ATTORNEY GENERAL OF THE STATE OF NEW YORK
BUREAU OF INVESTMENT PROTECTION
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In the Matter of

NEW YORK STATE UNITED TEACHERS
MEMBER BENEFITS,

Respondent.

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

WHEREAS, in April 2005, as part of a larger investigation into retirement products, Eliot Spitzer, Attorney General of the State of New York (the "OAG"), commenced an investigation ("Investigation") pursuant to Executive Law § 63(12) and Article 23-A of the General Business Law (the "Martin Act"), into a retirement benefits plan endorsed by the New York State United Teachers Benefits Trust[1] (the "Trust");

WHEREAS, New York State United Teachers ("NYSUT" or "Union") is a federation of more than 900 local unions representing more than 525,000 people who work in, or are retired from, New York State's primary schools, colleges and healthcare facilities;

WHEREAS, the Trust is a not-for-profit trust established in 1983 to endorse and monitor the quality of insurance plans, investment products and benefit programs provided to NYSUT members;

WHEREAS, the Trust exclusively endorsed and marketed the tax-deferred annuity

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[1] NYSUT Benefits Trust was renamed "NYSUT Member Benefits" after this Investigation was commenced.

retirement products of one insurance company, Aetna Life Insurance and Annuity Company ("Aetna"),[2] to eligible Union members;

WHEREAS, in the course of the Investigation extensive documentary evidence was reviewed by the OAG;

WHEREAS, the Trust has cooperated in the Investigation by producing documentary evidence and identifying evidence relevant to the Investigation;

WHEREAS, as set forth in the findings of fact ("Findings") below, the Investigation revealed that certain practices engaged in by the Trust violated the Martin Act and Executive Law § 63(12);

WHEREAS, the Trust has advised the OAG of its desire to resolve the Investigation;

WHEREAS, the Trust, without admitting or denying the OAG's Findings made below, has agreed to implement certain reforms and to reimburse certain costs (see Agreement below); and

NOW THEREFORE, the OAG, based upon the Investigation, makes the following Findings:

FINDINGS

1. NYSUT is a large federation of local unions, spread throughout New York, that represents more than 525,000 people employed in or retired from New York's schools, colleges and healthcare facilities. NYSUT, in turn, is a part of the American Federation of Teachers, the

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[2] Aetna remained NYSUT's endorsed 403(b) plan provider until late 2000, when it sold its retirement product line of business to ING Groep NV. The Trust endorsed 403(b) provider was eventually renamed ING Life Insurance and Annuity Company ("ING"), but was called "ING/Aetna" during a transition period after the sale.

AFL-CIO and Education International -- larger union federations with national and international representation. Certain unions that are affiliated with NYSUT, including the United Federation of Teachers, the United University Professions and the Professional Staff Congress, have opted out of the ING plans that are the subject of the Investigation.

2. In 1983, NYSUT established the Trust to provide benefits to members of NYSUT and affiliated unions. The Trust offered some benefits directly. These included a broad array of life, medical and property insurance and car rental, travel and shopping discounts. In addition to these benefits offered directly by the Trust, the Trust also negotiated with various vendors for other voluntary benefit programs, including retirement products such as 403(b) plans. A successful vendor would receive a Trust endorsement for its product. One Union official stated that by engaging in the endorsement process, NYSUT members would gain “an advocate for their concerns or problems.” Exhibit 1.[3] While the Trust has the power to endorse products, it cannot dictate what the various New York school districts offer their teachers and other employees. Each school district makes its own decision as to which retirement products it will sponsor. Nevertheless, the NYSUT name and collective buying power gives a significant advantage to vendors approaching school districts and individuals, allowing those vendors to capitalize on the sense of security and trust embodied in the Trust's endorsement of the products being sold. NYSUT members often invested in endorsed products because they believed that the Union was vouching for the quality of those products. The Trust -- which urged members in flyers to "take advantage of your union-endorsed benefits" (Exhibit 2) -- has a fiduciary duty to act in the best interest of members as it considers and endorses products.

[3] Citations refer to documents in the accompanying exhibit binder.

A. 403(b) Retirement Plans and NYSUT's Endorsed Product

3. A 403(b) retirement plan, named for section 403(b) of the Internal Revenue Code, is a tax deferred retirement savings plan established for the benefit of employees of educational institutions and certain other not-for-profit organizations. It allows teachers and other qualifying employees to invest for retirement, on a tax-deferred basis, in various mutual fund and fixed income investment options offered by an insurance company. Until 1974, 403(b) plans were solely a form of annuity contract -- investment vehicles with insurance features for which fees are charged. In 1974, section (7) was added to the Code, eliminating the need for an insurance "wrapper" for 403(b) plans and permitting investments to be made in mutual funds without any insurance charges. Both types of 403(b) plans -- the 403(b) annuity and the 403(b)(7) low-cost alternative -- allow teachers and other not-for-profit employees an opportunity to save for retirement much as private sector employees can through 401(k) tax-deferred retirement plans.

