

**PRIVILEGED/CONFIDENTIAL/ATTORNEY WORK PRODUCT**

**COMMONWEALTH OF PENNSYLVANIA  
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM  
Office of Chief Counsel**

DATE: January 8, 2010  
SUBJECT: Securities Litigation Policy  
TO: Corporate Governance Committee  
FROM: Gerald Garnish  
Chief Counsel

I attach a revision to the Securities Litigation Policy, which reflects the consensus of the Committee at its last meeting to lower the threshold to \$10 million.

At the same time, the Office of Chief Counsel took the opportunity to review the entire Policy and has recommended one additional modification to make a language change for the sake of consistency.

We attach a red-lined copy of the proposed revised Policy for the Committee's consideration.

Please let Jeff Clay or me know if you have any questions.

Attachment

**Securities Litigation Policy**  
**Of**  
**the Commonwealth of Pennsylvania**  
**Public School Employees' Retirement Board**

**Adopted by**  
**the Board of Trustees**  
**on September 19, 2003**  
**Effective September 19, 2003**

Adopted: September 19, 2003  
Date Last Revised: ~~September 28, 2007~~  
Date Last Reviewed By Chief Counsel: January 21, 2009

**Deleted:** \_\_\_\_\_

### ***Preface***

WHEREAS, the Public School Employees' Retirement System provides pension and other benefits to public school employees in accordance with the Public School Employees' Retirement Code;<sup>1</sup> and

WHEREAS, the Public School Employees' Retirement Board is empowered by the Retirement Code with the exclusive control and management of PSERS;<sup>2</sup> and

WHEREAS, the members of the PSERB stand in a fiduciary relationship to the members of PSERS with respect, *inter alia*, to the disbursement of any moneys from the fund;<sup>3</sup> and

WHEREAS, as fiduciaries, the members of the PSERB have the duty to invest and manage the funds of PSERS for the exclusive benefit of the members of PSERS;<sup>4</sup> and

WHEREAS, as fiduciaries, the members of the PSERB also have a duty to invest and manage the funds of PSERS with the care, skill and caution that a prudent investor would exercise under similar circumstances;<sup>5</sup> and

WHEREAS, as fiduciaries, the members of the PSERB also have a duty to take reasonable and appropriate actions to recover losses to the funds of PSERS arising from misconduct by the companies in which the PSERB invests; and

WHEREAS, as fiduciaries, the members of the PSERB also have a duty to monitor settlements, including attorneys' fees that are sought, in securities class action lawsuits and to object to them when they do not appear to be reasonable; and

WHEREAS, on May 28, 1999, pursuant to Resolution 1999-27, the PSERB adopted a policy to approve applications by PSERS to serve as lead plaintiff in securities class action law suits; and

WHEREAS, on September 19, 2003, pursuant to Resolution 2003-44, the PSERB determined that it would be beneficial to adopt a more deliberative approach to securities litigation to better protect PSERS' interests in connection with possible securities litigation and the coordination of action with the State Employees' Retirement System (SERS) when deemed appropriate; and

---

<sup>1</sup> 24 Pa.C.S. §8101 et seq.

<sup>2</sup> 24 Pa.C.S. §8521(a).

<sup>3</sup> 24 Pa.C.S. §8521(e).

<sup>4</sup> Rest. 3rd, Trusts (Duty of Loyalty) §170.

<sup>5</sup> 24 Pa.C.S. §8521 (a). Rest. 3rd, Trusts (Prudent Investor Rule) §227.

WHEREAS, on September 24, 2004, pursuant to Resolution 2004-50, the PSERB amended the Securities Litigation Policy to reflect the fact that the Policy would come under the auspices of the Corporate Governance Committee, and to more accurately reflect the securities litigation process then in use; and

WHEREAS, on June 3, 2005, the PSERB amended the Securities Litigation Policy, among other things, specifically to reflect the methodology for evaluating PSERS' possible involvement in securities litigation, to reflect PSERS' obligations pertaining to the settlement of class action lawsuits, and to establish guidelines for monitoring and reporting staff time and effort regarding securities litigation, and

WHEREAS, on September 28, 2007, the PSERB amended the Securities Litigation Policy, among other things, to identify the PSERB's objectives for pursuing an active role in class action lawsuits, and to direct the establishment and implementation of securities litigation implementation procedures and class action settlement procedures that collectively comprise PSERS' securities litigation program; and

Deleted: desires to

Deleted:

WHEREAS, the PSERB desires to amend the Securities Litigation Policy, among other things, to lower the loss threshold to consider seeking lead-plaintiff status in a class action.

