

INSURANCE DEPARTMENT OF THE STATE OF NEW YORK
SECOND AMENDMENT TO
REGULATION NO. 85
11 NYCRR 136
PUBLIC RETIREMENT SYSTEMS

I, Eric R. Dinallo, Superintendent of Insurance of the State of New York, pursuant to the authority granted by Sections 201, 301, 314, 7401(a) and 7402(n) of the Insurance Law of the State of New York, do hereby promulgate the second amendment to Part 136 of Chapter IX of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Regulation No. 85), to take effect upon publication in the State Register, to read as follows:

MATTER IN BRACKETS IS DELETED
MATTER UNDERLINED IS NEW

The title of Part 136 is amended to read as follows:

[STANDARDS FOR ACTUARIALLY FUNDED] PUBLIC RETIREMENT SYSTEMS

Part 136 is renumbered to Subpart 136-1, and titled as follows:

Subpart 136-1

STANDARDS FOR CERTAIN ACTUARIALLY FUNDED PUBLIC RETIREMENT SYSTEM

Section 136.1 is renumbered as 136.1 and amended to read as follows:

§ 136-1.1 Preamble.

(a) Subsection (b) of section 314 of the Insurance Law authorizes the Superintendent of Insurance to promulgate certain standards with respect to the public retirement and pension systems of the State of New York or of a municipality thereof. Specifically, subsection (b) provides as follows:

(b) Notwithstanding any other provision of law to the contrary, the superintendent shall have, in addition to any other powers conferred upon him by law, the following authority with respect to any system:

(2) to promulgate and amend from time to time, after consultation with the administrative heads of systems and after a public hearing, standards with respect to actuarial assumptions, accounting practices, administrative efficiency, discharge of fiduciary responsibilities, investment policies and financial soundness.”

(b) This [Part] Subparts designed to implement, with respect to certain of the public retirement and pension systems, the legislative intent contained in the foregoing.

Section 136.2 is renumbered as 136-1.2 and amended to read as follows:

§ 136-1.2 Definitions.

The following words and phrases, used in this [Part] Subpart, unless a different meaning is plainly required by the context shall have the following meanings:

(a) Retirement systems shall mean, as the context may require, any of the following public employee retirement systems:

- [(1) the New York State Employees' Retirement System;]
- [(2) the New York State Policemen and Firemen's Retirement System;]
- [(3)] (1) the New York State Teachers' Retirement System;
- [(4)] (2) the New York City Employees' Retirement System;
- [(5)] (3) the Police Pension Fund, article 2 (New York City);
- [(6)] (4) the Fire Department Pension Fund, article 1-B (New York City);
- [(7)] (5) the New York City Teachers' Retirement System; and
- [(8)] (6) the Board of Education Retirement System of the City of New York.

(b) Administrative heads shall mean, if not otherwise defined by law, the board of trustees of a retirement system, in their individual and collective capacities.

(c) Governmental unit shall mean New York state, any political subdivision thereof, or public authority created by such governmental unit.

Sections 136.3 through 136.9 are renumbered as 136-1.3 through 136-1.9.

A new Subpart 136-2 is added to read as follows:

ALL MATERIAL IS NEW

Subpart 136-2

STANDARDS FOR THE NEW YORK STATE AND LOCAL EMPLOYEES'
RETIREMENT SYSTEM, THE NEW YORK STATE AND LOCAL POLICE AND FIRE
RETIREMENT SYSTEM AND THE NEW YORK STATE COMMON RETIREMENT
FUND

§ 136-2.1 Purpose.

(a) Section 314 (b) of the Insurance Law authorizes the Superintendent of Insurance to promulgate certain standards with respect to public retirement and pension systems of the State of New York or of a municipality thereof. Specifically, subsection (b) states as follows:

(b) Notwithstanding any other provision of law to the contrary, the superintendent shall have, in addition to any other powers conferred upon him by law, the following authority with respect to any system:

(2) to promulgate and amend from time to time, after consultation with the administrative heads of systems and after a public hearing, standards with respect to actuarial assumptions, accounting practices, administrative efficiency, discharge of fiduciary responsibilities, investment policies and financial soundness...”

