

DISTRICT OF COLUMBIA RETIREMENT BOARD**NOTICE OF PROPOSED RULEMAKING**

The District of Columbia Retirement Board (the “Board”), pursuant to the authority set forth in § 121(e) of the District of Columbia Retirement Reform Act (the “Reform Act”), Pub. L. 96-122, 93 Stat. 866, November 17, 1979 (codified at D.C. Official Code § 1-711(e) (2011 Repl.)), hereby gives notice of its intent to adopt the following proposed investment rule under chapter 19 of title 7 of the District of Columbia Municipal Regulations (DCMR) in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*.

The Board was established by the Reform Act as an independent agency of the District of Columbia. The Board is responsible for managing and controlling the Police Officers and Fire Fighters’ Retirement Fund and the Teachers’ Retirement Fund (the “Funds”), as well as implementing and administering the retirement and post-employment benefit programs for members and officers of the Metropolitan Police Department and the Fire Department of the District of Columbia and the teachers in the public day schools of the District of Columbia.

The Reform Act was modeled after the Employee Retirement Income Security Act of 1974 (“ERISA”), Pub. L. 93-406, September 2, 1974, which governs private sector retirement plans. Both ERISA and the Reform Act contain identical provisions regarding fiduciary standards and responsibilities. The Board often follows ERISA guidance issued by the U.S. Department of Labor (“DOL”) when interpreting and implementing the Reform Act.

The proposed rule will adopt a plan assets rule substantially similar to the DOL’s plan assets regulation for purposes of defining plan assets for the Funds’ investments in commingled funds and determining who is subject to the Reform Act’s fiduciary standards. The proposed rule was approved by the Board on October 18, 2012.

CHAPTER 19**DISTRICT OF COLUMBIA RETIREMENT BOARD INVESTMENT RULES**

Chapter 19 of title 7 of the DCMR is added as follows:

1900 PURPOSE AND GOVERNANCE

1900.1 In accordance with section 121(a) of the District of Columbia Retirement Reform Act, as amended, Public Law 96-122 (codified at D.C. Official Code § 1-711(a) (2011 Repl.)), the District of Columbia Retirement Board (Board) has exclusive authority and discretion to manage and control the District of Columbia Police Officers and Fire Fighters’ Retirement Fund

and the District of Columbia Teachers' Retirement Fund (Funds) and to issue rules for the management and control of the Funds.

1901 PLAN ASSETS

1901.1 Individuals who exercise any discretionary authority or discretionary control regarding the management or disposition of plan assets or who provide investment advice for a fee (direct or indirect) with respect to plan assets may be deemed to be fiduciaries under § 102(20)(A) of the Reform Act (D.C. Official Code § 1-702(20)(A) (2011 Repl.)) unless an exception applies.

1901.2 This rule describes what constitutes plan assets with respect to the Funds' investment in another entity for purposes of the fiduciary duties imposed by the Reform Act. This rule is intended to be modeled after the U.S. Department of Labor's (DOL) plan assets regulation, as amended (29 C.F.R. § 2510.3-101).

(a) Generally, when the Funds invest in another entity, the Funds' assets include its investment, but do not, solely by reason of such investment, include any of the underlying assets of the entity. However, in the case of the Funds' investment in an equity interest of an entity that is neither a publicly-offered security nor a security issued by an investment company registered under the Investment Company Act of 1940, its assets include both the equity interest and an undivided interest in each of the underlying assets of the entity, unless it is established that:

- (1) the entity is an operating company, or
- (2) equity participation in the entity by benefit plan investors and by the Funds is not significant.

(b) Therefore, any person who exercises authority or control respecting the management or disposition of such underlying assets, and any person who provides investment advice with respect to such assets for a fee (direct or indirect), is a fiduciary of the Funds.

1901.3 Equity Interests and Publicly-Offered Securities.

(a) An "equity interest" means any interest in an entity other than an instrument that is treated as indebtedness under applicable law and which has no substantial equity features. A profits interest in a partnership, an undivided ownership interest in property and a beneficial interest in a trust are equity interests.

