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March 31, 2010

Hon. Michael McSweeney
City Clerk

Dear Mr. McSweeney:

You have requested my opinion as to whether placement agents who contact the New York City Comptroller ("Comptroller") or the boards of trustees of the City's five pension systems regarding investments by those systems are "lobbying" as defined by New York City Administrative Code ("Administrative Code") §3-211(c). For the reasons set forth below, it is my opinion that placement agents are lobbying when they attempt to influence the decisions made by the Comptroller, or members of his staff, or the boards of trustees, or members of their staffs, about the investment of pension funds (the "Funds").

The City's five pension systems are: (1) the New York City Employees' Retirement System ("NYCERS"); (2) the New York City Police Pension Fund ("PPF"); (3) the New York Fire Department Pension Fund ("FDPF"); (4) the New York City Teachers' Retirement System ("TRS"); and (5) the New York City Board of Education Retirement System ("BERS"). The Administrative Code provides for the governance of NYCERS, PPF, FDPF and TRS by boards of trustees, and specifies the membership of those boards. See Ad. Code §13-103 (NYCERS shall be administered by a board of trustees); §13-216 (PPF shall be administered by a board of trustees); §13-316 (FDPF shall be administered by a board of trustees); §13-507 (TRS board shall be continued). The Education Law and the Rules and Regulations of the BERS provide for the governance and membership of BERS. Education Law §2575; see also BERS Rules and Regulations §§5, 5a. A brief summary of the membership of each of the boards follows.

NYCERS

The Administrative Code provides that the NYCERS board of trustees shall have eleven members, and identifies those members as: (1) a representative of the Mayor, appointed by the Mayor, who will serve as Chairperson; (2) the Public Advocate; (3) the Comptroller of the City; (4) the President of each borough; (5) three employee representatives of the three public

employee unions representing the largest number of NYCERS members. Ad. Code §13-103(b)(1)-(5). The members of the NYCERS board serve as trustees of the funds established by the Administrative Code, and have "full power" to invest those funds. Ad. Code §13-134.

PPF

The PPF has a twelve-person board of trustees, and those members are: (1) the Police Commissioner, who shall serve as Chairperson of the board; (2) the Comptroller of the City; (3) a representative of the Mayor, appointed by the Mayor; (4) the City's director of finance; (5) the president, first vice-president and second vice-president of the Patrolmen's Benevolent Association ("PBA"); (6) the chairperson of the board of trustees of the PBA; (7) the presidents of the Captains' Endowment Association ("CEA"), the Lieutenants' Benevolent Association ("LBA"), the Sergeants' Benevolent Association ("SBA") and the Detectives' Endowment Association ("DEA"). Ad. Code §13-216(a)(1)-(12). The members of the PPF board serve as trustees of the funds established by the Administrative Code, and have "full power" to invest those funds. Ad. Code §13-233(a).

FDPF

The Administrative Code provides that the FDPF shall have a twelve-person board of trustees. Ad. Code §13-316. Those members include: (1) the Fire Commissioner, who shall serve as Chairperson; (2) the Comptroller of the City; (3) a representative of the Mayor, appointed by the Mayor; (4) the City's Commissioner of Finance; (5) the president, vice-president, and treasurer of the Uniformed Firefighters' Association ("UFA"); (6) the chairperson of the board of trustees of the UFA; (7) three elected members of the executive board of the Uniformed Fire Officers' Association ("UFOA"), one with a rank above captain, one with a rank of captain, and one with a rank of lieutenant; and (8) the president of the Uniformed Pilots and Marine Engineers Association ("UPMEA"). See Ad. Code 13-316(a)(1)-(10). The members of the FDPF board serve as trustees of the funds established by the Administrative Code and have "full power" to invest those funds. Ad. Code §13-336(a).

TRS

TRS has a seven-person board of trustees, which includes: (1) the president of the Board of Education; (2) the Comptroller; (3) two members appointed by the Mayor, one of whom must be a member of the Board of Education; and (4) three teacher-members, who are elected by the plan member-contributors. Ad. Code §13-507(1)-(4). The members of the TRS board serve as trustees of the funds established by local law, and the Administrative Code grants them exclusive control over the funds with "full power" to invest the funds. Ad. Code §13-534.

BERS

The BERS Rules and Regulations provide for a board consisting of the Board of Education and two employee-members elected by the plan members. BERS Rules and Regulations §5a. The members of the BERS board serve as trustees of the several funds created by the BERS Rules and Regulations and have full power to invest those funds. BERS Rules and Regulations §7(1).

