QUESTIONS AND ANSWERS ON STATE AND LOCAL VARIATIONS ON THE SEC PAY-TO-PLAY RULE

Date: March 2017

Investment Management Alert

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Many states and municipalities have adopted laws and regulations that affect how investment managers may solicit investment advisory business, including investment in sponsored public and private funds, from the state agencies and municipalities that administer employee benefit plans and other state investment vehicles. This Q&A seeks to highlight some of the issues relating to soliciting business from, or doing business with, these instrumentalities and also seeks to explain some of the important differences between state and local laws and the SEC's pay-to-play rule under the Investment Advisers Act of 1940, Rule 206(4)-5.

Q1: WE ARE AN SEC-REGISTERED INVESTMENT ADVISER AND COMPLY WITH THE SEC PAY-TO-PLAY RULE. IF WE COMPLY WITH THE SEC RULE, MUST WE ALSO COMPLY WITH STATE AND MUNICIPAL LAWS RELATING TO PAY-TO-PLAY?

A1: Yes; the SEC pay-to-play rule does not preempt federal, state and local pay-to-play, lobbying and related requirements, and there are significant restrictions imposed by the federal government, states, municipalities, governmental pension plans and other authorities that often exceed SEC requirements.

Q2: WHO IS RESTRICTED UNDER STATE LAWS FROM MAKING POLITICAL CONTRIBUTIONS? ARE THEY THE SAME PERSONS THAT FALL WITHIN THE DEFINITION OF *COVERED ASSOCIATES* UNDER THE SEC RULE?

A2: There is no uniformity among jurisdictions as to who is covered by pay-to-play or similar restrictions against seeking to obtain government business by making campaign or other contributions to elected officials. Some state restrictions are more expansive than the SEC rule and may include, in addition to employees who solicit government entities, affiliates and third-party solicitors and marketers.

Q3: WE HAVE HEARD THAT THE SEC EXCEPTION FROM THE TWO-YEAR TIME-OUT LOOK-BACK (TO ONLY A SIX-MONTH LOOK-BACK FOR A NATURAL PERSON WHO JOINS AN ADVISER AND DOES NOT SOLICIT CLIENTS FOR THAT ADVISER) AND THE NATURAL PERSON *DE MINIMIS* DOLLAR CONTRIBUTION EXCEPTION (OF $350 PER ELECTION TO ANY ONE OFFICIAL FOR WHOM A

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PERSON IS ENTITLED TO VOTE OR $150 TO OTHER OFFICIALS) MAY BE DIFFERENT IN VARIOUS STATES; IS THAT RIGHT?

A3: Yes; these exemptions may not be available or may vary widely in detail, depending on the jurisdiction. For example:

- Connecticut looks back to the beginning of the previous election cycle – which, until the 2018 election, means a look-back to January 2011 – with no *de minimis* exemption with respect to contributions to candidates for state treasurer.

Q4: WHAT TYPES OF CONTRIBUTIONS ARE RESTRICTED UNDER STATE LAWS?

A4: Many state statutes and regulations are far more restrictive than the SEC rule (which applies to any gifts or other contributions of value made for the purpose of influencing any election for federal, state or local office). For example:

- Types of gifts covered –
  - Trustees, investment officers and employees in a position of investment discretion over a state retirement system are often prohibited from soliciting or accepting anything of value, including reimbursement of expenses, meals, entertainment and the like, and state statutes may contain detailed descriptions of what may or may not be included.
  - In many states, violation of gift statutes is a crime for both the recipient and the donor.
  - Many states have *de minimis* (i.e., less than $50; in some cases, less than $10) exceptions to gift prohibitions; some states have no *de minimis* exception. For example, In New York City, the Comptroller has implemented a policy prohibiting employees of the Comptroller's Office from accepting any gifts (including, but not limited to, meals and entertainment, loans, travel, hospitality or any other thing) whatsoever from any person or firm doing business or seeking to do business with the City.
- Purpose of contribution –
  - State laws typically prohibit contributions made for any purpose (not only for the purpose of influencing an election).

Q5: WHAT INDIVIDUALS IN GOVERNMENT ENTITIES ARE RESTRICTED FROM RECEIVING GIFTS OR CONTRIBUTIONS UNDER STATE LAWS?

