

**Rules and Regulations  
of the  
New York State Deferred Compensation Board**

**Effective Date: June 15, 2011**

Following are the rules and regulations of the Deferred Compensation Board of the State of New York (the “Regulations”) as amended and restated consistent with the amendments adopted by the Board by resolution at a public meeting on May 20, 2011 and published in the State Register on June 15, 2011 at which time the amendments to the Regulations became effective and enforceable.

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**SUBTITLE II**

***Deferred Compensation Board***

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**PART 9000**

**SCOPE AND DEFINITIONS**

(Statutory authority: State Finance Law, § 5; L. 1982, ch. 547)

Sec.  
9000.1 Scope

Sec.  
9000.2 Definitions

**Section 9000.1 Scope.** This Subtitle applies to every deferred compensation plan established by the board or any local employer pursuant to section 5 of the State Finance Law.

**9000.2 Definitions.** (a) Unless otherwise defined, the terms used herein shall have the same meaning as that used in the Internal Revenue Code of 1986 (the “Internal Revenue Code”), as now in effect or hereinafter amended, the State Finance Law and the State plan or the model plan.

(b) Wherever used herein, the following terms shall be construed as follows:

(1) *Administrative service agency* means a person duly authorized to do business in the State of New York and qualified to administer and maintain records and accounts

of defined contribution plans which meet the requirements for qualification under the Internal Revenue Code, governmental plans and eligible deferred compensation plans. The functions of an administrative service agency under this Subtitle may be carried out by a trustee, provided that the person serving as a trustee otherwise satisfies all of the requirements under this Subtitle applicable to an administrative service agency.

(2) *Board* means the deferred compensation board of the State of New York established by section 5 of the State Finance Law.

(3) *Deferred compensation committee* means the committee or board, or other entity, office or officer, appointed in accordance with applicable law by a local employer to act in respect of a plan in accordance with section 9001.2(b) of this Subtitle.

(4) *Financial organization* means a person duly authorized to do business in the State of New York and who:

- (i) is registered as an investment adviser under the Investment Advisors Act of 1940, as such provisions may be amended from time to time;
- (ii) is a bank, as defined in such act; or
- (iii) is an insurance company qualified under the laws of more than one state to manage, acquire or dispose of any assets of plans which meet the requirements for qualification under the Internal Revenue Code, governmental plans and eligible deferred compensation plans.

The functions of a financial organization under this Subtitle may be carried out by a trustee, provided that the person serving as a trustee otherwise satisfies all of the requirements under this Subtitle applicable to a financial organization.

For the purposes of this Subtitle, a financial organization that provides self-directed investment services to a plan through a mutual fund or brokerage “window” arrangement sponsored by such financial organization shall be recognized as the sole financial organization in relation to such self-directed investment services and the term “financial organization” shall not be deemed to include any entity sponsoring mutual funds provided through such “window.”

(5) *Guaranteed investment contract* means a contract with an insurance company or a bank that guarantees a specific rate of return on the invested capital over the life of the contract and for the return of such invested capital and interest to the plan on one or more dates specified in the contract.

(6) *Independent Consultant* means a person duly authorized to do business in the State of New York and who may be or is retained by the board or a deferred compensation committee in accordance with the provisions of this Subtitle to provide advice to the board or deferred compensation committee on investment matters and who is registered as an investment adviser under the Investment Advisors Act of 1940, as such provisions may be amended from time to time.

(7) *Local employer* means a public employer as defined in section 5 of the State Finance Law but excluding the State of New York.

(8) *Model plan* means the form of plan authorized by the board for adoption in accordance with the provisions of this Subtitle by any local employer not participating in the State plan and not sponsoring a plan described in section 9001.2(a)(3) of this Subtitle, as such may be amended by the board from time to time. A copy of the model plan may be obtained from the board.

(9) *Participation agreement* means an agreement executed by an employee and the employer as described in the State plan and the model plan or such other similar agreement executed in connection with another plan.

(10) *Person* means any individual, corporation, partnership, association, trust, joint stock company, unincorporated organization or other similar entity.

(11) *President* means the president of the New York State Civil Service Commission.

(12) *Plan* means any of the State plan, the model plan and any other deferred compensation plan described in section 9001.2(a)(3) of this Subtitle.

(13) *Stable income fund* means, with respect to a plan, an investment option available to participants in the plan that seeks to provide book-value accounting, stability of principal and a low volatility total return.

(14) *State plan* means the Deferred Compensation Plan for Employees of the State of New York and Other Participating Public Jurisdictions established by the board, as such may be amended by the board from time to time. A copy of the State plan may be obtained from the board.

(15) *Trust* means a trust to hold the assets of a plan for the exclusive benefit of participants and their beneficiaries that meets the requirements of this Subtitle, including without limitation the requirements of section 9002.1(b), and section 457(g) of the Internal Revenue Code.

(16) *Trust Agreement* means an agreement evidencing a trust meeting the requirements of this Subtitle.

(17) *Trustee* means each person designated by the board or deferred compensation committee, as applicable, in accordance with the provisions of this Subtitle to hold in a trust any amounts under a plan.

(18) *Wrap contract* means a contract with a financial organization that provides for book-value accounting with respect to a designated portion of the assets of a stable income fund but that does not give the financial organization issuing the contract day-to-day investment authority with respect to such assets. Such term includes participating, non-participating and hybrid wrap contracts.