The Administrative Code allows the boards of trustees of the pension funds to delegate their power to invest pension funds, either in its entirety or with any limitations, including limitations with respect to the type and amount of investments, to the Comptroller. Ad. Code §13-702(a). The Comptroller serves as the custodian of each fund, subject to the direction of each respective board of trustees. See, e.g., Ad. Code §13-136 (Comptroller as custodian for NYCERS); Ad. Code §13-235 (Comptroller as custodian for PPF); Ad. Code §13-338 (Comptroller as custodian for FDPF); Ad. Code §13-536 (Comptroller as custodian for TRS); BERS Rules and Regulations §7(3) (Comptroller as custodian for BERS). The boards act by resolution to delegate to the Comptroller the authority to invest the funds of each pension system. See, e.g., NYCERS, Cal. No. R-41 (June 11, 2009); PPF Resolution FY 2009-10 (June 10, 2009). In this role, the Comptroller manages the assets of the City's five pension funds and acts as investment advisor to those Funds. See http://www.comptroller.nyc.gov/comptroller/duties.shtm. In particular, the Comptroller's "Bureau of Asset Management (BAM) assists the Pension Funds in selecting investment advisors and consultants." See http://www.comptroller.nyc.gov/comptroller/bureaus/bam/index.asp "BAM manages the Funds' cash, directs allocations to the investment advisors and assures that investments recommended by the advisors meet legal requirements." Id. The Comptroller also serves as trustee on four boards of trustees of the City's five pension systems. See Ad. Code §13-103(b)(3) (NYCERS Board of Trustees); §13-216(a)(2) (PPF Board of Trustees); §13-316(a)(2) (FDPF Board of Trustees); §13-507 (TRS Board of Trustees).

The Department of Finance has advised this office that placement agents are retained by private equity firms and hedge funds to identify investors willing to invest with such firms and funds.[1] Other third-parties that may be engaged in similar activities include "finders" and "solicitors." In a recently proposed rule, the Securities and Exchange Commission has defined and differentiated among these third-parties as follows:

> . . . Although the terms are sometimes used interchangeably, "finders" typically locate buyers and/or sellers for a security on behalf of a broker-dealer, "solicitors" typically locate investment advisory clients on behalf of an investment adviser, and "placement agents" typically specialize in finding investors (often institutional investors or high net worth investors) that are willing and able to invest in a private offering of securities on behalf of the issuer of such privately offered securities.

74 Fed. Reg. 39840, at 39853 (2009) (to be codified at 17 CFR Part 275, n. 137) (proposed August 7, 2009).[2] This office has been advised that placement agents are compensated by the private equity firms and hedge funds for facilitating the placement of an investment with their

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[1] Real estate investment funds and investment managers occasionally also use the services of placement agents.

[2] Although the question you posed focuses on placement agents, this analysis applies to all third-parties, as well as employees, regardless of the terminology used to identify them, who are retained or employed by investment firms to influence investment decisions made by the Funds.

firms and funds. This office has also been advised that in addition to introducing the firms and funds at issue to potential investors, placement agents may also counsel firm and fund managers on communication with investors and participate in the negotiation of contractual terms with investors.

During the past few years, governmental entities exercising oversight over public pension funds have begun to regulate placement agents and other third-parties mediating between investment firms and potential investors. As noted above, the Securities and Exchange Commission has recently proposed a rule that would "prohibit investment advisors from using third-party solicitors to obtain government clients." 74 Fed. Reg. at 39852. In its discussion of this proposed rule, the SEC has indicated that this prohibition would apply to all types of third-party solicitors, including placement agents. Id. Comments on this proposal were due on October 6, 2009. The New York State Insurance Department also recently adopted a rule prohibiting the New York State Common Retirement Fund from investing with "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." 11 NYCRR §136-2.4(d). The New York State Attorney General's Office has also developed a Public Pension Fund Reform Code of Conduct that prohibits investment firms from using third-parties such as placement agents to influence the investment decisions made by public pension funds. To date, eleven private equity firms have adopted the Fund's Reform Code of Conduct as part of settlements reached with the Attorney General's Office. See http://www.ag.ny.gov/media_center/2010/feb/feb17a_10.html.

The Administrative Code defines "lobbying" to include any attempt to influence:

> (iii) any determination made by an elected city official or an officer or employee of the city with respect to the procurement of goods, services or construction, including the preparation of contract specifications, or the solicitation, award or administration of a contract, or with respect to the solicitation, award or administration of a grant, loan, or agreement involving the disbursement of public monies,
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> . . . or
>
> (viii) any determination of a board or commission.

Administrative Code §3-211(c)(1)(iii), (viii).

