CALPERS, NATION'S LARGEST PUBLIC PENSION FUND, ADOPTS NEW POLICY ON PLACEMENT AGENTS

The latest chapter in the continuing saga of intermediaries for public pension funds was written this week when the Investment Policy Committee of CalPERS, the nation's largest public pension fund, adopted a new policy requiring disclosure and registration of placement agents used by its external investment managers.[1] The new policy is effective as of May 11, 2009, the date of adoption, and applies to any new agreements with investment managers after that date and to existing contracts for investment vehicles in which CalPERS is the majority investor. The policy also applies to any existing investment management agreements for which (1) the term of the agreement is extended, (2) CalPERS' funding commitment increases, or (3) there are changes to the agreement's substantive terms. CalPERS made the changes in response to the "pay to play" scandal involving investments by the New York State Common Retirement Fund. Given CalPERS' extensive influence in the industry, similar policies are likely to be considered and adopted by other state pension funds.

Disclosure

The new CalPERS policy[2] requires that CalPERS' external investment managers provide extensive disclosure regarding their use of placement agents to the CalPERS staff when investment discussions are initiated, including:

- a statement as to whether the external investment manager or anyone affiliated with it has agreed to compensate any placement agent in connection with a CalPERS investment;
- a resume for each officer, partner or principal of the placement agent, with specific note made of any affiliation of such persons or members of their immediate families with CalPERS;
- a description of any agreed compensation to placement agents, and any agreed compensation to employees of the external investment manager retained to solicit an investment from CalPERS and paid based on investment commitments secured;[3]

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1 "CalPERS Adopts Placement Agent Policy - Requires Disclosure of Agents, Fees," May 11, 2009, http://www.calpers.ca.gov/index.jsp?bc=/about/press/pr-2009/may/adopts-placement-agent-policy.xml.

2 The final policy as adopted on May 11, 2009 was not available from CalPERS at this writing. A draft of the policy is available at http://www.calpers.ca.gov/eip-docs/about/board-cal-agenda/agendas/policy/200905/item03-01.pdf.

3 Compensation to "bona fide employees" of the external investment manager who solicit investments from CalPERS but do not earn more than $100,000 per year or receive any incentive compensation based entirely on investment commitments from CalPERS need not be disclosed.

- a description of the services to be performed by the placement agent and a statement as to whether the placement agent is used by the external investment manager for all prospective clients or only for a subset;
- a copy of any agreement with the placement agent; and
- the names of any persons currently or formerly affiliated with CalPERS who suggested the retention of the placement agent.

The policy also requires that the external investment manager warrant the accuracy of the placement agent disclosure in any final agreement with CalPERS, and provide updates to any changes in the disclosure within five business days.

Registration

As noted in CalPERS' press release of May 11, 2009, the CalPERS policy requires that placement agents used in connection with CalPERS investments be registered with the SEC or FINRA. This is a change from the draft policy proposed by CalPERS staff on May 8, 2009, which would only have required disclosure of whether the placement agents were registered and if not registered, why registration was not required.[4] At this writing, no copy of the revised policy adopted by CalPERS is available, but a CalPERS spokesman confirmed that registration of placement agents will be required under the final policy.

Sanctions for Violations of the Policy

The CalPERS policy requires that external investment managers agree, in the event of a material omission or inaccuracy in the placement agent disclosure or other violation of the policy, to reimburse CalPERS for the greater of (1) any management or advisory fees for two years or (2) the amounts paid or promised to the placement agent. External investment managers must also agree to allow CalPERS to terminate investment management contracts immediately in the event of a violation of the policy.

The extensive disclosure regarding placement agents required under the CalPERS policy, as well as the registration requirement, are likely to become the model for other state and local pension funds. Investment managers, hedge funds, and private equity funds that seek investments from such pension funds would be well-advised to view the required CalPERS disclosure as a template for their own review of existing or future relationships with placement agents that might draw regulatory scrutiny.

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[4] See http://www.calpers.ca.gov/eip-docs/about/board-cal-agenda/agendas/policy/200905/item03-01.pdf (May 8, 2009).

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If you have any questions concerning the foregoing or would like additional information, please contact Adrienne Atkinson (212-728-8253, aatkinson@willkie.com), Daniel Schloendorn (212-728-8265, dschloendorn@willkie.com), Gregory Bruch (202-303-1205, gbruch@willkie.com), Barry Barbash (202-303-1201, bbarbash@willkie.com), Elizabeth Gray (202-303-1207, egray@willkie.com), Julie Smith (202-303-1209, jasmith@willkie.com), or the attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099 and has an office located at 1875 K Street, NW, Washington, DC 20006-1238. Our New York telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our Washington, DC telephone number is (202) 303-1000 and our facsimile number is (202) 303-2000. Our website is located at www.willkie.com.

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