

ATTORNEY GENERAL OF THE STATE OF NEW YORK

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:
IN THE MATTER OF :
KEVIN MCCABE :
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Investigation
No. 2009-152

**ASSURANCE OF DISCONTINUANCE
PURSUANT TO EXECUTIVE LAW § 63(15)**

In March 2007, the Office of the Attorney General of the State of New York (the “Attorney General”), commenced an industry-wide investigation (the “Investigation”), pursuant to Article 23-A of the General Business Law (the “Martin Act”), into allegations of “pay-to-play” practices and undisclosed conflicts of interest at public pension funds, including the New York State Common Retirement Fund. The Investigation revealed that private equity firms and hedge funds frequently use placement agents, finders, lobbyists, and other intermediaries (“placement agents”) to obtain investments from public pension funds, and that many of these placement agents do not hold the licenses and registrations generally required for placement agents. This Assurance of Discontinuance (“Assurance”) contains the findings of the Attorney General’s Investigation as relevant here and the relief agreed to by the Attorney General and Kevin McCabe (“McCabe”).

WHEREAS, the Attorney General finds that trillions of dollars in public pension funds in the United States are held in trust for millions of retirees and their families and these funds must be protected from manipulation for personal or political gain;

WHEREAS, the Attorney General finds that public pension fund assets must be invested solely in the best interests of the beneficiaries of the public pension fund;

WHEREAS, the Attorney General finds that the New York State Common Retirement Fund in particular is the largest asset of the State and, having been valued at \$150 billion at the time of the events described in this Assurance, was larger than the entire State budget this year;

WHEREAS, the Attorney General finds that public pension funds are a highly desirable source of investment for private equity firms and hedge funds;

WHEREAS, the Attorney General finds that private equity firms and hedge funds frequently use placement agents to obtain investments from public pension funds;

WHEREAS, the Attorney General finds that these placement agents are frequently politically-connected individuals selling access to public money;

WHEREAS, the Attorney General finds that the use of placement agents to obtain public pension fund investments is a practice fraught with peril and prone to manipulation and abuse;

WHEREAS, the Attorney General finds that the legislature has designated the New York State Comptroller, a statewide elected official, as the sole trustee of the Common Retirement Fund, vesting the Comptroller with tremendous power over the Common Retirement Fund, including the ability to approve investments and contracts worth hundreds of millions of dollars;

WHEREAS, the Attorney General finds that persons and entities doing business before the State Comptroller's Office are frequently solicited for and in fact make political contributions to the Comptroller's campaign before, during, and after they seek and obtain business from the State Comptroller's Office;

WHEREAS, the Attorney General finds that this practice of making campaign contributions while seeking and doing business before the Comptroller's Office creates at least the appearance of corrupt "pay to play" practices and thereby undermines public confidence in State government in general and in the Comptroller's Office in particular;

WHEREAS, the Attorney General finds that the system must be reformed to eliminate the use of intermediaries selling access to public pension funds, and to eliminate the practice of making campaign contributions to publicly-elected trustees of public pension funds while seeking and doing business before those public pension funds;

WHEREAS, the Attorney General is the legal adviser of the Common Retirement Fund under New York's Retirement and Social Security Law §14;

WHEREAS, McCabe acknowledges the problems with "pay-to-play" practices and conflicts of interest inherent in the use of placement agents and other intermediaries to obtain public pension fund investments; and

WHEREAS, McCabe embraces the Attorney General's Reform Code of Conduct attached to this Assurance and incorporated by reference herein; and

WHEREAS, McCabe has fully cooperated with the Attorney General's investigation.

I. MCCABE

1. From 1994 to 1998, McCabe was the Chief of Staff to the New York City Council Speaker. McCabe has worked on multiple political campaigns since leaving the City Counsel. In 1999, McCabe founded LGM Entertainment, a sports-based entertainment company.