NOW THEREFORE, the members of the PSERB establish the following Securities Litigation Policy in connection with possible securities litigation:

I. Definitions

A. **Consultant:** A litigation consultant retained by the PSERB to advise PSERS on matters related to securities litigation.

B. **Corporate Action Agency Committee:** An agency committee comprised of three PSERB members appointed by the Chair of the PSERB and four PSERS staff members appointed by PSERS' Executive Director.

C. **Executive Staff:** PSERS' Executive Director and Chief Investment Officer.

D. **FIFO (First In, First Out):** A method of accounting for the purchase and sale of securities whereby the securities are assumed to be sold in the chronological order in which they were purchased.

E. **Maximum Recovery (Profit & Loss) (P & L):** A FIFO loss calculation methodology in which sales of a particular security during the class period are matched against initial holdings of the security until all the initial holdings have been depleted, and then a gain or loss is calculated based on those purchases and sales. Subsequent sales during the class period are matched against purchases during the class period when calculating gain or loss. Holdings at the end of the class period are matched against purchases on a FIFO basis to determine unrealized losses. The gains (if any)

and losses are then aggregated to approximate the maximum amount PSERS might expect to recover at the end of a case.

F. **Maximum Recovery (Wash):** A FIFO loss calculation methodology in which sales during the class period are matched against initial holdings, but no gain or loss is calculated on these initial matched sales. Subsequent sales during the class period are matched against purchases during the class period and a gain or loss is calculated. Holdings at the end of the class period are matched against purchases on a FIFO basis to determine unrealized losses. The gains (if any) and losses are then aggregated to approximate the maximum amount PSERS might expect to recover at the end of a case.

G. **OAG:** Office of Attorney General

H. **OGC:** Office of General Counsel

I. **Policy:** Securities Litigation Policy adopted by the PSERB on September 19, 2003, as amended.

J. **PSERB:** The Public School Employees' Retirement Board.

K. **PSERS:** The Public School Employees' Retirement System.

L. **Unrealized losses:** Losses calculated for those shares acquired during the class period and still held. The current value of the shares is netted against their purchase cost.

## II. General Guidelines

Consistent with the Bylaws, the Corporate Governance Committee shall have the following responsibilities:

- A. To establish and modify, as it deems desirable, general principles consistent with this Policy to consider in determining whether PSERS should participate in securities litigation and in what capacity, with a general requirement of at least a \$10,000,000 loss to PSERS' retirement fund for PSERS to seek lead plaintiff or co-lead plaintiff status in a class action law suit;
- B. To recommend to the PSERB whether PSERS should institute securities litigation and, if so, whether it should do so individually or as a lead plaintiff or co-lead plaintiff in a class action law suit, and whether it should pursue litigation jointly with the State Employees' Retirement System;
- C. To recommend to the PSERB whether PSERS should institute other actions, including but not limited to shareholder derivative actions, actions

Deleted: 25,000,000

before the Securities and Exchange Commission (SEC), or participation in SEC rulemaking;

- D. To consider, in making a decision to recommend institution of securities litigation, the objectives of the PSERB, including, preservation of the retirement fund and collection of all amounts due to the retirement fund; maximizing the net recovery of PSERS; and the opportunity to effect meaningful corporate governance reforms as part of any securities litigation settlement;
- E. To identify for the PSERB the net added value to PSERS in pursuing a particular securities litigation;
- F. To take such further actions as the Corporate Governance Committee deems necessary or desirable to effect the desired results in the exercise of the foregoing and to comply with applicable laws and regulations.

### III. Application of Policy

#### A. General Procedures.

PSERS' Office of Chief Counsel shall design securities litigation implementation procedures to implement this Policy, and shall review and revise the securities litigation implementation procedures from time to time as necessary or required.

PSERS' Investment Accounting Division shall design class action settlement procedures to implement this Policy and shall review and revise the class action settlement procedures from time to time as necessary or required.

#### B. Consultant.

PSERS' Executive Director shall be authorized, subject to all necessary approvals required by law, to issue a Request For Proposals (either on behalf of PSERS alone or jointly with the State Employees' Retirement System), to enable the Corporate Governance Committee to establish and evaluate the credentials of a Consultant to advise PSERS on matters related to securities litigation.

