

**LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS**

Bill Number: *CS/CS/SB 18, 218 & 238a

49th Legislature, 2nd Session, 2010

Tracking Number: .181830.1

Short Title: Changes to State Investment Bodies

Sponsor(s):

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**SENATE FINANCE COMMITTEE SUBSTITUTE FOR
SENATE RULES COMMITTEE SUBSTITUTE FOR SENATE BILLS 18, 218 & 238**

AS AMENDED

Senate Floor Amendment #1 creates a new section of the *Public Finances Act* that restricts receipt of gifts and campaign contributions as follows:

- **Except for gifts of food or beverage given in a place of public accommodation, consumed at the time of receipt, not exceeding \$50.00 for a single gift and not exceeding \$150.00 in a calendar year, the State Investment Officer, State Investment Council (SIC) members and employees of the council may not receive or accept anything of value directly or indirectly from a person who:**
 - **has a current contract with the SIC;**
 - **is a potential bidder, offeror, or contractor for the provision of services or personal property to the SIC;**
 - **is authorized to invest public funds pursuant to state or federal law or is an employee or agent of such a person; or**
 - **is an organization, association, or other entity having a membership that includes the above persons.**

- **No candidate in a primary or general election for a position that qualifies the person for ex-officio SIC membership and no ex-officio SIC member may accept campaign contributions valued at more than \$25.00 from a person who:**
 - **has a current contract with the council;**
 - **is a potential bidder, offeror, or contractor for the provision of services or personal property to the council;**
 - **is authorized to invest public funds pursuant to state or federal law or is an employee or agent of such a person; or**
 - **is an organization, association, or other entity having a membership that includes the above persons.**

Original Bill Summary:

CS/SB 18, 218 & 238 amends current law to change the composition of the State Investment Council (SIC). Substantive provisions of the bill are listed by section as follows:

Section 1:

- removes from the SIC:
 - the Governor;
 - three public members appointed by the Governor with the advice and consent of the Senate;
 - the State Investment Officer; and
 - the chief financial officer of a state institution of higher education appointed by the Governor with the advice and consent of the Senate; and
- includes on the SIC:
 - one public member appointed by the President Pro Tempore of the Senate with advice and consent of the Senate;
 - one public member appointed by the Minority Floor Leader of the Senate with the advice and consent of the Senate;
 - one public member appointed by the Speaker of the House of Representatives with the advice and consent of the Senate;
 - one public member appointed by the Minority Floor Leader of the House of Representatives with the advice and consent of the Senate; and
 - three members appointed by the Governor, with no more than two from the same political party, and with the advice and consent of the Senate;
- requires the SIC to select a chair and vice chair from its membership; and
- provides that a majority of the council's membership constitutes a quorum.

Section 2:

- requires that the public members have no less than 10 years experience in the field of investment or finance;
- permits the removal from the council of public members by the appointing person or entity for failure to attend three consecutive meetings or other causes;
- prohibits members of the council, for two calendar years prior to their appointment to the council and for two calendar years after the end of the term for which the member was appointed, from having had any contracts to do business with:
 - the SIC;
 - the Investment Office;
 - the Office of the State Treasurer;
 - the Educational Retirement Board (ERB);
 - the Public Employees Retirement Association (PERA);
 - the New Mexico Finance Authority (NMFA); or
 - the State Board of Finance; and

- changes references to the *Conflicts of Interest Act* to references to the *Governmental Conduct Act*.

Section 3: Requires the council, and not the Governor, to appoint the State Investment Officer.

Section 4:

- transfers investment powers to the SIC, rather than the State Investment Officer; but
- provides that the SIC may delegate administrative functions and duties to the State Investment Officer.

Section 5:

- provides for powers and duties of the SIC and the State Investment Officer, including:
 - authorizing the SIC to make purchases, sales, exchanges, investments, and reinvestments of the assets of all funds in accordance with the *Uniform Prudent Investor Act*;
 - making the SIC (in addition to the State Investment Officer) trustees of all funds under their control;
 - requiring the SIC to provide an opportunity for public comment at its meetings and to publish advance notices of its meetings on the council’s website and in a newspaper of general circulation at least 10 days prior to the meeting;
 - providing that the SIC, the State Investment Officer, any person providing investment advice to the council or State Investment Officer for a fee or other compensation, and all persons exercising discretionary authority or control of funds under the management of the council are fiduciaries; and
 - authorizing the SIC to select and contract for the services of one or more custodian banks¹ for all funds under its management.

Section 6: Requires the monthly reports of the operations of the State Investment Office to:

- include a detailed summary of fees paid for each investment bought, sold, or exchanged, and a disclosure of contractor arrangements; and
- be published on the websites of the SIC, the Legislature, and the Department of Finance and Administration (DFA).