(b) This Subpart establishes standards for the management of the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System (hereinafter, collectively, "the Retirement System"), and the New York State Common Retirement Fund (hereinafter "the Fund"). These standards are intended to assure that the conduct of the business of the Retirement System, the Fund, and of the State Comptroller (as administrative head of the Retirement System and sole trustee of the Fund) are consistent with the following principles:

- (1) the retirement system and the fund shall operate under a strong governance framework with a rigorous system of internal controls;
- (2) the retirement system and the fund shall maintain a high level of operational transparency;
- (3) the Comptroller shall adhere to and manage the retirement system and the fund with the highest ethical, professional and conflict of interest standards;
- (4) the Comptroller shall have a fiduciary responsibility to act for the sole benefit of the retirement system's members and beneficiaries; and
- (5) the retirement system and the fund shall be managed in the most efficient and effective manner possible.

§ 136-2.2 Definitions.

The following words and phrases, as used in this Subpart, unless a different meaning is plainly required by the context, shall have the following meanings:

(a) Retirement system shall mean the New York State and Local Employees' Retirement System and the New York State and Local Police and Fire Retirement System.

(b) Fund shall mean the New York State Common Retirement Fund, a fund in the custody of the Comptroller as trustee, established pursuant to Section 422 of the Retirement and Social Security Law, which holds the assets of the retirement system.

(c) Comptroller shall mean the Comptroller of the State of New York in his capacity as administrative head of the Retirement System and the sole trustee of the fund.

(d) OSC shall mean the Office of the State Comptroller.

(e) Consultant or advisor shall mean any person (other than an OSC employee) or entity retained by the fund to provide technical or professional services to the fund relating to investments by the fund, including outside investment counsel, litigation counsel, custodians, administrators, broker-dealers, and persons or entities that identify investment objectives and risks, assist in the selection of money managers, securities, or other investments, or monitor investment performance.

(f) Investment manager shall mean any person (other than an OSC employee) or entity engaged by the Fund in the management of part or all of an investment portfolio of the fund. "Management" shall include, but is not limited to, analysis of portfolio holdings, and the purchase, sale, and lending thereof. For the purposes hereof, any investment made by the Fund pursuant to RSSL § 177(3) shall be deemed to be the investment of the Fund in such investment entity (rather than in the assets of such investment entity).

(g) Placement agent or intermediary shall mean any person or entity engaged by an investment manager (other than an employee of the investment manager) to assist the investment manager in obtaining investments by the fund, otherwise doing business with the fund, whether compensated on a flat fee, a contingency, or any other basis. Regular employees of an investment manager are excluded from this definition unless they are employed principally for the purpose of obtaining investments or providing other intermediary services with respect to the Fund.

(h) Investment policy statement shall mean a written document that, consistent with law, sets forth a framework for the investment program of the fund.

(i) Third party administrator shall mean any person or entity that contractually provides administrative services to the retirement system, including receiving and recording employer and employee contributions, maintaining eligibility rosters, verifying eligibility for benefits or paying benefits and maintaining any other retirement system records. Administrative services do not include services provided to the fund relating to fund investments.

(j) Unaffiliated Person shall mean any person other than: (1) the Comptroller or a family member of the Comptroller, (2) an officer or employee of OSC, (3) an individual or entity doing business with OSC or the fund, or (4) an individual or entity that has a substantial financial

interest in an entity doing business with OSC or the fund. For the purpose of this paragraph, the term "substantial financial interest" shall mean the control of the entity, whereby control means the possession, direct or indirect, the power to direct or cause the direction of the management and policies of the entity, whether through the ownership of voting securities, by contract (except a commercial contract for goods or non-management services) or otherwise; but no individual shall be deemed to control an entity solely by reason of his being an officer or director of such entity. Control shall be presumed to exist if any individual directly or indirectly owns, controls or holds with the power to vote ten percent or more of the voting securities of such entity.

(k) Family member shall mean any person living in the same household as the Comptroller, and any person related to the Comptroller within the third degree of consanguinity or affinity

§ 136-2.3 Fiduciary Responsibilities

(a) The Comptroller is a fiduciary and shall act solely in the interests of the members and beneficiaries of the retirement system. At all times the Comptroller shall perform his or her responsibilities with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

(b) The fund shall at all times be under the control of the Comptroller, who shall adopt an investment policy statement and any amendments such as needed. Key elements of an investment policy statement shall include, without limitation:

- (1) investment purpose;
- (2) investment objectives;
- (3) roles and responsibilities of the Comptroller, and the Comptroller's staff and committees, with respect to investments of the assets of the fund;
- (4) investment guidelines and limits encompassing all types of investments;
- (5) asset allocation targets, including procedures for rebalancing;
- (6) standards for measuring investment performance and evaluating investment risk; and
- (7) any other guidelines adopted by the Comptroller with respect to specific investment related issues, including, but not limited to, securities lending, proxy voting, brokerage, and securities litigation.