A5: Once again, state laws vary from jurisdiction to jurisdiction and also vary from the SEC rule (which applies to any person – or that person's election committee – who is at the time of the contribution an incumbent, a candidate or a successful candidate for elective office directly or indirectly responsible for, or influential over, the hiring of an adviser, or with authority to appoint a person with that authority). For example:

- New Jersey regulates contributions to any candidate for governor or for a seat in the legislature, certain local officials and political parties in New Jersey.

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- Connecticut restricts contributions to any exploratory, candidate or political committee established by, or supporting or authorized to support, certain candidates for state office or a party committee (including a state central committee as well as town committees).
- Maryland requires disclosure of contributions to any state employee or official and any campaign finance committee that promotes the success or defeat of a candidate or political party and also covers such contributions that are related to a public question.

Q6: HOW DO STATE LAWS RESTRICT THE ACTIVITIES OF SOLICITORS AND PLACEMENT AGENTS?

A6: States and other jurisdictions restrict activities related to the hiring of third-party placement agents (regardless of the SEC rule's permitted use of certain registered solicitors) in various manners. In addition, certain plans may also adopt their own policies that go beyond the scope of any statutory restrictions. Examples include the following:

- Certain states prohibit paying any contingency fee in connection with investments by a public investment fund with an investment manager or in the manager's funds.
- Prohibitions usually apply to payments of contingency fees to third-party placement agents and may also apply to contingency fees paid to employees (in some cases, regardless of whether such employees are required to register as “lobbyists” in such state or locality).
- Non-contingent performance bonuses to employees may be permitted in some circumstances; for example, if a bonus is based upon the performance of the investment advisory firm as a whole and is not contingent upon the award of business by a state or local plan.
- Violation of a contingency fee prohibition could be a felony in certain states.
- Effective June 9, 2014, all five of the New York City Retirement Systems (“NYC Systems”) passed a resolution banning the use of use of placement agents across all investment classes.
- In addition, a private fund manager must disclose any placement agent fees paid in connection with securing commitments by other investors in a fund in which any of the NYC Systems invests.
- New York's governor has announced a permanent ban on the use of all placement agents, including in connection with investments by its largest retirement system, whether compensated on a flat fee, a contingent fee or any other basis.
- In February 2017, the Treasurer of the Commonwealth of Pennsylvania issued a directive prohibiting investment managers from using third-party placement agents for funds managed on behalf of the Commonwealth of Pennsylvania Treasury Department.

Q7: IS IT TRUE THAT OUR INVESTMENT MANAGEMENT ACTIVITIES COULD BE CONSIDERED LOBBYING UNDER STATE LAW?

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A7: Yes; certain activities related to contracting with a government entity for providing investment management services (or investing in a fund sponsored by the investment manager) may trigger state lobbyist registration considerations. For example:

- Many states have adopted lobbying laws that require individuals and entities who work for third-party placement agents, as well as certain employees of hedge fund managers, hedge funds, investment advisers and other investment managers, to register with those states as lobbyists.
- In these states, sales staff of third parties, as well as in-house sales and marketing personnel, are the most likely to be required to register.
- Ohio and California are among the states requiring lobbyist registration for investment management professionals, in certain circumstances.
- Examples of activities triggering lobbyist registration –
  - Ohio
    - "Lobbyist," in connection with a state retirement system, is defined as a person or entity whose main purpose on a "regular and substantial basis" is to influence the system's decisions by direct communications with board members, investment officials or any employee whose position involves substantial and material exercise of investment discretion.
  - California
    - Any placement agent (finders, solicitors, marketers, consultants, brokers or other intermediaries), including internal sales or marketing personnel that influence state pension plan investments, must register as a lobbyist, with limited exceptions.

Q8: IF LOBBYIST REGISTRATION IS REQUIRED, WHO IS REQUIRED TO REGISTER?

A8: If registration is required, the person or entity required to register varies from jurisdiction to jurisdiction. For example, in some cases, the marketing employee who lobbies on behalf of an investment manager is required to register as a lobbyist, while in other cases, the investment manager entity registers as a lobbyist and may be required to list marketing employees who lobby on behalf of the investment manager on the investment manager's registration statement.