PSERS shall seek to contract with not more than two (2) Consultants at any given time to advise PSERS on matters relating to securities litigation, including assisting PSERS in analyzing its interest in both pending and potential securities litigation based upon PSERS' holdings and exposure during the relevant periods, including identification of the specific benefit to PSERS in pursuing litigation, risk and value assessment, damage estimates, and recovery projections.

Upon receiving an assignment, a Consultant will be expected to perform an analysis and submit a report and recommendation in a prompt and judicious manner to

allow PSERS sufficient time to take any legal action recommended by the Consultant or determined to be appropriate by the PSERB. A Consultant shall not be eligible to be considered as potential counsel to represent PSERS in any legal actions undertaken pursuant to this Policy, nor, without express written consent of PSERS, advise the actual counsel selected to represent PSERS in any legal actions undertaken pursuant to this Policy.

C. Calculation of Losses.

PSERS' Office of Chief Counsel shall monitor securities litigation matters, and PSERS may also subscribe to a securities litigation monitoring support service to assist in such oversight, which shall include evaluating and monitoring potential or pending securities litigation, and estimating PSERS' potential losses in a particular case.

For PSERS to seek lead or co-lead plaintiff status in a class action lawsuit or to bring its own action, a loss of at least \$10,000,000 must be calculated under either the P & L or Wash recovery methods. If it is clear that the Federal District Court in which the class action lawsuit is brought requires a specific loss determination method, then PSERS must have suffered at least a \$10,000,000 million loss under that particular method to seek lead or co-lead plaintiff status.

Deleted: 25,000,000

Deleted: 25

D. Factors to Consider in Deciding to Seek Lead Plaintiff Status:

1. Is PSERS an appropriate lead plaintiff?

- Are there reasons why PSERS should not seek lead plaintiff status, (including estimated damages that do not meet PSERS' threshold, unique claims or damages that are large enough to merit filing a separate case, or an impractical or non-sympathetic venue)?
- Does PSERS have a conflict of interest in being lead plaintiff, such as a large continuing holding that would compromise PSERS' ability to vigorously pursue the case?
- Is the potential class action a legitimate suit or simply a nuisance suit that PSERS has no interest in pursuing?
- Are there unusual circumstances or facts that could complicate PSERS' position, such as the risk of being viewed as a "professional plaintiff," weaknesses in PSERS' case not common to other potential lead plaintiffs, or documents or opinions inconsistent with PSERS' position?
- Are there non-monetary remedies of special importance to PSERS, such as corporate governance reforms, which other potential lead plaintiffs may not pursue?

- What is the likelihood of PSERS increasing its net recovery or capturing other added value by being lead plaintiff?

- Is there a less burdensome way of managing PSERS' potential claim other than litigation (such as attempting to convince a shareholder with a larger loss to become lead plaintiff, monitoring the case from the sidelines, filing a motion to support or oppose a candidate for lead plaintiff, or negotiating an agreement with lead counsel to keep PSERS informed of case development)?

2. Does PSERS have the resources available to devote to litigation?

- Is PSERS willing to bear the administrative burden of court appearances, strategy sessions, etc.?

- Is PSERS limited by staffing constraints?

- What are the capabilities and anticipated testimony of PSERS' likely witnesses?

- Do PSERS' investment managers support PSERS' position in the litigation?

- Are PSERS' investment managers willing to respond to requested discovery?

3. Strength of claim and defenses.

- What claims can be asserted in the action and what is the likelihood of their sustainability?

- Is the case vulnerable to a motion to dismiss?

- What are the possible defenses to be raised and how strong are such defenses?

- What are the potential sources of recovery (corporate defendants, individual officers and directors, auditors, underwriters)?

- Is PSERS willing to pursue a shareholder derivative action?

- Will PSERS' participation lend credibility and support to a cause of action that is legitimate but might fail otherwise?



4. Satisfaction with other potential lead plaintiffs and lead counsel.

- Will another sophisticated lead plaintiff likely come forward to manage the case?
- Is PSERS willing to contact other institutional investors to jointly pursue lead plaintiff status?
- Is PSERS satisfied with the reputation and skills of potential lead counsel candidates?
- Will PSERS' participation in the litigation assist in lowering attorney fees?

E. Review of New Cases.

At the time that PSERS' Office of Chief Counsel learns of a loss in excess of PSERS' threshold arising from a securities fraud claim, PSERS' Office of Chief Counsel will obtain information regarding the potential claim and advise PSERS' Executive Staff of the potential claim.