Section 7:

- amends the composition of the Private Equity Investment Advisory Committee to the SIC to provide that the three members with experience in finance and investment are appointed by the SIC, and not the Governor; and
- removes the provision authorizing the State Investment Officer to:
 - enter into contracts with investment advisors for private equity fund investments and film fund investments authorized by law and all other private equity investments; and

¹ The term “custodian bank” means a financial institution with the general fiduciary duties to manage, control, and collect the assets of an investment fund, including receiving all deposits and paying all disbursements as directed by staff, safekeeping of assets, coordination of asset transfers, timely settlement of securities transactions, and accurate and timely reporting of the assets by individual account and in total.

- pay budgeted expenses for the advisors from the assets of any fund administered under the supervision of the SIC.

Section 8: Provides cleanup language.

Section 9: Amends the authority of the Public Employee Retirement Association (PERA) Retirement Board to:

- authorize the board to make purchases, sales, exchanges, investments, and reinvestments of all funds; and employ contractors, advisors, or investment management services;
- permit the board to select and contract for the services of one or more custodian banks for all funds under the Retirement Board's management; and
- require the board to provide an opportunity for public comment at its meetings and to publish advance notices of its meetings on PERA's website and in a newspaper of general circulation at least 10 days prior to the meeting.

Section 10: Provides that PERA Retirement Board and any person providing investment advice to the Retirement Board for a fee or other compensation and all persons exercising discretionary authority or control of funds under the management of the retirement board are fiduciaries.

Section 11: Requires that the PERA Retirement Board:

- provide quarterly reports disclosing all contractor arrangements and detailing investment, reinvestment, purchase, sale and exchange transactions, and fees paid for each transaction and performance of the funds;
- publish the reports and PERA's written investment policy, including any amendments, on the websites of PERA, the Legislature, and DFA.

Section 12: Amends current law concerning public lands to require the SIC, rather than the State Investment Officer, to assume the responsibility for the Public Buildings at Capital Permanent Fund.

Section 13: Amends the *Educational Retirement Act of the Public School Code* to provide that, except for ex-officio members, Educational Retirement Board (ERB) members who fail to attend three consecutively scheduled meetings, unless in each case excused for cause by the board members in attendance, are considered to have resigned from the board. The board shall by resolution declare the office vacated as of the date of adoption of the resolution.

Section 14: Amends the *Educational Retirement Act* requiring the ERB to provide an opportunity for public comment at its meetings and to publish advance notices of its meetings on ERB's website and in a newspaper of general circulation at least 10 days prior to the meeting.

Section 15: Amends the *Educational Retirement Act* to provide that no candidate in a primary or general election for a position that qualifies the person for ex-officio ERB membership, no ex-officio ERB member; and no person who is a nominee for board membership may accept campaign contributions valued at more than \$25.00 from a person who:

- has a current contract with the board;
- is a potential bidder, offeror, or contractor for the provision of services or personal property to the board;

- is authorized to invest public funds pursuant to state or federal law or is an employee or agent of such a person; or
- is an organization, association, or other entity having a membership that includes the above persons.

Section 15 further requires, within 10 days after an election in which one or more ERB members are elected by an association, that all persons who were candidates for board membership in that election file a report with the ERB disclosing, by amount and specific source, all contributions to their respective campaigns, whether made:

- directly to the candidate;
- to a political action committee; or
- to some other entity supporting the candidate's election.

Within 60 days after the election, the ERB is required to publish the above reports.

Section 16: Amends the *Educational Retirement Act* to:

- authorize the ERB to employ contractors, advisors, or investment management services in any investment or reinvestment;
- require the ERB to:
 - provide quarterly reports disclosing all contractor arrangements and detailing investment, reinvestment, purchase, sale and exchange transactions, and fees paid for each transaction and performance of the fund; and
 - publish the reports and ERB's written investment policy, including any amendments, on the websites of the ERB, the Legislature, and DFA;
- provide that the ERB and any person providing investment advice to the board for a fee or other compensation and all persons exercising discretionary authority or control of funds under the management of the board are fiduciaries; and
- authorize the ERB to select and contract for the services of one or more custodian banks for all funds under the board's management.

Section 17: Creates a new section of the statutes concerning the investment of public money to require the SIC to appoint an Alternative Investment Advisory Committee for any separate alternative investment² asset class when the percentage of the portfolio invested by the SIC in that alternative investment asset class exceeds 10 percent of the total funds invested by the council.

The bill requires that an Alternative Investment Advisory Committee consist of five members, one of whom shall be the State Investment Officer and four of whom shall be appointed by the SIC.

- Of the members appointed to the committee by the council, at least one, but not more than two, shall be a member of the SIC and the remainder shall be public members.

² The term "alternative investment" means an asset class other than private equity investments as defined in Section 6-8-20 NMSA 1978, a traditional public equity or a fixed income mutual fund and includes New Mexico economic development investments, hedge funds, real estate, and real assets.

