

Legal Risk Management Tip November 2013

DO YOU MEET THE DEFINITION OF LOBBYIST?

It has been two years since the California Assembly expanded the definition of “lobbyist” to cover internal sales professionals of investment firms who solicit investment advisory business from CalPERS and CalSTRS. However, some principals of these firms remain unaware that their firms and their sales professionals may need to register as lobbyists. This month’s Legal Risk Management Tip provides helpful information to those who seek to do business with the state of California, and a reminder to those who currently do.

Who Must File

Internal sales professionals who meet the definition of “placement agent” must register as lobbyists with the state’s Fair Political Practices Commission and adhere to a variety of regulatory restrictions. Investment advisers and broker-dealers that meet the definition of either a “lobbying firm” or “lobbyist employer” also must register.

“Placement agent” means an individual employed or retained by an external manager or an investment fund managed by an external manager, and who acts or has acted for compensation as a finder, solicitor, marketer, consultant, broker, or other intermediary in connection with the offer or sale to a state public retirement system in California of either of the following: (a) the investment management services of the external manager or (b) an ownership interest in an investment fund managed by the external manager.

“External manager” means either (a) a person who is seeking to be, or is, retained by a state public retirement system in California, to manage a portfolio of securities or other assets for compensation, or (b) a person who manages an investment fund and who offers or sells, or has offered or sold, an ownership interest in the investment fund to a state public retirement system in California.

“Lobbying firm” means any business entity, including an individual contract lobbyist, which (a) receives or becomes entitled to receive any compensation, other than reimbursement for reasonable travel expenses, for the purpose of influencing legislative or administrative action on behalf of any other person, and any partner, owner, officer, or employee of the business entity is a lobbyist, or (b) receives or becomes entitled to receive any compensation, other than reimbursement for reasonable travel expenses, to communicate directly with any elected state official, agency official, or legislative official for the purpose of influencing legislative or administrative action on behalf of any other person, if a substantial or regular portion of the activities for which the business entity receives compensation is for the purpose of influencing legislative or administrative action.

“Lobbyist employer” means any person, other than a lobbying firm, that: (a) employs one or more lobbyists for economic consideration, other than reimbursement for reasonable travel expenses, for the purpose of influencing legislative or administrative action, or (b) contracts for

the services of a lobbying firm for economic consideration, other than reimbursement for reasonable travel expense, for the purpose of influencing legislative or administrative action.

Exclusions

There are two exclusions from the definition of placement agent which in turn will exclude the person or firm from registration. The exclusions include the portfolio manager exclusion and the competitive bidding process exclusion.

Portfolio Manager Exemption

Specifically excluded from the definition of “placement agent” are portfolio managers who spend one-third or more of their time managing the securities or assets of the external manager.

Competitive Bidding Process Exemption

Also excluded from the definition of “placement agent” are employees, officers or directors of external managers that are registered investment advisers or broker-dealers that have been selected through a competitive bid process applicable to the retirement board or public pension or retirement system and who have agreed to a fiduciary standard of care set forth in the California Constitution for board members of the state pension systems.

Filing Process and Ongoing Compliance

With the exception of the two narrow exclusions, these definitions are intended to cover investment advisers, broker-dealers, and their sales professionals. Filings shall be made no later than 10 days after falling within one of the definitions, and shall be made both by online or electronic means and in paper format. Renewals are to be made between November 1 and December 31, of each even-numbered year.

Aside from the registration and renewal requirements, internal sales professionals of regulated investment advisers and broker-dealers must comply with the restrictions imposed on lobbyists in the state, including limits on gifts to public officials, limits on campaign contributions and, notably, a ban on contingency fee arrangements relative to CalPERS and CalSTRS investments. Once registered, regulated sales personnel also must complete in-person ethics training and comply with quarterly disclosure and reporting requirements, which includes disclosure of compensation paid to employees. Lobbying firms and lobbying employers must file periodic reports as well.

Enforcement

This is a law that compliance departments should be familiar given the consequences of non-compliance. The law imposes both criminal and civil liability, and provides for injunctive relief. Any person who knowingly or willfully violates this law is guilty of a misdemeanor and subject to a fine up to the greater of \$10,000 or three times the amount the person failed to report. Civil penalties can be up to \$5,000 per violation.

Local Requirements

It is important to note that this law applies to the employees of investment advisers and broker-dealers who solicit business from state retirement systems only, and not for retirement systems of cities and towns across the state. Accordingly, investment advisers and broker-dealers and their sales professionals should remain mindful of local law to determine whether they qualify as lobbyists and are subject to registration under applicable local law.

For more information on these and other considerations, please contact us at info@jackolg.com, or (619) 298-2880. Also, please visit our website at www.jackolg.com.

Author: Charles H. Field, Of Counsel; Editor: Michelle L. Jacko, Esq., Managing Partner, JLG. JLG works extensively with investment advisers, broker-dealers, investment companies, hedge funds and banks on legal and regulatory compliance matters.

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