

## SERS Board Governance Policy Manual

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<b>Policy Name:</b>	<b>Securities Litigation Policy</b>
<b>Policy Number:</b>	2019-POL-BD-02
<b>Effective Date:</b>	September 25, 2019, as amended December 12, 2023
<b>Reviewed Date:</b>	December 5, 2023
<b>Applies To:</b>	SERS Board Members and Designees
<b>Contact Person:</b>	SERS Legal Office

### I. Purpose

The State Employees' Retirement System ("SERS") provides pension benefits to members of SERS in accordance with the State Employees' Retirement Code (the "Retirement Code").<sup>1</sup> The State Employees' Retirement Board (the "Board") is empowered by the Retirement Code with the exclusive control and management of the State Employees' Retirement Fund (the "Fund").<sup>2</sup> The members of the Board stand in a fiduciary relationship to SERS members regarding the investments and disbursements of any of the moneys of the Fund, and have the duty and obligation to invest and manage the Fund for the exclusive benefit of SERS members.<sup>3</sup> As fiduciaries, the members of the Board have the duty to invest and manage the Fund with the care, skill and caution that a prudent investor would exercise under similar circumstances.<sup>4</sup>

The Board has long recognized that the Fund assets include SERS' securities litigation claims for losses to the Fund arising from misconduct by publicly-traded entities in which the Board invests. As fiduciaries, the members of the Board have a duty to take reasonable and appropriate actions to recover losses to the Fund. In furtherance of the recognition of the Board's fiduciary duties, on October 28, 1998, the Board adopted Resolution 1998-67, which established a sub-committee with authority to approve applications by SERS to serve as lead plaintiff for the class in securities class actions. On June 4, 2003, the Board adopted Resolution 2003-49, which repealed Resolution 1998-67, established a Securities Litigation Committee of the Board (the "SLC"), and gave the SLC broad powers for determining whether SERS should institute securities litigation, but specified a minimum of \$3,000,000 in estimated losses to SERS as a general requirement for participating as an active class representative in a class action. On May 31, 2006, the Board adopted Resolution 2006-53 adopting the SERS Securities Litigation Policy (the "SLP"), which established the procedures for determining when and how to actively pursue securities litigation and the selection process to secure outside litigation counsel for such purpose. On April 24, 2013, the Board adopted Resolution 2013-25, which amended the SLP (the "First Amended SLP") to:

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<sup>1</sup> 71 Pa. C.S. §5101 *et seq.*

<sup>2</sup> 71 Pa. C.S. §5931(a)

<sup>3</sup> 71 Pa. C.S. §5931(e)

<sup>4</sup> 71 Pa. C.S. §5931(a). Rest. 3<sup>rd</sup>, Trusts (Prudent Investor Rule) §227

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(1) establish a secondary threshold where the potential burdens of class action class representation were reduced or absent and a greater recovery was evident, such as when opting out of a pending domestic class action in order to bring an independent action against defendants (where a \$2,000,000 loss was established as appropriate for further analysis), and (2) authorize SERS to consider joining a foreign or domestic joint, group or other available securities-based action filed outside the United States (where a threshold loss of \$500,000 was established as appropriate for further analysis).

For purposes of selecting outside law firms to represent SERS in these matters, a securities litigation counsel pool was established from which law firms were to be selected when the SLC approved active participation in securities litigation. On September 16, 2015, pursuant to Resolution 2015-51, the Board adopted the Second Amended Securities Litigation Policy (2018 POL-BD-03) (the “Second Amended SLP”) so as to conform the outside securities litigation counsel selection process with procedures established by the Governor’s Office of General Counsel, resulting in the creation of a new securities litigation counsel pool established in conjunction with the Public School Employees’ Retirement System (“PSERS”).

