Morgan Lewis

G. Jeffrey Boujoukos
Partner
+1.215.963.5117
jeff.boujoukos@morganlewis.com

April 24, 2025

VIA ELECTRONIC MAIL AND FEDEX

Office of the Secretary
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090
rule-comments@sec.gov

Re: Administrative Proceeding File Nos. 3-21836 and 3-21837: *In the Matter of Aon Investments USA Inc.*, Proposed Plan of Distribution

Dear Ms. Countryman:

We represent the Pennsylvania Public School Employees' Retirement System ("PSERS"), an agency of the Commonwealth of Pennsylvania that administers the retirement plan for over 500,000 of Pennsylvania's public school teachers and employees. The Commonwealth of Pennsylvania is the guarantor of the retirement plan. We write to comment on the Securities & Exchange Commission's Proposed Plan of Distribution (the "Proposed Plan") in *In the Matter of Aon Investments USA Inc.*, Administrative Proceeding File No. 3-21837 and *In the Matter of Shaughnessy*, Administrative Proceeding File No. 3-21836 (the "Settled Actions"). On March 25, 2025, the Secretary published the Notice of Proposed Plan of Distribution and Opportunity for Comment ("Notice"), giving interested parties a chance to comment within 30 days.

First, PSERS recognizes the efforts of the Enforcement Staff and Office of Distributions in this matter. In particular, we appreciate the Staff's availability to discuss the distribution, and the courtesy extended in this regard. However, we respectfully raise several objections to the Proposed Plan as it would deprive PSERS of a distribution from the Fair Fund that would reimburse it for harm caused by the misconduct identified in the Settled Actions.

The Fair Fund in this matter currently contains $1,572,187.79. Despite the amount in the Fund, the Proposed Plan appears to restrict PSERS's Fair Fund recovery to the amount of disgorgement ordered against the Respondents ($495,098.50), plus interest. *See, e.g.,* Plan ¶¶ 2 and 8. PSERS is the only party harmed by the conduct identified in the Settled Actions. *Id.* The Proposed Plan's overly restrictive determination of "investor's harm" has the practical effect of sending approximately $1,000,000 to the Treasury instead of the sole harmed party, a result expressly acknowledged in the Proposed Plan: "Since the Net Available Fair Fund, as defined in the Plan, exceeds the Loss from Fees of the Eligible Claimant, the Eligible Claimant will receive a payment equal to the amount of their Loss of Fees, as calculated above." *Id.* at Exhibit A.

This result is wholly inequitable, unnecessary, and inconsistent with the purpose of a Fair Fund and applicable law.

I. The Conduct That Harmed PSERS

Pursuant to Pennsylvania's Retirement Code, PSERS contracts with and relies on outside investment professionals, advisors and consultants, such the Respondents in the Settled Actions, to assist it in carrying out its statutory and other duties and obligations.

As described in the Settled Actions:

- "In 2013, Aon was engaged as an investment adviser and to provide general investment consultant services to PSERS. In this role, Aon provided investment advisory services to PSERS, including advising on appropriate investment strategies, suitable investment opportunities, and the engagement and retention of investment managers in certain asset classes, and providing various performance measurement, risk and attribution services." *In the Matter of Aon Investments USA Inc.,* Administrative Proceeding File No. 3-21837, ¶ 4.

- "As part of measuring performance, Aon was also responsible for calculating PSERS's investment returns for purposes of risk share. During the relevant time period, an Aon lead partner (the "Aon Partner") and another Aon employee ("Aon Employee A") were assigned to the PSERS engagement." *Id.*

- "Beginning in June 2020, PSERS staff had repeatedly raised questions about Aon's calculation of the Risk Share Return Rate. Prior to the Board certification, PSERS staff noted, and repeatedly asked Aon to investigate, a 37 basis point (0.37%) discrepancy between: (1) the 2015 performance returns used to calculate the Risk Share Return Rate; and (2) the performance returns reported for 2015 in the Commonwealth of Pennsylvania's Annual Comprehensive Financial Report ("Annual Financial Report")." *Id.*, at p. 2.

