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Via Email (rule-comments@sec.gov)

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE,
Washington, DC 20549-1090

Re: File No. S7-18-09

Dear Ms. Murphy:

I am writing to comment on the Securities and Exchange Commission's (the "**Commission**") proposal to adopt a new rule under the Investment Advisers Act of 1940 that would prohibit an investment adviser from

- Providing advisory services for compensation to a government client for two years after the adviser or certain of its executives or employees make a contribution to certain elected officials or candidates;
- Providing or agreeing to provide, directly or indirectly, payment to any third party for solicitation of advisory business from any government entity on behalf of the adviser; and
- Soliciting from others, or coordinating, contributions to certain elected officials or candidates or payments to political parties when the adviser is providing or seeking government business.

The proposed rule would also impose specified record keeping requirements.

1. Background.

I am an attorney in private practice in Irvine, California and an Adjunct Professor of Law at Chapman University Law School. I previously served as California's Commissioner of Corporations and in that capacity was responsible for the administration and enforcement of California's securities laws.¹ As Commissioner, my responsibilities

¹ I have also served as a member of the California Senate Commission on Corporate Governance, Shareholder Rights and Securities Transactions, Co-Chairman of the

included administration and enforcement of California's laws and regulations with respect to the registration and conduct of investment advisers. I am writing in my individual capacity and not on behalf of my law firm, the law school or any of my law firm's clients.

2. The proposed rule is inconsistent with the principle of federalism.

On May 20, 2009, President Obama issued a memorandum to the heads of executive departments and agencies. In that memorandum, President Obama stated:

Executive departments and agencies should be mindful that in our Federal system, the citizens of the several States have distinctive circumstances and values, and that in many instances it is appropriate for them to apply to themselves rules and principles that reflect these circumstances and values.

In proposing a new federal rule, the Commission notes: "several states, counties, localities, and even individual public pension funds, have undertaken to prohibit or regulate these practices in recent years".² The Commission, however, does not explain in its proposing release why these state and local efforts are inadequate.³ Thus, the Commission's claimed need to adopt a new, federal rule is belied by its own finding that state and local officials already have taken action to address pay-to-play arrangements.

Justice Louis Brandeis once famously observed "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."⁴ After the Commission published its proposed pay-to-play rule, the California legislature enacted emergency legislation addressing pay-to-play arrangements involving public employee retirement systems.⁵ Notably, California takes a fundamentally different

Corporations Committee of the Business Law Section of the California State Bar and Chairman of the Business and Corporate Law Section of the Orange County (California) Bar Association. I am writing in my individual capacity and not on behalf of any of these groups.

² The proposing release does not cite the adoption by the California Public Employees Retirement System (CalPERS) on May 11, 2009 of its Statement of Policy for Disclosure of Placement Agent Fees. On September 23, 2009, I submitted a request to the California Office of Administrative Law for a determination pursuant to California Government Code Section 11340.5 and 1 CCR § 260 that the CalPERS Statement constituted regulations subject to the rulemaking provisions of the California Administrative Procedure Act.

³ The Commission cites only letters from two New York state officials requesting Commission action.

⁴ *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

⁵ AB 1584, 2009 Cal. Stat. ch. 301 (attached). See Keith Paul Bishop, *Unveiling Pay-to-Play Arrangements*, Los Angeles Daily Journal p. 6 (Oct. 21, 2009).

approach than does the Commission. In contrast to the Commission's proposed ban on payments, California takes the more flexible approach of requiring public retirement systems to adopt disclosure policies and imposing a five-year cooling off period for violators. While it remains to be seen whether California's disclosure-based approach will be adequate, it is clear that the Commission's proposed rule would effectively terminate state and local efforts to fashion their own approaches to pay-to-play arrangements.

3. The Commission has failed to demonstrate a need for a new rule.

In the proposing release, the Commission cites numerous successful enforcement actions by the Commission and law enforcement authorities. Rather than demonstrate the need for additional regulation, these enforcement actions make it clear that current laws and regulation are adequate for policing pay-to-play arrangements.⁶

Very Truly Yours,

/s/ Keith Paul Bishop

⁶ The Commission's case for regulation would be bolstered by evidence that it and law enforcement authorities had no existing authority to address pay-to-play arrangements.

Assembly Bill No. 1584

CHAPTER 301

An act to amend Section 22212.5 of the Education Code, and to amend Sections 20098 and 31528 of, and to add Sections 7508.5, 7513.8, 7513.85, 7513.9, and 7513.95 to, the Government Code, relating to public employees' retirement, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor October 11, 2009. Filed with
Secretary of State October 11, 2009.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1584, Hernandez. Public employees' retirement: retirement boards.

Existing law prohibits designated officers and employees of the Board of Administration of the Public Employees' Retirement System (PERS) and the Teachers' Retirement Board of the State Teachers' Retirement System (STRS), who served in those positions for less than 5 years, from taking any specified action on behalf of any person, other than the state, to influence certain actions by the retirement boards or systems within 2 years after leaving that position.