4. In 1988, with the assistance of an outside consultant, the Trust issued a formal Request for Proposal ("RFP") to identify a retirement plan for endorsement. At the conclusion of the RFP process, the Trust selected Aetna and endorsed a new 403(b) annuity product called Opportunity Plus which allowed for investments in both mutual funds and a fixed income account. The Trust did not consider offering members a low-cost 403(b)(7) plan. In return for the Trust's endorsement of Opportunity Plus, Aetna agreed to pay an expense reimbursement that initially approximated $40,000 a year.

5. The Opportunity Plus product was first endorsed by the Trust and offered for sale in June 1989. In the first year alone, 7,500 participants invested $100,000,000. By 1994, participation in Opportunity Plus increased to 26,000 people with a total investment of

$735,000,000; by 1999, 40,400 people had invested over $2,000,000,000 in the plan. At the end of 2003, there were approximately 50,000 current and retired school district employees invested in Opportunity Plus, though the total value of their investments had diminished slightly from the plan's 1999 peak due to the 2000 stock market decline. Today, more than 53,000 current and retired school district employees participate in Opportunity Plus, which holds approximately $2,350,000,000.

6. Since its inception in 1989, investors in Opportunity Plus have been charged every year both for the expenses of the mutual funds they select plus an insurance charge, a so-called Mortality and Expense fee ("M&E"), on their mutual fund investments. A fixed-income option offered by the plan carries no M&E fees. In 1989, the annual M&E was 1.25% of each retirement account's mutual fund balance, and the average mutual fund cost was .54% (although costs varied by fund), giving average combined annual charges of 1.79%. The combined charges for mutual fund investments have changed little as the plan has grown in the years since then: they grew to 2.04% in 1994 (an amount that could be as high as 2.85% for a teacher investing in the most expensive mutual fund) and declined slightly thereafter, reaching 1.86% in 2004. The M&E component of the combined costs was reduced to 1.10% in 2000, 1.05% in 2001 and finally to 1.00% in 2002.

7. The only insurance benefits plan participants have ever received in exchange for the Opportunity Plus annual M&E fee is the right to annuitize their investment upon retirement, meaning that instead of taking their savings as a lump sum, they can opt for a guaranteed stream of payments. Opportunity Plus offers no death benefit -- in the event of death, a participant's heirs simply receive the money in the participant's account.

8. As more NYSUT members invested in the endorsed product, Aetna, and later ING, paid ever increasing amounts to the Trust to keep the endorsement. In 1994, the endorsement agreement increased the annual payments to the Trust from $40,000 to $400,000 a year. The figure increased further to $592,000 a year in 1998. In 2001, after Aetna sold its retirement business line to ING, the Trust negotiated a payment scale starting at $1,852,000 in 2001 and gradually increasing to $2,402,000 in 2006. Also in 2001, the Trust negotiated for additional payments based on the amount of NYSUT member assets invested in ING products, later changed to a flat "per head" endorsement fee based on the overall number of NYSUT members. In 2004, the Trust projected that these additional amounts would increase the total endorsement payment to the Trust to over $3,000,000 in 2005 and 2006, rising to $4,200,000 in 2009. Exhibit 3.

9. The Trust used a portion, but not all, of these funds to pay for additional account "enhancements" that were offered to Opportunity Plus investors but not to other NYSUT members. In 1992, for example, the Trust began to allow investors to automate their monthly withdrawals. In 1994, the Trust started offering Opportunity Plus investors insurance that would cover $500 of a member's Opportunity Plus contributions in the event of disability, as well as sliding scale life insurance with an option to purchase further protection. In 1996, Trust also began to offer free financial counseling for the families of deceased Opportunity Plus investors.

10. Another "enhancement" involved the Trust hiring financial advisors for its members. In 2001, the Trust began to receive payments of $600,000 per year from ING to pay the salaries of six "Coordinators of Financial Services" ("Coordinators") who traveled around New York State and gave presentations on retirement issues to school districts and Union

members. In September 2004, Opportunity Plus offered a number of new "enhancements" including: a free $10,000 term life insurance policy; a financial counseling service for terminally ill participants and families of deceased participants; a legal service plan that included a free simple will every three years and two free one-hour office sessions with an attorney per year; three hours of access a year to a financial planning hotline; and an in-person financial planning session (for a fee).