Q9: ARE THERE COMMON EXEMPTIONS FROM STATE LOBBYING REGISTRATION REQUIREMENTS THAT WE MIGHT RELY ON?

A9: Yes; if a state requires an investment manager or placement agent to register as a lobbyist in order to solicit business from a state agency or plan, they may also provide for exemptions. Common exemptions from registration as a lobbyist that exist in some states include the following:

- *De minimis* exemptions are fairly common where an individual has not been compensated for his or her lobbying activities, and has not expended funds on such lobbying activities, above set thresholds. *De minimis* thresholds vary significantly from state to state.

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- *De minimis* exceptions may apply in some states when an individual spends only a minimal amount of his or her time on lobbying activities.
- Participation in a state competitive bid and/or request for proposal process may be an exempted activity.

Q10: WHAT ARE THE CONSEQUENCES OF REGISTERING WITH A STATE AS A LOBBYIST?

A10: Common requirements that apply to state registered lobbyists include the following:

- Ongoing reporting requirements for individual lobbyists and their employers.
- Ethics training.
- Prohibition on contingency fees (i.e., based on an award of an advisory contract or an investment in a fund) in some states.
- Filing of a written a placement agent and/or lobbyist agreement (or summary of such an agreement, if oral).
- Payment of registration fees.
- Reporting of information such as compensation, lobbying expenditures, gifts and entertainment to public officials or political contributions.

Q11: WHAT ARE THE CONSEQUENCES OF FAILING TO REGISTER WITH A STATE AS A LOBBYIST?

A11: Potential consequences may include:

- Possible cancellation of the contract between the investment manager and the state entity.
- Failure to comply with a state or municipal lobbying statute can result in a fine and, in some cases, may rise to a misdemeanor.
- Possibly triggering “bad actor” disqualification:
  - Pursuant to the Dodd-Frank Act, the SEC adopted rules under Regulation D of the Securities Act that disqualify certain bad actors from relying on the Rule 506 safe harbor exemption from Securities Act registration.
  - A criminal conviction for failure to comply with state or local lobbying laws could be considered a “disqualifying event” for purposes of the SEC's rules, resulting in treatment as a “bad actor” for purposes of the Regulation D Rule 506 exemption

Q12: ARE THERE ANY ADDITIONAL STATE AND/OR PLAN-SPECIFIC DISCLOSURE REQUIREMENTS?

A12: Yes; state disclosure requirements are often broader than those under the SEC pay-to-play rule. Also, specific plans may have adopted their own policies in additional to any applicable state-level requirements.

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Investment managers doing business or seeking to do business with state plans may be required to make disclosures to state boards of ethics or state elections enforcement commissions or other agencies, in addition to making disclosures to the plans with whom they wish to do business, and the information disclosed may be publicly available (for example, posted online) in some circumstances.

Q13: WHERE AND/OR HOW DO WE FIND THE APPLICABLE STATE LAWS OR A PARTICULAR PLAN'S POLICIES?

A13: Applicable requirements appear in state and local statutes and regulations and often include formal and informal positions taken by municipalities, cities, counties and the state or local pension plans themselves. Sometimes positions appear in minutes of meetings of public officials or standardized contractual provisions or may only be clarified by direct communications with governing bodies. Many of these laws are in a state of flux and are subject to change.

Q14: WHAT ARE SOME OF THE STEPS WE SHOULD TAKE TO BE SURE WE ARE IN COMPLIANCE?

A14: Affirmative steps should be taken to monitor and achieve compliance with the various state and local requirements concerning lobbyist registration (including for internal marketing activities), placement agent use, political contributions and gifts and entertainment, including the following:

- Before accepting an engagement with any government entity, determine what laws, policies and disclosures apply to such an engagement, and whether current preclearance requests for political contributions, if approved, or any prior political contributions would preclude such engagement.
- Prior to hiring new employees, require disclosure of all political contributions and gifts and entertainment provided to state and local government officials.
- Identify the permissible political contribution and gift and entertainment thresholds applicable to your business and do not approve any political contributions or gifts and entertainment exceeding applicable thresholds.
- Update policies and procedures to require preclearance of all political contributions and gifts and entertainment, and do not approve any gifts and entertainment above a *de minimis* amount, which could be $0, depending on an investment manager's clientele.
- Review and update recordkeeping policies as necessary.
- Before marketing to a state or local plan, determine whether registration as a lobbyist and/or lobbyist employer is required.
- Prior to engaging a placement agent to contact a particular state or local plan on your behalf, confirm that the use of placement agents or payment of fees to placement agents is not prohibited by state or local law or by a plan's own policies.