The trustees of the boards of the City's five pension systems are public officers. Assessing whether a position is a public office involves a consideration of multiple factors but courts have identified the crux of the position of public officer as requiring "that some sovereign power, whether great or small, be exercised in the position." Mayor v. Council, 235 A.D.2d 230 (1st Dep't 1997), appeal denied, 89 N.Y.2d 815 (1997). As to the distinguishing feature of public officers - that their duties involve some exercise of the sovereign power - the trustees' duties all concern the retirement benefits of current and former public employees, and the resolution of

issues relating to the pensions of those employees. Because the duties of the trustees involve some portion of the sovereign power, the trustees should be considered public officers.[3]

The Comptroller makes recommendations about how to invest the Funds to the boards of trustees. The trustees determine, by resolution, how the assets of the Funds should be invested. The assets are invested in a combination of stocks and bonds, real estate investment funds, as well as with private equity firms. This office has been advised that when the board of trustees of one of the five pension systems invests in real estate investment funds or with private equity firms, the Comptroller, on behalf of the board, enters into limited partnership agreements or contracts with such funds or firms. Pursuant to such agreements or contracts, the funds or firms are paid management or other investment fees or expenses.

Administrative Code section 3-211(c)(1)(iii) defines lobbying as any attempt to influence "any determination made by an elected city official or an officer . . .of the city with respect to . . .[an] award or administration of . . . [an] agreement involving the disbursement of public monies." Inasmuch as these agreements or contracts provide for the payment of management or other investment fees or expenses to such funds or firms, they involve the disbursement of public monies. The decision to enter into such limited partnership agreements or contracts constitutes a determination made by public officers - the members of the boards of trustees of the pension systems - with respect to an "award or administration of . . .[an] agreement involving the disbursement of public monies." Ad. Code §3-211(c)(1)(iii).

Administrative Code §3-211 also defines lobbying as any attempt to influence "any determination of a board or commission." Ad. Code §3-211(c)(1)(viii). Thus, those persons who attempt to influence the determinations of boards are engaged in lobbying. The boards of trustees of the five pension systems approve the investments in real estate or with private equity firms. These approvals fall within the broad scope of the term "determination." Therefore, placement agents who approach the boards of trustees, or individual members of such boards, to influence their determinations with respect to the investment of the pension systems' funds are engaged in lobbying.

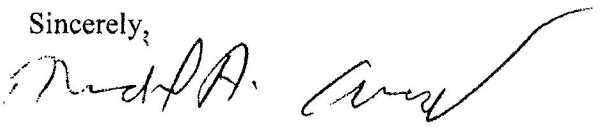
Placement agents also approach the Comptroller or his staff to influence investment decisions. The Comptroller makes recommendations to the boards of trustees. In an Advisory Opinion, the City Clerk's office has opined that in periodic reports a lobbyist must report the names of the decision-makers the lobbyist has attempted to influence as well as the names of the designated representatives of those decision-makers when the decision-makers rely on the substantive input of those representatives. Advisory Opinion 1987-17. The Opinion recognized that governmental decision-makers rely on the "informed recommendations of subordinates in the decision-making process." Id. While the Comptroller is not a subordinate of the boards of trustees of the City's pension systems, the reasoning underlying the Opinion – that lobbyists can, through communications with third-parties, influence decision-makers who rely on recommendations by these third-parties - applies with equal force to the relationship between the

[3] In a recent opinion, the Conflicts of Interest Board (COIB) has also concluded that the trustees of each of the Funds are public servants as defined by Chapter 68 of the Charter, and are subject to its provisions. COIB Advisory Opinion No. 2009-3.

boards of trustees and the Comptroller. Therefore, because the Comptroller makes recommendations to the boards, even if placement agents do not communicate directly with board members, any attempt to influence the recommendations of the Comptroller (directly or through his staff) also constitutes an attempt to influence a determination of the boards of trustees. Ad. Code §3-211(c)(1)(viii). Moreover, as the Comptroller is a member of the board of trustees of four City pension funds, any attempt to influence the Comptroller is equally an attempt to influence a determination of those boards.

For the reasons stated above, it is my opinion that placement agents who attempt to influence the decisions of the Comptroller, or members of his staff, or the boards of trustees of the City's five pension funds, or members of their staffs, or individual members of such boards, with respect to the investments of those funds, are "lobbying" and are subject to the provisions of the Administrative Code regulating lobbyists, including, but not limited to, the following: the filing of statements of registration, periodic reports and fundraising and political consulting reports pursuant to Ad. Code §§3-213, 3-216 and 3-216.1; the prohibition on contingent retainer agreements pursuant to Ad. Code §3-218; and the prohibition on offering or giving a gift to any public servant pursuant to Ad. Code §3-225. In addition, under Ad. Code §3-702(3)(g), contributions from lobbyists to "participating candidates," as defined in the New York City campaign finance act, are not matchable.

Sincerely,



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