## PART 9001

### GENERAL PROVISIONS

(Statutory authority: State Finance Law, § 5; L. 1982, ch. 547)

Sec.	Sec.
9001.1 Application; Incorporation by Reference	9001.3 Ineligibility
9001.2 Establishment of plan by local employer	9001.4 Special provisions

**Section 9001.1 Application; Incorporation by Reference.** (a) This Subtitle shall be interpreted and applied so that any plan established hereunder shall be an eligible deferred compensation plan under section 457 of the Internal Revenue Code.

(b) The Board hereby adopts and incorporates by reference the provisions of Sections 457, 401(a)(9) and 72(p) of the Internal Revenue Code and the corresponding sections of title 26 of the Code of Federal Regulations and Section 203 of the Investment Advisers Act of 1940, effective as of the date of the adoption of these Regulations. Copies of said material may be obtained from the U.S. Government Printing Office, Washington D.C. 20402 and such material is available for public inspection and copying at the Offices of the New York State Deferred Compensation Board, Empire State Plaza Concourse – North, Room 124, Albany, NY 12223.

**9001.2 Establishment of plan by local employer.** (a) Except as specifically provided in this section 9001.2(a), a local employer may not establish or maintain more than one plan for its employees. A local employer may establish a plan for its employees:

- (1) by becoming a participating employer in the State plan as provided therein;
- (2) by adopting the model plan in accordance with the procedures prescribed in Part 9002 of this Subtitle; or
- (3) by adopting another plan which complies with all requirements of this Subtitle and section 457 of the Internal Revenue Code in accordance with the procedures prescribed in Part 9002 of this Subtitle.

A local employer which has previously established a plan may establish a plan in accordance with the requirements of this Subtitle so long as (i) all amounts held under the previously established plan have been distributed or otherwise paid out in accordance with the terms of such previously established plan and all other obligations of the previously established plan have been satisfied, or (ii) another local employer has been substituted as sponsor of the previously established plan.

(b) A deferred compensation committee shall be appointed by a local employer to act on behalf of the local employer under the model plan or a plan described in section 9001.2(a)(3) of this Subtitle to the extent permitted or required by this Subtitle and by such plan whenever such employer adopts such plan and shall continue in existence, as it may be reconstituted from time to time by the local employer in accordance with applicable law, for so long as such plan remains in existence.

**9001.3 Ineligibility.** Independent contractors shall not be eligible to participate in any plan.

**9001.4 Special provisions.** (a) Actuarial tables which distinguish on the basis of sex shall not be utilized for any purpose under any plan.

(b) Any installment distribution option permitted by any plan shall comply with all requirements of sections 457 and 401(a)(9) of the Internal Revenue Code and any treasury regulations promulgated thereunder.

(c) Any plan shall provide clear procedures for the review of domestic relations orders and shall require compliance with all domestic relations orders properly issued in accordance with such procedures and the requirements of applicable law in respect of amounts under the plan.

(d) Any plan established under this Subtitle may permit the loan of any amounts under such plan solely to a participant or beneficiary; *provided* that such plan establishes clear procedures for the administration of such loans and shall require compliance with sections 457 and 72(p) of the Internal Revenue Code and any treasury regulations promulgated thereunder and any other applicable laws.

## PART 9002

### ESTABLISHMENT OF PLAN

(Statutory authority: State Finance Law, § 5; L. 1982, ch. 547)

Sec.  
9002.1 Assets held in trust

Sec.  
9002.2 Documents to be filed

**Section 9002.1 Assets held in trust.** (a) A plan established by the board or a local employer shall require (i) that its assets be invested by one or more financial organizations selected by the board or deferred compensation committee, as applicable, and (ii) that, by January 1, 1999 or such other later date as may be permitted under section 457 of the Internal Revenue Code with respect to a plan in existence as of August 20, 1996 and immediately with respect to all other plans, all such assets shall be held in one or more trusts pursuant to one or more trust agreements.

(b) Each trustee designated by the board or deferred compensation committee must be authorized to act as a trustee under applicable law and shall be either a member of the board with respect to the State plan or a member of the relevant deferred compensation committee with respect to a model plan or other plan or a financial organization selected in accordance with the requirements of this Subtitle. A trust agreement between the board or deferred compensation committee and a trustee shall not meet the requirements of this section 9002.1(b) unless it satisfies each of the following requirements:

(1) the trust established by such agreement meets all of the requirements applicable to trusts described in section 457(g) of the Internal Revenue Code;

(2) such agreement provides that the assets of the plan to which such trust relates (i) are held in trust for the exclusive benefit of plan participants and their beneficiaries, (ii) may be used only to pay plan benefits and defray reasonable expenses of administering the plan and (iii) cannot revert to the State or local employer until all plan benefits have been paid to plan participants and beneficiaries in accordance with the terms of the plan;

(3) such agreement names the trustee and provides that, upon the trustee's appointment as such, the trustee shall have exclusive authority and direction to manage and control the assets of the plan, except to the extent that (i) such management and control has been delegated in accordance with the terms of the trust agreement to one or more financial organizations appointed in accordance with this Subtitle, (ii) the trust agreement provides that such trustee shall manage and control the assets of the plan at the direction of the board or deferred compensation committee or at the direction of one or more financial organizations appointed by the board or deferred compensation committee for this purpose, or (iii) the assets of the plan are to be allocated among the investment options available under the plan in accordance with the investment directions of plan participants, which investment directions may be communicated to the trustee by an administrative service agency appointed by the board or deferred compensation committee for this purpose;

(4) to the extent that the trustee performs the duties under this Subtitle of an administrative service agency, such agreement meets all of the requirements under this Subtitle applicable to contracts with administrative service agencies;

(5) to the extent that the trustee performs the duties under this Subtitle of a financial organization, such agreement meets all of the requirements under this Subtitle applicable to contracts with financial organizations; and

(6) such agreement satisfies the other applicable requirements of this Subtitle and any other applicable law.