- (b) A “publicly-offered security” is a security that is:
 - (1) freely transferable,
 - (2) widely held (more than 100 holders unrelated to management and to each other), and
 - (3) registered under the Securities Exchange Act of 1934 (or scheduled to be registered subsequent to an initial public offering).

1901.4 Operating Company.

An “operating company” is an entity that is primarily engaged in the production or sale of a product or service other than the investment of capital, plus hybrid entities known as a “venture capital operating company” or a “real estate operating company.”

1901.5 Insignificant Equity Participation.

- (a) Equity participation in an entity by benefit plan investors or by the Funds is “significant” on any date if, immediately after the most recent acquisition of any equity interest in the entity, 25 percent or more of the value of any class of equity interests in the entity is held by benefit plan investors or by the Funds. For this purpose, the value of any equity interests held by a person (other than a benefit plan investor) who has discretionary authority or control with respect to the assets of the entity or any person who provides investment advice for a fee (direct or indirect) with respect to such assets, or any affiliate of such a person, shall be disregarded.
- (b) A “benefit plan investor” is any of the following:
 - (1) any employee benefit plan (as defined in § 3(3) of ERISA), that is subject to the provisions of title I of ERISA;
 - (2) any plan described in and covered by § 4975(e)(1) of the Internal Revenue Code; or
 - (3) any entity whose underlying assets include plan assets by reason of, and to the extent of, benefit plan investors’ investment in the entity.

- (c) An “affiliate” of a person includes any person, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person. For this purpose, “control”, with respect to a person other than an individual, means the power to exercise a controlling influence over the management or policies of such person.

1901.6 Joint Ownership.

For purposes of this rule, where the Funds jointly own property with others, or where the value of the Funds' equity interest in an entity relates solely to identified property of the entity, such property shall be treated as the sole property of a separate entity.

1901.7 Specific Rules Relating to Funds' Investments.

Notwithstanding any other provision of this rule:

- (a) Except where the entity is an investment company registered under the Investment Company Act of 1940, when the Funds acquire or hold an interest in any of the following entities its assets include its investment and an undivided interest in each of the underlying assets of the entity:
 - (1) a group trust which is exempt from taxation under § 501(a) of the Internal Revenue Code pursuant to the principles of Rev. Rul. 81-100, 1981-1 C.B. 326;
 - (2) a common or collective trust fund of a bank;
 - (3) a separate account of an insurance company, other than a separate account that is maintained solely in connection with fixed contractual obligations of the insurance company under which the amounts payable, or credited, to the Funds and to any participant or beneficiary of the Funds (including an annuitant) are not affected in any manner by the investment performance of the separate account.
- (b) When the Funds own all of the outstanding equity interests (other than director's qualifying shares) in an entity, its assets include those equity interests and all of the underlying assets of the entity.

1901.8 Governmental Mortgage Pools.

- (a) Where the Funds acquire a guaranteed governmental mortgage pool certificate, the Funds' assets include the certificate and all of

its rights with respect to such certificate under applicable law, but do not, solely by reason of the Funds' holding of such certificate, include any of the mortgages underlying such certificate.

- (b) A “guaranteed governmental mortgage pool certificate” is a certificate backed by, or evidencing an interest in, specified mortgages or participation interests therein and with respect to which interest and principal payable pursuant to the certificate is guaranteed by the United States or an agency or instrumentality thereof. This term includes a mortgage pool certificate with respect to which interest and principal payable pursuant to the certificate is guaranteed by:
- (1) the Government National Mortgage Association;
 - (2) the Federal Home Loan Mortgage Corporation; or
 - (3) the Federal National Mortgage Association.

Comments on this proposed rulemaking should be submitted in writing to Erie F. Sampson, General Counsel, District of Columbia Retirement Board, 900 7th Street, N.W., 2nd Floor, Washington, D.C. 20001, or by email to erie.sampson@dc.gov, within thirty (30) days of the publication of this notice in the *D.C. Register*. Additional copies of this proposed rulemaking are available on the Board’s website: <http://www.dcrb.dc.gov>.