II. THE NEW YORK STATE AND NEW YORK CITY OFFICES OF THE COMPTROLLER

2. The New York Office of the State Comptroller (the “OSC”) administers the New York State Common Retirement Fund (the “CRF”). The CRF is the retirement system for New York State and many local government employees. Most recently valued at approximately \$116.5 billion, the CRF is by far the single largest monetary fund in State government and the third-largest public employee pension fund in the country. The New York State Comptroller (“State Comptroller”) is designated by the legislature as the sole trustee responsible for faithfully managing and investing the CRF for the exclusive benefit of over one million current and former State employees and retirees.

3. The State Comptroller is a statewide elected official and is the State’s chief fiscal officer. The State Comptroller is the sole trustee of the CRF, but typically appoints a Chief Investment Officer and other investment staff members who are vested with authority to make investment decisions. The State Comptroller, the Chief Investment Officer and CRF investment staff members owe fiduciary duties and other duties to the CRF and its members and beneficiaries.

4. The CRF invests a portion of its assets in what it terms “alternative investments,” which include private equity funds and hedge funds. The CRF generally invests in private equity funds as one of various limited partners. In these investments, a separate investment manager generally serves as the general partner which manages the day-to-day investment, while the CRF invests as a limited partner.

5. The New York City Office of the Comptroller manages the assets of the five New York City Pension Funds (“NYC Pension Funds”): The New York City Employee

Retirement System, The Teachers' Retirement System of the City of New York, The New York City Police Pension Fund, The New York City Fire Department Pension Fund and The Board of Education Retirement System. Each Pension Fund is financially independent and has its own board of trustees. The New York City Comptroller is the custodian and investment advisor to the board of trustees of each of the NYC Pension Funds. The NYC Pension Funds cover more than 237,000 retirees and beneficiaries and more than 344,000 City and City-affiliated employees. As of the end of the fiscal year on March 31, 2009, the NYC Pension Funds had combined assets of \$77.1 billion.

6. The CRF and the NYC Pension Funds are large and desirable sources of investment funds, and gaining access to and investments from them is a competitive process. Frequently, investment managers seeking an investment from the CRF and/or the NYC Pension Funds have retained third parties known as “placement agents” or “finders” to introduce and market them to the CRF and/or NYC Pension Funds. The CRF recently banned the use of placement agents in April 2009. By May 2009, the board of trustees of all five of the NYC Pension Funds had voted to suspend the use of placement agents.

7. Placement agents and other third parties who are engaged in the business of effecting securities transactions are required to be licensed and affiliated with broker-dealers regulated by an entity now known as the Financial Industry Regulatory Authority (“FINRA”). *See* §3(a)(4) and §15(b) of the Securities and Exchange Act of 1934. To obtain such licenses, the agents are required to pass the “Series 7” or equivalent examination administered by FINRA. In addition, the Martin Act requires

that all dealers, brokers, or salesmen (e.g., placement agents) who sell or purchase securities within or from New York State must file broker-dealer registration statements with the Attorney General. *See* GBL § 359-e(3).

III. THE MORRIS/LOGLISCI INDICTMENT AND UNLICENSED AGENTS

8. As a result of the Investigation, a grand jury returned a 123-count indictment (the “Indictment”) of Henry “Hank” Morris, the chief political officer to Alan Hevesi, who served as Comptroller from January 2003 through December 2006, and David Loglisci, the CRF’s Director of Alternative Investments and then Chief Investment Officer during the Hevesi administration. The Indictment charges Morris and Loglisci with enterprise corruption and multiple violations of the Martin Act, money laundering, grand larceny, falsifying business records, offering a false instrument for filing, receiving a reward for official misconduct, bribery, rewarding official misconduct and related offenses.

9. The Indictment alleges that Morris, the chief political advisor to Hevesi, and Loglisci, joined forces in a plot to sell access to billions of taxpayer and pension dollars in exchange for millions of dollars in political and personal gain. Morris steered to himself and certain associates an array of investment deals from which he drew tens of millions of dollars in so-called placement fees. He also used his unlawful power over the pension fund to extract vast amounts of political contributions for the Comptroller’s re-election campaign from those doing business and seeking to do business with the CRF.