**9002.2 Documents to be filed.** (a) Each local employer adopting the model plan or another plan shall file, prior to the acceptance of any deferrals under such plan, with the president for acknowledgment:

(1) a completed copy of the plan supplying all relevant information, including without limitation the information which is bracketed in the model plan;

(2) an executed copy of the trust agreement entered into with each trustee;

(3) a certification signed by its chief executive officer and chief legal officer stating (i) that the local employer is aware that there are three options for adopting a plan as described in section 9001.2(a) of this Subtitle, that the local employer has made an informed choice in determining to adopt the plan and that the local employer understands the ongoing responsibilities it is undertaking, including without limitation pursuant to this Subtitle, section 457 of the Internal Revenue Code and the plan, by adopting the plan; (ii) that the local employer's plan and trust agreement meet the requirements of section 457 of the Internal Revenue Code and of all other applicable State and local laws including this Subtitle; and (iii) that all required approvals of any local governing body or officer have been issued; provided, however, that in executing any such certification with respect to the adoption or amendment of the model plan, the chief executive officer and chief legal officer may rely on any ruling or determination issued by the Internal Revenue Service in respect of the model plan or any amendment to the model plan promulgated by the board;

(4) the name of each trustee, independent consultant, financial organization, firm of certified public accountants and administrative service agency which has been selected to provide services in respect of the plan and a certification signed by its chief executive officer and chief legal officer stating that each such trustee, independent consultant, financial organization, firm of certified public accountants and administrative service agency has been duly selected to provide services in accordance with the provisions of this Subtitle;

(5) evidence that bonds and insurance have been secured pursuant to the provisions of this Subtitle; and

(6) except to the extent that fiduciary acknowledgment is not required under section 9003.6 of this Subtitle, evidence that each trustee, independent consultant,

administrative service agency and financial organization selected by the deferred compensation committee will act as a fiduciary under section 457(g) of the Internal Revenue Code and under State and common trust law principles with respect to all trusteeship, administrative or investment matters for which it has assumed responsibility and the plan will be indemnified as a result of any cause of action brought against it as a result of acts or omissions of the trustee, independent consultant, administrative service agency or financial organization together with the reasonable costs of litigation arising therefrom.

(b) No deferral may be accepted under any plan until the board has been furnished with a written acknowledgment by the president that all of the documents and materials required by subdivision (a) and, to the extent applicable, subdivision (d) of this section 9002.2 have been received.

(c) No amendment may be made to a model plan other than an authorized amendment promulgated by the Board; provided, however, that notwithstanding any other provision hereof, the requirements of the preceding sentence shall be effective as of January 1, 1997 and shall not affect the validity of any amendment to a model plan which was duly adopted in accordance with the then-effective requirements of this section 9002.2 prior to January 1, 1997. Any amendment to a model plan made by the local employer which maintains such model plan shall require the same proof and procedures contained in subdivisions (a) and (b) of this section. Where one or more of the documents and materials required by subdivision (a) of this section contains identical information as submitted on the most recent filing of such documents and materials, a local employer that has adopted an amendment authorized by the Board may submit an affidavit, on a form provided by the Board, attesting that the documents and materials required by subdivision (a) of this section have not changed since the local government last submitted such documents and materials. In the event that one or more of the documents or materials required by subdivision (a) of this section has changed, such documents and materials are required to be submitted at the same time the affidavit is submitted to the president.

(d) Each local employer adopting or amending a plan other than the model plan or amending the model plan in a manner other than authorized by the board shall file, prior to the acceptance of any deferrals under such plan, with the president for acknowledgment (i) a ruling or determination issued by the Internal Revenue Service stating that such plan or form of plan meets the requirements of section 457 of the Internal Revenue Code applicable to eligible deferred compensation plans or (ii) an opinion of legal counsel that such plan meets the requirements of section 457 of the Internal Revenue Code applicable to eligible deferred compensation plans.



## PART 9003

### SELECTION OF AND AGREEMENTS WITH TRUSTEES, INDEPENDENT CONSULTANTS, ADMINISTRATIVE SERVICE AGENCIES, FINANCIAL ORGANIZATIONS AND CERTIFIED PUBLIC ACCOUNTANTS

(Statutory authority: State Finance Law, § 5; L. 1982, ch. 547)

Sec.	Sec.
9003.1 Contracts or agreements	9003.5 Miscellaneous requirements
9003.2 Competitive proposals	9003.6 Acknowledgment
9003.3 Criteria for selection	9003.7 Precluded investments
9003.4 Provision of diverse investments	9003.8 Transfer of assets