11. These features proved of little use to the vast majority of Opportunity Plus investors. During the year spanning from September 1, 2004 through August 31, 2005, only 297 investors (out of more than 50,000) called the financial hotline. A mere eleven members (or their spouses) received the counseling for ill or deceased investors. Just 32 members received the $10,000 life insurance payout. And the legal services plan produced only 587 simple wills, 213 healthcare proxies and 155 letters. The total direct cost to the Trust of all these benefits (not including Trust overhead) was $1,067,000, less than one-half of what the Trust received from ING during the same period. On the other hand, NYSUT members paid ING over $12,000,000 in M&E fees and approximately the same amount in mutual fund costs during these twelve months. Thus in the course of one year, teachers paid about $24 million, ING paid the Trust about $2.66 million, and the Trust gave teachers “enhancements” costing about $1 million. The difference between the monies the Trust received from ING and the cost of the "enhancements" went into the Trust's overhead, certain other costs associated with the Opportunity Plus plan, and a pool of excess cash, controlled by the Trust, that grew to $5.5 million in August 2005.

B. <u>The Trust’s “Silent Partnership” with Aetna/ING</u>

12. By 1998, the Trust referred to its relationship with Aetna as a “[p]artnership – our

view is that we are not equal partners, but silent partners." Exhibit 4. As part of this "silent partnership," the Trust took covert steps to expand Aetna's business. For instance, in 1998, the Trust began to endorse a new Aetna Financial Counseling Program ("FCP") to be conducted by Ernst & Young ("E&Y"). In promotional material issued by the Trust, this program is described as providing an "independent review" and offering unbiased advice. Exhibit 5. In fact, however, it was a program to sell ING/Aetna products: an undated email from an ING Managing Director to the Manager of the Trust stated that the "initial purpose of the FCP program [sic] was to generate 403(b) leads for the Opp. Plus Producer." Exhibit 6. The relevant agreement between Aetna and the Trust reflects this purpose:

> ... Aetna's Representatives will be the only persons Members will be referred to for individualized financial planning services pursuant to the Program. All requests from Members who participate in the Program for individualized financial planning services will be referred to Aetna or its Representatives. The Trust will instruct E&Y to refer Members who need or desire financial planning services to Aetna or its Representatives.

Exhibit 7. ING representatives capitalized on the FCP to sell Union members a variety of other products beyond Opportunity Plus, including variable annuities, mutual funds, long-term care insurance, stocks, term life insurance, Roth IRAs and medical insurance. Exhibit 8.

13. Another Trust program, Financial Building Blocks, was also advertised as a source of neutral investment information for members: "There's <u>no</u> sales pitch - they do <u>not</u> promote specific products or services." [Emphasis in original] Exhibit 9. However, an internal ING email from January 2004 praised an ING employee who participated in the Financial Building Blocks program for using the opportunity "as a 'foot in the door' to promote" ING products. Exhibit 10. The Trust itself attempted to obscure the role that ING/Aetna played in

delivering these seminars: an email to all Trust employees dated February 5, 2001 instructs them to route calls about the program to ING/Aetna employees who would not identify themselves as such over the phone.

> Please make a note of the following: **When we get calls for Financial Building Blocks, please transfer them directly to [two Aetna employees].**
>
> The reason is that everyone else over in Aetna answers the phone 'ING-Aetna,' and we say FBB is NYSUT's program with no sales agenda. We don't want the local leaders to get the wrong idea right off the bat. [The two Aetna employees] answer the phones with their names, not Aetna.

Exhibit 11. [Boldface type in original]

14. As discussed above, there have always been lower cost 403(b)(7) alternatives to the Opportunity Plus plan. In 1998, the Trust – which had a financial stake in the total amount invested by NYSUT members – asked Aetna to take steps to retain teachers with large account balances who wanted to shift to cheaper plans. Aetna thereafter offered such individuals "a free consultation with an Aetna planner" as an inducement to stay. Exhibit 4. When members continued to switch, the Trust asked Aetna in 2000 to create a cheaper alternative product to "assist in retaining the 5%-6% of assets that [were] being lost to lower cost competitors each year." Exhibit 12. The result, a 403(b)(7) plan called "Opportunity Independence," offered direct access to mutual funds without insurance charges. Opportunity Independence investors therefore avoided M&E fees; on the other hand, they were charged a 0.40% "Administration Fee" in addition to the applicable fund expenses. The mutual funds available through Opportunity Independence were, in some instances, more expensive than those offered in Opportunity Plus. For example, Opportunity Independence – supposedly a low cost alternative -- offered an S&P 500 index fund with an expense ratio of 0.93%, even though an S&P 500 index

fund costing 0.10% was offered in the Opportunity Plus plan.

15. As noted above, the Trust received approximately $600,000 a year from ING to pay its Coordinators' salaries. According to the Trust's endorsement agreement with ING, the Coordinators were responsible for "acting as liaison between [ING] and the Trust, and overseeing on behalf of the Trust all aspects of the [ING] programs and services sponsored by the Trust." Exhibit 13. The Coordinators held themselves out to teachers as working solely on behalf of the Trust in the best interests of NYSUT members. As one Coordinator wrote to a teacher in 2003:

> A final note, which I hope I made clear at the meeting, but which I would like to reiterate here: I work for [the Trust], not ING. My pay is not tied in any way to ING. Whether or not NYSUT members choose to use ING, or remain with ING, has no bearing whatsoever on my compensation. My sole interest is to maximize this benefit for NYSUT members, who are the only people I ultimately need to answer to.

