

SENATE BILL NO. 68  
INTRODUCED BY D. WANZENRIED  
BY REQUEST OF THE DEPARTMENT OF COMMERCE

ABILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR CONFIDENTIALITY OF CERTAIN ALTERNATIVE INVESTMENT INFORMATION SUBMITTED TO THE BOARD OF INVESTMENTS; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, alternative investments historically have involved keeping certain information confidential because confidentiality is essential to the success of the alternative investments, and disclosure of certain information may prevent the generation of sustainable and profitable rates of return for the investments of public funds; and

WHEREAS, recent litigation in other states has sought to require public pension funds and other public funds to disclose certain information about alternative investments; and

WHEREAS, inability to shield certain information as trade secrets of alternative investments may provide grounds for alternative investment funds to exclude participation by public funds, resulting in reduced investment returns; and

WHEREAS, participation in certain alternative investments helps to minimize risk by diversifying the state's pension fund portfolios and maximizing returns.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**NEW SECTION. Section 1. Definitions.** As used in [sections 1 through 3], the following definitions apply:

(1) "Alternative investment" means an investment in a private equity fund, private real estate fund, private venture capital fund, private hedge fund, or private absolute return fund.

(2) "Alternative investment manager" means the limited partnership, limited liability company, or similar legal structure through which the board invests in alternative investments.

(3) "Board" means the board of investments established in 2-15-1808.

(4) "Portfolio positions" means individual portfolio investments made by alternative investment managers.

(5) "Public fund" means those funds described in Article VIII, section 13, of the Montana constitution and

17-6-203.

(6) "Trade secret" has the meaning provided in 30-14-402.

NEW SECTION. **Section 2. Legislative findings and purpose.** (1) The intent of [sections 1 through 3] is to balance Article II, section 9, of the Montana constitution, which addresses the public's right to examine documents and observe the deliberations of all public bodies, with the ability of the board to exercise its fiduciary responsibility for prudent investment by recognizing that some investment information may be protected as a trade secret under the 5th and 14th amendments to the U.S. constitution as well as under Article II, sections 4 and 17, of the Montana constitution, which prohibit depriving a person of property, life, or liberty without due process of law. Through the findings in this section and the conditions in [section 3], the legislature seeks to limit Article II, section 9, to the extent of providing due process conditions necessary for trade secrets associated with alternative investments.

(2) [Section 3] and this section are not intended to reverse the general presumption of access and openness guaranteed under the Montana constitution and access to public writings as described in 2-6-102, but rely on the constitutional exemption to public disclosure granted generally to trade secrets.

(3) The legislature recognizes that the public has a paramount interest in knowing how public money is spent and invested but also recognizes the fiduciary responsibilities of the board, charged in Article VIII, section 13, of the Montana constitution with prudently investing public retirement system assets and state compensation insurance fund assets. The board also has a fiduciary duty to invest the assets of the state general fund, the permanent coal tax trust fund, and other public funds with care, skill, prudence, and diligence. This fiduciary duty includes diversifying the investment of assets in a manner that minimizes the risk of loss and maximizes the rate of return.

(4) The intent of [section 3] is to:

(a) clarify the type of alternative investment information that is protected from public disclosure as a trade secret under the 5th and 14th amendments to the U.S. constitution, as well as Article II, sections 4 and 17, of the Montana constitution;

(b) balance the public's right to access information about the board with the ability of the board to continue to invest in alternative investment funds in a manner that allows the public to monitor the cost and performance of public investments;

(c) address public concerns about conflicts of interest of public officials by making known the principals involved in management of alternative investment funds; and

(d) establish predictability about what can and cannot be disclosed regarding alternative investment funds so that the board may continue to invest in these funds without concerns about violating trade secrets.

**NEW SECTION. Section 3. Conditions for alternative investment trade secrets -- exceptions. (1)**

Except as provided in subsection (2), the following records regarding alternative investments in which public funds are invested by the board are trade secrets and may not be disclosed:

(a) due diligence materials that are proprietary to ~~the board~~ or the alternative investment manager, which would include the rationale for making individual portfolio investments;

(b) quarterly and annual financial statements of alternative investment funds;

(c) meeting materials of alternative investment managers;

(d) records containing information regarding the portfolio positions in which alternative investment funds invest;

(e) capital call and distribution notices; and

(f) alternative investment agreements and all related documents, EXCEPT AS PROVIDED IN SUBSECTIONS (2)(G) AND (2)(H).

(2) Information regarding alternative investments in which the board has invested is subject to disclosure and is not a trade secret exempt from disclosure if the information:

(a) is already in the public domain;

(b) has already been publicly released by the board or the alternative investment manager;

(c) relates to the name, address, and vintage year of each alternative investment fund;

(d) is the dollar amount of:

(i) the commitment made to each alternative investment fund by the board since the alternative investment fund's inception;

(ii) cash contributions made by the board to each alternative investment fund since the alternative investment fund's inception;

(iii) cash distributions received by the board from each alternative investment fund and recorded on a fiscal yearend basis;

(iv) cash distributions received by the board plus the remaining value of partnership assets attributable to the board's investment in each alternative investment fund and recorded on a fiscal yearend basis;

(v) the total management fees and costs paid on a fiscal yearend basis by the board to each alternative investment fund; and

(vi) the cash profit received by the board from each alternative investment fund on a fiscal yearend basis;

(e) is the net internal rate of return of each alternative investment fund since the alternative investment fund's inception; or

(f) is the investment multiple of each alternative investment fund since the alternative investment fund's inception;

(G) DESCRIBES ANY RESTRICTIONS ON WITHDRAWALS OF INVESTMENTS FROM EACH ALTERNATIVE INVESTMENT FUND;

(H) RELATES TO HOW THE PORTFOLIO WILL BE INVESTED AND PRICED AND BY WHOM AND, IF DISPUTED, HOW PRICING WILL BE VERIFIED;

(I) IS THE ALTERNATIVE INVESTMENT FUND'S PROSPECTUS; OR

(J) IS AUDIT RETURNS.

(3) SUBSECTION (1) DOES NOT APPLY TO THE POWERS AND DUTIES OF THE LEGISLATIVE AUDITOR UNDER TITLE 5, CHAPTER 13.

NEW SECTION. Section 4. Codification instruction. [Sections 1 through 3] are intended to be codified as an integral part of Title 17, chapter 6, and the provisions of Title 17, chapter 6, apply to [sections 1 through 3].

NEW SECTION. Section 5. Effective date. [This act] is effective on passage and approval.

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