On October 24, 2018, the Board adopted Resolution 2018-75, as amended by Resolution 2018-99, which established the SERS Office of Chief Counsel (“OCC”) as an independent legal office separate from the Governor’s Office of General Counsel, with the exact date to be determined by the Board Secretary, with notice to the Governor’s General Counsel pursuant to § 409 of Act 2017-05. The Chief Counsel, with the concurrence of the Board Secretary, was delegated the authority to retain, hire, terminate, reclassify or promote any other counsel, either in-house or outside counsel, as they deem necessary and appropriate, subject to Commonwealth personnel and procurement rules. On December 22, 2018, upon the Board Secretary’s determination, the OCC, as an independent legal office, was formally established. Similarly, effective January 1, 2018, PSERS established an independent legal office. The OCC was reclassified as the Chief Counsel’s Office (“CCO”) via Executive Board Resolution OR-20-025 on October 27, 2020.

On November 19, 2018, the Board adopted Resolution 2018-82, which included the adoption of the Securities Litigation Committee Charter (the “SLC Charter”). Pursuant to the SLC Charter’s provision that the SLC is to recommend any proposed changes to the Second Amended SLP and/or the SLC Charter to the Board, the SLC undertook a review of the Second Amended SLP and the SLC Charter. On September 25, 2019, upon the recommendation of the SLC and the Board Governance and Personnel Committee, the Board adopted Resolution 2019-73, which repealed Securities Litigation Policy (2018 POL-BD-03), adopted this Third Amended Securities Litigation Policy (this “Third Amended SLP”), and revised the SLC Charter.

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The purpose of the Securities Litigation Policy is to set forth the Board's approach to securities litigation, as recommended by the SLC, in order to protect the best interests of the Fund and its members.

### II. Definitions

- A. **Consultant:** A litigation consultant retained by the Board to advise the Board on matters related to securities litigation.
  
- B. **Class Action Securities Litigation:** Where one or a small group of plaintiffs can represent an entire class of similarly situated claimant investors in an action brought against the same defendant(s). If and when legal proceedings have concluded as a result of a proposed settlement, all putative/passive members of the class of claimant investors, as defined by the terms of settlement ratified by the court, can file proofs of claim to receive their pro-rata share of settlement monies. Class Action Securities Litigation is exclusively filed in the federal courts of the United States and Canada.
  
- C. **Class Period:** A specific period of time in which the defendant's unlawful conduct is alleged to have occurred in a securities litigation matter.
  
- D. **FIFO (First In, First Out):** A method of accounting used to place a net value on the purchase and sale of securities during the Class Period whereby the securities are assumed to be sold in the chronological order in which they were purchased (i.e., the first security purchased is assumed to be the first security sold).
  
- E. **LIFO (Last In, First Out):** A method of accounting used to place a net value on the purchase and sale of securities during the Class Period whereby the securities are assumed to be sold in the reverse-chronological order in which they were purchased (i.e., the last security purchased is assumed to be the first security sold).

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- F. ***Opt-In Securities Litigation:*** Where each individual claimant investor is required to either (i) bring an independent securities litigation proceeding against defendant(s) from the outset (which can be joined by a group of similarly situated claimant investors by a certain date set by the court), or (ii) join an established securities litigation previously filed against such defendant(s) by a group of similarly situated claimant investors by a certain date set by the court, in order to protect any future right it may have to make a damages claim against defendant(s). When opting into a litigation group, each claimant investor is generally required to appoint the agent(s) who initiated the case (and/or their legal counsel) to represent its claim against the defendant(s). This will usually entail the claimant investor signing an agreement directly with the agent(s) (and/or their legal counsel) and paying a proportional share of the litigation group's fees and expenses as a co-plaintiff in the securities litigation. Claimant investors who fail to protect their claim rights through the above-referenced methods will not be entitled to receive payment of its proportional share from any resultant settlement with or judgment entered against defendant(s). Opt-In Securities Litigation is practiced exclusively in jurisdictions outside of the United States and Canada.
- G. ***Opt-Out Securities Litigation:*** Where an individual claimant investor or group of similarly situated claimant investors, who are putative/passive members of the class of plaintiffs in a Class Action Securities Litigation filed against defendant(s), elects to "opt-out" of the Class Action Securities Litigation in order to bring a separate, distinct and otherwise independent securities litigation proceeding against the same defendant(s). Opt-Out Securities Litigation is generally utilized by claimant investors that (i) are required to file an independent securities action in order to preserve certain claims that would otherwise be time-barred by the running of the Statute of Repose (which period is not stayed by the filing of the Class Action Securities Litigation in the manner in which the Statute of Limitation is stayed by such filing), (ii) assert that an expanded Class Period from that claimed by the lead plaintiff of the Class Action Securities Litigation (and eventually certified by the court in the class action if its claims survive defendants' motion to dismiss) is more accurate/appropriate, thus expanding such claimant investor's claim for damages against defendant(s), and/or (iii) are not satisfied with the proposed settlement negotiated by the lead plaintiff on behalf of the putative/passive class of plaintiffs in the Class Action Securities Litigation, and believe they can secure a larger recovery if they bring an independent securities action against defendant(s).
- H. ***Unrealized Losses:*** Losses calculated for those securities acquired during the Class Period and still held. The current value of these securities is netted against their purchase cost.
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### III. General Guidelines