Exhibit 14. In fact, however, the Coordinators' salaries were paid entirely by ING (though the Trust paid for their benefits).

16. Contrary to what they told Union members, the Coordinators acted as sales agents for ING. For example, if a local school district or union limited ING's ability to sell to teachers (by, for example, banning ING sales representatives from entering school grounds to solicit in teachers' break rooms), the Coordinators used "soft pressure tactics . . . to apply to the Union leaders to stress the importance of being supportive of NYSUT and it's [*sic*] endorsed products." Exhibit 15. The Trust even issued written guidelines for the Coordinators to follow to help ING gain access to uncooperative school districts, including sending "a formal letter of protest from the [Union] local to the [school] district . . ." in situations where "there appears to be discrimination against ING . . . ." Exhibit 16. The Coordinators also accompanied ING sales

agents to conferences where ING was marketing its products to teachers and Union leaders.

17. The Trust's role in steering business to ING is illustrated by its 2001 initiative to encourage school districts to contribute to teachers' retirement plans. Emails written by Coordinators show that, as it sought this benefit for its membership, the Trust also worked to ensure that as much of the employer contribution money as possible was funneled to Opportunity Plus. For example, on February 4, 2002, one Coordinator wrote to ING:

> My goal in the initial meeting is to educate the leadership on the benefits for both the Employees and Employer. I do explain the process of establishing an Employer 403b account and the advantages of using the ING/Aetna Opportunity Plus 403b.
>
> I'm concerned that the local leadership and/or District will feel 'Sales' pressure if I'm there w/a Representative of ING at the initial meeting.
>
> Once I guage [*sic*] their interest, I would certainly welcome both you and/or the Representative on follow-up meetings . . . .

Exhibit 17. Upon reviewing the above message, Lynette Metz, the Director of the Trust, commented "[t]his approach is the way to go," and instructed that the message be forwarded to all Coordinators. Exhibit 17.

18. Another Coordinator wrote on March, 2, 2004: "Generally, I prefer to do executive board meetings by myself so I can sell them on using ING exclusively without the pressure of an agent being there." Exhibit 18.

19. ING viewed the Coordinators as valuable assets in their marketing efforts. An ING Regional Manager on November 26, 2001 wrote:

> Since the appointment of [two Coordinators] in my territory the future could not look brighter. What these two folks have brought to our marketing efforts with their knowledge and enthusiasm is truly gratifying. To accompany seasoned agents with them to new teacher meetings and see the enthusiasm is very

noticeable. I think at this point they have worked with each of my producers at least for a day each and the rapport and chemistry is there. Both of these folks were great appointments for our short and long term marketing plans . . . .

Exhibit 19.

20. One ING employee wrote a review of a Coordinator on October 27, 2003, praising his assistance in ING's marketing efforts. She wrote:

> A case in point . . . was a recent deal that was done in Chappaqua. The union president wanted no mention of specific product or company, etc. [the Coordinator] used a nice soft selling approach and somebody in the audience finally was baited to ask why this [*sic*] NYSUT approved ING and as a result we have an exclusive. A soft sell that worked very well. He has done this approach in many other places . . . .

Exhibit 20.

C. <u>The Trust and ING Failed to Adequately Disclose their Relationship</u>

21. Until it learned of the OAG investigation into retirement and insurance products, the Trust had never disclosed to NYSUT members that the Trust received payments from ING. Exhibit 21. In January 2005, the Chairman of the Trust recognized the need for disclosure of the endorsement arrangement:

> In light of the current financial and insurance industry environment, issues continue to arise regarding the fees associated with 403(b) programs. In order to address these issues and better educate our members, the Trust is in the process of creating an internal document, which fully explains the fees connected to the ING Opportunity programs as well as the expense reimbursement paid to the Trust. A final reader-friendly version of the document will be available at the NYSUT RA in April and will be included going forward in the ING Opportunity Plus enrollment kits.

Exhibit 22.

22. On February 23, 2005, Lynette Metz described the Trust's contemplated first disclosure relating to this topic:

> Just thought you'd like to see a new piece that is going in the 403(B) [*sic*] enrollment kit. . . . We went from a 'try to hid [*sic*] it' to a 'full disclosure' environment within the last year on the topic of expense reimbursement. The . . . Security and Insurance sandals [*sic*] have moved us in this direction. Dick [Iannuzzi] thought is to spell it out up fount [*sic*] that we get an expense reimb. for the program - if members don't like it then they can go elsewhere.

Exhibit 23. Previously, the Trust's relationship with Aetna and ING had never been "spelled out" so that members could make an informed choice to "go elsewhere."

