



MEMORANDUM

TO: All Public Pension Clients

FROM: Ronald J. Cohen, Brent J. Chudachek and Richelle B. Levy
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RE: Recent Important Public Pension Legislation

The Governor signed into law new legislation, which revises the rules governing investments made by public pension plans in Florida. The law was signed May 2, 2023, takes effect July 1, 2023 and is codified in Ch. 2023-28, Laws of Florida. The new law relates to, “Government and Corporate Activism” and aims to eliminate the consideration of any factors in investment decisions other than “pecuniary factors.” The Legislation makes significant changes to numerous provisions of Florida law, but this Memorandum is limited to certain requirements for investing public pension money.

As you know, Florida has enacted a comprehensive legislative program regulating governmental pension plans. Many of these provisions are in Chapter 112, Part VII, which governs all local law pension systems in Florida and Chapter 175 and Chapter 185, which govern certain fire plans and police plans, respectively. The new law amends those Chapters.

Ch. 2023-28, Laws of Florida states that all investment decisions by public retirement plans must comply with the newly created Section 112.662. That new section provides in part that:

2) Notwithstanding any other law, when deciding whether to invest and when investing the assets of any retirement system or plan, only pecuniary factors may be considered and the interests of the participants and beneficiaries of the system or plan may not be subordinated to other objectives, including sacrificing investment return or undertaking additional investment risk to promote any nonpecuniary factor. The weight given to any pecuniary factor must appropriately reflect a prudent assessment of its impact on risk or returns.

Significantly, the law limits Trustees' considerations to "pecuniary factors," which when used as applying to investments by public pension systems is defined as:

a factor that the plan administrator, named fiduciary, board or board of trustees, prudently determines is expected to have a material effect on the risk of returns on that investment based on appropriate investment horizons consistent with the investment objectives and funding policies of the retirement system or plan. The term does not include the consideration of the furtherance of any social, political, or ideological interests.

New Fla. Stat. Section 112.662 also sets out rules governing when a public pension plan exercises shareholder rights, in essence providing that, "when deciding whether to exercise shareholder rights or when exercising such rights on behalf of a retirement system or plan, including the voting of proxies, only pecuniary factors may be considered and the interests of the participants and beneficiaries of the system or plan may not be subordinated to other objectives, including sacrificing investment return or undertaking additional investment risks to promote any non-pecuniary factors."

The new provisions require fiduciaries to invest solely based upon risk and return, and they may not, under any circumstance, consider non-pecuniary factors. Some people are referring to this Act as the ESG Law (standing for Environmental, Social and Governance), but note that in this section of the law, the word “environmental” is not used. However, it may be interpreted to be a part of social, political or ideological interests.

The law also requires that by December 15, 2023, and by December 15 for each odd numbered year thereafter, “each retirement system or plan shall file a comprehensive report detailing and reviewing the governance policies concerning decision-making and vote decisions and adherence to the fiduciary standards required of such retirement system or plan under this section, including the exercise of shareholder rights.”

At the time of writing this memorandum, the Department of Management Services (which is the Agency to which local governmental retirement plans must submit the comprehensive report), has not yet issued rules or guidance concerning the form of the report or the information that will be required to be included in the report. From some discussions that we have had with consultants and certain clients, it appears that the investment consultant will likely prepare this comprehensive report.

Following the submission of the comprehensive reports, the Department of Management Services must submit a summary report to the Governor, the Attorney General, the Chief Financial Officer, the President of the Senate and the Speaker of the House, summarizing the reports submitted and must identify any relevant trends among such systems or plans.

It also requires the Department of Management Services to report incidences of non-compliance to the Attorney General, who may institute proceedings to enjoin any persons found violating this section. If the Attorney General prevails, attorneys' fees can be assessed against the person that didn't comply. The Department of Management Services is specifically given authority to adopt rules concerning the comprehensive report and compliance.

The law will also require public pension plans to include certain language in contracts with investment managers executed, amended or renewed on or after July 1, 2023. The contracts will require that when the investment manager is making a written communication to a company in which the manager invests public funds on behalf of a pension plan, if such communication discusses social, political or ideological interests, or subordinates the interests of the company's shareholders to the interests of another entity, or advocates for the interest of an entity other than the company's shareholders, the following provision must be included:

The views and opinions expressed in this communication are those of the sender and do not reflect the views and opinions of the people of the State of Florida.

The required contractual language must also provide that if the investment manager does not include the disclaimer as required, the contract may be unilaterally terminated.

The law also makes changes in Chapter 112.661 concerning fiduciary standards for investments. The law largely adopts and incorporates the investment fiduciary standards of ERISA. The law on investment policies currently states that if there is any conflict between the law on investment policies and other laws on investments, the law on investment policies shall prevail. That provision has been amended, to provide that

if there is any conflict between the investment policy law and any other law, the law on investment policies still prevails, but the provisions required in this new law take precedence over any conflicting provision. All the provisions discussed in this memo are applicable to all local pension plans through Ch. 112, Part VII, including police and fire plans. Also, Chapters 175 and 185 have been amended with the same provision stating that the plans must comply with the new provisions of Fla. Stat. Sec. 112.662.

We will be discussing this law with each plan, and will keep you posted of significant developments in its implementation.