**Section 9003.1 Contracts or agreements.** (a) The contracts or agreements effecting the appointment of any trustee, independent consultant, administrative service agency, financial organization or firm of certified public accountants to provide services in respect of a plan shall be awarded pursuant to the procedures set forth in this Part 9003 and shall comply with the requirements of this Subtitle. Contracts or agreements with administrative service agencies shall not be required in whole or in part if an appointed trustee or financial organization, in the opinion of the board or of the deferred compensation committee, as applicable, is able to perform all or a portion of the required services as effectively. Contracts or agreements with independent consultants shall not be required in whole or in part if, in the opinion of the board or of the deferred compensation committee, as applicable, such board or deferred compensation committee is able to effectively make decisions with respect to the investment of plan assets, the allocation of plan assets among financial organizations and the selection of financial organizations to invest the assets of a plan without the advice of a consultant. Upon the expiration or termination of any contract or agreement entered into in accordance with this Subtitle, the board or deferred compensation committee, as applicable, shall follow the procedures set forth in this Part 9003 in awarding new contracts and entering into new agreements. Unless they are entered into in accordance with the procedures set forth in this Part 9003 and are in all other respects in substantial compliance with the requirements of this Subtitle, all contracts or agreements entered into in respect of a plan shall be null and void and new competitive proposals shall be submitted pursuant to the procedures set forth in this Part 9003. Notwithstanding the previous sentence, no trustee who is the only trustee of a plan shall be forced to resign the position of trustee solely by operation of this section 9003.1 prior to the time such person's successor as trustee has been duly qualified and appointed.

(b) Notwithstanding section 9003.1(a) of this Subtitle, a deferred compensation committee may contract with a firm of certified public accountants selected as a result of a competitive proposal undertaken by the local employer that expressly included in the scope of services an audit of the deferred compensation plan sponsored by the local government to be conducted in compliance with section 9005.1 of this Subtitle. The competitive request for proposals must be in general compliance with section 9003.2 of this Subtitle, except for the requirement of notice in the *State Register*. The deferred compensation committee must adhere to the criteria contained in section 9003.3 of this Subtitle in the selection of such auditor made pursuant to this paragraph (b). A firm of certified public accountants selected by a deferred

compensation committee pursuant to this paragraph (b) shall be subject to the provisions of section 9003.5 of this Subtitle. The firm of certified public accountants may be the same firm that is under contract with the local employer for other auditing services of the local employer.

(c) Notwithstanding section 9003.1(a) of this Subtitle, the board or a deferred compensation committee may contract with a financial organization for the purposes of investing a portion of the assets of a plan selected as a result a search conducted by the independent consultant to the board or deferred compensation committee of financial organizations that provide such services. The board or deferred compensation committee shall provide direction to the independent consultant, in writing, designating the generally recognized investment classification and sub-classification that the independent consultant is to make a recommendation to the board or deferred compensation committee after the conduct of a search of qualified financial organizations and the number of financial organizations that is to be recommended, which number shall not be less than three. The independent consultant must adhere to the criteria contained in section 9003.3 of this Subtitle prior to recommending any financial organization to the Board or deferred compensation committee. The independent consultant must recommend at least the number of financial organizations requested by the board or deferred compensation committee in each generally accepted investment classification and sub-classification and a detailed analysis of each financial organization being recommended, including a comparison of such recommended financial organization to the appropriate and generally recognized benchmarks for such investment classification and sub-classification. The board or deferred compensation committee may select one or more financial organizations for the purposes of investing a portion of the assets of a plan from the recommendation of the independent consultant. The provisions of this Section 9003.1(c) apply to the board and any deferred compensation committee that enters into contracts with financial organizations separately from any other contracts or agreements effecting the appointment of any trustee, independent consultant, administrative service agency, or firm of certified public accountants to provide services in respect of a plan. (added June 18, 2008)

**9003.2 Competitive proposals.** All contracts and agreements in respect of a plan shall be awarded only after receiving competitive proposals; provided, however, that no competitive proposal or bidding shall be necessary for the board or a deferred compensation committee to serve as the trustee of a plan under its authority or with respect to financial organizations selected pursuant to Section 9003.1(c). The board or deferred compensation committee, as applicable, shall cause to be published an announcement requesting competitive proposals. Such announcement shall be published in the *State Register* and in the official newspaper or newspapers, if any, or otherwise in an appropriate newspaper designated for such purposes, at least 90 days prior to the date on which the contract or agreement will be awarded, and shall request proposals within a specified time period from the date of publication. (amended June 18, 2008)

**9003.3 Criteria for selection.** (a) In reviewing competitive proposals and selecting a trustee, independent consultant, financial organization, administrative service agency or a firm of certified public accountants, the board or deferred compensation committee, as applicable, shall act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man or woman 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; provided, however, that the board

or deferred compensation committee, as applicable, may reasonably rely on the evaluation of such competitive proposals made by its properly selected independent consultants in any case other than their own selection. The board or deferred compensation committee, as applicable, shall consider, as applicable, in selecting a trustee, independent consultant, financial organization, administrative service agency or firm of certified public accountants among other items, the following:

(1) the stability of the independent consultant, administrative service agency, firm of certified public accountants or financial organization as evidenced by its experience or investment record over a substantial period of time;

(2) the ability of the trustee, independent consultant, administrative service agency, firm of certified public accountants or financial organization to meet its contractual obligations, provide the services set forth in the proposals, and to comply with the reporting requirements to the board or deferred compensation committee, as applicable, and participants, and with all requirements of the plan, section 457 of the Internal Revenue Code and this Subtitle;

(3) the variety and types of investment products offered by the financial organization, and the ability to transfer among such products offered by a different financial organization with which the board or deferred compensation committee may have a contract;

(4) the trustee's, independent consultant's, administrative service agency's, firm of certified public accountants' or financial organization's experience with plans that meet the requirements for qualification under the Internal Revenue Code, eligible deferred compensation plans under section 457 of the Internal Revenue Code, individual retirement accounts, tax-sheltered annuities under section 403(b) of the Internal Revenue Code, and the trustee's, independent consultant's, administrative service agency's, firm of certified public accountants' or financial organization's familiarity with public pension systems and the fiduciary obligations of administrators, investment managers and trustees under the Employee Retirement Income Security Act of 1974 and similar federal or State statutes;

(5) whether the trustee, investment, consulting, auditing or administrative products and services described in the proposal are of the highest quality and soundness in all respects;

(6) the overall cost efficiency of the proposal; and

(7) the overall quality and scope of the services to be provided to plan participants under the trustee's, independent consultant's, administrative service agency's, firm of certified public accountants' or financial organization's proposal.