The County Employees Retirement Law of 1937 prohibits a member or employee of a retirement board from becoming an endorser, surety, or obligor on, or from having any personal interest in the making of an investment for the board, or in the gains or profits that accrue from those investments, except as specified. That law also prohibits a member or employee of a retirement board or board of investments from selling or providing any investment product that would be considered an asset of the retirement fund to a retirement system established under that law.

This bill would include a member of the board, a deputy executive officer, and an assistant executive officer among those positions subject to the 2-year postemployment restriction, and would delete the qualification that the person have served in that position for less than 5 years. The bill also would make that postemployment restriction applicable to designated officers and employees, board members, and administrators of county retirement systems and specified employees of other public pension and retirement systems.

This bill would require the retirement boards of each public pension or retirement system to develop and implement, on or before June 30, 2010, a policy requiring the disclosure of payments to placement agents, as defined, in connection with system investments in or through external managers, as defined. The bill would prohibit an external manager or placement agent that violates that policy from soliciting new investments from the system for 5 years after the violation was committed, but would provide for the reduction of that prohibition as specified. The bill also would prohibit the system from entering into any agreement with an external manager that

does not agree in writing to comply with the policy. The bill would require a placement agent, prior to acting as a placement agent in connection with any potential system investment, to disclose to the board all campaign contributions made by the placement agent to any elected member of the board, and all gifts given to any member of the board, during the prior 24-month period, and to disclose any subsequent campaign contribution made by the placement agent to an elected member of the board, or a subsequent gift given to any member of the board, during the time the placement agent is receiving compensation in connection with a system investment. The bill would prohibit a member or employee of the board from, directly or indirectly, by himself or herself, or as an agent, partner, or employee of a person or entity other than the board, selling or providing any investment product that would be considered an asset of the fund to any public retirement system in California.

This bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 22212.5 of the Education Code is amended to read:

22212.5. (a) Except as otherwise provided in subdivision (d), this section shall apply to the following positions in the system: chief executive officer, system actuary, general counsel, chief investment officer, and other investment officers and portfolio managers whose positions are designated managerial pursuant to Section 18801.1 of the Government Code.

(b) Notwithstanding Sections 19816, 19825, 19826, 19829, and 19832 of the Government Code, the board shall fix the compensation for the positions specified in subdivision (a). In so doing, the board shall be guided by the principles contained in Sections 19826 and 19829 of the Government Code, consistent with its fiduciary responsibility to its members to recruit and retain highly qualified and effective employees for these positions.

(c) When a position specified in subdivision (a) is filled through a general civil service appointment, it shall be filled from an eligible list based on an examination that was held on an open basis, and tenure in those positions shall be subject to the provisions of Article 2 (commencing with Section 19590) of Chapter 7 of Part 2 of Division 5 of Title 2 of the Government Code. In addition to the causes for action specified in that article, the board may take action under the article for causes related to its fiduciary responsibility to its members, including the employee's failure to meet specified performance objectives.

(d) An individual who held a position designated in subdivision (a), or was a member of the board, a deputy executive officer, or an assistant executive officer, shall not, for a period of two years after leaving that position, for compensation, act as agent or attorney for, or otherwise represent, any other person, except the state, by making any formal or informal appearance before or by making any oral or written communication

to the board, or any officer or employee thereof, if the appearance or communication is made for the purpose of influencing administrative or legislative action or any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, contract, or sale or purchase of goods or property.

SEC. 2. Section 7508.5 is added to the Government Code, to read:

7508.5. Except as otherwise provided in Section 20098 or 31528 of this code, or Section 22212.5 of the Education Code, an individual who was a member of the retirement board of a public pension or retirement system, as defined in subdivision (h) of Section 17 of Article XVI of the California Constitution, or an administrator, executive officer, investment officer, or general counsel of that board, shall not, for a period of two years after leaving that position, for compensation, act as agent or attorney for, or otherwise represent, any other person except the public entity maintaining that pension or retirement system, by making any formal or informal appearance before, or any oral or written communication to, the pension or retirement system, or any officer or employee thereof, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, contract, or sale or purchase of goods or property.

SEC. 3. Section 7513.8 is added to the Government Code, to read:

7513.8. As used in Sections 7513.85, 7513.9, and 7513.95:

(a) “Board” means the retirement board of a public pension or retirement system, as defined in subdivision (h) of Section 17 of Article XVI of the California Constitution.

(b) “External manager” means an asset management firm that is seeking to be, or has been, retained by a public retirement system in California to manage a portfolio of assets, including securities, for a fee.

(c) “Placement agent” means any person or entity hired, engaged, or retained by, or acting on behalf of, an external manager, or on behalf of another placement agent, as a finder, solicitor, marketer, consultant, broker, or other intermediary to raise money or investment from, or to obtain access to, a public retirement system in California, directly or indirectly, including, without limitation, through an investment vehicle.

SEC. 4. Section 7513.85 is added to the Government Code, to read:

7513.85. (a) The board shall develop and implement, on or before June 30, 2010, a policy requiring the disclosure of payments to placement agents in connection with system investments in or through external managers. The policy shall include, but not be limited to, the following requirements:

(1) Disclosure of the existence of relationships between external managers and placement agents.

