July 19, 2017

Thomas DiNapoli
New York State Comptroller
59 Maiden Lane
New York, NY 10038

Re: Request to Evaluate Divestment of New York State Common Retirement Fund Investment that Pays President Trump's Business in Likely Violation of the U.S. Constitution

Dear Comptroller DiNapoli:

We ask that you evaluate whether the New York State Common Retirement Fund's ongoing payment of management and performance fees to the CIM Fund III, which in turn directly pays President Trump's hotel management company, violates the New York State Common Retirement Fund's high ethical standards, fiduciary duties to its beneficiaries, and the Domestic Emoluments Clause of the U.S. Constitution; and if appropriate, to divest.

I. The New York State Common Retirement Fund's payments to President Trump's company

As recently reported in Reuters,[1] the New York State Common Retirement Fund is a significant investor in the CIM Fund III real estate fund. About half of the total $2.37 billion investment in CIM Fund III comes from public pension funds, and the New York State Common Retirement Fund is one of the largest public pension funds invested in the fund, with an initial

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[1] Julia Harte, *Exclusive: A New York hotel deal shows how some public pension funds help to enrich Trump*, Reuters, Apr. 26, 2017, http://reut.rs/2pyu2QG.

commitment estimated at approximately $225 million.[2]

In 2015, CIM Fund III acquired the Trump SoHo hotel in New York, NY. While CIM Fund III has apparently not made a capital call from investors since 2014, the New York State Common Retirement Fund is reportedly required to pay management and performance fees to CIM Fund III, with the most recent quarterly payments due on or about January 31, 2017 and on or about April 10, 2017.[3] In fiscal years 2015 and 2016, respectively, the New York State Common Retirement Fund paid $7.5 million and $5.3 million in management fees to CIM Group LP, the manager of the CIM Fund III.[4]

CIM Fund III, in turn, reportedly has a contract with President Trump's hotel management company, Trump International Hotels Management LLC (part of a larger network known as the Trump Organization), to manage the hotel. Under this agreement, CIM Fund III pays President Trump's company 5.75% of gross hotel operating revenue. Furthermore, CIM Fund III pays operating and overhead charges on the unsold hotel suite units (about two-thirds of the total units). In 2015, CIM Fund III paid $3.16 million directly to President Trump's company under this contract. These payments to President Trump's company are derived in part from the performance and management fees that the New York State Common Retirement Fund pays to CIM Fund III.

II. The New York State Common Retirement Fund's ongoing payments to CIM Fund III which subsidize a company owned by President Trump may violate the U.S. Constitution.

While not all relevant facts are publicly available, based on initial reporting, it appears that the New York State Common Retirement Fund's ongoing payments to CIM Fund III, which CIM Fund III in turn relays in part to President Trump's company, may violate the high ethical standards and fiduciary duties established by law for the administration of the New York

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[2] The largest public pension fund investor in CIM Fund III is CalPERS, which initially committed $700 million. The Teacher Retirement System of Texas also committed an initial $225 million. The other nine public pension funds that are invested in CIM Fund III made initial commitments ranging from $15 to $75 million.

[3] On June 26, 2017, Free Speech for People filed a Freedom of Information Law request with the New York State Comptroller to obtain information about whether such payments have been made. This request has been designated as FOIL Request 2017-353.

[4] See New York State and Local Retirement System, 2015 Comprehensive Annual Report, 108 (2015); New York State and Local Retirement System, 2016 Comprehensive Annual Report, 112 (2016).

State Common Retirement Fund as well as the U.S. Constitution.

The arrangements between the New York State Common Retirement Fund and CIM Fund III, and between CIM Fund III and Mr. Trump's company, may have been entirely lawful and appropriate before January 20, 2017. But the situation has changed since the inauguration of Mr. Trump as president. The U.S. Constitution's Domestic Emoluments Clause provides: "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period *any other Emolument from the United States, or any of them*."[5] This provision, which is not waivable by Congress, prohibits any state from providing additional sources of income to the President.