All proposals shall be in writing, contain a representation that the proposal complies with all requirements of this Subtitle and clearly indicate all direct fees, indirect fees and charges. All brokerage fees and related charges shall be negotiated so that the best competitive rate under the circumstances is obtained.

(b) Each proposal submitted under this Part 9003 shall fully disclose any sponsorship or similar arrangement. Such arrangements shall be precluded unless it can be demonstrated by clear and convincing evidence that the arrangement is cost effective.

(c) Before a contract or agreement between a deferred compensation committee and a trustee, independent consultant, administrative service agency, firm of certified public accountants or financial organization may become effective, the deferred compensation committee must submit in writing to the president the name of such selected trustee, independent consultant, administrative service agency, firm of certified public accountants or financial organization and a certification signed by its chief executive officer and chief legal officer stating that each such trustee, independent consultant, administrative service agency, firm of certified public accountants or financial organization has been duly selected to provide services in accordance with the provisions of this Subtitle.

**9003.4 Provision of diverse investments.** The board and each deferred compensation committee shall appoint, with respect to the plan under their control, in accordance with the requirements of this Subtitle, one or more financial organizations such that amounts held under the plan may be at all times invested in one or more of a broad range of investment alternatives, including without limitation a diverse selection of fixed income and equity investments.

**9003.5 Miscellaneous requirements.** (a) All contracts and agreements entered into with a trustee, an independent consultant, a financial organization, a firm of certified public accountants or an administrative service agency shall be in writing, shall be awarded on the basis of a competitive bid conducted or a search conducted in accordance with Section 9003.1(c) in respect of the specific contract or agreement in accordance with this Part 9003, shall not exceed five years in duration, and shall impose no penalties or surrender charges for the transfer of assets or responsibilities on expiration of the contract or agreement. Where the board or a deferred compensation committee enters into a contract or agreement with a trustee, a financial organization or organizations, and an administrative service agency and such trustee, financial organization or organizations and administrative service agency is selected by the board or deferred compensation committee independently from each other service, such contracts or agreements shall not exceed ten years in duration. Notwithstanding the previous sentence, no trustee who is the only trustee of a plan shall be forced to resign the position of trustee solely by operation of this section 9003.5(a) prior to the time such person's successor as trustee has been duly qualified and appointed. (amended June 18, 2008)

(b) Notwithstanding Section 9003.5(a), when the board or a deferred compensation committee deems it to be in the best interest of the plan, the board or any deferred compensation committee may extend, in writing, by vote duly taken, any contract or agreement entered into with a trustee, an independent consultant, a financial organization, a firm of certified public accountants or an administrative service agency for a duration not to exceed two consecutive one-year periods and with the consent of such party; *provided, however*, that any such one-year extension shall be implemented only upon (1) the expiration of the initial term of such contract or agreement in the case of the first one-year extension, or (2) the expiration of the first one-year extension in the case of the second one-year extension. In the event that the board or a deferred compensation committee implements such an extension, the board or the deferred compensation

committee shall describe in writing the reasons for its determination that the extension is in the best interest of the plan.

(c) Neither the Board nor any deferred compensation committee may permit, nor enter into an agreement that permits, a trustee, financial organization, independent consultant, administrative service agency or any other person to select one or more other trustees, administrative service agencies, firms of certified public accountants, independent consultants, or financial organizations to provide services in respect of a plan. Notwithstanding the previous sentence, this section 9003.5(c) shall not prohibit the Board or any deferred compensation committee from entering into an agreement with

(1) a financial organization selected and retained by the Board or a deferred compensation committee, as applicable, in accordance with this Subtitle, that provides for self-directed investment services through a mutual fund or brokerage “window” arrangement sponsored by such financial organization with respect to a plan, *provided* that such self-directed investment services shall not be the sole investment alternative provided under a plan and that the Board and the deferred compensation committee shall establish clear guidelines regarding participants' access to, and level of participation in, such self-directed investment services

(2) a financial organization selected and retained by the Board or a deferred compensation committee, as applicable, in accordance with this Subtitle, to manage the stable income fund of such plan which authorizes such financial organization to engage in one or more of the following fund management activities with respect to the assets of a stable income fund:

(i) the investment of the assets of the stable income fund in one or more guaranteed investment contracts, provided, however, that such guaranteed investment contract shall not exceed five years in duration;

(ii) the purchase of one or more wrap contracts with respect to the assets of the stable income fund; or,

(iii) the periodic allocation of the assets of the stable income fund between or among two or more other financial organizations selected and retained by the Board or deferred compensation committee, as applicable, in accordance with this Subtitle,

provided that, in each case,

(i) the written agreement between the Board or deferred compensation committee, as applicable, and the financial organization, expressly authorizes the applicable fund management activities and states that the financial organization is a fiduciary to the plan with respect to the fund management activities so authorized;

(ii) any such fund management activity is undertaken by the financial organization in accordance with reasonable practices of the financial organization

applicable to its clients generally, and the financial organization receives no fee or other consideration from any person (other than the plan) related to such fund management activity;

(iii) the guaranteed investment contract or wrap contract, as applicable, imposes no penalties or surrender charges for the transfer of assets or responsibilities on expiration of the contract or agreement;

(iv) the trustee of the plan continues to be the owner on behalf of the plan of all of the assets of the stable income fund; and,

(v) any such fund management activity complies with the criteria for selection and reporting of section 9003.3 of this Subtitle and the then effective investment policies and guidelines of the Board or deferred compensation committee, as applicable, related to the stable income fund.