(2) A resume for each officer, partner, or principal of the placement agent detailing the person’s education, professional designations, regulatory licenses, and investment and work experience.

(3) A description of any and all compensation of any kind provided, or agreed to be provided, to a placement agent.

(4) A description of the services to be performed by the placement agent.

(5) A statement whether the placement agent, or any of its affiliates, are registered with the Securities and Exchange Commission or the Financial Industry Regulatory Association, or any similar regulatory agent in a country other than the United States, and the details of that registration or explanation as to why no registration is required.

(6) A statement whether the placement agent, or any of its affiliates, is registered as a lobbyist with any state or national government.

(b) Any external manager or placement agent that violates the policy shall not solicit new investments from the system for five years after the violation was committed. However, this prohibition may be reduced by a majority vote of the board at a public session upon a showing of good cause.

(c) The system shall not enter into any agreement with an external manager that does not agree in writing to comply with the policy.

(d) Nothing in this section shall require the board to take action as described in this section unless the board determines, in good faith, that the action described in this section is consistent with the fiduciary responsibilities of the board as described in Section 17 of Article XVI of the California Constitution.

SEC. 5. Section 7513.9 is added to the Government Code, to read:

7513.9. (a) Any placement agent, prior to acting as a placement agent in connection with any potential system investment, shall disclose to the board all campaign contributions made by the placement agent to any elected member of the board during the prior 24-month period. Additionally, any subsequent campaign contribution made by the placement agent to an elected member of the board during the time the placement agent is receiving compensation in connection with a system investment shall also be disclosed.

(b) Any placement agent, prior to acting as a placement agent in connection with any potential system investment, shall disclose to the board all gifts, as defined in Section 82028, given by the placement agent to any member of the board during the prior 24-month period. Additionally, any subsequent gift given by the placement agent to any member of the board during the time the placement agent is receiving compensation in connection with a system investment shall also be disclosed.

SEC. 6. Section 7513.95 is added to the Government Code, to read:

7513.95. A member or employee of the board shall not, directly or indirectly, by himself or herself, or as an agent, partner, or employee of a person or entity other than the board, sell or provide any investment product that would be considered an asset of the fund to any public retirement system in California.

SEC. 7. Section 20098 of the Government Code is amended to read:

20098. (a) The board shall appoint and, notwithstanding Sections 19816, 19825, 19826, 19829, and 19832 shall fix the compensation of an executive officer, a general counsel, a chief actuary, a chief investment officer, and other investment officers and portfolio managers whose positions are designated managerial pursuant to Section 18801.1.

(b) The executive officer, deputy executive officers, and the assistant executive officers may administer oaths.

(c) When fixing the compensation for the positions specified in subdivision (a), the board shall be guided by the principles contained in Sections 19826 and 19829, consistent with its fiduciary responsibility to its members to recruit and retain highly qualified and effective employees for these positions.

(d) When a position specified in subdivision (a) is filled through a general civil service appointment, it shall be filled from an eligible list based on an examination that was held on an open basis, and tenure in the position shall be subject to the provisions of Article 2 (commencing with Section 19590) of Chapter 7 of Part 2 of Division 5 of Title 2. In addition to the causes for action specified in that article, the board may take action under the article for causes related to its fiduciary responsibility to its members, including the employee's failure to meet specified performance objectives.

(e) An individual who held a position designated in subdivision (a), or was a member of the board, a deputy executive officer, or an assistant executive officer, shall not, for a period of two years after leaving that position, for compensation, act as agent or attorney for, or otherwise represent, any other person, except the state, by making any formal or informal appearance before, or any oral or written communication to, the Public Employees' Retirement System, or any officer or employee thereof, if the appearance or communication is made for the purpose of influencing administrative or legislative action or any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, contract, or sale or purchase of goods or property.

SEC. 8. Section 31528 of the Government Code is amended to read:

31528. (a) Unless permitted by this chapter, a member or employee of the board shall not become an endorser, surety, or obligor on, or have any personal interest, direct or indirect, in the making of any investment for the board, or in the gains or profits accruing from those investments. A member or employee of the board shall not directly or indirectly, for himself or herself, or as an agent or partner of others, borrow or use any of the funds or deposits of the retirement system, except to make current and necessary payments authorized by the board.

(b) A member or employee of the board shall not, directly or indirectly, by himself or herself, or as an agent or partner or employee of others, sell or provide any investment product that would be considered an asset of the fund, to any retirement system established pursuant to this chapter.

(c) An individual who held a position designated in Section 31522.3, 31522.4, or 31522.5, or was a member of the board or an administrator, shall not, for a period of two years after leaving that position, for compensation, act as agent or attorney for, or otherwise represent, any other person except the county, by making any formal or informal appearance before, or any oral or written communication to, the retirement system, or any officer or employee thereof, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or

any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, contract, or sale or purchase of goods or property.

SEC. 9. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to ensure that public pension board members, employees, and consultants conduct business to the highest ethical standard, comply with all fiduciary responsibilities, and actively work to eliminate actual or perceived conflicts of interest as soon as possible, it is necessary that this act take effect immediately.