23. For its part, originally Aetna did not make any disclosure at all regarding its financial arrangements with the Trust. Thus from June 1989 through November 1992, the Aetna prospectus for Opportunity Plus (the formal disclosure available to all investors) stated only that "Opportunity Plus is endorsed by [NYSUT] and [the Trust]." Exhibit 24. Subsequent Aetna and ING prospectus disclosures referred to the payments made to the Trust, but never revealed that they were used in large part to market the Opportunity plan to teachers. For instance, the 2001 Opportunity Plus prospectus states: "We contribute to the costs incurred by [the Trust] for retaining up to six employees who assist in management of the Opportunity Plus program." Exhibit 25. This description of the Coordinators' role fails to reflect their significant marketing activities.

24. One Coordinator objected to an anticipated change in prospectus language which would have shown the Trust's financial incentive to push members to invest with ING:

> I am hesitate [*sic*] to have the prospectus outline a reimbursement per Opp+ client. I know that myself and most likely the other financial coordinators and probably others, often pitch IN as an exclusive carrier of employer monies. We also have a role in assisting ING in school Districts that ING may be having difficulty with. I am often asked or simply bring up myself, that neither NYSUT nor myself receive extra money from ING should a local choose to use them as an exclusive carrier. Same goes when were [*sic*] assisting with access. Should the prospectus outline a dollar amount reimbursement based on the number of Opp+ clients, we can no

> longer state that, and I feel that we lose some of our objectivity. I can certainly see us using that as an "off the books" formula in determining the dollar amount, but would prefer not to have it in the prospectus.

Exhibit 26. The change in prospectus language was never adopted.

25. In 2001, a senior NYSUT executive objected when ING wanted to enhance its disclosure in Opportunity Plus marketing materials to comport with National Association of Securities Dealers' regulations. The proposed new language read: "All fees and expenses associated with Opportunity Plus **including those received by NYSUT Benefit Trust** are detailed in the current prospectus, which should be read carefully prior to investing or sending money." Exhibit 27 [emphasis supplied]. Thereafter, NYSUT's then-Executive Director of Finance and Administration wrote to ING's Chief Executive Officer to request that the language in bold above be removed. He argued:

> The issue, as I'm sure you can understand, is that [the Trust] does not want to advertise the financial arrangement between ING and NYSUT Benefit Trust to our competition. This is exactly what will happen, as they will use this information against us to persuade potential participants against our program. In addition, the ING type of disclosure on work site posters could create political problems for our local presidents. We need the support of local presidents in order to properly market this program. As you can well imagine, competition is fierce in New York State school districts. It is our position that the expense reimbursement arrangement should be disclosed to participants only in the prospectus. This matter must be resolved in order resume more active marketing and promotion of our program. Millions of dollars are being lost to our competition each day that this matter is allowed to go unresolved.

Exhibit 27.

26. ING ultimately agreed to compromise language as follows:

> Opportunity Plus is a tax deferred variable annuity issued by [Aetna/ING]. . . . All fees and expenses associated with [Opportunity Plus], including those of the Trust, are detailed in the current prospectuses, . . . which should be read carefully prior to investing or sending money.

Exhibit 28. Metz, the Trust's Director, enthusiastically noting its obfuscating quality, approved this compromise language: "I think this lang. is even better. It makes you think that the expenses they are talking about are the expense [*sic*] of the ING National Trust." Exhibit 28.

D. <u>The Trust Overstated its Role as Union Advocate</u>

27. Brochures created by the Trust to describe its endorsed products assured prospective investors that "we've done all the background work, so you don't have to!", (Exhibit 2) and "you needn't spend a lot of time searching for quality insurance and investments. We already did." Exhibit 29. One brochure vouched that every "program endorsed by NYSUT Benefit Trust is researched, designed and monitored to ensure it will enhance your lifestyle. . . . When you participate in a NYSUT benefit program, NYSUT acts as your advocate to ensure that you receive satisfaction." Exhibit 30.

28. In fact, the Trust did little or no "background work." It never conducted a formal RFP for retirement products after 1988. The Trust conducted an "informal process" in 1998 that, according to the Trust, demonstrated the superiority of Opportunity Plus to all other available plans. Exhibit 31. The Trust retained no documents relating to this "informal process." Nor did the Trust perform any due diligence before selecting ING as the provider of Opportunity Independence in 2000.

29. Even though the Trust employed people with a variety of NASD licenses and CPA and Certified Financial Planner designations, it never conducted an effective review unencumbered by loyalty to the current provider, Aetna/ING. NYSUT management did demonstrate financial sophistication, however, when it came to selecting retirement products for

the Union's own employees (including those who work for the Trust). They are offered 401(k) plans which are not available to school districts but are similar to 403(b)(7) plans. The 401(k) plans are administered by Fidelity Investments with combined annual expenses of approximately .50% – less than a third of the expenses of the Opportunity Plus product that the Trust urges on Union members.