- All members appointed by the SIC must be qualified by competence, experience, and knowledge of the alternative investment asset class for which the advisory committee is created and shall have no less than five years of experience in the field of investment or finance.
- Public members shall be appointed for three-year terms, provided that the terms of the initial committee members shall be staggered so that the term of one member expires each year.
- Members shall serve until their successors are appointed. A vacancy occurring other than by expiration of term shall be filled in the same manner as the original appointment but only for the unexpired term.
- The SIC may dissolve the advisory committee when the percentage of the portfolio invested by the SIC in that alternative investment asset class falls below 5.0 percent of the total funds invested by the council for a period of more than one year.
- The advisory committee shall review and make recommendations to the SIC on its designated alternative investment asset class and shall advise the council in matters and policies related to such investments.
- Members of the advisory committee shall receive per diem and mileage as provided for nonsalaried public officers in the *Per Diem and Mileage Act* and shall receive no other compensation, perquisite, or allowance.
- The advisory committee shall elect a chair from among its members annually and may elect other officers as necessary. The committee shall meet upon the call of the chair.
- Members of the advisory committee are public employees within the meaning of the *Tort Claims Act* and are entitled to all immunity and indemnification provided under that act.
- A person shall not be a member of an advisory committee if any recommendation, action, or decision of the committee will or is likely to result in direct, measurable economic gain to that person or that person's employer.
- "Alternative investment" means an asset class other than private equity investments as defined in Section 6-8-20 NMSA 1978, a traditional public equity or a fixed income mutual fund and includes New Mexico economic development investments, hedge funds, real estate and real assets.

Section 18: Creates a new section of the *Public Employees Retirement Act* to require the Retirement Board to appoint an Alternative Investment Advisory Committee for any separate alternative investment asset class when the percentage of the portfolio invested by the Retirement Board in that alternative investment asset class exceeds 10 percent of the total funds invested by the board.

The provisions for the membership of the advisory committee are similar to those for the committee authorized in Section 17.

Section 19: Creates a new section of the *Educational Retirement Act* to require the ERB to appoint an Alternative Investment Advisory Committee for any separate alternative investment asset class when the percentage of the portfolio invested by the ERB in that alternative investment asset class exceeds 10 percent of the total funds invested by the board.

The provisions for the membership of the advisory committee are similar to those for the committee authorized in Section 17.

Section 20: Creates a temporary provision providing that, on the effective date of CS/SB 18, 218 & 238:

- the State Investment Officer and the Governor are no longer members of the SIC;
- the three public members serving on the SIC the day before the effective date of the bill shall continue to serve until their successors are appointed for an interim basis; and
- the chief financial officer of a state institution of higher education appointed by the Governor shall continue to serve until the officer's successor is appointed on an interim basis.

The temporary provision further provides for the transition of the SIC's membership upon the bill's effective date.

Section 21: The bill contains an emergency clause.

Fiscal Impact:

The Fiscal Impact Report (FIR) prepared by the Legislative Finance Committee (LFC) states the following concerning the bill's fiscal impact:

- Due to increased membership of the council and the addition of various alternative investment advisory committees, per diem reimbursement and committee/board related administrative costs will increase for each agency. However, these costs typically take up very little of an investment agency's budget; therefore, the additional operating impacts on the agency budgets are forecast to be relatively small.
- The bill may also have additional operating impact on SIC, ERB, and PERA because it grants each investment agency the ability to contract with its own custodial bank. None of these three agencies' operating budgets are funded with General Fund appropriations, and thus this provision would have no direct impact on the General Fund.
- Currently, the State Board of Finance (BOF) contracts with one custodial bank on behalf of all state investment agencies. Because the BOF is currently in the process of awarding a new four-year custodial bank contract, it is unclear if and when these additional operating impacts will be realized.

Substantive Issues:

The FIR prepared by LFC states the following substantive issues concerning the bill:

“Recently the state's investments have seen a great deal of turmoil both from a performance standpoint and a reputational standpoint. The bill attempts to address these issues by proposing a number of different changes to the ways in which investments are made including board makeup, investment decision making processes, and board member conduct. A variety of the proposals in the substitute are also included in an Independent Operating and Fiduciary Review (IOFR) performed by institutional investment advisor Ennis Knupp and Associates on behalf of the Legislative Council and BOF. There are a number of recommendations made in the IOFR which are not included in the substitute, but the proposed legislation does address a number of the review's points, including:

- board composition and influence;
- board member attendance and responsibility;

- the investment decision making process with respect to both traditional and alternative investments;
- the methodologies and procedures for appointing the State Investment Office, allowing the agencies to contract with their own custodial banks.

The bill analysis prepared by the SIC identifies the following substantive issues:

- Under existing SIC investment holdings, currently only one additional alternative investment committee would have to be created.
- Finding and appointing seven new SIC public members, as well as an undefined number of new alternative advisory committee members who are qualified and without conflict, and are willing to commit significant time and personal liability to an unpaid public service position will be a significant challenge.
- The bill provides that “...members of the Private Equity Investment Advisory Committee, ERB, PERA and Alternative Investment Advisory Committees are public employees within the meaning of the *Tort Claims Act* and are entitled to all immunity and indemnification provided under that act.” However, SIC notes, there does not appear to be any such protection for SIC members who may face legal action in the course of their duties on the council. In addition, it is unclear whether this is merely an oversight or whether it would be a specific exclusion under the law.

Related Bill(s):

CS/SB 246 *Public Employee Pension Contribution Increase*