The following guidelines shall apply to securities litigation matters:

A. The SLC Charter provides that the SLC shall have the following responsibilities:

The SLC shall determine whether SERS should: (1) seek lead or co-lead plaintiff status in a Class Action Securities Litigation or take any other active role, including but not limited to, serving as a class representative, (2) initiate or join an Opt-Out Securities Litigation, or object to any portion of a proposed settlement of a Class Action Securities Litigation as a putative/passive member of the class of claimant investors, (3) initiate an independent, or join a group that has an established, Opt-In Securities Litigation action filed outside of the United States/Canada, and/or (4) collaborate with PSERS, other Commonwealth entities, and/or non-Commonwealth entities regarding securities litigation matters.

- i. The CCO shall have the SLC/Board's authority to: (a) select outside legal counsel in accordance with procedures established by the CCO, and (b) approve the amount of compensation to be paid to outside legal counsel (subject to court approval, where applicable).
- ii. For securities litigation matters in which SERS has taken an active role, the SLC shall approve the amount and terms of any settlement of securities litigation claims (subject to Office of Attorney General and court approval).
- iii. In making the decisions described in the SLC Charter, the SLC shall comply with the Securities Litigation Policy (and other applicable policies and procedures) and fully consider any evaluations provided by the CCO and other claim evaluators, including but not limited to evaluations by firms in the securities litigation pool and/or consultants retained by the Board. Where necessary and appropriate, the CCO may coordinate with and seek input from the SERS Investment Office in performing securities litigation evaluations for the SLC's consideration and/or assisting selected outside securities litigation counsel in an active case.
- iv. The SLC shall collaborate with the CCO, the Executive Director and the Director of Governance and Strategic Initiatives to review the Securities Litigation Policy, as provided for in the SERS By-laws. The SLC shall recommend any changes to such policies and procedures to the Board Governance and Personnel Committee, who shall review and recommend adoption to the Board.
- v. The SLC shall perform such other activities related to the SLC's functions and duties as contained in its Charter or as requested by the Board from time to time.

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- B. In determining whether to institute securities litigation, the SLC shall consider the objectives of the Board, including, but not limited to, preservation of the Fund and collection of all amounts due to the Fund; maximizing the net recovery of SERS; and the opportunity to effect meaningful corporate governance reforms as part of any securities litigation settlement.
- IV. Application of Policy
- A. General Procedures
- i. Establishment of Securities Litigation Pool
1. The CCO, with the concurrence of the Board Secretary, is authorized to work with PSERS in the establishment and maintenance of a pool of qualified outside law firms (the “SL Pool”) to serve as securities litigation counsel for the Board (and/or the PSERS board) in any legal actions undertaken pursuant to this Third Amended SLP.
- ii. Securities Litigation Implementation Procedures
1. The CCO shall design certain securities litigation implementation procedures (the “Securities Litigation Implementation Procedures”) to implement the Securities Litigation Policy and shall review and revise the Securities Litigation Implementation Procedures from time to time, as necessary or required. The Securities Litigation Implementation Procedures shall include, but not be limited to: (a) the process for determining when and how to pursue securities litigation as lead or co-lead plaintiff in a Class Action Securities Litigation, (b) the process for determining when and how to (i) pursue an Opt-Out Securities Litigation, either alone or jointly with others, or (ii) object to any portion of a proposed settlement of a Class Action Securities Litigation as a putative/passive member of the class of claimant investors, and (c) the process for determining when and how to consider initiating an independent, or joining a group that has an established, Opt-In Securities Litigation action filed outside of the United States/Canada.