At the Founding, the term "emolument," from the Latin *emolumentum* (profit), was understood broadly. For example, Samuel Johnson's influential 1755 dictionary defined "emolument" as "Profit; advantage."[6] Unfortunately, the New York State Common Retirement Fund's ongoing payments to CIM Fund III are giving President Trump a "profit" from the state of New York—more specifically, from its state and local workers.

We recognize that the New York State Common Retirement Fund made its initial capital investment in CIM Fund III well before President Trump was elected, and that this investment was presumably lawful at the time. And payments made by the New York State Common Retirement Fund to CIM Fund III *before* President Trump's inauguration certainly do not raise any constitutional questions. However, ongoing regular payments of millions of dollars to a real estate fund that transfers a significant portion of those fees directly to President Trump's company may constitute an unconstitutional emolument from New York. And as the supreme law of the land, the U.S. Constitution is part and parcel of the law of New York.[7]

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[5] U.S. Const., art. II, § 1, cl. 7 (emphasis added) (also known as the Presidential Compensation Clause).

[6] Samuel Johnson, *A Dictionary of the English Language* 690 (1755).This broad meaning" is also supported by the sixteen occurrences of the word in William Blackstone's *Commentaries on the Laws of England*, https://balkin.blogspot.com/2017/05/emolument-in-blackstones-commentaries.html.

[7] *See* U.S. Const. art. VI, cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); N.Y. Const. art. XIII, § 1 (state officials' oath to "support the Constitution of the United States").

These facts appear distinct from a previous Domestic Emoluments Clause question regarding California pension fund payments: President Reagan's state pension from his service as governor. In 1981, the U.S. Department of Justice's Office of Legal Counsel opined that President Reagan's receipt of his California pension did not violate the Domestic Emoluments Clause.[8] There, President Reagan's California retirement benefits were *not* found to constitute compensation. Furthermore, President Reagan was being treated no differently than any similarly situated private citizen who had worked for the state of California. Here, it appears that President Trump's company is being actively compensated, with fees generated from the New York State Common Retirement Fund, for managing a hotel.

President Trump has had more than enough opportunity to remedy the problems presented by his ownership interests in the Trump Organization, but he opted against taking that opportunity. On November 30, 2016, the U.S. Office of Government Ethics announced that the "[o]nly way to resolve these conflicts of interest is to divest."[9] The nearly ten-week transition period between the presidential election and the presidential inauguration gave Mr. Trump sufficient opportunity to resolve these issues in numerous ways.[10] For example, he could have liquidated the business and invested the proceeds in a diversified mutual fund or a true blind trust.[11]

But despite every opportunity, neither Mr. Trump nor the Trump Organization has done anything remotely adequate to address these serious concerns. Instead, on January 11, 2017, the Trump Organization's tax law firm announced a plan to transfer *management* control of the Trump Organization to Mr. Trump's sons and a senior executive, without removing Mr. Trump's *ownership* stake.[12]

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[8] *See* Larry L. Simms, Office of Legal Counsel, U.S. Dep't of Justice, *President Reagan's Ability to Receive Retirement Benefits from the State of California* (June 23, 1981), https://www.justice.gov/file/22681/download.
[9] Michael D. Shear & Eric Lipton, *Ethics Office Praises Donald Trump for a Move He Hasn't Committed To*, N.Y. Times, Nov. 30, 2016, http://nyti.ms/2gK988R.
[10] *See* Richard Painter & Norman Eisen, *Donald Trump will still be violating the Constitution as soon as he's sworn in*, Wash. Post, Dec. 13, 2016, http://wpo.st/9EZN2.
[11] *See* Norman Eisen, Richard W. Painter & Laurence H. Tribe, *5 Ways You'll Know if Trump Is Playing by the Rules*, Politico, Jan. 10, 2017, http://politi.co/2iCgLj2.
[12] *See Donald Trump's News Conference: Full Transcript and Video,* N.Y. Times, Jan. 11, 2017, http://nyti.ms/2kHSolf.