A financial organization engaged in the management activities described in paragraph (2) of this section 9003.5(c) shall do so in accordance with the procedures of this paragraph (2) and with other provisions of this Subtitle to the extent such other provisions are incorporated into this paragraph (2).

**9003.6 Acknowledgment.** Except as otherwise provided in this section 9003.6, each trustee, independent consultant, administrative service agency and financial organization so appointed shall acknowledge in writing that it is a fiduciary with respect to all administrative or investment matters for which it has assumed responsibility with respect to a plan. Notwithstanding the foregoing, no such fiduciary acknowledgment shall be required pursuant to this section 9003.6 from a financial organization (i) which issues a guaranteed investment contract, or (ii) which is the manager of an open-ended investment company registered under the Investment Company Act of 1940, as now in effect or as hereinafter amended, solely by reason of the investment, upon the specific direction of a trustee, another financial organization, the Board, a deferred compensation committee or an administrative service agency acting in accordance with the terms of the plan to implement the investment directions of one or more participants, of amounts held under the plan in shares of such open-ended investment company.

**9003.7 Precluded investments.** No contract or agreement entered into with a financial organization may provide for the investment of any amounts under a plan in any annuity contract providing for a term which could exceed five years or which is measured by one or more natural lives or any life insurance or other contract providing traditional death benefits.

**9003.8 Transfer of assets.** All amounts deferred under a plan, together with all necessary investment instructions, shall be paid by the State or local employer as promptly as possible, but in no event later than two business days from the applicable payroll date, to an appointed trustee which shall then pay such amounts as promptly as possible, but in no event later than one business day following receipt thereof by such trustee, to one or more appointed financial organizations for investment, and upon receipt thereof by each such financial organization shall, if not otherwise invested, be transferred to an interest-bearing account to hold such amounts in cash or cash equivalent investments within one business day, where such

amounts may remain until the financial organization receives all necessary investment instructions or otherwise determines it prudent to transfer such amounts to another investment fund.

## PART 9004

### SOLICITATION AND EDUCATION

(Statutory authority: State Finance Law, § 5; L. 1982, ch. 547)

Sec.

9004.1 Provisions

**Section 9004.1 Provisions.** No trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency nor any of their agents shall use information obtained by reason of its appointment in respect of a plan as a trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency to solicit or otherwise induce any person to invest in, purchase, utilize or act in any other manner regarding any products or services made available by such trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency. Educational materials designed to acquaint employees with the benefits of such plan may be provided by a financial organization or administrative service agency upon prior approval by the Board or deferred compensation committee, as applicable. All information obtained in connection with any services performed or proposed to be performed in respect of a plan shall be confidential and used exclusively for purposes relating to such plan and expressly contemplated by an agreement entered into with the Board or deferred compensation committee, as applicable, in accordance with the requirements of this Subtitle. Neither the Board nor any deferred compensation committee shall enter into any agreement in respect of a plan with a trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency which permits the use of any information obtained by reason of appointment as a trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency to solicit or otherwise induce any person to invest in, purchase, utilize or act in any other manner regarding any products or services made available by such trustee, independent consultant, financial organization, firm of certified public accountants or administrative service agency for any purpose not directly related to the administration of the plan and the investment of plan assets in accordance with the requirements of this Subtitle.



## PART 9005

### AUDITING, BONDING AND INSURANCE

(Statutory authority: State Finance Law, § 5; L. 1982, ch. 547)

Sec.	Sec.
9005.1 Financial Statements, Auditing and Agreed Upon Procedures	9005.3 Statements
9005.2 Authority of board and committee	9005.4 Bonding and insurance

#### **Section 9005.1 Financial Statements, Auditing and Agreed-Upon Procedures**

**Reports.** The board, with respect to the State plan, and the deferred compensation committee, with respect to any other plan, shall be responsible for causing such plan to be in compliance with this Section 9005 for each plan year.

(a) Subject to paragraph (c) of this Section 9005.1, a plan shall be subject to this paragraph (a) for a plan year if the plan has fewer than 100 participants as of the last day of the plan year. If a plan is subject to this paragraph (a) for a plan year, the deferred compensation committee shall:

(1) prepare, or cause to be prepared, for the plan year an unaudited financial statement of the net assets available for benefits and the related statements of changes in net assets available for benefits for the plan year-end; and

(2) engage, or cause to be engaged, in accordance with the requirements of Part 9003 of this Subtitle, a certified public accountant to conduct a review of the plan's activities during the plan year and to produce an agreed-upon procedures report for the plan year, which report shall specify the procedures and the results of the procedures by such firm of certified public accountants in the review of each of the following items (and any other additional items as may be required by the deferred compensation committee for the plan):

(i) whether participant account balances, by investment option and in the aggregate as of the plan-year end, as reported by the administrative service agency for the plan, agree to the value of the assets held by the trustee of the plan by investment option and in the aggregate as of plan-year end;

