

## Recent Developments on California Lobbyist Registration Requirements Applicable to Certain Placement Agents

The California Fair Political Practices Commission (FPPC) recently released two Advice Letters, dated April 7, 2011,<sup>1</sup> and April 20, 2011,<sup>2</sup> setting forth certain clarifications with respect to AB 1743, which was signed into law on September 30, 2010. Among other things, AB 1743 requires that “placement agents” (as defined in AB 1743) seeking to do business with California state and local retirement systems and pension funds register as lobbyists pursuant to the California Political Reform Act, California Government Code Sections 81000 *et seq.* (the “PRA”), and applicable local laws.<sup>3</sup>

Of particular note, the FPPC clarified that:

- External managers, and their affiliates, seeking exemption from the lobbyist requirements with respect to solicitation of state public retirement systems through a competitive bidding process are exempt throughout the entire bidding process despite the language in AB 1743 requiring that the external manager be “providing services pursuant to a contract executed as a result of that competitive bidding process.” The FPPC further clarified that this exemption likely would also apply to efforts to obtain extensions of the contract so awarded, but not to contracts for other services from the same retirement system or fund. Additionally, the FPPC stated that a competitive bidding process means solely the formal “request for proposal” (RFP) processes set forth in Section 22364(a) of the California Education Code and Section 20153(a) of the

Government Code and would not include processes such as “requests for information,” “requests for qualifications” or other meetings or processes occurring prior to the commencement of the formal RFP process.

- Employees of external managers who have a limited role in the fundraising process may participate in certain meetings with a state system or fund without registering as a lobbyist so long as they attend such meeting with a placement agent hired by his or her firm that is registered as a lobbyist pursuant to the PRA.
- Typical custodial banking services (even if such services include sweeping otherwise-uninvested end-of-day cash into short-term money market vehicles or the performance of currency conversions) do not fall under the definitions of external manager under AB 1743.
- AB 1743 is not retroactive to contracts entered into before its effective date, but does apply to any contract made or amended after such date.
- AB 1743 generally does not cover routine trading and sales of securities by a broker-dealer. The FPPC states that Section 86300 of the PRA exempts from the definition of lobbyist any individual working in the capacity of a state employee, and that paid consultants who only provide advice to government agency clients, and who do not represent the client-agency before other agencies or in other processes, are analogous to employees of the

client-agency. Under the exemption, the FPPC determined that the limited circumstances of performing trades for the retirement system at its direction are not actions contemplated in the definition of external manager and that the persons performing these functions are analogous to agency employees, and therefore, not lobbyists.

- Various state public retirement systems or funds may be covered by AB 1743 and placement agents must register as a lobbyist with respect to each covered system or fund that it intends to solicit. For example, in an AB 1743 FAQ issued by the FPPC in January 2011, the FPPC specifically noted that before making solicitations to the University of California Retirement System, placement agents would be required to register as lobbyists. However, in the April 7 Advice Letter, the FPPC clarified that defined-contribution plans or traditional retirement plans (such as a 401(k) or 457 plan) are not covered by AB 1743.
- Questions regarding the applicability of AB 1743 to local lobbyist requirements falls outside the FPPC's jurisdiction and such inquiries must be addressed to each individual locality.

Certain local governments have taken the position that AB 1743 *does not* supplant local requirements. Moreover, these local governments have stated that the one-third exemption set forth in AB 1743 does not apply to local lobbying laws that would otherwise require "placement agents" (as defined in AB 1743) to register as a lobbyist, submit periodic reports and comply with other applicable requirements of the local government.

The one-third exemption states that an employee, officer, director, equityholder, partner, member or trustee of an external manager who spends one-third or more of his or her time, during a calendar year, managing the securities or assets owned, controlled, invested or held by the external manager is not a placement agent and is not subject to the local lobbyist filing

requirement set forth in AB 1743. These localities have stated that AB 1743 neither requires nor exempts local lobbyist registration, and that specific analysis of the local requirements is necessary to determine whether a "placement agent" is required to register as a lobbyist and, if so, whether certain local exceptions or exemptions would apply.

Further, to address certain concerns with and to provide clarifications to AB 1743, SB 398<sup>4</sup> was introduced in the California Senate in February. SB 398 would amend the provisions of AB 1743 as follows:

- SB 398 would amend the definitions of "placement agent," "external manager" and "investment fund" to limit the scope of activities covered by AB 1743. Notably, "external manager" would continue to include a person retained, or seeking to be retained, to manage a portfolio of securities or other assets for compensation, and would no longer refer to a person who engages "in the business of investing, reinvesting, owning, holding or trading securities or other assets" and who offers or sells securities, but rather would refer to a person who "manages an investment fund" and offers or sells an "ownership interest in the investment fund." Similarly, the definition of "placement agent" would be amended to omit references to the sale of securities, assets or services of an external manager, and instead would refer to the offer or sale of investment management services (i.e., the management of a portfolio of securities or other assets) or an ownership interest in an investment fund. Consistent with the FPPC Advice Letters described above, these amendments would clarify that the state lobbying requirements do not apply to broker-dealers participating in routine trading or to financial firms providing custodial services for a retirement system.
- Consistent with the April 7, 2011 FPPC Advice Letter described above, SB 398 would amend the competitive bidding exemption to clarify that such exemption applies to the entire RFP

process and would cover all external managers participating in the RFP process prior to actual contract award (so long as they meet the other requirements related to such exemption), even if they are not ultimately awarded a contract.

- SB 398 would also add a competitive bidding exemption to the local lobbyist requirements for local plans similar to the exemption that already applies to the state lobbyist registration requirements. As noted above, however, certain local governments have taken the position that AB 1743 does not apply to local lobbying requirements, which has raised concerns about the application of AB 1743 to such local lobbyist requirements. SB 398, however, does not address this issue.

*For more information about these lobbyist requirements, or any other matter mentioned in this Legal Update, please contact any of the following lawyers.*

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## Endnotes

- <sup>1</sup> Available at <http://www.fppc.ca.gov/adv/Advice%20Letters/2011/11015.doc>
- <sup>2</sup> Available at <http://www.fppc.ca.gov/adv/Advice%20Letters/2011/11031.doc>
- <sup>3</sup> Legal Update: “California Imposes Lobbyist Registration Requirement and Contingency Compensation Prohibition on Certain Placement Agents,” available at <http://www.mayerbrown.com/publications/article.asp?id=9903&nid=6>
- <sup>4</sup> Available at [http://www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=sb\\_398&sess=CUR&house=B&author=hernandez](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_398&sess=CUR&house=B&author=hernandez)

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