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### iii. Securities Litigation Monitoring

1. The CCO shall monitor various securities litigation matters and the Executive Director is authorized to subscribe to a securities litigation monitoring support service on behalf of the Board to assist in such oversight, which shall include, for Class Action Securities Litigation, Opt-In Securities Litigation and Opt-Out Securities Litigation, (a) filings of various securities litigation actions, (b) terms of settlements of various securities litigation actions, (c) SERS' estimated securities-related losses calculated under the LIFO and FIFO methods, and (d) instances where SERS' estimated losses have exceeded a threshold specified by the Securities Litigation Policy. The securities litigation monitoring support service may be combined with other services, including, but not limited to, claims filing services in Class Action Securities Litigation matters where SERS remains a member of the class of claimant investors.

### iv. Claims Filing - The Board understands that it is important to file proofs of claim for SERS' pro-rata share of securities litigation recoveries when SERS is a member of a class of claimant investors in a Class Action Securities Litigation.

#### 1. Class Action Litigation Claims Filing

Proofs of Claim in Class Action Securities Litigation matters are currently filed on SERS' behalf by Bank of New York Mellon, the sub-custodian of SERS' securities ("Sub-custodian"), pursuant to an agreement with the Treasury Department. The Sub-custodian is to monitor such filings to assure that such filings are being made in an accurate and timely fashion, and that SERS is receiving its proper share of such recoveries. The Executive Director, on behalf of the Board, is authorized to engage outside service providers to provide claims filing services in Class Action Securities Litigation matters, which may be combined with other securities litigation services, including, but not limited to, securities litigation monitoring support services.

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### B. Consultant

- i. The Executive Director shall be authorized, subject to all necessary approvals required by law, to issue a request for proposals (either on behalf of the Board alone or jointly with the PSERS board), to enable the SLC to establish and evaluate the credentials of a Consultant to advise on matters related to securities litigation.
- ii. The Board shall seek to contract with not more than two (2) Consultants at any given time, who shall, at the request of the CCO, advise the Board on matters relating to securities litigation, including assisting the Board in analyzing its interest in both pending and potential securities litigation based upon SERS' holdings and exposure during the Class Period, including identification of the specific benefit to the Board and SERS in pursuing litigation, risk and value assessment, damage estimates, and recovery projections.
- iii. Upon receiving an assignment, a Consultant will be expected to perform an analysis and submit a report and recommendation in a prompt and judicious manner to allow the Board sufficient time to take any legal action recommended by the Consultant and/or determined to be appropriate by the Board. A Consultant shall not be eligible to be considered as potential counsel to represent the Board in any legal actions undertaken pursuant to the Securities Litigation Policy, nor, without express written consent of the SLC, advise the actual counsel selected to represent the Board in any legal actions undertaken pursuant to the Securities Litigation Policy.

### C. Loss Thresholds

- i. For the Board to consider seeking lead or co-lead plaintiff status in a Class Action Securities Litigation lawsuit, a loss of at least \$10,000,000 must be calculated under either the LIFO or FIFO recovery methods. If it is clear that the Federal District Court in which the lawsuit is brought requires a specific loss determination method, then SERS must have suffered at least a \$10,000,000 loss under that particular method to consider seeking lead or co-lead plaintiff status.
- ii. For the Board to consider bringing its own Opt-Out Securities Litigation action, a loss of at least \$7,500,000 must be calculated under the LIFO or FIFO recovery methods. If it is clear that the jurisdiction in which the Opt-Out Securities Litigation is to be brought requires a specific loss determination method, then SERS must have suffered at least a \$7,500,000 loss under that particular method to consider bringing the action.

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- iii. For the Board to consider joining in a foreign or domestic joint, group or other available Opt-In Securities Litigation, a loss of at least \$1,000,000 must be calculated under the LIFO or FIFO recovery methods. If it is clear that the jurisdiction in which the action is to be or has been brought requires a specific loss determination method, then SERS must have suffered at least a \$1,000,000 loss under that particular method to consider bringing the action.
- iv. Thresholds set forth in this section may be modified downward in instances where the SLC believes there are important policy reasons for commencing or joining a particular action even though the threshold amount has not been met.