(ii) whether participant deferrals reported by the plan sponsor, by individual participant and in the aggregate, for the plan year agree with the deferrals received by the trustee of the plan for the plan year;

(iii) whether participant deferrals for the plan year were properly authorized and accurately remitted to the trustee of the plan in accordance with the timing and other requirements of the plan document (or industry practice if no direction is provided in the plan document);

(iv) whether the plan properly and separately accounted for pre-tax and, if applicable, designated Roth contributions deferred or contributed for the plan year;

(v) whether maximum contribution limitations and minimum required distribution requirements were properly implemented for the plan year;

(vi) whether participant requests for lump sum and installment benefit distributions for the plan year were properly authorized and processed in accordance with the plan document and contractual provisions (or industry practice, if no direction is provided in the plan document or applicable contracts);

(vii) whether participant requests for unforeseeable emergency withdrawals during the plan year were processed according to written procedures, properly authorized and properly documented;

(viii) whether participant requests for plan loans during the plan year were processed according to written procedures and were properly authorized and documented;

(ix) whether participant requests for deferral amount changes and asset allocation changes for the plan year were processed accurately and in a timely manner in accordance with the plan document and applicable contract provisions (or industry practice, if no direction is provided in the plan document or applicable contracts);

(x) whether all plan-level and participant-level fees for the plan year were disclosed to participants, were allocated in accordance with written procedures and on a uniform basis and were assessed solely to support operations of the plan; and

(xi) whether, for the plan year, employees who were eligible during that plan year to elect to participate in the plan were provided with written notification of the plan and enrollment opportunities.

(3) The specific procedures and methods applied to each item covered by paragraph (a)(2) of this Section 9005.1 shall be determined in the professional judgment of the certified public accountant in accordance with generally accepted industry standards in conjunction with the deferred compensation committee for the plan prior to the firm's performance of the agreed-upon procedures on the plan.

(b) A plan shall be subject to this paragraph (b) for a plan year if it is the State plan or, subject to paragraph (c) of this Section 9005.1, if the plan has 100 or more participants as of the last day of the plan year. If a plan is subject to this paragraph (b) for a plan year, the board or deferred compensation committee, as applicable, shall:

(1) prepare, or cause to be prepared, a financial statement of the net assets available for benefits and the related statements of changes in net assets available for benefits for the plan year-end, which statements shall be prepared in accordance with Governmental Accounting Standards Board Statement 32, "Accounting and Financial Reporting for Internal Revenue Code Section 457 Deferred Compensation Plans", or any successor statement thereto; and

(2) engage, or cause to be engaged, in accordance with the requirements of Part 9003 of this Subtitle, a certified public accountant to conduct an audit of the financial statements described in paragraph (b)(1) of this Section 9005.1 in accordance with auditing standards generally accepted in the United States of America.

(c) The following rules shall apply to plans that would otherwise become subject to paragraph (a) or (b) of this Section 9005.1 (or cease to be subject to paragraph (a) or (b) of this Section 9005.1) from one plan year to the next succeeding plan year as a result of an increase or decrease in the number of participants in the plan.

(1) A plan that (i) was subject to paragraph (a) of this Section 9005.1 for a prior plan year and that has complied with the requirements set forth in paragraph (a) above for that plan year and (ii) becomes subject to paragraph (b) of this Section 9005.1 for the current plan year by virtue of having 100 or more participants as of the last day of the current year, may elect to comply with the provisions of paragraph (a) of this Section 9005.1 for such current plan year, and, if such election is made, shall not be subject to the requirements of paragraph (b) of this Section 9005.1 for the current year.

(2) A plan that (i) was subject to paragraph (b) of this Section 9005.1 for a prior plan year and (ii) would be subject, but for the operation of this paragraph (c)(2), to paragraph (a) of this Section 9005.1 for the current plan year by virtue of having fewer than 100 participants as of the last day of the current plan year, shall be required to continue to comply with the provisions of paragraph (b) of this Section 9005.1 for such current plan year and shall not become eligible to utilize the procedures in paragraph (a) of this Section 9005.1.

(3) Example: Plan X has 90 participants as of the last day of Plan Year 1, and accordingly, the deferred compensation committee of Plan X causes the plan to comply with the financial statement and agreed-upon procedures requirements described in paragraph (a) of this Section 9005.1 with respect to Plan Year 1. On the last day of Plan Year 2, Plan X has 110 participants. Plan X may elect to continue to comply with the provisions of paragraph (a) of this Section 9005.1 and will not be subject to the audit requirements of paragraph (b) for Plan Year 2.

(4) Example. Plan Y has 110 participants as of the last day of Plan Year 1, and accordingly, the deferred compensation committee of Plan Y causes the plan to comply with the financial statement and audit requirements described in paragraph (b) of this Section 9005.1 with respect to Plan Year 1. On the last day of Plan Year 2, Plan Y has 90 participants. Plan Y must continue to comply with the provisions of paragraph (b)

of this Section 9005.1 and will not be permitted to rely on the agreed-upon procedures provisions of paragraph (a) of this Section 9005.1 for Plan Year 2.

(d) The deferred compensation committee for a plan subject to paragraph (a) of this Section 9005.1 for a given plan year may elect to comply with the requirements of paragraph (b) of this Section 9005.1 for such plan year.

(e) For purposes of this Section 9005.1, "participant" means any person who, as of the last day of a plan year, has an account balance under the plan that is greater than zero.