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Q15: HAS INFORMATION ALREADY BEEN COMPILED SETTING FORTH THE REQUIREMENTS RELATING TO VARIOUS STATE AND LOCAL PLANS?

A15: As of the date of this Q&A, K&L Gates LLP attorneys have researched requirements relating to the following state and local plans, and in certain cases, entities that administer state and/or local plans, with respect to multiple issues: pay-to-play; campaign contributions; lobbying; use of placement agents; and gifts and entertainment, including any pre-contractual disclosure requirements, ongoing contractual disclosure requirements and penalties for violating these requirements:

State	Plan or Entity
Alaska	▪ Alaska Retirement Management Board (which serves as the trustee of the assets of the Public Employees' Retirement System, Teachers' Retirement System and five other state plans)
Arizona	▪ Arizona State Retirement System ▪ Arizona Public Safety Personnel Retirement System ▪ City of Phoenix Employees Retirement System
California	▪ Alameda County Employees Retirement Association ▪ Alameda-Contra Costa Transit District Retirement System ▪ Bay Area Rapid Transit (BART) Investment Plans Committee (which administers BART's Deferred Compensation Plan and Money Purchase Pension Plan) ▪ California Public Employees' Retirement System ▪ California State Teachers' Retirement System ▪ Contra Costa County Employees Retirement Association ▪ Contra Costa Water District Retirement Plan ▪ East Bay Municipal Utility District Retirement System ▪ Fresno City Employees Retirement System ▪ Fresno City Fire and Police Retirement System ▪ Fresno County Employees Retirement Association ▪ Imperial County Employees Retirement System ▪ Kern County Employees Retirement Association ▪ Los Angeles City Deferred Compensation Plan

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	▪ Los Angeles City Employees Retirement System ▪ Los Angeles City Fire and Police Pension Fund ▪ Los Angeles City Water and Power Employees Retirement Plan ▪ Los Angeles County Employees Retirement Association ▪ Marin County Employees Retirement Association ▪ Mendocino County Employees Retirement Association ▪ Merced County Employees Retirement Association ▪ Oakland Municipal Employees Retirement System ▪ Oakland Police and Fire Retirement System ▪ Orange County Employees Retirement System ▪ Sacramento County Employees Retirement System ▪ San Bernardino County Employees Retirement Association ▪ San Diego City Employees Retirement System ▪ San Diego County Employees Retirement Association ▪ San Francisco Employees Retirement System ▪ San Joaquin County Employees Retirement Association ▪ San Jose Federated City Employees Retirement System ▪ San Jose Police and Fire Department Retirement Plan ▪ San Luis Obispo County Pension Trust ▪ San Mateo County Employees Retirement Association ▪ Santa Barbara County Employees Retirement System ▪ Sonoma County Employees Retirement Association ▪ Stanislaus County Employees Retirement Association ▪ Tulare County Employees Retirement Association ▪ University of California Retirement Plan (UC Regents) ▪ Ventura County Employees Retirement Association
Colorado	▪ Colorado Public Employees' Retirement Association

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	▪ Fire and Police Pension Association of Colorado
Connecticut	▪ Connecticut Retirement Plans and Trust Funds (which consist of the State Employees' Retirement Fund, Teachers' Retirement Fund, Municipal Employees' Retirement Fund, Probate Court Retirement Fund, Judges' Retirement Fund, the State's Attorneys' Retirement Fund and eight state trust funds)
Florida	▪ Florida State Board of Administration (which manages the Florida Retirement System Pension Plan, the Florida Retirement System Investment Plan and four other state investment funds)
Illinois	▪ Illinois Municipal Retirement Fund ▪ Teachers' Retirement System of the State of Illinois ▪ Illinois State Board of Investment ▪ Chicago Laborers' and Retirement Board Employees' Annuity and Benefit Fund ▪ County Employees' and Officers Annuity Benefit Fund of Cook County ▪ Forest Preserve District Annuity and Benefit Fund of Cook County ▪ Metropolitan Water Reclamation District Retirement Fund ▪ Municipal Employees' Annuity and Benefit Fund of Chicago ▪ Park Employees' Annuity and Benefit Fund ▪ Policemen's Annuity and Benefit Fund of Chicago ▪ Public School Teachers' Pension and Retirement Fund of Chicago ▪ State Universities Retirement System of Illinois
Idaho	▪ Public Employee Retirement System of Idaho
Indiana	▪ Indiana Public Employees' Retirement Fund ▪ Indiana Teachers' Retirement Fund
Kentucky	▪ Kentucky Retirement Systems (which consist of Kentucky Employees Retirement System, State Police Retirement System and County Employees Retirement System) ▪ Kentucky Teachers' Retirement System

