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To: Senate Committees on Ways and Means and on Judiciary

From: Cheryl Kakazu Park, Director

Date: April 6, 2021, 10:00 a.m.
Via Videoconference

Re: Testimony on H.B. No. 930, H.D. 1, S.D. 1
Relating to Employees' Retirement System Investments

Thank you for the opportunity to submit testimony on this bill, which would exempt certain specific types of alternative investment fund information from disclosure under chapter 92F, the Uniform Information Practices Act (Modified) (UIPA). The Office of Information Practices (OIP) offers comments explaining its lack of objection to this bill.

OIP believes the exemption to public disclosure set out in this bill makes clear that the only documents being statutorily exempted from the UIPA are the specifically listed categories of documents relating to alternative investments, and does not allow room for an interpretation that the exemption might apply to records related to managing and investing Employees' Retirement System (ERS) funds generally. After setting out a list of categories of records that are statutorily exempted from the UIPA, the bill goes on to specify that the categorical exemption for those records is in addition to any other UIPA exceptions that may apply to ERS records. OIP believes this makes clear that ERS records not falling into one of the listed categories of exempt records may be withheld to the extent they fall under one of the UIPA's generally applicable exceptions to disclosure, but are not automatically exempted from disclosure.

OIP finds the listed categories of records relating to alternative investments that would be statutorily exempted by this bill reasonably limited and specific, and based on the explanation in the bill's purpose clause, consistent with the UIPA's generally applicable exceptions to disclosure. The records to be protected would likely fall under the UIPA's frustration exception to disclosure in any case, so this bill would not restrict public access to a type of records that have historically been public under the UIPA, and OIP recognizes that having a specific statutory exemption will give confidence to alternative investments that ERS will not be required to publicly release their confidential information.

Thank you for considering OIP's comments.

TESTIMONY BY THOMAS WILLIAMS
EXECUTIVE DIRECTOR, EMPLOYEES' RETIREMENT SYSTEM
STATE OF HAWAII

TO THE SENATE COMMITTEES ON WAYS AND MEANS AND THE JUDICIARY

ON

HOUSE BILL NO. 930, H.D. 1, S.D. 1

April 06, 2021
10:00 A.M.
Conference Room 211

RELATING TO THE EMPLOYEES' RETIREMENT SYSTEM INVESTMENTS

Chairs Dela Cruz and Rhoads, Vice Chairs Keith-Agaran and Keohokalole, and Members of the Committees,

H.B. 930, H.D. 1, S.D. 1 identifies certain specific types of alternative investment fund information, the disclosure of which would likely put the Employees' Retirement System ("ERS") at a competitive disadvantage, and therefore exempts such categories of information from disclosure under chapter 92F, Hawaii Revised Statutes (HRS), consistent with market best practices. With ERS' $14.6 billion unfunded liability and its 55.3% funded ratio, it is essential that ERS' assets be protected and its ability to be competitive in alternative private markets not be impaired. The ERS Board of Trustees strongly supports this legislation.

This bill amends section 88-103 to exempt certain specific types of alternative investment fund information from disclosure under chapter 92F. This will enable the ERS to efficiently maintain the confidentiality of information relating to alternative investments such as investments in private equity, private credit and private real estate funds, consistent with competitive investment market best practices. H.B. 930, H.D. 1, S.D. 1 addresses earlier concerns raised by the Civil Beat Law Center and with the assistance of the Office of Information Practices, restricts the documents which may be exempt from disclosure requirements of chapter 92F, HRS, while still ensuring that the system will not be disadvantaged as a competitive investor.

In order to address the system's unfunded liability and other financial needs, the system, as a prudent investor, engages in diversified investments, including private alternative investment funds. Due diligence into such investments

requires that the system invest time and money for detailed proprietary and confidential information and research regarding the projected performance of each fund. If the system is required to disclose such confidential information, the system is disadvantaged as a competitive investor.

General Partner and Limited Liability Corporations competing with those in which ERS invests, currently may access proprietary information and use this information to their advantage, diminishing the competitive position of those private funds in which we invest. Competing investors would be able to acquire, at no cost, the system's investment intelligence and that of the funds in which we invest, resulting in oversubscription of the system's best investments, reducing the system's access. Further, if the system is required to disclose confidential information which the investment funds require to be kept confidential, difficult to access high-performing funds will be deterred from allowing the system to invest with them. The system currently expends significant time and staff resources in responding to requests for such confidential information, which in turn is sold on the commercial markets.

H.B 930, H.D. 1, S.D. 1 identifies certain, specifically listed categories of alternative investment fund information the disclosure of which would likely put the system at a competitive disadvantage, and therefore categorically exempts such categories of information from disclosure under chapter 92F, consistent with market best practices. A byproduct is that investment staff will be allowed to focus its attention on ERS high value investment activities as opposed to information gathering and disclosure to commercial entities.

