

February 13, 2011

Anita D. Stearns Mayo
Pillsbury Winthrop Shaw Pittman, LLP
50 Fremont Street
San Francisco, CA 94105-2228

Re: Your Request for Advice
Our File No. I-11-219

Dear Ms. Stearns Mayo:

This letter responds to your request for advice regarding the lobbying provisions of the Political Reform Act (the “Act”).¹ Please note that our review is limited to the provisions of the Act. Because your inquiry is general in nature and does not involve a specific client or transaction, we are treating your letter as a request for informal assistance.²

QUESTION

Do the Act’s provisions regarding placement agents, as added by Assembly Bill 1743 (“AB 1743”) and amended by Senate Bill 398 (“SB 398”) apply to individuals acting on behalf of a depository institution to offer investment grade commercial paper, time deposits, or certificates of deposit of such depository institution (or an affiliate) to a California public pension or retirement system board?

CONCLUSION

Based on and limited to your facts, the sections of the Act added by AB 1743 and amended by SB 398 do not apply to a bank offering its investment grade commercial paper, time deposits, or certificates of deposit to a California public retirement system.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

FACTS

You represent several (unnamed) large foreign depository institutions that have California branches. These foreign depository institutions are regulated by their home countries and must be approved by the Federal Reserve Board (“FRB”) before establishing branches in the United States. The FRB must first determine whether the foreign depository institution’s home country has a regulatory system comparable to the federal bank system of regulation in the United States. Once the branches are approved, the California Department of Financial Institutions (“DFI”) and the FRB license, supervise, and perform examinations of these branches.

Banks routinely offer to sophisticated investors, including CalSTRS and CalPERS, the banks’ (or their affiliates’) own commercial papers and the banks’ own time deposits and certificates of deposit. On a regular basis, the funding desks of such banks located at branches in California will contact investment officers of CalSTRS or CalPERS to determine whether CalSTRS or CalPERS would be interested in acquiring either such commercial paper or deposits. The commercial paper is issued pursuant to the exemption from registration with the Securities and Exchange Commission (“SEC”) found in Section 3(a)(3) of the Securities Act of 1933. As is required by the terms of Section 3(a)(3), the commercial paper has a maturity at the time of issuance not exceeding nine months; consistent with the interpretations of the SEC, the issuance of the commercial paper arises out of a current transaction or the proceeds thereof are used for current transactions. In some cases, the commercial paper is technically issued by a finance subsidiary of the bank, but is fully guaranteed by the bank itself.

The commercial paper is rated as investment grade by leading credit rating agencies in the United States and the deposits, while not rated per se, in effect bear the issuing bank's investment grade rating. As is commonplace in the banking industry, deposits issued by the banks are often booked at an offshore branch of the bank, but are payable at the California branches of the banks. These activities by foreign banks are comparable to the funding activities of many of the largest United States financial institutions.

You ask whether the banks’ offering their own commercial papers and deposits to CalSTRS and CalPERS would be subject to the lobbying provisions and registration requirements under the Act.

ANALYSIS

The Legislature passed AB 1743 in 2010, which was effective as of January 1, 2011. Later in 2011, the Legislature passed an update to AB 1743, SB 398, which was effective as of October 9, 2011. It is those amended definitions in Sections 82025.3 and 7513.8 of the Government Code (found in SB 398) that apply to your clients’ situation.

AB 1743 made a key change to the Act that includes “placement agent” in the Act’s definition of “lobbyist.” The rules and regulations regarding lobbyists therefore now apply to

placement agents. AB 1743 codifies the policy of requiring certain disclosures of individuals who solicit the business of California public retirement systems. SB 398 amended the original bill to clarify and limit the types of instruments that would make one qualify as a placement agent or external manager (not all financial instruments fall within the new definitions). We are restricted to the language of the statutes presented in both bills, and analyze your situation on that basis.

The bills have added definitions that, when taken together, add context to whether a placement agent should register as a lobbyist. Below are the key definitions followed by an analysis of your facts.

External Manager, Section 82025.3

(a) “External manager” means either of the following:

(1) A person who is seeking to be, or is, retained by a state public retirement system in California or an investment vehicle to manage a portfolio of securities or other assets for compensation.

(2) 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 or an investment vehicle.

(b) For purposes of this section, “investment fund” has the same meaning as set forth in Section 7513.8.

(c) For purposes of this section, “investment vehicle” has the same meaning as set forth in Section 82047.3.

Investment Fund, Section 7513.8(c)

(1) “Investment fund” means a private equity fund, public equity fund, venture capital fund, hedge fund, fixed income fund, real estate fund, infrastructure fund, or similar pooled investment entity that is, or holds itself out as being, engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, owning, holding, or trading securities or other assets.

(2) Notwithstanding paragraph (1), an investment company that is registered with the Securities and Exchange Commission pursuant to the Investment Company Act of 1940 (15 U.S.C. Sec. 80a-1 *et seq.*) and that makes a public offering of its securities is not an investment fund.

Investment Vehicle, Section 7513(d)

“Investment vehicle” means a corporation, partnership, limited partnership, limited liability company, association, or other entity, either domestic or foreign, managed by an external manager in which a board is the majority investor and that is organized in order to invest with, or retain the investment management services of, other external managers.

Placement Agent, Section 82047.3³

(a) “Placement agent” means an individual directly or indirectly hired, engaged, or retained by, or serving for the benefit of or on behalf of, 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 or an investment vehicle either of the following:

(1) In the case of an external manager within the meaning of paragraph (1) of subdivision (a) of Section 82025.3, the investment management services of the external manager.

(2) In the case of an external manager within the meaning of paragraph (2) of subdivision (a) of Section 82025.3, an ownership interest in an investment fund managed by the external manager.

Applying the definitions above will determine whether a person must register as a lobbyist.

Is there a placement agent? To qualify as a placement agent, a person must 1) be hired or serving an external manager, or an investment fund managed by an external manager, and 2) act for compensation in connection with the offer or sale to a Board or an investment vehicle of an ownership interest in a fund managed by the external manager. Stopping there, to qualify as a placement agent, there must be an external manager.

Is there an external manager? An external manager is either a person who is or is seeking to be retained by a state public retirement system in California or an investment vehicle *to manage a portfolio of securities or other assets* for compensation or a person who manages an investment fund and who offers or sells an ownership interest in the investment fund to a state public retirement system or investment vehicle.

Your clients, foreign banks with California affiliates, would like to offer investment grade commercial papers, time deposits, or certificates of deposit to the California state public retirement systems. The banks are not offering to manage a portfolio of securities or other assets, e.g. real estate, nor are they offering to sell an ownership interest in an

³ Exceptions to the definition of placement agent are found in 82047.3(b) and (c), attached.

investment fund (as defined). Here, the banks are not providing any advisory function. The banks are issuing their own commercial papers and time deposits and offering these to California state public retirement systems. Based on the definitions above, your clients are not external managers. For this reason, their marketing staff are not placement agents.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Heather M. Rowan
Counsel, Legal Division

HMR:jgl