(c) No investment or loan transaction shall be made by the fund unless the same has been approved in writing by the Comptroller. The Comptroller may delegate his or her powers of investment to a committee or agent of the Comptroller in accordance with the fund's investment policy statement. Such committee or agent shall file timely written reports of its activities to the Comptroller under a schedule to be established by the Comptroller, and shall render special reports whenever requested by the Comptroller. The Comptroller shall furnish any such reports promptly upon the request of the superintendent.

(d) In respect to the delegation of investment powers, the Comptroller shall regularly review:

- (1) the present holdings in the investment account;
- (2) any material changes in the account during the preceding period;
- (3) the reasons for such changes and the results achieved thereby;
- (4) the investment activity in the account including the rate of turnover; and
- (5) any other factors that the Comptroller deems pertinent to an analysis of financial performance and planning, consistent with or her obligation as a fiduciary.

(e) The Comptroller shall adopt, as shall be deemed necessary, such mortality, service and other tables recommended by the retirement system's actuary and certify the rates of deduction from compensation and ascertain contributions by the employers reported to be necessary to pay the benefits authorized under the provisions of law. The Comptroller shall also submit to the superintendent, in writing, the reasons for the decision not to adopt such recommendations presented by the retirement system's actuary.

(f) The Comptroller shall not reverse, reject, or unduly delay the adoption of the recommendations of the retirement system's board in the performance of its statutory duty, unless such rejection, reversal or delay is supported by objective reasons stated, in writing, by the Comptroller.

(g) The Comptroller shall ascertain when contributions to the retirement system are due and institute appropriate procedures to enforce prompt payment thereof. Contributions for a fiscal year which are more than three months overdue shall be reported to the superintendent by a schedule appended to the annual statement filed with the Insurance Department.

(h) Neither the Comptroller, nor any consultant, advisor, investment manager, agent or employee, shall:

- (1) deal in the assets of the retirement system or the fund for his or her own account;
- (2) act in any capacity in any transaction involving the retirement system or the fund on behalf of a party whose interests are adverse to the retirement system or the fund;
- (3) receive any consideration from any party other than OSC, the retirement system or the fund in connection with a transaction involving the retirement system or the fund; or
- (4) own or maintain any indicia of ownership or personal interest in any assets of the retirement system or the fund other than an interest in the retirement system as a member or beneficiary.

(i) The Comptroller shall require proper minutes of meetings of any committee established by law, regulation or the Comptroller. The Comptroller shall furnish such minutes promptly upon the request of the superintendent.

(j) The Comptroller shall be responsible for ensuring that all members of any committees established by law or regulation or by the Comptroller to assist in the management of the retirement system or in the investment of the assets of the fund have been, (1) provided with appropriate information pertaining to their duties and their fiduciary and ethical responsibilities and (2) provided training with respect to discharge of their fiduciary duties and responsibilities to the fund.

§ 136-2.4 Governance Responsibility and Ethics Provisions

(a) Committees:

(1) The Comptroller shall appoint committees required by statute, regulation, or executive order of the Comptroller, including but not limited to, the Investment Advisory Committee and the Real Estate Advisory Committee (also known as the Mortgage Advisory Committee) required by Section 408 of the Retirement and Social Security Law. The Comptroller shall establish and administer written ethical standards applicable to the members of such committees. The ethical standards shall establish a financial disclosure and conflicts of interest process designed to ensure that decisions are made for the benefit of the retirement system members and beneficiaries. Such ethical standards shall be published on the OSC public website.

(2) The Comptroller shall authorize the investment advisory committee to review the investment policy statement and offer advice regarding amendments to the investment policy statement as needed.

(3) The Comptroller shall develop a process to receive and investigate complaints from any source, or upon his or her own initiative, concerning allegations of corruption, fraud, criminal activity, conflicts of interest or abuse by a committee member. The process shall be set forth in written guidelines and such guidelines shall be published on the OSC public website.

(b) Employees:

(1) All employees of OSC who have responsibility for matters related to the fund are subject to the applicable provisions of the Public Officers Law.

(2) All employees of OSC who have responsibility for matters related to the fund shall be provided training with respect to discharge of their duties and responsibilities to the fund.

(3) The Comptroller shall develop a process to receive and investigate complaints from any source, or upon his or her own initiative, concerning allegations of corruption, fraud, criminal activity, conflicts of interest or abuse in OSC by a State officer or employee

relating to his or her office or employment. The process shall be set forth in written guidelines and such guidelines shall be published on the OSC public website.