E. The Effect of Opportunity Plus Fees on NYSUT Members

30. The endorsed Opportunity Plus plan was and remains far more expensive than low cost retirement plans offered by other providers. The impact of the higher fees charged by the Opportunity products as compared to a low-cost 403(b)(7) retirement plan is significant over the long term. For example, an investor who, from 1994 through 2005 contributed $10,000 a year to Opportunity Plus and invested his entire contribution in the S&P 500 Index Fund offered in the plan, given the S&P Index's 11.5% annual increase over the eleven year period, would have saved $183,077.47 by the end of 2005. In contrast, a comparable investment in the S&P 500 Index Fund offered by one competing low-cost 403(b)(7) retirement plan would have saved approximately $200,282.91 -- a difference of $17,205.44. Of course, the low-cost 403(b)(7) plan is a no-frills retirement vehicle, lacking the "enhancements" offered to Opportunity Plus investors. As is demonstrated above, however, these "enhancements" are worth little and are utilized by relatively few Union members.

F. Violations

31. The foregoing acts and practices of the Trust violated the Martin Act, Article 23-A of the General Business Law, which makes it illegal to employ any deception or concealment in the purchase, sale or promotion of securities.

32. The foregoing acts and practices of the Trust violated § 63(12) of the Executive Law, because they demonstrate a persistent fraud or illegality in the conduct of a business.

AGREEMENT

IT NOW APPEARING THAT the Trust desires to settle and resolve the Investigation without admitting or denying the OAG's Findings;

NOW, THEREFORE the OAG and the Trust hereby enter into this Assurance of Discontinuance ("Assurance"), pursuant to Executive Law § 63(15), and agree as follows:

I. Remedial Measures

A. Independent Consultant

33. The Trust, at its sole cost and expense, will retain an independent consultant ("Consultant") acceptable to the OAG, to oversee the implementation of the remedial measures agreed to herein. The Trust shall cooperate fully with the Consultant and shall provide the Consultant with access to its files, books, records and personnel as requested for review. The Consultant shall oversee or perform the following tasks:

(a) Determine whether it is in the best interests of NYSUT's members to have the Trust endorse any retirement products;

(b) If the Consultant decides that an endorsement by the Trust of a retirement product is appropriate, he or she shall oversee the RFP Process described below;

(c) Within 90 days of the execution of this Assurance, develop policies, procedures and training programs for all Trust employees relating to endorsement of products and conflicts of interest; and

(d) Prepare and submit to the OAG by June 1, 2007, a report ("Report") describing (1) the procedures to follow during the RFP; (2) the results of the RFP; and (3) any appropriate recommendations to ensure compliance with this Assurance. The Report shall be made available to NYSUT members on request.

(e) The Trust shall adopt all recommendations made in the Report. As to any recommendation upon which the Trust and the Consultant do not agree, the Trust and the Consultant shall attempt in good faith to reach an agreement within 90 days of issuance of the Consultant's Report. In the event the Trust and the Consultant are unable to agree on an alternative proposal, the Trust will abide by the recommendation of the Consultant.

34. Upon certification by the Consultant that the tasks specified in paragraph I.A.33 have been completed, and agreement by the OAG that such is true, the work of the Consultant shall be deemed terminated. The Trust shall not have the authority to terminate the Consultant prior to said certification and consent. The Trust also shall not be in and shall not have an attorney-client relationship with the Consultant, and shall not invoke the attorney-client privilege, or any other doctrine or privilege, to prevent the Consultant from transmitting any information, reports or documents to the OAG.

B. RFP Process for Future Providers

35. If it is determined by the Consultant that members will be best served by the Trust's endorsement of retirement plans, the Trust shall conduct an RFP process in order to identify at least three suitable retirement plan providers to endorse for the consideration of

NYSUT members. The Trust shall make available to every RFP participant all pertinent data and/or information available to any one RFP participant. The Trust shall not give preferential treatment in the RFP process to any provider.

36. If, after the conclusion of the RFP process, the Consultant continues to believe that endorsing retirement plans is in the best interests of Union members, the Trust shall endorse at least one suitable low-cost plan.

37. If, at the conclusion of the RFP and consistent with the terms of this Assurance, the Trust determines that an ING Life Insurance and Annuity Company product is a suitable and appropriate product for NYSUT's membership, the Trust may continue to endorse ING as one of its endorsed plan providers.

C. <u>Other Provisions Relating to Retirement Products</u>

38. The Trust shall establish a mechanism whereby plan participants may roll over, at no cost to them, their investments in the Opportunity products to the plan or plans of the new plan providers.

39. Payments received by the Trust from endorsed 403(b) product providers shall be limited to reimbursements for actual expenses incurred by the Trust in performing its oversight functions and shall not be used to promote any plan.

40. The Trust shall establish a program to provide Union members with unbiased professional investment advice at least once every year for so long as the Trust endorses any retirement products. The investment advice shall not be offered by, affiliated with, or directly paid for by any endorsed retirement plan provider.

41. All funds that the Trust has received from ING but not yet disbursed shall be spent

solely on improved investment products made available to all NYSUT members, and not for NYSUT employee salaries, overhead, conventions, hotel charges or entertainment.