### D. Factors to Consider in Deciding Whether to Seek Lead Plaintiff Status in Class Action Securities Litigation

#### **i. Analysis of Lawsuit and Defendants**

##### 1. What are the strengths of the lawsuit's causes of action?

What claims are or could be asserted in the action and what is the likelihood of their sustainability? Is the case vulnerable to a motion to dismiss under the Private Securities Litigation Reform Act's pleading standards?

##### 2. What are the potential sources of recovery (insurance, deep pockets, etc.)?

Do the defendants have any funds to pay a settlement or judgment? Are there viable and collectible claims against individual officers and directors or other third parties (auditors, underwriters, etc.) that appear unlikely to be vigorously pursued without SERS' participation in the litigation?<sup>5</sup>

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<sup>5</sup> Consideration might also be given to pursuing a shareholder derivative action where the company is not pursuing claims it might have against third parties, if the shareholders would benefit from realizing on those claims.

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3. Is there a need for governance changes to address company problems?

Are needed corporate governance changes likely to be made only as part of a settlement or judgment?

4. Was there egregious activity within the company such that a personal recovery from the defendants appears to be the most expedient way of preventing similar future corporate behavior?
5. Will SERS' participation have a positive impact on reforming securities litigation in general?

Will our credibility as an institutional investor lend support to a cause of action that is legitimate but might otherwise fail?

### ii. Analysis of Other Potential Lead Plaintiffs and Counsel

1. Is the case unlikely to be pursued if SERS does not take action?
2. Will another sophisticated lead plaintiff be likely to come forward to manage the case?

Where other institutional investors appear to have similar large claims, consideration may be given to contacting them about jointly opting out of a class action matter to bring a collective independent action against defendants.

3. Is SERS satisfied with the reputation and skills of potential lead counsel candidates?

Have there been indications from prior cases that likely lead counsel would seek a fee award in excess of market rates? Will participating in the suit assist in lowering attorney's fees for the class and foster healthy competition within the plaintiffs' bar?

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### iii. Analysis of Whether SERS is an Appropriate Lead Plaintiff

1. Will SERS have a conflict of interest in being lead plaintiff (e.g., a large continuing holding that could compromise its incentive to vigorously pursue the case)?

Is the potential securities class action really a nuisance suit that SERS should oppose? In such a case, SERS could add value to its holdings in the subject company by supporting its efforts to have the suit dismissed.

2. Do compromising materials appear in SERS' or its investment manager's files?

Is there a potential that the defendants may be able to mount a stronger defense against SERS than against another lead plaintiff candidate?

3. Are there unusual circumstances or facts that could complicate or undermine SERS' position (e.g., service as a lead plaintiff in more than five cases in the last three years; public criticism of the manager's decision to invest in the company on SERS' behalf, etc.)?

Has SERS applied for lead plaintiff in so many actions that it is taking the risk of becoming – or being seen as – a “professional plaintiff?”

4. Are there unique claims held by SERS that may not apply to other class members (e.g., section 18 claims for direct reliance on misstatements in 10-Ks, section 11 claims from purchases pursuant to a false registration statement, etc.), which might create a conflict of interest or support a larger recovery in an independent lawsuit?

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### **iv. Analysis of Resources Available to Devote to Lawsuit**

1. Are there resources available to pursue the litigation?

Is SERS willing to bear the administrative burden of court appearances, strategy sessions, the discovery process, depositions, etc.? Is SERS limited by staffing constraints? Is SERS willing to accept the possibility that the court may impose Rule 11 sanctions against it if the litigation is unsuccessful?

2. What are the capabilities and anticipated testimony of SERS' likely witnesses?

3. Is the portfolio manager willing to support SERS' position in the litigation?

Does the investment manager agree that there was wrongdoing? Will the investment manager be willing to respond to requested discovery?

### **v. Analysis of Impact on SERS' Investment Program**

1. Is there potential interference with the fund's anticipated future trading strategy if material, non-public information on the defendant company were to be acquired during the litigation?

The investment manager may be restricted from trading the stock due to acquisition of inside information during the lawsuit. Can a firewall be established to allow continued trading?