(f) The agreed-upon procedures requirement described in paragraph (a)(2) of this Section 9005.1 and the audit requirement described in paragraph (b)(2) of this Section 9005.1 shall be completed by no later than 6 months following the end of the plan year to which such agreed-upon procedures or audit relates. Provided, however, for a plan year that ended on or after December 31, 2010 and before December 31, 2011, the agreed-upon procedures or audit relating to such plan year shall be completed by no later than 12 months following the end of such plan year.

(g) The board or deferred compensation committee, as applicable, for a plan shall adopt and communicate to plan participants written procedures whereby a plan participant may request in writing or electronically to receive the financial statements and agreed-upon procedures report described in paragraph (a)(2) of this Section 9005.1 and the audited financial statements and accompanying auditors report described in paragraph (b)(2) of this Section 9005.1 at no cost to the participant other than a reasonable charge for copying and postage. The board or deferred compensation committee, as applicable, will be deemed to have satisfied the requirements of this paragraph (g) if participants (i) are able to obtain the applicable reports and financial statements for the plan or (ii) are directed to a web site associated with the plan or the State or local employer sponsor of the plan that contains such information in a readily readable and downloadable format.

(h) The board or deferred compensation committee, as applicable, shall file with the president a complete and accurate copy of the financial statements and agreed-upon procedures report described in paragraph (a)(2) of this Section 9005.1 or the audited financial statements and accompanying auditors report described in paragraph (b)(2) of this Section 9005.1 promptly following delivery of such statements and reports to the board or deferred compensation committee, as applicable.

(i) The provisions of this Section 9005.1 shall be in effect for each plan year of a plan ending on or after December 31, 2010. (added June 15, 2011)

**9005.2 Authority of board and committee.** The board and each deferred compensation committee shall receive reports from its agents and appointed trustees, independent consultants, administrative service agencies and financial organizations, and shall promptly terminate or amend such agency, arrangement, agreement or contract with such trustee, independent consultant, administrative service agency or financial organization if its obligations under this Subtitle or otherwise so require. To the extent necessary to comply with this section 9005.2 or

section 9006.1, the board or deferred compensation committee, as applicable, shall have the authority to serve as a temporary or interim trustee until a successor trustee is appointed in accordance with this Subtitle.

**9005.3 Statements.** Each participant in a plan shall be furnished with a statement at least quarterly from the trustee or administrative service agency. Such statement shall indicate the balance of his or her account under the plan, the participant's interest in each investment option under the plan and any other data which the board or deferred compensation committee, as applicable, shall determine to be relevant. Each participant in a plan shall be furnished with clear and complete written disclosure no less frequently than annually (i) of all fees and expenses paid out of or charged against any assets of the plan, including all fees and expenses netted against any investment return on amounts held under the plan and (ii) of the allocation of all such fees and expenses to and among participants' accounts under the plan.

**9005.4 Bonding and insurance.** (a) Each person appointed in accordance with this Subtitle or outside agent which handles, holds, invests, maintains custody of or directs disbursement of funds or serves as a trustee shall be bonded with a customary or usual bond, obtained from an organization duly authorized and licensed to provide such bond in the State of New York, to protect against any loss resulting from fraud or dishonesty by such person or the employees, officers and agents thereof.

(b) The amount of the bond shall not be less than the lesser of:

(1) 100 percent of the amount under the plan managed or administered or held by such person; or

(2) \$25 million; provided, however, that the board or deferred compensation committee, as applicable, may, in its discretion, require a bond in a greater amount if the board or deferred compensation committee determines that such greater amount is necessary or advisable to adequately protect the plan from any loss resulting from fraud or dishonesty by such person.

The cost of any such bond for a trustee who is a member of the board or deferred compensation committee shall be treated as a reasonable and necessary expense of administering the plan and may be paid from the assets of the plan.

(c) Each trustee, independent consultant, administrative service agency and financial organization appointed in accordance with this Subtitle shall provide appropriate evidence of adequate insurance, and the cost of any such insurance for a trustee who is a member of the board or deferred compensation committee, as applicable, shall be treated as a reasonable and necessary expense of administering the plan and may be paid from the assets of the plan.

## PART 9006

### COMPLIANCE

(Statutory authority: State Finance Law, § 5; L. 1982, ch. 547)

Sec.

9006.1 Authority of board

9006.2 Documentary provisions

Sec.

9006.3 Exemptions

**Section 9006.1 Authority of board.** Upon notice that any plan or any contract or agreement or other arrangement entered into in respect of a plan does not substantially comply with this Subtitle or any other applicable federal, State or local law, or that a local employer is not ensuring substantial compliance with its plan, the board may investigate, hold hearings and take such action as it deems warranted or appropriate, including but not limited to termination of the plan, contract, agreement or other arrangement.

**9006.2 Documentary provisions.** Every contract or agreement entered into by the board or a deferred compensation committee in respect of a plan shall contain a provision that the agreement or contract is subject to the plan and to this Subtitle, and that such plan and this Subtitle are made a part thereof.

**9006.3 Exemptions.** In exceptional circumstances, and where the board deems it to be in the best interest of the plan, the board in its sole discretion may grant an exemption from the applicability of any of the rules and regulations set forth under this Subtitle; *provided, however,* that, any exemption granted hereunder must be in accordance with the requirements of the Internal Revenue Code, the plan and the board's fiduciary obligations. In the event that the board grants such an exemption, the board shall describe in writing the exceptional circumstances and explain the reasons for its determination that the exemption is in the best interests of the plan. All requests for such exemption must be submitted to the board in writing and contain a detailed explanation of the reasons why an exemption has been requested.

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