In addition, Mr. Trump has apparently transferred his ownership stakes in various Trump business entities to "The Donald J. Trump Revocable Trust." This trust, of which Mr. Trump's son and the Trump Organization's chief financial officer are trustees, has as its purpose "to hold assets for the 'exclusive benefit' of the president," and uses Mr. Trump's Social Security number as its taxpayer identification number.[13] Furthermore, in February 2017, the trust was amended so that Mr. Trump ""shall distribute net income or principal to Donald J. Trump at his request," or whenever his son and a longtime employee "deem appropriate."[14] The terms of this revocable trust mean that Mr. Trump can draw upon funds paid to any of the Trump Organization entities at any time.

This is not a "blind trust." Mr. Trump knows which businesses his trust owns, and how his actions as President may affect their income and value—including Trump SoHo. The trust is run not by an independent trustee, but by his own son and a longtime executive. And he can revoke the trust at any time.[15] This arrangement does not diminish Mr. Trump's interest and ability to enrich himself through presidential actions affecting his business entities, and to shape U.S. policy to preserve and promote his business assets, including Trump SoHo.

III. The New York State Common Retirement Fund and New York State Comptroller's duties to fund participants and to the law.

Under New York state law, all state employees are required to participate in the retirement system, with limited exceptions, and mandatory salary deductions are subtracted from their compensation to fund that system.[16] New York State Common Retirement Fund participants do not have the ability to select the funds in which their mandatory salary deductions are invested. The New York State Comptroller is the sole trustee of the system vested with "full power" to "hold, purchase, sell, assign, transfer or dispose of any of the securities or investments, in which any of the funds of the retirement system shall be invested."[17] The Comptroller's discretion to manage the retirement system's funds is, however, subject to limitations and restrictions imposed by law, which includes the restrictions placed on

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[13] Susanne Craig & Eric Lipton, *Trust Records Show Trump Is Still Closely Tied to His Empire*, N.Y. Times, Feb. 3, 2017, https://nyti.ms/2kytJlP.
[14] Drew Harwell, *Trump can quietly draw money from trust whenever he wants, new documents show*, Wash. Post, Apr. 3, 2017, http://wapo.st/2nQOjgK.
[15] *See* Craig & Lipton, *supra*, https://nyti.ms/2kytJlP.
[16] N.Y. Retire. & Soc. Sec. Law § 40(b)(1).
[17] N.Y. Retire. & Soc. Sec. Law § 13.b.1; § 422(1).

emoluments by the United States Constitution.[18] The Comptroller has demonstrated an unprecedented commitment to transparency, high ethical standards, and strict oversight.[19] In fact, many of the Comptroller's reforms have been aimed at preventing the potential for conflicts of interest associated with political contributions to elected officials.[20] The Comptroller is also obligated to "manage the retirement system and the fund with the highest ethical, professional and conflict of interest standards."[21]

The arrangement between CIM Fund III and the Trump Organization, which results in the funneling of money from New York pension fund beneficiaries to the Trump Organization and, ultimately to Mr. Trump, raises serious ethics and conflict of interest concerns. As the sole trustee, the Comptroller has the authority and the obligation to dispose of the investment in the CIM Fund III now that it has become a source of unethical, personal enrichment for the President and an unlawful emolument.

The New York State Common Retirement Fund's investment in this scheme is also clearly contrary to the strong public policy that New York has established against conflicts of interest and political corruption. Over a century ago, the New York Court of Appeals called the fact "[t]hat sound morality and civic honesty are corner stones of the social edifice . . . a truism which needs no re-enforcement by argument." Veazey v. Allen, 173 N.Y. 359, 368 (1903). Because of this truism, "whenever [New York] courts are called upon to scrutinize a [business] which is clearly repugnant to sound morality and civic honesty, they need not look long for a well-fitting definition of public policy." Id.