- "In response to these inquiries from PSERS staff, Aon failed to adequately investigate the discrepancy. Aon also misstated to PSERS that the discrepancy was not due to errors in the 2015 returns used to calculate the Risk Share Return Rate, but instead reflected retroactive adjustments to the returns reported in the Annual Financial Report to reflect updated figures received after quarter close. Aon also provided PSERS with two other reasons for the 37 basis point discrepancy that Aon had already ruled out as causes for the discrepancy." *Id.*

- "In January 2021, Aon identified errors in the underlying performance data used to calculate the Risk Share Return Rate. In February 2021, Aon realized that those errors impacted PSERS's overall return and required the recalculation of the Risk Share Return Rate. In March 2021, Aon reported to PSERS management and the Board that the corrected Risk Share Return Rate was 6.34%." *Id.*

- "Even after the error was discovered, Aon made misstatements and omitted facts in communications with PSERS about the extent to which Aon understood the nature and impact of the errors." *Id.*

- "As a result of the conduct described above, Aon willfully violated Section 206(2) of the Advisers Act, which prohibits an investment adviser from engaging 'in any transaction,

> practice or course of business which operates as a fraud or deceit upon any client or prospective client.'" *Id.* at ¶ 35.

- "In their respective Orders, the Commission ordered Aon to pay disgorgement of $495,098.50, prejudgment interest of $47,089.29 and a civil penalty of $1,000,000.00, and Shaughnessy to pay a civil penalty of $30,000.00, to the Commission. In each of the Orders, the Commission also created a Fair Fund pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002. . . ." *See Notice* at p. 2.

It is PSERS's belief that Aon's errors were initially introduced into the performance reports in September 2019. Between the effective date of the applicable PSERS-Aon contract (October 1, 2019) to the date that PSERS terminated the PSERS-Aon contract (December 15, 2023), PSERS paid a total of $2,836,223.78 to Aon. PSERS estimates that 25% of the total fees paid to Aon ($709,055.90) are attributable to the performance reporting and risk share calculation.

Further, the harm caused to PSERS by conduct described in the Settled Actions goes well beyond the fees paid to Aon. As demonstrated to the Enforcement and Distributions Staff in detailed submissions dated January 27, 2023, and February 16, 2023, Aon caused PSERS to incur millions of dollars in additional consultant fees, additional employee costs and attorneys' fees directly attributable to Aon's errors. For example, PSERS was forced to retain consultants to specifically address Aon's performance reporting errors at a cost in excess of $2.4 million alone. Much of these costs arose from Aon's refusal to provide PSERS the root cause of its reporting error and the results of the independent forensic review it conducted. These costs and fees are separate and distinct from those incurred by PSERS in connection with private litigation it pursued against Aon in state court.

Finally, any expense that is not reimbursed, from the Fair Fund or otherwise, harms the retirement fund that PSERS administers (and by extension, its members).

II. Applicable Law

SEC Rule of Practice 1100, 17 CFR § 201.1100, states that the Commission "may order that the amount of the disgorgement and of the civil money penalty, together with any funds received by the Commission pursuant to 15 U.S.C. 7246(b), be used to create a fund for the benefit of investors who were harmed by the violation."

Pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002,

> If, in any judicial or administrative action brought by the Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws, or such person agrees, in settlement of any such action, to such civil penalty, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation.

In discussions regarding the Fair Fund, the Distributions Staff directed PSERS to Section 21(d)(4) of the Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78u(d)(4), as authority for the proposition that PSERS attorneys' fees and costs cannot be recovered from the Fair Fund. Section 21(d)(4) states:

> Except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission, funds disgorged

> under paragraph (7) as the result of an action brought by the Commission in Federal court, or as a result of any Commission administrative action, shall not be distributed as payment for attorneys' fees or expenses incurred by private parties seeking distribution of the disgorged funds.

However, the disgorgement ordered in the Settled Actions was not pursuant to the Exchange Act—it was pursuant to the Advisers Act, and the Advisers Act does not contain a similar provision. In addition, the majority of the Fair Fund is not disgorgement at all, but civil penalty.