D. Notification to Union Members

42. Within 30 days of the execution of this Assurance, the Trust shall send to every active or retired Union member a signed copy of the letter attached hereto as Exhibit A. The Trust further agrees to provide a copy of said letter to new Union members for at least two years from the date of this Assurance.

43. Within 30 days of the completion of the RFP, the Trust shall, in a form acceptable to the OAG, send to every active or retired Union member a second letter that contains the following information:

(a) An explanation of the RFP process and an explanation as to why the successful providers were endorsed;

(b) A comparison of the fees and expenses of the endorsed plan providers;

(c) An explanation of the services offered by each endorsed provider;

(d) A projection of the impact of the various fees and expenses on long-term investment returns;

(e) An explanation on how plan participants may roll over their investments in the Opportunity products, at no cost, to another endorsed plan; and

(f) An explanation disclosing in simple and clear language the arrangement between the endorsed provider and the Trust.

E. **Costs**

44. The Trust shall pay the sum of $100,000 to the OAG, representing the costs of the Investigation. ______

F. **General Relief**

45. The Trust agrees that the OAG has jurisdiction over the matters discussed herein. The Trust will cease and desist from engaging in any acts in violation of the Martin Act and/or Executive Law § 63(12), and will comply with the Martin Act and Executive Law § 63(12).

II. **Other Provisions**

A. **Scope of this Assurance of Discontinuance**

46. Except as provided below, this Assurance concludes the Investigation and any action the OAG could commence against NYSUT, the Trust and its current and former officers, trustees and employees (but not ING), arising from or relating to the subject matter of the Investigation; provided however, that nothing contained in this Assurance shall be construed to cover claims of any type by any other state agency or any claims that may be brought by the OAG to enforce the Trust's obligations arising from or relating to the provisions contained in the Assurance. The Assurance shall not prejudice, waive or affect any claims, rights or remedies of the OAG with respect to any person, other than the Trust and its current and former officers, trustees and employees, all of which claims, rights, and remedies are expressly reserved.

47. If the Trust commits a breach of any of the obligations described herein, the OAG may in its sole discretion terminate the Assurance upon written notice to the Trust and the Trust agrees that any statute of limitations or other time related defenses applicable to the subject of the Investigation and any claims arising from or relating thereto are tolled from and after April 12,

2005. In the event of such termination, the Trust expressly agrees and acknowledges that the Assurance shall in no way bar or otherwise preclude the OAG from commencing, conducting or prosecuting any investigation, action or proceeding, however denominated, related to the Investigation, against the Trust or from using in any way any statements, documents or other materials produced or provided by the Trust after commencement of the Investigation, including, without limitation, any statements, documents or other materials provided for purposes of settlement negotiations.

48. Pursuant to the terms of Executive Law § 63(15), in the event this Assurance is violated, evidence of such violation shall constitute prima facie proof of violation of the Martin Act in any civil action or proceeding thereafter commenced by the OAG and the may seek an order permanently enjoining the Trust from further violating said statute.

B. **Cooperation**

49. The Trust shall fully and promptly cooperate with the OAG with regard to the Investigation, and related proceedings and actions, of any other person, corporation or entity, including but not limited to current and former employees, concerning retirements plans. The Trust shall use its best efforts to ensure that all its officers, directors, employees and agents also fully and promptly cooperate with the OAG in the Investigation and related proceedings and actions. Cooperation shall include without limitation: (1) production voluntarily and without service of subpoena of any information and all documents or other tangible evidence reasonably requested by the OAG, and any compilations or summaries of information or data that the OAG reasonably requests be prepared; (2) without the necessity of a subpoena, having NYSUT's and the Trust's officers, directors, employees and agents attend any proceedings at which the presence

of any such persons is requested by the OAG and having such persons answer any and all inquiries that may be put by the OAG to any of them at any proceedings or otherwise ("proceedings" include but are not limited to any meetings, interviews, depositions, hearings, grand jury hearing, trial or other proceedings); (3) fully, fairly and truthfully disclosing all information and producing all records and other evidence in their possession relevant to all inquiries made by the OAG concerning any fraudulent or criminal conduct whatsoever about which the Trust has any knowledge or information; (4) in the event any document is withheld or redacted on grounds of privilege, work-product or other legal doctrine, a statement shall be submitted in writing by the Trust indicating: a) the type of document; b) the date of the document; c) the author and recipient of the document; d) the general subject matter of the document; e) the reason for withholding the document; and f) the Bates number or range of the withheld document. The OAG may challenge such claim in any forum of its choice and may, without limitation, rely on all documents or communications theretofore produced or the contents of which have been described by the Trust, its officers, directors, employees, or agents; and (5) the Trust shall not jeopardize the safety of any investigator or the confidentiality of any aspect of the Investigation, including sharing or disclosing evidence, documents, or other information with others during the course of the investigation, without the consent of the OAG. Nothing herein shall prevent the Trust from providing such evidence to other regulators, or as otherwise required by law.

