



# NYS DEFERRED COMPENSATION BOARD

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DIANA JONES RITTER

EDWARD M. CUPOLI

JOSEPH F. PENNISI

May 21, 2010

**Memorandum To:** Files

Minutes of the May 21, 2010  
Public Meeting of the  
New York State Deferred Compensation Board

A public meeting of the New York State Deferred Compensation Board (the “*Board*”) was held on May 21, 2010, in Conference Room 2E at the offices of Shearman & Sterling LLP, 599 Lexington Avenue, New York, NY 10022. The meeting began at approximately 9:00 a.m. and adjourned at approximately 3:20 p.m. A separate memorandum to the files, also dated May 21, 2010, lists the materials prepared for and referred to during the meeting.

**In attendance:**

Board Members: Diana Jones Ritter, Edward M. Cupoli, Joseph F. Pennisi

Staff Members (“*Staff*”): Edward Lilly, David Fischer, Sharon DiMura, James Kiyonaga, Craig Dickinson

Shearman & Sterling LLP (“*Counsel*”): Kenneth Laverriere,<sup>1</sup> Veronica Wissel, James Tallon, Adrienne Hart (Legal Assistant)

The Bank of New York Mellon (“*BNYM*”): Mary Dunleavy, Gregory Wilcox

Nationwide Retirement Solutions (“*NRS*”): Ric Whetro, Patrick Ray, Jill O’Callaghan, Greg Watson, Cain Hayes, Brenda Anderson

Evaluation Associates LLC (“*EAF*”): Linda Schlissel

Dwight Asset Management (“*Dwight*”): David Starr, Marie Mastro

Clifton Gunderson: Thomas Heseltine

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<sup>1</sup> Mr. Laverriere attended the meeting via teleconference.

Artio Global (“*Artio*”): Rob Morier, Siobhan Kranz, Brian Holland

Fidelity Investments (“*Fidelity*”): Gavin Baker, Steve Anderson

Diana Jones Ritter acted as Chairperson and Adrienne Hart acted as Secretary of the meeting. Ms. Ritter called the meeting to order and Edward Lilly presented a brief overview of the agenda.

## **I. APPROVAL OF MINUTES**

After reviewing the minutes of the public meeting held on February 25, 2010, Ms. Ritter moved to approve the minutes, Joseph Pennisi seconded the motion, and the Board unanimously approved the minutes.

## **II. NRS PRESENTATION**

Patrick Ray provided an overview of some of the staff changes at NRS, including the appointments of Greg Watson as Assistant Vice President of Marketing, and Cain Hayes as Senior Vice President of Sales. Mr. Ray noted that Mr. Hayes replaces Steve Somen as Senior Vice President Sales, who is now serving as Vice President of Operations at NRS. Messrs. Hayes and Watson introduced themselves and provided an overview of general corporate and strategic developments at NRS.

Mr. Ray updated the Board on 2010 Plan activities, including Suffolk County Community College’s adoption of the Plan, the April fee assessment results, the website accessibility project, and HELPLINE statistics during the last quarter. Mr. Ray also provided an update on the “Missing Piece Campaign,” noting that over the past four months, the campaign has resulted in the enrollment of over 2,600 new participants.

Mr. Ray then provided the Board with an overview of the results of the recent participant satisfaction survey. Overall, participants were generally satisfied with the Plan, and were particularly satisfied with their local account executives, the website and the HELPLINE. Participants were slightly less satisfied with the quarterly newsletter and the voice response system. A discussion took place regarding ideas for improving upon the newsletter and voice response system.

## **III. PLAN ISSUES**

### **A. 457 Plan Audit Requirement under the Rules**

A discussion ensued regarding the audit requirement under the Rules and Regulations of the New York State Deferred Compensation Board (the “**Rules**”) and alternatives available to the Board to assist local plan sponsors in complying with the audit requirement. Mr. Lilly gave an overview of the discussion of the issue at the last Board meeting, including the request from certain model plan sponsors for guidance on how to comply with the audit rule. Mr. Lilly also discussed Staff’s recent discovery that not all deferred compensation plans subject to the Rules have

been filing their annual audits with the Civil Service Commissioner, as is required by the Rules.