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Louisiana	▪ Louisiana State Employees' Retirement System ▪ Parochial Employees Retirement System of Louisiana ▪ Teachers' Retirement System of Louisiana
Maine	▪ Maine Public Employees Retirement System
Maryland	▪ Maryland State Retirement and Pension System
Massachusetts	▪ Massachusetts Pension Reserves Investment Trust Fund (which is supervised by the Pension Reserves Investment Management Board, or MassPRIM) ▪ Massachusetts Public Employee Retirement Administration Commission (which oversees over 100 public pension systems in Massachusetts, including municipal pension systems)
Michigan	▪ General Retirement System of the City of Detroit ▪ Michigan Department of Treasury, Bureau of Investments (which manages assets of the State of Michigan Retirement Systems)
Minnesota	▪ University of Minnesota
Mississippi	▪ Public Employees Retirement System of Mississippi
Missouri	▪ City of St. Louis Employees Retirement System ▪ Missouri Department of Transportation and Highway Patrol Employees' Retirement System ▪ Missouri State Employees Retirement System ▪ Missouri Local Government Employees Retirement System ▪ Public School Retirement System of Missouri
Montana	▪ Montana Board of Investments
New Hampshire	▪ New Hampshire Retirement System
New Jersey	▪ Division of Investment of the New Jersey Department of Treasury (which manages all of the New Jersey state pension funds)
New Mexico	▪ New Mexico Educational Retirement Board ▪ New Mexico Public Employees Retirement Association

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	▪ New Mexico State Investment Office (which manages the New Mexico Permanent Trust Funds, as well as investments for 17 other governmental clients)
New York State	▪ New York State Common Retirement Fund (which holds assets of the New York State and Local Police and Fire Retirement System and the New York State and Local Employees' Retirement System) ▪ New York State Teachers' Retirement System
New York City	▪ New York City Board of Educational Retirement System ▪ New York City Employees' Retirement System ▪ New York City Fire Department Pension Fund ▪ New York City Police Pension Fund ▪ New York City Teachers' Retirement System
North Carolina	▪ Investment Management Division of the Department of the State Treasurer of North Carolina (which manages the assets of the Teachers' and State Employees' Retirement System, the Consolidated Judicial Retirement System, the Firemen's and Rescue Workers' Pension Fund, the Local Governmental Employees' Retirement System, the Legislative Retirement System and the North Carolina National Guard Pension Fund)
Ohio	▪ Ohio Highway Patrol Retirement System ▪ Ohio Police & Fire Pension Fund ▪ Ohio Public Employees Retirement System ▪ School Employees Retirement System of Ohio ▪ State Teachers Retirement System
Oklahoma	▪ Oklahoma City Employees Retirement System ▪ Oklahoma Police Pension and Retirement System
Oregon	▪ Oregon State Treasury (which manages the Oregon Public Employees Retirement System)
Pennsylvania	▪ Pennsylvania Public School Employees' Retirement System ▪ Pennsylvania State Employees' Retirement System