10. The Investigation also revealed that forty to fifty percent of the agents receiving placement fees for obtaining investments from the CRF and NYC Pension Funds were

unlicensed agents. As a result of this finding, the Attorney General issued subpoenas to over 100 investment firms and their agents in May 2009 targeting the use of unlicensed agents.

IV. FINDINGS AS TO MCCABE

GKM/NY Venture Capital Fund

11. McCabe entered into an agreement with GKM Newport Management (“GKM”) in or about December 2003 to act as a placement agent for the GKM/NY Venture Capital Fund. McCabe proposed to introduce GKM to several investors, including the CRF. During in or about December 2003 and January 2004, McCabe set up initial meetings with CRF investment staff on GKM’s behalf.

12. In or about Summer 2004, McCabe and Hank Morris formed the entity Purpose LLC (“Purpose”) in order to share fees associated with any CRF investment into the GKM/NY Venture Capital Fund. As of August 10, 2004, McCabe, signing on behalf of Purpose, entered into a placement agreement (the “Agreement”) with GKM Newport Management (“GKM”). Per their Agreement, GKM was to pay Purpose 75 basis points (0.75%) of CRF-invested capital under management in the GKM/NY Venture Capital Fund, in addition to 10% of any carried interest, or success fees, earned by GKM on the CRF-invested capital.

13. At the time when McCabe entered into the Agreement, he had no experience as a placement agent. Nor was McCabe registered with FINRA or other relevant authorities. In fact, McCabe held no securities licenses of any kind. At no time was Purpose a registered broker-dealer.

14. The CRF committed \$400 million to the GKM/NY Venture Capital Fund in or about October 2004. Subsequently, GKM began paying quarterly fees to Purpose.

15. On or about August 24, 2006, GKM entered into a second placement agreement with Purpose in contemplation of receiving an additional \$400 million allocation from the CRF. For this second agreement, GKM agreed to pay Purpose 50 basis points (0.50%) on capital invested by the CRF, in addition to 10% of any carried interest.

16. In or about December 2006, CRF increased its capital commitment to GKM's GKM/NY Venture Capital Fund from \$400 to \$800 million.

17. In total, Purpose received approximately \$658,000 in fees from GKM, of which McCabe received approximately \$477,000 through Merriweather & Williams Ltd, an entity he controlled. Purpose retained approximately \$180,000.

Campaign Contributions

18. In or about December 2004, the partners at GKM contributed approximately \$25,000 to Hevesi's campaign.

AGREEMENT

WHEREAS, MCCABE wishes to resolve the Investigation and is willing to abide by the terms of this Agreement set forth below;

WHEREAS, MCCABE does not admit or deny the Attorney General's findings as set forth in this Assurance;

WHEREAS, the Attorney General is willing to accept the terms of the Assurance pursuant to New York Executive Law § 63(15), and to discontinue, as described herein, the Investigation of MCCABE;

WHEREAS, the parties believe that the obligations imposed by this Assurance are prudent and appropriate;

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the parties, as follows:

I. CODE OF CONDUCT

19. The Attorney General and MCCABE hereby enter into the attached Public Pension Fund Reform Code of Conduct, which is hereby incorporated by reference as if fully set forth herein. MCCABE agrees to fully abide by the terms of the Code of Conduct as it pertains to him.

II. LICENSING

20. MCCABE agrees that henceforth, prior to engaging in any business effecting securities transactions, he will obtain all required licenses, will affiliate with a broker-dealer regulated by FINRA and will file any broker-dealer registration statements with the Attorney General as required under the Martin Act.

III. PAYMENT

21. MCCABE agrees to pay the Office of the Attorney General a total of SEVEN HUNDRED AND FIFTEEN THOUSAND (\$715,000) DOLLARS. This payment shall be accomplished as follows:

- a. Within thirty days of signing of this Assurance, MCCABE will turn over THREE HUNDRED THOUSAND (\$300,000) DOLLARS to the Office of the Attorney General of the State of New York.
- b. Within one year of the signing of this Assurance, MCCABE will turn over ONE HUNDRED FIFTEEN THOUSAND (\$115,000) DOLLARS to the Office of the Attorney General of the State of New York.