### **vi. Analysis of Alternatives to Becoming Lead Plaintiff**

1. Is there a less burdensome way of managing SERS' potential claims under the litigation?

Options may include doing nothing (i.e., staying a passive member of the class); attempting to get a larger claimant to become lead plaintiff; monitoring the case from the sidelines; writing a letter to the court

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and/or lead counsel to bring up issues being ignored; filing a motion to support or oppose a particular lead plaintiff or lead counsel candidate; filing a notice of appearance and more actively monitoring the case; attempting to negotiate an agreement with prospective lead counsel that will require them to keep SERS informed of case developments, provide SERS with access to discovery upon request, and allow SERS to participate in settlement negotiations or be consulted on a settlement; waiting until a proposed settlement has been announced and reviewing the settlement terms carefully with the option to object to a poor settlement and/or excessive attorneys' fees; and opting out of the class to file a separate action (e.g., where SERS has a substantial section 18 claim for direct reliance on misrepresentations in a document filed with the SEC that is unlikely to be pursued as part of the class action).

### 2. Are there non-litigation alternatives to achieving SERS' goals?

Non-litigation alternatives to addressing the underlying cause of the company's problems are also considered (e.g., contacting appropriate law enforcement agencies about potential prosecution of wrongdoers; filing a shareholder resolution; running an alternate slate of directors; negotiating for remedial corporate governance changes such as the addition of independent directors or creation of an independent audit or nominating committee).

### E. List of Actions Authorized in Support of Securities Litigation

- i. The CCO may coordinate with SERS' Investment Office, investment managers and investment consultants as it deems necessary or desirable.
- ii. The CCO may coordinate with, advise and represent the Board and staff in connection with investigations, discovery and trial activities as it deems necessary or desirable.
- iii. The CCO, in consultation with and approval by the SLC Chair and, to the extent required under the agreement with the law firm representing the Board in the litigation, may approve the engagement of experts, consultants and other special expenditures which such law firm may recommend.
- iv. The CCO may coordinate and communicate with such other public funds and class members (and their counsel), as well as with state and federal

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agencies as it deems necessary or desirable.

- v. The CCO may make such filings or approve such filings by the law firm representing SERS in the litigation as it deems necessary or desirable.
- vi. The CCO shall periodically report to the SLC regarding securities litigation matters, including the status of litigation in which the SLC has authorized involvement. In the event of significant strategy changes prior to or during such matters, the CCO may make additional recommendations to the SLC.
- vii. The CCO shall monitor and, when appropriate, participate in hearings regarding settlement petitions, including attorneys' fees requested in securities class action lawsuits, and object to such settlements and/or fee requests when the CCO, with the concurrence of the Executive Director, deem them to be not reasonable. The CCO shall work closely with outside counsel on cases, participate in important strategy decisions, and review important documents and pleadings. The CCO will obtain the authorization of the SLC prior to taking any legal action in appellate courts.
- viii. With the approval of the Office of Attorney General, the SLC or, with the advice of SERS' Chief Counsel, the SLC Chair may approve a settlement of a particular litigation.
- ix. Consistent with the Securities Litigation Policy, the Sub-custodian shall monitor and ensure that proofs of claim are filed in all applicable Class Action Securities Litigation settlements, that the appropriate cash amounts are received by SERS, and the SERS Office of Finance and Administration shall, at the request of the SLC, report on the collection of proofs of claim in Class Action Securities Litigation settlements.
- x. Consistent with the Securities Litigation Policy, the CCO shall monitor any Opt-In Securities Litigation claims filed on behalf of the Board, that the appropriate cash amounts of the claims are received by SERS, and at the request of the SLC, report on the collection of claims in Opt-In Securities Litigation.

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### Document Properties

- a. **Document Owner:** Executive Office
- b. **Document Author:** SERS Legal Office
- c. **Summary of Changes:** N/A

<b>Date</b>	<b>Version</b>	<b>Author</b>	<b>Summary</b>
July 15, 2019	2019 POL- BD- 02	SERS Legal Office	The policy the Board has established to set forth the Board's approach to securities litigation.
December 12, 2023	2	SERS Legal Office	Biennial review. Ministerial changes to the policy.