In 1954, enacting sweeping ethics reforms, the Legislature made the public policy of the state clear:

> A continuing problem of a free government is the maintenance among its public servants of moral and ethical standards which are worthy and warrant the confidence of the people. The people are entitled to expect from their public servants a set of standards above the morals of the market place. A public official

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[18] N.Y. Retire. & Soc. Sec. Law § 13.b.

[19] *See* "Comptroller DiNapoli's Pension Reforms," https://www.osc.state.ny.us/pension/reforms_pensionfund.htm.

[20] Id. (ban on doing business with investment advisers who make political contributions to the State Comptroller or a candidate for State Comptroller and prohibition on placement agents, paid intermediaries or registered lobbyists investing with the New York State Common Retirement Fund.)

[21]N.Y. Comp. Codes R. & Regs. tit. 11 § 136-2.1(2)(b)(3).

> of a free government is entrusted with the welfare, prosperity, security and safety of the people he serves. In return for this trust, the people are entitled to know that no substantial conflict between private interests and official duties exists in those who serve them.

N.Y. Pub. Officials Law § 74, Decl. of Intent, L. 1954, c. 696, § 1.40 To this end, the state has enacted numerous prohibitions designed to prevent public corruption and conflicts of interest. *See*, *e.g.*, N.Y. Civ. Serv. Law § 107; N.Y. Gen. Muni. Law § 805-a; N.Y. Pub. Officials Law §§ 73-74; *see also* 19 N.Y. Code R. & Regs. § 932.3 ("No [public officer] shall engage in any outside activity which interferes or substantially conflicts with the proper and effective discharge of such individual's official State duties or responsibilities."). CIM Fund III's transfer of funds paid by the Comptroller, (as an investor in the fund) to the Trump Organization jeopardizes the Comptroller's ability to administer the New York State Common Retirement Fund according to the highest ethical standards.

The inequity of the situation created by CIM Fund III's direct payments to the Trump Organization is magnified by the fact that the money used for this investment comes from mandatory deductions from the paychecks of public employees. These employees are thus forced to indirectly subsidize President Trump beyond the Constitution's mandate of a fixed salary, and have not been given the opportunity to decide whether they wish their paychecks to contribute to this scheme. Indeed, given serious allegations that the Trump Organization violated federal campaign finance law by making corporate contributions to the 2016 presidential campaign,[22] ongoing mandatory employee subsidization of President Trump's company and its corporate political activity may implicate the First Amendment rights of New York State Common Retirement Fund participants against compelled political speech.[23]

IV. The Comptroller's next steps.

The New York State Retirement Fund should not participate in this scheme by using public employees' money to pay a fund that ultimately pays Mr. Trump. The Comptroller has been a staunch advocate against corruption and conflict of interest, especially in the case of political contributions. We are

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[22] Jonathan Easley, *GOP lawyer files FEC complaint against Trump*, The Hill, Dec. 9, 2015, http://bit.ly/1mbSp0R.

[23] *See generally Knox v. Serv. Employees Int'l Union,* 567 U.S. 310 (2012); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 Colum. L. Rev. 800, 866-69 (2012).

bringing this investment to the Comptroller's attention because of the Comptroller's long track record of successfully addressing fraud, conflicts of interest, and corruption.

Any management and/or performance fees paid by the New York Common Retirement Fund to CIM Fund III after January 20, 2017 constitute participation in a scheme that enriches the President with public employees' money contrary to the high ethical standards established by the Comptroller (and required by law) and contrary to the domestic emoluments clause of the Constitution.

The flow of money and value from the New York State Common Retirement Fund through CIM Fund III to Trump International Hotels Management LLC to President Trump cannot continue.

We respectfully request that the New York Comptroller work with other pension fund investors in CIM Fund III to demand that CIM Fund III sell the Trump SoHo property and terminate its relationship with the Trump Organization based on the Trump Organization's ongoing participation in a corruption scheme that violates the Constitution; or, alternatively, that the Comptroller divest the New York State Common Retirement Fund's interest in CIM Fund III.

We are available to discuss this request with you further at your convenience, and we look forward to hearing from you. Thank you for your consideration.

Sincerely,

Shanna Cleveland

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