A Section 40 for Providers.

Except that the above concerning Former Providers notwithstanding, a Former Provider making payments to a Retiree in the form of an annuity must continue to make such payments, and where directed by the Participant and the Plan Administrator, deduct monthly Retiree Insurance premiums and remit such premiums to the Plan Administrator in a method prescribed by the Administrator, until the earlier of the Participant's election to discontinue Retiree Insurance coverages and the Participant's death.

Purpose: Insertion of this new section provides refinement of the conditions under which a Provider operates (or does not operate) under the Plan; reflecting changes in the nature of the Provider line-up; and codifying greater control of Providers by the Plan Administrator.

B. Section 5.3 Participant Change in Providers: Insert the following text at the end of the first sentence of the Section:

"…….or another form acceptable to the Plan Administrator."

Purpose: Insertion of this language facilitates participant Provider changes via electronic media; positioning the Department to make greater use of technology in the Plan's operation and administration.

C. Section 5.4 Employer Change in Providers: Delete the first sentence of this Section and replace it with the following:

"Upon the Employer's election to either terminate, add or otherwise change either a Contract or Legacy Provider, and where permitted by that Provider, the Employer may transfer all accumulations held by such Provider to either another Provider or funding vehicle."

Purpose: This revision reflects the use of Provider statuses and codifies mapping of assets to other products of the same Provider, in addition to mapping to another Provider; extending the Department's ability to actively manage Provider relationships.

D. Section 5.8 Transfer of Benefit to Other Plans: Insert the following new Section 5.8:

5.8 Transfer of Benefit to Other Plans

At the direction of the Plan Administrator, assets of the Plan, which source and amounts are determined by the Administrator, may be transferred to a plan operating under M.G.L. Chapter 32. Such transfer of assets shall be considered non-taxable to the participant as a Trustee to Trustee transfer in accordance with Revenue Ruling 67-213, 1967-2 C.B. 149.

Purpose: This insertion codifies and facilitates the transfer of assets from the Plan to the State's primary pension; anticipating an environment where employees who are no longer eligible for ORP participation may use such funds to purchase service under the state pension, as well as the potential for ORP participants to have a second, voluntary choice of retirement plan coverage.

E. Section 5.9 Plan Expenses and Fees: Inset the following new Section 5.9:

5.9 Plan Expenses and Fees

All direct expenses of the Plan shall be paid by the Employer or from Plan assets. The Employer may establish and maintain a Revenue Credit Account or another similar account ("Credit Account") under the Plan that is funded by any Provider. Plan expenses may be paid from a Credit Account subject to the terms of the Account and subject to applicable law. To the extent that a Credit Account requires that the funds be fully expended prior to the close of the Plan Year and there are funds remaining in that Credit Account at the end of the Plan Year, the remaining funds shall be divided on a non-discriminatory basis among all participating employees in accordance with the method determined by the Plan Administrator.

Fees that are related to a particular Provider Account may be assessed against such Provider Account in accordance with the terms of such Provider Account.

Purpose: This insertion facilitates the use of Revenue Credit Accounts under the Plan as suspense accounts; the holding Provider credits from excess revenue, and the allocation of such funds to participants; and the allocation of such revenue credits to a specific Provider where needed to cover fees related to that sole Provider.

6. Article 8 Distributions

A. Section 8.2 Timing of Distributions: Delete the final two sentences of the Section and replace them with the following:

"…..The Participant must elect, in writing, or in another form that is acceptable to and filed with the Plan Administrator, to draw benefits from the Plan. The distribution of his Provider Account may be made at any time after termination of employment with the Employer but not sooner than the applicable Distribution Date, nor later than as soon as administratively feasible after the Participant reaches his Required Beginning Date."

Purpose: This revision allows for use of electronic media in requesting distributions from the Plan, and reflects application of the new "Distribution Date".

B. Section 8.3 Small Benefit Distribution: Delete the single sentence comprising this Section and replace it with the following:

"Distribution of any Participant's vested Provider Account that equals $5,000 or less prior to the commencement of distribution shall be paid as soon as administratively feasible after the Participant becomes eligible for a distribution, but not sooner than the applicable Distribution Date, provided the Participant consents to the distribution."

Purpose: This replacement reflects application of the new "Distribution Date" under the Plan.

C. Section 8.7 Distribution during Working Retirement: Insert this new Section 8.7

8.7 Distributions during Working Retirement

A trust forming part of a pension plan shall not be treated as failing to constitute a qualified trust under Code Section 401(a)(36) solely because the Plan provides that a distribution may be made from such trust to an employee who has attained age sixty-two (62) and who is not separated from employment at the time of such distribution.

