

Client Alert

A report
for clients
and friends
of the Firm May 5, 2009

Probe into Placement Agent Practices Expands

This past Friday, New York Attorney General Andrew Cuomo made two announcements regarding his expanding investigation of the pension fund industry. First, in a press release on the Attorney General's web site [<http://www.oag.state.ny.us/>], Cuomo announced that his office has issued more than 100 subpoenas to investment firms and their placement agents with respect to investments made by the New York Common Retirement Fund (NYCRF) and various New York City public pension plans. Over the past few weeks, Cuomo's office has issued a 123-count indictment against two aides of former New York Comptroller Alan Hevesi (accompanied by an SEC civil complaint); charged the former head of a state political party with receiving illegal payments; and induced a felony guilty plea by a former hedge fund manager.

A particular focus of this new stage of the investigation, which Attorney General Cuomo has been coordinating with the SEC, appears to be the use of unregistered placement agents to secure business from New York state and local pension plans. With few exceptions, placement agents are required to be federally registered as broker-dealers under the Securities Exchange Act of 1934 (or associated with an entity so registered) and under the laws of the states in which they solicit potential investors.

In addition, both NYCRF and the New York City Employee Retirement System (NYCERS) have announced prohibitions on the future use of placement agents to secure investments from the plans. The Illinois legislature has passed legislation effectively prohibiting interaction between its state retirement plans and placement agents. In New Mexico,

Governor Bill Richardson has signed legislation requiring investment managers seeking investments from the state's public pension plans to disclose the use of placement agents. The California Public Employees Retirement System (CalPERS), with more than \$177 billion in investments, has adopted a policy requiring disclosure of the use of placement agents. And yesterday, Connecticut Treasurer Denise Nappier announced that all fund of funds managers will be required to provide additional disclosure of third-party payments made in connection with investments on behalf of the Connecticut Retirement Plans and Trust Funds, with such disclosure to be publicly available.

Second, also this past Friday, Cuomo briefed representatives of 35 state attorney general's offices on the progress of his pension fund investigation. These officials have "decided to create a multi-state task force to explore pension fund abuse so states can share vital information to prosecute wrongdoing and facilitate nationwide reform." See [<http://www.oag.state.ny.us/>]. This raises the specter that investigations on the use of placement agents to solicit public pension plans will take on a nationwide scale.

Investment managers that have used placement agents in the past with respect to public plan investments, or that may engage placement agents in the future, should ensure that written placement agent agreements contain comprehensive representations and covenants by the agent regarding registration, disclosure and compliance with all applicable laws. Investment managers should also be alert to their disclosure obligations, which may vary depending on the state or the particular pension fund. In addition, to conform with best practices, investment managers should consistently perform and document appropriate due diligence regarding a potential placement agent's registration, investment licenses and background.

We will keep our clients informed of further developments and evolving best practices in this regard. If you have any specific questions concerning these matters, please feel free to contact your Proskauer Rose lawyer. In addition, please feel free to contact any of the Proskauer Rose lawyers listed below.

Sarah Gold

(Co-Chair Securities Litigation and Enforcement Group)

New York

212.969.3370 – sgold@proskauer.com

Robert Cleary

(former US Attorney in Illinois and New Jersey)

New York

212.969.3340 – rcleary@proskauer.com

Scott Harshbarger

(former Massachusetts Attorney General)

Boston

617.526.9632 – sharshbarger@proskauer.com

Kathy Rocklen

(Co-Chair Financial Service Group)

New York

212.969.3755 – krocklen@proskauer.com

Dietrich Snell

(former NY Deputy Attorney General)

New York

212.969.3830 – dsnell@proskauer.com

Ronald Wood

(formerly with the SEC's Division of Enforcement)

Los Angeles

310.284.5660 – rwood@proskauer.com

**BOCA RATON • BOSTON • CHICAGO • HONG KONG • LONDON • LOS ANGELES
NEWARK • NEW ORLEANS • NEW YORK • PARIS • SÃO PAULO • WASHINGTON, D.C.**

Client Alert

Proskauer's Private Investment Funds Group comprises more than 100 lawyers and advises clients worldwide on all of the legal and business issues important to private equity and hedge funds and their managers, including structuring investment vehicles of all types, portfolio company investments, institutional investor representation and secondary purchases and sales.

Please feel free to call any of the Proskauer lawyers listed below at any time if you have additional questions, or if we can be of additional assistance with the issues raised in this alert.

New York

Christopher M. Wells

212.969.3600 – cwells@proskauer.com

Ira G. Bogner

212.969.3947 – ibogner@proskauer.com

Timothy M. Clark

212.969.3960 – tclark@proskauer.com

Stephen A. Devaney

212.969.3262 – sdevaney@proskauer.com

Bruce L. Lieb

212.969.3320 – blieb@proskauer.com

Amanda H. Nussbaum

212.969.3642 – anussbaum@proskauer.com

Charles H. Parsons

212.969.3254 – cparsons@proskauer.com

Marc A. Persily

212.969.3403 – mpersily@proskauer.com

Los Angeles

Raj Tanden

310.284.4567 – rtanden@proskauer.com

London

Matthew D.J. Hudson

44.20.7016.3601 – mhudson@proskauer.com

Mary B. Kuusisto

44.20.7016.3611 – mkuusisto@proskauer.com

William Yonge

44.20.7016.3680 – wyonge@proskauer.com

Paris

Olivier Dumas

33.1.53.05.69.17 – odumas@proskauer.com

Daniel Schmidt

33.1.53.05.68.30 – dschmidt@proskauer.com

Boston

Robin A. Painter

617.526.9790 – rpainter@proskauer.com

David W. Tegeler

617.526.9795 – dtegeler@proskauer.com

Laurier W. Beaupre

617.526.9759 – lbeaupre@proskauer.com

Howard J. Beber

617.526.9754 – hbeber@proskauer.com

Daniel P. Finkelman

617.526.9755 – dfinkelman@proskauer.com

Sean J. Hill

617.526.9805 – shill@proskauer.com

David T. Jones

617.526.9751 – djones@proskauer.com

Scott S. Jones

617.526.9772 – sjones@proskauer.com

Arnold P. May

617.526.9757 – amay@proskauer.com

Stephen T. Mears

617.526.9775 – smears@proskauer.com

Malcolm B. Nicholls III

617.526.9787 – mnicholls@proskauer.com

Jamie E. Poindexter

617.526.9773 – jpoindexter@proskauer.com

Hong Kong

Joseph Cha

852.3410.8033 – jcha@proskauer.com

Ying Li

852.3410.8088 – yli@proskauer.com

Proskauer Rose is an international law firm that handles a full spectrum of legal issues worldwide.

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

© 2009 PROSKAUER ROSE LLP. All rights reserved. Attorney Advertising.

You can also visit our Website at www.proskauer.com