A general discussion then followed regarding the Board's role in enforcing, and the limited resources available to the Board to enforce the Rules. James Tallon from Shearman & Sterling gave the Board an overview of the provisions of Section 5 of the State Finance Law, the provisions of the Rules and applicable New York case law related to the Board's obligation to enforce the Rules. Mr. Tallon advised that, given the structure of the State Finance Law and the Rules as well as relevant New York case law, the Board does not have an affirmative obligation to enforce the Rules and does not appear to have either sufficient staff or financial resources to enforce the Rules. After questioning by Board members, Mr. Tallon noted that the State Finance Law does not grant the Board authority to enforce the Rules. In addition, the Rules give the Board limited discretion regarding non-compliance which do not obligate the Board to take any enforcement action with respect to non-compliance. After further questions from the Board, Mr. Tallon discussed the obligations of the Board under the Public Officers Law to report certain claims to the Attorney General and the application of the indemnification provisions of the Public Officers Law to the individual Board members and Staff. Mr. Tallon also discussed the deference afforded by State courts to discretionary acts by State regulators and noted that, when confronted with information about non-compliance with the Rules, it would be advisable for the Board to consider the available information and then exercise its discretion regarding what course of action to follow in light of both the information presented to the Board and the Board's available resources.

Following Mr. Tallon's remarks, the Board discussed the current provisions of the Rules that require annual audits of plans by local plan sponsors. Mr. Lilly described certain information available to Staff about non-compliance with the audit requirement by local plan sponsors. Mr. Lilly then described approaches to financial statements and audits by other agencies in the State, including fire districts, in their administration of Length of Service Award Programs. Mr. Lilly described discussions that Staff has had over the last several months with the Office of the State Comptroller regarding audit practices for fire districts and other state entities, and the manner in which auditing standards differ for large and small entities. Mr. Lilly then reviewed the potential ambiguities with the current audit requirement and the challenges that small plans face in conducting audits. A general discussion then followed regarding the Rules and alternatives for addressing the apparent non-compliance with the Rules, during which Board members asked a number of follow-up questions to Mr. Lilly and Mr. Tallon. After this discussion, the Board determined that an appropriate course of action would be to engage in a rulemaking to clarify the audit rule in order to encourage and facilitate compliance with the audit requirement in the Rules. Mr. Pennisi noted the importance of implementing an audit rule that would give participants in 457 plans information about the plan, while mitigating the burden of a costly auditing process on small plans. Ms. Ritter then requested that Staff work with its advisers to develop a draft amendment to the audit requirement in the Rules that takes into account, among other things, plan size, to be reviewed at the Board's next quarterly meeting.

## **B. Plan Document Amendment**

Dave Fischer then gave an overview regarding the proposed amendments and restatement of the Plan document developed by Staff and Counsel. Mr. Fischer highlighted the key amendments to the Plan document, including allowing spousal beneficiaries to select a subsequent beneficiary, the addition of the option for beneficiaries to receive distributions under the tax code's

“five-year rule,” modification of the 45-day waiting period for distributions, the six-month suspension of deferrals upon a participant’s receiving an unforeseeable emergency withdrawal, the allowance for participants who roll over or transfer funds from another 457 plan to transfer outstanding loans as part of their plan assets, and clarification of the indemnification provisions in the Plan to limit indemnification to Board members and Staff. The Board then discussed each of these items in detail and agreed to accept all of the proposed policy amendments to the Plan, with the exception of the six-month suspension of deferrals after an unforeseeable emergency withdrawal. Ms. Ritter noted that the Board should encourage deferrals to the maximum extent allowed by law, and participants should be allowed to continue to save for retirement, even after an unforeseeable emergency withdrawal. Mr. Pennisi then moved to approve all of the amendments described by Mr. Fischer except the unforeseeable emergency withdrawal suspension of deferrals, Edward Cupoli seconded the motion, and the amendments were approved by unanimous consent. A discussion then ensued regarding next steps with respect to the Plan document amendment and restatement. It was decided that the Board would review the Plan document proposed revisions before the next quarterly Board meeting, and Staff would obtain input from NRS, as well as coordinate with Counsel to draft similar revisions to the Model Plan and present such proposed revisions to Model Plan Sponsors.

### **C. Budget Presentation**

Mr. Lilly presented the Board with an overview of the Plan’s 2009-2010 administrative budget. He noted that actual expenditures were lower than anticipated and revenues exceeded the budgeted projections. Accordingly, Mr. Lilly noted that the Plan ended the fiscal year with a budget surplus of \$885,361, which was higher than the Board’s anticipated surplus of \$600,000. Mr. Lilly then reviewed the mutual fund fee reimbursements that had been made to participants in fiscal year 2009-2010, and gave an overview of fees related to the international funds and the Stable Income Fund (the “**Fund**”).