- c. Within two years of the signing of this Assurance, MCCABE will turn over SIXTY THOUSAND (\$60,000) DOLLARS to the Office of the Attorney General of the State of New York.
- d. Within three years of the signing of this Assurance, MCCABE will turn over an additional SIXTY THOUSAND (\$60,000) DOLLARS to the Office of the Attorney General of the State of New York.
- e. MCCABE agrees to give up any rights or claims he may have to any monies retained by Purpose, including but not limited to the ONE HUNDRED EIGHTY THOUSAND (\$180,000) DOLLARS described in paragraph 17 above.

22. All of MCCABE's payments shall be made in the form of a certified or bank check made out to "State of New York" and mailed or otherwise delivered to: Office of the Attorney General of the State of New York, 120 Broadway, 25th Floor, New York, New York 10271, Attn: Linda Lacewell, Special Counsel.

23. MCCABE agrees that he shall not, collectively or individually, seek or accept, directly or indirectly, reimbursement or indemnification, including, but not limited to, payment made pursuant to any insurance policy, with regard to any or all of the amounts payable pursuant to paragraph 21 above.

IV. GENERAL PROVISIONS

24. MCCABE admits the jurisdiction of the Attorney General. MCCABE is committed to complying with relevant laws to include the Martin Act, General Business Law § 349, and Executive Law § 63(12).

25. The Attorney General retains the right under Executive Law § 63(15) to compel compliance with this Assurance. Evidence of a violation of this Assurance proven in a court of competent jurisdiction shall constitute prima facie proof of a violation of the Martin Act, General Business Law § 349, and/or Executive Law § 63(12) in any civil action or proceeding hereafter commenced by the Attorney General against MCCABE.

26. Should the Attorney General prove in a court of competent jurisdiction that a material breach of this Assurance by MCCABE has occurred, MCCABE shall pay to the Attorney General the cost, if any, of such determination and of enforcing this Assurance, including without limitation legal fees, expenses and court costs.

27. If MCCABE defaults on any obligation under this Assurance, the Attorney General may terminate this Assurance, at his sole discretion, upon 10 days written notice to MCCABE. MCCABE agrees that any statute of limitations or other time-related defenses applicable to the subject of the Assurance and any claims arising from or relating thereto are tolled from and after the date of this Assurance. In the event of such termination, MCCABE expressly agrees and acknowledges that this Assurance shall in no way bar or otherwise preclude the Attorney General from commencing, conducting or prosecuting any investigation, action or proceeding, however denominated, related to the Assurance, against MCCABE, or from using in any way any statements, documents or other materials produced or provided by MCCABE prior to or after the date of this Assurance, including, without limitation, such statements, documents or other materials, if any, provided for purposes of settlement negotiations, except as otherwise provided in a written agreement with the Attorney General.

28. Except in an action by the Attorney General to enforce the obligations of MCCABE in this Assurance or in the event of termination of this Assurance by the Attorney General, neither this Assurance nor any acts performed or documents executed in furtherance of this Assurance: (a) may be deemed or used as an admission of, or evidence of, the validity of any alleged wrongdoing, liability or lack of wrongdoing or liability; or (b) may be deemed or used as an admission of or evidence of any such alleged fault or omission of MCCABE in any civil, criminal or administrative proceeding in any court, administrative or other tribunal. This Assurance shall not confer any rights upon persons or entities who are not a party to this Assurance.