50. The Trust shall comply fully with the terms of this Agreement. If the Trust violates the terms of Paragraph 49 in any material respect, as determined solely by the OAG: (1) the OAG may pursue any action, criminal or civil, against any entity for any crime it has committed, as authorized by law, without limitation; (2) as to any criminal prosecution brought by

the OAG for violation of law committed within six years prior to the date of this Agreement or for any violation committed on or after the date of this Agreement, the Trust shall waive any claim that such prosecution is time barred on grounds of speedy trial or speedy arraignment or the statute of limitations.

C. Miscellaneous Provisions

51. 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.

52. No failure or delay by the OAG in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies provided herein shall be cumulative.

53. The Trust consents to the jurisdiction of the OAG in any proceeding or action to enforce the Assurance.

54. The Trust enters into this Assurance voluntarily and represent that no threats, offers, promises or inducements of any kind have been made by the OAG or any member, officer, employee, agent or representative of the OAG to induce the Trust to enter into this Assurance.

55. The Assurance may be changed, amended or modified only by a writing signed by all parties hereto.

56. The Assurance, together with the attached Exhibits, constitutes the entire agreement between the OAG and the Trust, and supersedes any prior communication, understanding or agreement, whether written or oral, concerning the subject matter of this Assurance.

57. The Assurance shall be effective and binding only when it is signed by all parties. The Assurance may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one instrument.

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

Dated: June 13, 2006

ELIOT SPITZER
Attorney General of the State
of New York

By: ______________________
David D. Brown, IV
Assistant Attorney General
Investment Protection Bureau

NEW YORK STATE UNITED TEACHERS MEMBER BENEFITS

By: ______________________
Ivan Tiger, Chairman

ACKNOWLEDGMENT

STATE OF NEW YORK)
:s.s.
COUNTY OF ALBANY)

On this 13 day of June, 2006, before me personally came Ivan Tiger, known to me, who, being duly sworn by me, did depose and say that he is Chairman, NYSUT Member Benefit Trust of ______., the entity described in the foregoing Assurance of Discontinuance, is duly authorized by New York State United Teachers Member Benefits to execute the same, and that he signed his name in my presence by like authorization.

Diane J. Lindsay
Notary Public

DIANA J. LINDSAY
Notary Public, State of New York
No. 4839677
Qualified in Albany County
Commission Expires___________

My commission expires:

8/31/09

NEW YORK STATE UNITED TEACHERS MEMBER BENEFITS

By: ______________________

Roderick Sherman, Secretary

ACKNOWLEDGMENT

STATE OF NEW YORK)

:s.s.

COUNTY OF WARREN)

On this 12th day of June, 2006, before me personally came Roderick Sherman known to me, who, being duly sworn by me, did depose and say that he is Secretary of NYSUT Member Benefits., the entity described in the foregoing Assurance of Discontinuance, is duly authorized by New York State United Teachers Member Benefits to execute the same, and that he signed his name in my presence by like authorization.

____

Notary Public

My commission expires:

GERARD J. DE WOLF
Notary Public, State of New York
Qualified in Columbia County
No.02DE5047048
My Commission Expires July 24, 2008

Exhibit A

*****, 2006

[Member Name]

[Address]

Dear [Name]:

As you may be aware, New York State United Teachers Member Benefits Trust (“the "Trust") recently reached a settlement with the Office of the New York State Attorney General (“OAG”) relating to the Opportunity Plus retirement plan, which the Trust has endorsed since 1989. I am writing to inform you about certain steps that the Trust has agreed to take, as part of the settlement, in order to ensure that the Trust only endorses the best available retirement products.

The Trust has agreed to hire an Independent Consultant - someone who is completely objective - to consider whether it makes sense for the Trust to continue to endorse any retirement products. In the event that the Consultant concludes that such endorsements are in the best interest of NYSUT members, the Trust will conduct an open Request for Proposal (“RFP”) process to identify at least three plans for endorsement, including one low-cost plan. The Independent Consultant will oversee the RFP process to make sure that it is fair, and will also review the Trust's policies, procedures and training relating to endorsement of products and conflicts of interest. The Independent Consultant will issue a public report summarizing the review of the RFP process as well as the review of compliance matters.

In the event the Trust endorses any new retirement products, you will receive another letter informing you of the newly-endorsed plans. Union members who have invested in the Opportunity products will be offered the opportunity to shift their assets into the new plans at no cost.

Finally, the Trust has agreed to implement a program to provide all NYSUT members with free and objective investment and retirement planning advice. [Trust to provide details.]

If you have any questions about the settlement with the New York Attorney General or the Opportunity Plus plan, please contact Betsy Porter at 1-800-626-8101, Ext.1247 or Derek Clement at 1-800-626-8101, Ext.1251.

Sincerely,