Purpose: This new Section is required by the IRS; reflecting the expansion of "phased retirement" in the workplace. Payments to participants at least age 62, while employed, will not adversely affect the Plan's tax-qualified status.

7. Article 9 Form of Distribution

A. Section 9.1 Earliest Distribution Date: Delete the first sentence of this Section and replace it with the following text:

"Distribution of a Participant's Provider Account shall occur no earlier than the date on which the Participant becomes eligible for a distribution in accordance with Sections 8.1 and 8.2 of this Plan, unless specifically authorized elsewhere in the Plan."

Purpose: This replacement language includes references to Section 8.2 relating to the "timing" of a distribution and the new "Distribution Date" under the Plan.

B. Section 9.2 Method of Payment: Delete subsection 9.2(c)1 and replace it with the following text:

1. A full or partial Lump Sum Payment option may be elected at any time by an Alternate Payee; and by Participants age fifty-five (55) and older at the time that a distribution is requested; for purposes of this Section, no participant may be considered an Alternate Payee; and

Purpose: This revision clarifies the Plan rule that Alternate Payees (typically a participant's former spouse) may receive either full or partial lump sum payments at any time; reflecting the common practice of Alternate Payees to draw full lump sums upon implementation of their Domestic Relations Order.

8. Article 13 General Provisions

A. Section 13.4 Designation of a Beneficiary: Delete the single sentence comprising this Section and replace it with the following:

"A Participant's designation of his Beneficiary shall be in writing, or in another form that is acceptable to the Plan Administrator, on a form provided by the Plan Administrator and may be changed from time to time in the same manner insofar as permitted in connection with the benefit involved and in accordance with the rules of section 9.5(a). "

Purpose: This revision facilitates use of electronic media to designate beneficiaries; positioning the Plan to allow greater use of technology in its operation and administration.

B. Section 13.9 Unallocated Funds: Insert the following new Section 13.9:

13.9 Un-allocated Funds

Any amounts contributed to the Plan, and/or assets arising thereupon or otherwise accruing under the Plan that are not allocated to participant Provider Accounts, but are held in suspense, shall be used to reduce future Employer Plan Contributions. Use of such un-allocated funds must be completed before the end of each Plan Year.

Purpose: This new Section reflects the accumulation of small amounts of unallocated cash at a Provider, typically generated by adjustments and re-calculations for contributions held in suspense either in aggregate or for individual participants, and mandates the use of such funds to reduce future Employer Plan Contributions.

9. Exhibit A Providers

Replace "Exhibit A" with the following "Appendix A":

Appendix A – Provider Information

A complete list of all funds available under the Plan from each Contract and Legacy Provider is available on the Plan's web pages (www.bhe.mass.edu/orp); at the Human Resources office on each campus; and directly from the Plan Administrator.

All Providers may have restrictions on distribution options and fees which apply. A full description of those is available in the prospectus and/or annuity contract.

Contract Providers

1. For employees becoming participants PRIOR TO September 1, 2010

Annuity Contracts

Lincoln National Insurance Company: MultiFund Select

TIAA – CREF: Group Retirement Annuity

VALIC: Portfolio Director I and II

Disability and Life Insurance Program

Standard Insurance Company of Oregon

2. For all participants ON OR AFTER September 1, 2010 THROUGH December 31, 2012:

Annuity Contracts and Mutual Funds

Fidelity Investments: Mutual Funds

Lincoln National Insurance Company:

- Lincoln Alliance (fixed annuity and mutual funds)
- MultiFund Select Annuity

TIAA –CREF:

- Group Retirement Annuity (annuity and mutual funds
- Retirement Choice Annuity (annuity and mutual funds)

VALIC:

- Portfolio Director I and II (annuity)
- RSVP Mutual Fund Platform (fixed annuity and mutual funds)

Disability and Life Insurance Program

Standard Insurance Company of Oregon

3. For all participants ON AND AFTER January 1, 2013:

Annuity Contracts and Mutual Funds

Fidelity Investments: Mutual Funds

TIAA –CREF:

- Group Retirement Annuity (annuity and mutual funds

- Retirement Choice Annuity (annuity and mutual funds)

VALIC:

- Portfolio Director I and II (annuity)
- RSVP Mutual Fund Platform (fixed annuity and mutual funds)

Disability and Life Insurance Program

Standard Insurance Company of Oregon

Legacy Providers

None

Former Providers

Lincoln National Life Insurance Co. dba Lincoln Financial Group (effective January 1, 2013)

Purpose: Revision of the former "Exhibit A" to an "Appendix" provides the appropriate venue for identifying Provider information by the Plan's new "Provider Status"; and clearly identifying and recording product offerings over time.