(c) Investment managers, and consultants or advisors:

(1) The Comptroller shall require that investment managers, and consultants or advisors:

(i) promptly disclose to the fund in writing any conflict of interest the investment manager or consultant or advisor may have which could reasonably be expected to impair the investment manager's, or consultant or advisor's ability to render unbiased and objective advice; and

(ii) file annually with the fund a statement acknowledging that they are aware of and that they are in compliance with the above standard. Such statement shall contain the following language:

"ALL INVESTMENT MANAGERS, AND CONSULTANTS OR ADVISORS OWE THE COMPTROLLER A FIDUCIARY DUTY. THIS MEANS THAT INVESTMENT MANAGERS, OR CONSULTANTS OR ADVISORS MUST DISCLOSE TO THE COMPTROLLER INFORMATION ABOUT MATERIAL CONFLICTS OF INTEREST. FAILURE TO TRUTHFULLY COMPLETE THIS STATEMENT MAY RESULT IN CRIMINAL OR CIVIL LIABILITIES".

(2) The Comptroller shall establish transparent procurement guidelines and procedures with respect to procurement of all investment managers, and consultants or advisors. Such guidelines and procedures shall be published on the OSC public website. The method of selection of investment managers and consultants or advisors shall be documented in writing, in a procurement record.

(3) The Comptroller shall develop a process to receive and investigate complaints from any source, or upon his or her own initiative, concerning allegations of corruption, fraud, criminal activity, conflicts of interest or abuse by a person or entity having business dealings with the fund relating to such deals. The process shall be set forth in written guidelines and such guidelines shall be published on the OSC public website.

(d) Placement agents or intermediaries: In order to preserve the independence and integrity of the fund, to address potential conflicts of interest, and to assist the Comptroller in fulfilling his or her duties as a fiduciary to the fund, the Comptroller shall maintain a reporting and review system that must be followed whenever the fund engages, hires, invests with, or commits to, an outside investment manager who is using the services of a placement agent or intermediary to assist the investment manager in obtaining investments by the fund, or otherwise doing business with the fund. The Comptroller shall require investment managers to disclose to the Comptroller and to his or her designee payments made by or on behalf of such placement agent or intermediary. The reporting and review system shall be set forth in written guidelines and such guidelines shall be published on the OSC public website.

(e) Audit committee:

Consistent with his or her obligations as a fiduciary, the Comptroller shall establish an audit committee for the retirement system and the fund comprised exclusively of unaffiliated persons, one of whom shall reflect the interests of public employees and one of whom shall reflect the interests of public employers. The Comptroller shall:

- (1) develop an audit committee charter for the committee;
- (2) establish written standards for the selection of audit committee members;
- (3) authorize the audit committee to review and report to the Comptroller on the internal audit plans and the internal audit and regular examination reports related to the retirement system and the fund;
- (4) authorize the audit committee to review and report to the Comptroller on the procurement of external auditor services by the retirement system and the fund;
- (5) authorize the audit committee to review and report to the Comptroller on the annual audit process related to the retirement system and the fund and the Comprehensive Annual Financial Report, which shall include consulting with external auditors to review the adequacy of internal controls and significant findings and recommendations; and
- (6) authorize the audit committee to develop quarterly progress reports to the Comptroller that, at a minimum, discuss: (i) the audits of the retirement system and the fund scheduled to be conducted, along with the scope of the audits; (ii) the audits of the retirement system and the fund completed; and (iii) significant audit findings and recommendations related to the retirement system and the fund.

§ 136-2.5 Transparency and Financial Reporting

- (a) All records, including work papers for the preparation of the annual statement filed with the superintendent, shall be available to the Department's examiners and be maintained in accordance with the requirements of NYCRR Part 243 (Regulation No. 152).
- (b) The Comptroller shall require that all agreements with consultants or advisors, investment managers, or third party administrators include provisions that require the person or entity to: (1) submit to a review by the superintendent coming fees paid by the fund and services rendered to the fund; and (2) respond in writing to any inquiry or request for information by the superintendent concerning fees paid by the fund and services rendered to the fund.
- (c) Books of account and records of the retirement system and of the fund shall be maintained by fiscal year for which the retirement system files reports.

(d) The Comptroller shall maintain a classification of its accounts, numbered and titled, together with an accurate description of the content of each account by debit and credit. The classification of accounts shall be consistent with the requirements of the accounting and financial reporting standards of the Government Accounting Standards Board and of any other reporting requirement judged to be necessary by the superintendent.