Relying on Section 21(d)(4) to preclude PSERS's recovery is also contrary to the purpose of the section, as demonstrated by Congressional intent. This provision was added to the Exchange Act as part of the Private Securities Litigation Reform Act of 1995 ("Reform Act"), 109 Stat. 737 (15 U.S.C. §§ 77z–1 and 78u–4). The stated purpose of the Act was to target perceived abuses of the class-action vehicle in litigation involving nationally traded securities. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006). Title I of the Reform Act, "Reduction of Abusive Litigation," was part of Congress' effort to curb these perceived abuses. *Id.* Section 103 of Title I, which contains the text of Exchange Act Section 21(d)(4), is captioned "Elimination of Certain Abusive Practices." There is no suggestion that the provision was intended to entirely limit the ability of an aggrieved investor to recover for harm resulting from the violation of the Advisers Act, whatever form that harm takes.

The Commission has recognized that 21(d)(4) is targeted at certain practices prevalent in private securities litigation.

> Section 21(d)(4) of the Exchange Act evidences Congress's intent that certain practices prevalent in private securities litigation, such as compensation of attorneys and other private parties from investors' compensation, should not be carried over to the distribution of Commission disgorgement funds.

Order Approving Plan of Distribution, *In re MagnaChip Semiconductor*, Administrative Proceeding File No. 3-17956 (May 10, 2023) p. 3. Similarly, the Commission argued to the United States Court of Appeals for Ninth Circuit in *SEC v. Pritzker*, that Section 21(d)(4) was "enacted to curb 'perceived abuses' in private litigation, including by limiting 'attorney's fees'" and reflects "an explicit policy decision by Congress to prioritize compensating investors over private plaintiffs' attorneys in Commission actions." Brief of Plaintiff-Appellee, at p. 30, *SEC v. Pritzker*, Case: 20-17419 (9th Cir. May 26, 2021) (citing *Dabit*, at 81)).

Finally, even if Section 21(d)(4) of the Exchange Act were applicable to this matter, it is not an absolute bar. Rather, the Commission has the discretion to allow payment of attorneys' fees and costs. Section 21(d)(4)("Except as otherwise ordered by the court upon motion by the Commission, **or, in the case of an administrative action, *as otherwise ordered by the Commission***. . . .") (emphasis added).

III. Specific Objections to The Proposed Plan

The Proposed Plan inappropriately limits the amount that PSERS can recover from the Fair Fund, and PSERS objects to the following aspects of the Plan.

A. Limitation of recovery to "investment advisory fees"

PSERS objects to the limitation set forth in Paragraphs 2, 3 and 14 of the Proposed Plan, the Plan of Allocation attached as Exhibit A to the Proposed Plan, and elsewhere in the Proposed Plan, that

restricts recovery from the Fair Fund to "investment advisory fees" due to the "Respondents' misconduct." PSERS can demonstrate that the conduct that is the subject of the Settled Actions caused it to incur expense well beyond "investment advisory fees." These expenses had nothing to do with private litigation and PSERS can further demonstrate that these costs would not have been incurred but for this "misconduct."

Further, this is not an instance where PSERS's claims for costs and fees would deprive other aggrieved investors of recovery, or unduly dissipate the Fair Fund, as PSERS is the sole harmed investor. To the contrary, as it currently stands, the Proposed Plan will result in approximately $1 million being sent to the Treasury. These funds should be used for the "benefit of investors who were harmed by the violation" as contemplated by SEC Rule of Practice 1100, and the "benefit of the victims of such violation" as discussed in SOX Section 308(a).

Even were Section 21(d)(4) applicable and read to exclude PSERS's requests for costs and fees, the Commission still can exercise its discretion to reach an equitable result. Respectfully, equity would be well served by allowing PSERS to seek redress for all harm caused by the conduct set forth in the Settled Actions.

B. Limitation of recovery to the period of July 1, 2020 through March 31, 2021

PSERS objects to the definition of "Relevant Period" set forth in the Proposed Plan that would limit recovery to "investment advisory fees that it paid between July 1, 2020, through March 31, 2021." As discussed above, PSERS believes that the Aon error began in September 2019. Between the effective date of the applicable PSERS-Aon contract (October 1, 2019) to the date that PSERS terminated the PSERS-Aon contract (December 15, 2023), PSERS paid a total of $2,836,223.78 to Aon.