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	▪ Philadelphia Board of Pensions & Retirement
Rhode Island	▪ Rhode Island State Investment Commission
South Carolina	▪ South Carolina Retirement System Investment Commission (which invests the assets of the South Carolina Retirement System, South Carolina Police Officers Retirement System, Retirement System for Judges and Solicitors of the State of South Carolina, Retirement System for Members of the General Assembly of the State of South Carolina and the National Guard Retirement System)
Tennessee	▪ Tennessee Consolidated Retirement System ▪ Tennessee Valley Retirement System
Texas	▪ The Teacher Retirement System of Texas ▪ The Employees Retirement System of Texas ▪ Texas Permanent School Fund ▪ Texas County & District Retirement System ▪ Fort Worth Employees Retirement Fund
Utah	▪ Utah Retirement System
Virginia	▪ Fairfax County Retirement Administration Agency (which manages the Employees' Retirement System, the Police Officers Retirement System and the Uniformed Retirement System) ▪ Virginia Retirement System
Washington	▪ Washington State Investment Board (which manages 17 retirement plans for public employees, teachers, school employees, law enforcement officers, firefighters and judges, including Public Employees' Retirement System, Teachers' Retirement System, School Employees' Retirement System, Law Enforcement Officers' and Fire Fighters' Retirement System, Washington State Patrol Retirement System, Public Safety Employees' Retirement System, Judges' Retirement Fund, Judicial Retirement System, Judicial Retirement Account and Deferred Compensation Program, and 22 other public funds)
West Virginia	▪ West Virginia Investment Management Board (which is responsible for the investment of the assets of the Public Employees' Retirement System, Teachers' Retirement System, State Police Retirement

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	System, Judges' Retirement System and 14 other plans)
Wisconsin	▪ Employees' Retirement System of the City of Milwaukee ▪ State of Wisconsin Investment Board (which invests assets on behalf of the Wisconsin Retirement System, the State Investment Fund and five state trust funds)
Wyoming	▪ Wyoming Retirement System (which consists of nine separate retirement programs: the Public Employees Pension System; the Warden, Patrol and DCI System; two Paid Firefighter systems; the Volunteer Fire Pension System; Volunteer Emergency Medical Technician Pension System; the Air Guard Firefighter Pension System; the Law Enforcement Pension System; and the Judicial Pension System)

In addition to the extensive research relating to the plans listed above, as of the date of this Q&A, K&L Gates LLP attorneys have researched specific issues (such as pay-to-play, campaign contributions, lobbying, use of placement agents and/or gifts and entertainment) relating to the following state and local plans, and in certain cases, entities that administer state and/or local plans:

State	**Plan or Entity**
Alabama	▪ Montgomery County Employees' Retirement System
Alaska	▪ Alaska Permanent Fund Corporation
Arkansas	▪ Arkansas Public Employees Retirement System ▪ Arkansas Teachers Retirement System
Delaware	▪ Delaware Public Employees' Retirement System
Florida	▪ Chief Investment Officer and Pension Administration Manager for the City of Jacksonville ▪ Jacksonville Police and Fire Pension Plan ▪ City of Miami Fire Fighters' and Police Officers' Retirement Trust ▪ Clearwater Employees' Pension Fund ▪ State of Florida Government Employees' Deferred Compensation Plan
Georgia	▪ Georgia Employees Retirement System ▪ Teachers' Retirement System of Georgia

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Hawaii	▪ Employees' Retirement System of the State of Hawaii
Iowa	▪ Iowa Public Employees' Retirement System
Kansas	▪ Kansas Public Employees Retirement System
Massachusetts	▪ Boston Retirement System
Minnesota	▪ University of Minnesota/University of Minnesota Foundation ▪ Minnesota State Board of Investment
Nebraska	▪ Nebraska State Investment Council
North Dakota	▪ North Dakota State Investment Board
Pennsylvania	▪ Pennsylvania Municipal Retirement System
Rhode Island	▪ Employees Retirement System of Rhode Island (which consists of five retirement plans: State Employees, Public School Teachers Municipal Employees' Retirement System, Judicial Retirement Plan and State Police Retirement Plan)
Tennessee	▪ City of Nashville Pension System ▪ Metropolitan Government of Nashville and Davidson County
Texas	▪ Dallas Employees Retirement Fund ▪ Houston Municipal Employees Pension System ▪ Texas Municipal Retirement System ▪ Texas Treasury Safekeeping Trust Company
Vermont	▪ Vermont Pension Investment Committee
Washington, D.C.	▪ District of Columbia Retirement Board

Please feel free to contact the authors of this Q&A or your K&L Gates relationship lawyer if you have any questions relating to these requirements.

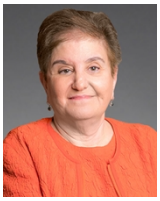
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