(e) The Comptroller shall maintain records that set forth the expenses incurred by the retirement system and the fund on their behalf in the course of operations.

(f) The Comptroller shall have on his or her staff an internal auditor who shall report to the Comptroller and shall submit regular reports of audits of the retirement system's and fund's records, accounting procedures, and investment operations, including recommendations for improvement and correction. The Comptroller shall require the internal auditor to conduct audits on an annual basis based on risk assessment of the operations of the retirement system and the fund, including audits of business relationships with the retirement system and the fund. The Comptroller shall share all internal and external audit reports related to the retirement system and the fund with the audit committee. The Comptroller shall furnish any such reports promptly upon the request of the superintendent.

(g) The Comptroller shall:

(1) file with the superintendent an annual statement in the format prescribed by Section 307 of the Insurance Law, including the retirement system's financial statement, together with an opinion of an independent certified public accountant on the financial statement;

(2) file with the superintendent the Comprehensive Annual Financial Report within the time prescribed by law, but no later than the time it is published on the OSC public website;

(3) disclose on the OSC public website, on at least an annual basis, all fees paid by the fund to investment managers, consultants, advisors, and third party administrators;

(4) disclose on the OSC public website, on at least an annual basis, instances where an investment manager has paid a fee to a placement agent or intermediary;

(5) disclose on the OSC public website the fund's investment policies and procedures; and

(6) require fiduciary and conflict of interest reviews of the fund every three years by a qualified unaffiliated person.

Section 136-2.6 Financial Soundness and Actuarial Principles

(a) Consistent with his or her obligations as a fiduciary, the Comptroller shall establish an actuarial committee comprised exclusively of unaffiliated persons that have expertise and experience in actuarial science.

(b) The Comptroller shall:

- (1) develop an actuarial committee charter for the committee;
- (2) establish written standards for the selection of actuarial committee members;
- (3) authorize the actuarial committee to make recommendations to the retirement system actuary regarding actuarial assumptions and methodologies; and
- (4) authorize the actuarial committee to review and report to the Comptroller on the financial soundness of the retirement system.

§ 136-2.7 Implementation

(a) Failure to implement provisions of applicable law or regulation shall be regarded as a breach of fiduciary responsibility.

(b) The Comptroller, any officer or employee of OSC, or any other person or entity having a fiduciary responsibility to the fund, who willfully violates or knowingly participates in a violation of any fiduciary standard promulgated pursuant to Section 314 of the Insurance Law or other applicable law or regulation, shall be guilty of a breach of fiduciary responsibility.

(c) In the event the superintendent determines that there is reasonable cause to believe that the breach has occurred, the superintendent shall, providing notice to the Comptroller or his or her designee, and to the subject officer or employee of OSC or such other person or entity having a fiduciary responsibility to the fund, transmit a notice of reasonable cause to: the Temporary President of the Senate and the Speaker of the Assembly, if the notice relates to the Comptroller; or the Comptroller, if the notice relates to an officer or employee of OSC or to any other person or entity having a fiduciary responsibility to the fund.

(d) In any case where the superintendent determines that there is reasonable cause to believe that a breach by the Comptroller, an officer or employee of OSC, or any other person or entity having a fiduciary responsibility to the fund, has resulted in a depletion of the fund, the superintendent, after providing notice to the Comptroller or the Comptroller's designee, may transmit a copy of his or her determination to the Attorney General or any other appropriate civil or criminal law enforcement authorities for any appropriate further action.

(e) In any case where the superintendent's determination results in an adjudication that the fund has been depleted by reason of any breach, the adjudication will be published on the OSC public website.

(f) This Subpart shall take effect upon publication in the State Register and will apply to all contracts related to the management of the fund entered into or renewed by the Comptroller subsequent to that date.

I, Eric R. Dinallo, Superintendent of Insurance of the State of New York, do hereby certify that the foregoing is the Second Amendment to Part 36 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Regulation 85), entitled "Public Retirement Systems," promulgated by me on October 28, 2008, pursuant to the authority granted by Sections 201, 301, 314, 7401(a), and 7402(n) of the Insurance Law, to take effect upon publication in the State Register.

Pursuant to the provisions of the State Administrative Procedure Act, prior notice of the proposed amendment was published in the State Register in July 23, 2008. No other publication or prior notice is required by statute.

Eric R. Dinallo
Superintendent of Insurance

October 28, 2008