The Staff appears to be limiting the "Relevant Period" to the period that was the subject of the negotiated resolutions with the Respondents settled on a neither admit nor deny basis. Respectfully, PSERS was not a party to those settlement negotiations and does not agree with the time-period or the amount. By their terms, the findings in the Orders "are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding" and should not bind PSERS.

Further, in the Aon Order, the Commission found that "[e]ven after the error was discovered, Aon made misstatements and omitted facts in communications with PSERS about the extent to which Aon understood the nature and impact of the errors." *In the Matter of Aon Investments USA Inc.*, Administrative Proceeding File No. 3-21837, at p. 2. A March 5, 2021 statement was found to be misleading by the Commission because "it understated the extent of the impact of the issue when, at that time, Aon did not know the scope of the error's impact." *Id.* at ¶ 32. These misstatements could not have been corrected until 2022 because, as the Commission also found, "[i]n fact, many, if not most, of the accounts sourced from the custodian bank were impacted by systemic erroneous revisions that were made in the PARis system in May 2016 **(and not fully understood until late 2022)**." *Id.* (emphasis added).

C. Truncation of the Dispute Process

PSERS objects to Paragraphs 2 and 25 of the Proposed Plan regarding the "claims-made process" and the "Dispute Process." Paragraph 2 of the Proposed Plan states in pertinent part:

> Based on information obtained by the Commission staff during its investigation and the review and analysis of applicable records, the Commission staff has reasonably concluded

> that it has all records necessary to calculate the investor's harm. As a result, the Fair Fund is not being distributed according to a claims-made process, so procedures for making and approving claims in accordance with Rule 1101(b)(4) of the Commission's Rules, 17 C.F.R. § 201.1101(b)(4), are not applicable.

Rule 1101(b)(4) contemplates that a proposed plan will include "[p]rocedures for making and approving claims, procedures for handling disputed claims, and a cut-off date for the making of claims." Other than the statement regarding the applicability of Section 21(d)(4) of the Exchange Act, PSERS has not been provided with any explanation for the denial of its claim for harm, how Aon fees were calculated, or how the relevant "Relevant Period" was set.

Allowing PSERS the opportunity to make a claim supported by evidence, which then would result in acceptance or denial by the administrator and the opportunity to dispute based on specific and identified evidence, would lend necessary transparency to this matter and afford PSERS some level of process. Given that PSERS is the only claimant on the Fair Fund, there will be little expense associated with this effort. Likewise, there is no harm because the remainder of the Fund will otherwise be sent to the Treasury.

D. Plan of Allocation calculation of "Fees Paid"

The Plan of Allocation attached as Exhibit A to the Proposed Plan has the following provision:

> To avoid payment of a windfall, the Fees Paid will be reduced by the amount of any compensation for the loss that resulted from the conduct described in the Orders that was received from another source (e.g., class action settlement), to the extent known by the Fund Administrator.

The phrase "any compensation for the loss that resulted from the conduct described in the Orders" is overbroad and open to more than one interpretation. If the definition of "Fees Paid" is not eliminated or revised based on the above objections, then the "loss" must be limited to those fees identical to "Fees Paid" as defined in the Proposed Plan. Simply put, payment for harm or loss other than the specific fees for the specific time period identified in the Proposed Plan would not be, or result in, a "windfall" and should not reduce PSERS's recovery from the Fair Fund.

IV. Conclusion

For the reasons set forth herein, PSERS respectfully requests that the Proposed Plan be modified to allow it to seek distribution from the Fair Fund for loss associated with the conduct described in the Settled Action. This is a unique situation where the concerns expressed by Congress regarding abusive private litigation and depletion of amounts available to harmed investors are not present and principles of equity weigh in favor of distributing the Fair Fund to the sole victim of the conduct rather than transferring it to the Treasury.

Sincerely,

/s/ G. Jeffrey Boujoukos
G. Jeffrey Boujoukos