### **D. Independent Investment Advisor RFP**

Mr. Lilly then gave an overview of the status of the independent investment advisor Request for Proposals (“**RFP**”). He noted that the RFP was sent to 33 potential bidders, including 6 entities that qualify in New York as Minority and Women Business Enterprises. It was then noted that any questions that are raised regarding the RFP should be directed to Mr. Lilly.

## **IV. AUDIT REVIEW**

At this time, Tom Heseltine presented the Board with an update on the 2009-2010 Plan audit. Mr. Heseltine noted that the Board should receive a draft of the 2009-2010 audit by June 15.

Mr. Heseltine described significant progress that has been made in several areas that have been problematic in prior years. He noted some areas of concern where NRS had been unable to demonstrate its compliance. Mr. Heseltine advised that in some of these cases, there is no evidence that NRS is not in compliance, but rather, it is an issue of NRS not being able to provide documentation of its compliance. Ms. Ritter asked the rest of the Board if an executive session was needed, to which the other Board members responded that it was not.

## **V. STABLE INCOME FUND SEPARATE ACCOUNTS**

David Starr presented the Board with an overview of the current actions being taken by Dwight to attain additional wrap capacity for maturing funds. Mr. Starr noted that while the Fund currently has sufficient liquidity and cash flow to meet participant demands, wrap capacity continues to be difficult to obtain due to market conditions, and wrap providers are requiring higher fees. Mr. Starr and Marie Mastro then presented the Board with the Plan's options for placing the upcoming maturing proceeds. One option discussed was to utilize a separate account product from an insurance provider. A discussion ensued regarding the characteristics of a separate account product. Mr. Starr noted that a separate account is similar to a wrapped bond portfolio, except that the underlying securities are held in the name of the insurance company in a separate account rather than in the name of the Plan trust. Mr. Lilly noted that because a separate account is neither a guaranteed investment contract nor a wrap contract as defined in the Rules, the Board would need to select a separate account provider through an RFP process. A discussion ensued regarding the benefits and risks of a separate account product to hold some of the assets of the Fund. Mr. Cupoli then moved to initiate an RFP process for a separate account provider, Mr. Pennisi seconded the motion, and the motion was approved. Kenneth Laverriere then exited the meeting.

## **VI. EAI PRESENTATION**

Linda Schlissel provided a general overview of the performance of the Plan's investment options and the current Plan asset allocation. Ms. Schlissel reviewed the international equity portfolio and the key characteristics and performance records of the five active portfolio managers. Ms. Schlissel informed the Board that Artio is currently the underperforming manager, but that no one manager is consistently underperforming. Ms. Schlissel explained that the international portfolio is structured so that it will perform better in falling markets, so weaker performance in a stronger market is not surprising. Ms. Schlissel pointed out that AllianceBernstein has gone from the lowest performing manager to the current best performing manager in the international portfolio.

## **VII. STABLE INCOME FUND REVIEW**

Ms. Mastro provided the Board with an overview of the current performance and structure of the Fund. She discussed the status of current and upcoming maturing proceeds and general Fund performance, which she noted continues to be positive. Mr. Starr then gave the Board a regulatory update, noting that the recent Wall Street reform legislation passed by the U.S. Senate could impact the Plan's ability to enter into wrap contracts. Mr. Lilly noted that the U.S. House of Representatives' version of the legislation did not contain the problematic provision and the Board has communicated its concerns to its New York Senators and other individuals involved in reconciling the House and Senate versions of the legislation.

**VIII. ARTIO PRESENTATION**

Brian Holland then gave the Board an overview of Artio's overall investment strategy and performance history, explaining that Artio has taken a defensive strategy in response to the recent difficult economic climate, which led to weaker performance in the improving market. A general discussion followed regarding the presentation.

**IX. FIDELITY OTC PRESENTATION**

Gavin Baker provided the Board with an overview of Fidelity OTC's investment strategy, noting the fund's focus on valuation and price momentum. A general discussion followed regarding the presentation.

**X. ADJOURN**

There being no further matters for discussion, Mr. Cupoli moved to conclude the meeting. Mr. Pennisi seconded the motion, and the Board unanimously approved the motion. The Board meeting was then adjourned at approximately 3:20 p.m.

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Adrienne Hart

Secretary of the Meeting