29. MCCABE has fully and promptly cooperated in the Investigation and shall continue to do so. Such cooperation shall include, without limitation, and on a best efforts basis:

- a. Production, voluntarily and without service of a subpoena, upon the request of the Attorney General, of all documents or other tangible evidence requested by the Attorney General, and any compilations or summaries of information or data that the Attorney General requests that MCCABE prepare, except to the extent such production would require the disclosure of information protected by the attorney-client and/or work product privileges;
- b. Without the necessity of a subpoena, having MCCABE attend any Proceedings (as hereinafter defined) in New York State or elsewhere at which the presence of MCCABE is requested by the Attorney General and having MCCABE answer any and all inquiries that may be put by the Attorney General to him at any proceedings or otherwise; "Proceedings" include, but are not limited to, any meetings, interviews, depositions, hearings, trials, grand jury proceedings or other proceedings;
- c. Fully, fairly and truthfully disclosing all information and producing all records and other evidence in his possession, custody or control relevant to all inquiries made by the Attorney General concerning the subject matter of the Assurance, except to the extent such inquiries call for the disclosure

of information protected by the attorney-client and/or work product privileges; and

- d. Making outside counsel reasonably available to provide comprehensive presentations concerning any internal investigation relating to all matters in the Assurance and to answer questions, except to the extent such presentations call for the disclosure of information protected by the attorney-client and/or work product privileges.

30. In the event MCCABE fails to comply with paragraph 28 of the Assurance, the Attorney General shall be entitled to specific performance, in addition to other available remedies.

31. The Attorney General has agreed to the terms of this Assurance based on, among other things, the representations made to the Attorney General and his staff by MCCABE, his counsel, and the Attorney General's Investigation. To the extent that representations made by MCCABE or his counsel are later found to be materially incomplete or inaccurate, this Assurance is voidable by the Attorney General in his sole discretion.

32. MCCABE shall, upon request by the Attorney General, provide all documentation and information reasonably necessary for the Attorney General to verify compliance with this Assurance.

33. All notices, reports, requests, and other communications to any party pursuant to this Assurance shall be in writing and shall be directed as follows:

If to MCCABE:

Michael G. Dowd, Esq.
112 Madison Ave, 3d Floor
New York, New York 10016

If to the Attorney General:

Office of the Attorney General of the State of New York

120 Broadway, 25th Floor
New York, New York 10271
Attn: Linda Lacewell

34. This Assurance and any dispute related thereto shall be governed by the laws of the State of New York without regard to any conflicts of laws principles.

35. MCCABE consents to the jurisdiction of the Attorney General in any proceeding or action to enforce this Assurance.

36. MCCABE agrees not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any finding in this Assurance or creating the impression that this Assurance is without factual basis. Nothing in this paragraph affects MCCABE's: (a) testimonial obligations; or (b) right to take legal or factual positions in defense of litigation or other legal proceedings to which the Attorney General is not a party.

37. This Assurance may not be amended except by an instrument in writing signed on behalf of the parties to this Assurance.

38. This Assurance constitutes the entire agreement between the Attorney General and MCCABE and supersedes any prior communication, understanding or agreement, whether written or oral, concerning the subject matter of this Assurance. No representation, inducement, promise, understanding, condition or warranty not set forth in this Assurance has been relied upon by any party to this Assurance.

39. In the event that one or more provisions contained in this Assurance shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

40. This Assurance may be executed in one or more counterparts, and shall become effective when such counterparts have been signed by each of the parties hereto.

41. Upon execution by the parties to this Assurance, the Attorney General agrees to suspend, pursuant to Executive Law § 63(15), this Investigation as and against MCCABE solely with respect to his marketing of investments to public pension funds in New York State.

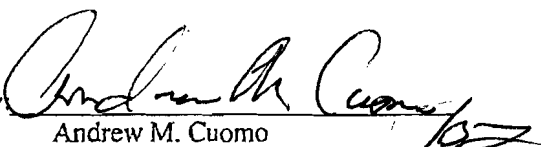
42. Any payments and all correspondence related to this Assurance must reference

Investigation No. 09-152

WHEREFORE, the following signatures are affixed hereto on the dates set forth below.

ANDREW M. CUOMO

Attorney General of the State of New York

By: 
Andrew M. Cuomo

120 Broadway
25th Floor
New York, New York 10271
(212) 416-6199

Dated: April 14, 2010

KEVIN MCCABE

By: 

Dated: April 14, 2010