PSERS' Office of Chief Counsel and Executive Staff will then confer with and seek advice from one or both of the Consultants to determine what action to take, if any, consistent with this Policy. If it is determined that PSERS should initiate securities litigation individually, or as a lead plaintiff or co-lead plaintiff in a class action lawsuit, or in some other capacity, then PSERS' Office of Chief Counsel and Executive Staff will make a recommendation to that effect to the Corporate Governance Committee at its next regularly scheduled meeting (or at a special meeting of the Committee and the PSERB if time does not permit).

In extraordinary circumstances in which there is no time to have the issue addressed by a regular or special meeting, the Corporate Action Agency Committee shall be authorized to act.

If, however, PSERS' Office of Chief Counsel and Executive Staff, after considering the recommendation of the Consultant, decide to take no action, then the Office of Chief Counsel shall so notify the Corporate Governance Committee and the PSERB. Any individual PSERB member shall have the right to have that decision placed on the agenda of the next scheduled meeting of the Corporate Governance Committee and PSERB (or at a special meeting of the Committee and the PSERB if time does not permit). Pending said meeting, no action shall be taken regarding the potential claim.

If the Corporate Action Agency Committee or the Corporate Governance Committee and the PSERB authorize the commencement of securities litigation,

PSERS' Office of Chief Counsel will seek authorization and the appointment of counsel and delegation of authority from OGC and OAG.

PSERS' Office of Chief Counsel will finalize the agreement for legal services with counsel, OGC and OAG, and advise counsel to proceed with the litigation. The final terms and conditions of all legal services contracts entered into as a consequence of the policy must be satisfactory to the Executive Staff and the Office of Chief Counsel.

Deleted: the law firm  
Deleted: the law firm

F. Monitoring of Securities Litigation.

PSERS' Office of Chief Counsel shall periodically report to the Corporate Governance Committee or the PSERB regarding securities litigation matters, including the status of litigation in which the PSERB has authorized involvement. In the event of significant strategy changes prior to or during particular securities litigation, the Office of Chief Counsel and Executive Staff will make additional recommendations to the Corporate Governance Committee. For example, if PSERS seeks lead plaintiff status in a particular securities litigation and is not granted lead or co-lead plaintiff status, PSERS' Office of Chief Counsel and Executive Staff will seek direction from the Corporate Governance Committee and the PSERB.

PSERS' Office of Chief Counsel and Executive Staff shall monitor, and, when appropriate, participate in hearings regarding settlement petitions, including attorneys' fees requested in securities class action lawsuits, and object to such settlements and/or fee requests when the Office of Chief Counsel and Executive Staff do not deem them reasonable. PSERS' Office of Chief Counsel will obtain the authorization of the Corporate Governance Committee and the PSERB prior to taking any legal action in appellate courts.

G. Reporting Requirements.

Consistent with this Policy and the procedures established by PSERS' Investment Accounting Division, PSERS' Investment Accounting Division shall monitor and ensure that claims are filed by PSERS' custodian bank in all applicable class action settlements, that the appropriate cash amount of the claims are received by the custodian bank, and report quarterly to the PSERB on the collection of claims in securities class action settlements filed by PSERS' custodian bank.

PSERS' Office of Chief Counsel shall submit to the PSERB at the January meeting an annual report on securities litigation matters for the prior year, and shall include the amount of staff time and effort expended on particular securities litigation matters in which PSERS is actively involved.

Sections Amended September 24, 2004

Sections throughout Policy revised to reflect the fact that the Policy will now come under the auspices of the PSERB's new Corporate Governance Committee, and to more accurately reflect the securities litigation process currently in use.

Sections Amended June 3, 2005

Sections throughout Policy revised to, among other things, specifically reflect the methodology for evaluating PSERS' possible involvement in securities litigation, to reflect PSERS' obligations pertaining to settlement of class action lawsuits, and to establish guidelines for monitoring and reporting staff time and effort regarding securities litigation.

Sections Amended September 28, 2007

Sections throughout Policy revised to, among other things, identify the PSERB's objectives for pursuing an active role in class action lawsuits, and direct the establishment and implementation of securities litigation implementation procedures and class action settlement procedures that collectively comprise PSERS' securities litigation program.

Sections Amended \_\_\_\_\_

Sections throughout Policy revised to lower the stated threshold for PSERS to consider lead plaintiff status.