The ERS Board of Trustees is in strong support of this proposal.

Thank you for this opportunity to testify.

UNITE HERE! LOCAL 5 HAWAII

Eric W. Gill, Financial Secretary-Treasurer Gemma G. Weinstein, President Godfrey Maeshiro, Senior Vice President

April 5, 2021

Committee on Ways and Means, and
Senator Donovan Dela Cruz, Chair
Senator Gilbert Keith-Agaran, Vice Chair

Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice Chair

Testimony in strong opposition to HB 930

Chairs Dela Cruz and Rhoads and Members of the Committees:

UNITE HERE Local 5 is **strongly opposed to HB 930**. The Employees Retirement System fund is working people's money. Beneficiaries have struggled long and hard to ensure that they and their families can have the ability to retire with dignity. They have sacrificed other things they could have potentially negotiated in order to ensure that the retirement fund would be built. Working people deserve to be able to see what their money is being invested in, whether those investments are suitable to their needs and concerns, and whether those investments are sound. In order to do this, we must preserve transparency about these investments. This bill would remove some of that transparency with regard to private equity funds, hedge funds, and other alternative investments.

Private equity ("PE") firms in particular need to be closely monitored by the public. While all PE firms may not have engaged in the all of misdeeds listed below, the prevalence of these issues by some PE firms makes transparency/ public disclosure critical.

A 2016 report by the Center for Economic and Policy Research states:

> Private equity general partners (GPs) have misallocated PE firm expenses and inappropriately charged them to investors; have failed to share income from portfolio company monitoring fees with their investors, as stipulated; have waived their fiduciary responsibility to pension funds and other LPs; have manipulated the value of companies in their fund's portfolio; and have collected transaction fees from portfolio companies without registering as broker-dealers as required by law. **In some cases, these activities violate the specific terms and conditions of the Limited Partnership Agreements (LPAs) between GPs and their limited partner investors(LPs), while in others vague and misleading wording allows PE firms to take advantage of their asymmetric position of power vis-à-vis investors and the lack of transparency in their activities.** In addition, some of these practices violate the U.S. tax code. Monitoring fees are a tax deductible expense for the portfolio companies owned by PE funds and greatly reduce the taxes these companies pay. In many cases, however, no monitoring services are actually provided and the payments are actually dividends, which are taxable, that are paid to the private equity firm.[i] [emphasis added]

Further on, the report elaborates on fiduciary responsibility:

> Some Limited Partnership Agreements specifically state that private equity firms may waive their fiduciary responsibility towards their limited partners. This means that the general partner may make decisions that increase the fund's profits (and the GP's share of those profits —so-called carried interest) even if those decisions negatively affect the LP investors. This waiver has serious implications for investors, such as pension funds and insurance companies, which have fiduciary responsibilities to their members and clients. These entities violate their own fiduciary responsibilities if

they sign agreements that allow the PE firm to put its interests above those of its members and clients.[ii]

Concerns about private equity have not disappeared since 2016. In fact, on June 23, 2020, the SEC Office of Compliance Inspections and Examinations ("OCIE") issued a risk alert about several common practices in private equity. In the report's introduction, the OCIE notes:

> Many of the deficiencies discussed below may have caused investors in private funds ("investors") to pay more in fees and expenses than they should have or resulted in investors not being informed of relevant conflicts of interest concerning the private fund adviser and the fund.[iii]

Here are a few excerpts of the OCIE's report:

> "The [OCIE] staff observed private fund advisers that preferentially allocated limited investment opportunities to new clients, higher fee-paying clients, or proprietary accounts or proprietary-controlled clients, **thereby depriving certain investors of limited investment opportunities without adequate disclosure."**[iv] [emphasis added]

> "The staff observed private fund advisers that allocated securities at different prices or in apparently inequitable amounts among clients (1) without providing adequate disclosure about the allocation process or (2) in a manner inconsistent with the allocation process disclosed to investors, **thereby causing certain investors to pay more for investments or not to receive their equitable allocation of such investments."** [v] [emphasis added]

> "Advisers charged private fund clients for expenses that were not permitted by the relevant fund operating agreements, such as adviser-related expenses like salaries of adviser personnel, compliance, regulatory filings, and office expenses, **thereby causing investors to overpay expenses."** [vi] [emphasis added]

> "Advisers failed to comply with contractual limits on certain expenses that could be charged to investors, such as legal fees or placement agent fees, **thereby causing investors to overpay expenses."** [vii] [emphasis added]

> "**Advisers failed to follow their own travel and entertainment expense policies, potentially resulting in investors overpaying for such expenses."** [viii] [emphasis added]

> "*Valuation.* The staff observed private fund advisers that did not value client assets in accordance with their valuation processes or in accordance with disclosures to clients (such as that the assets would be valued in accordance with GAAP). In some cases, the staff observed that this failure to value a private fund's holdings in accordance with the disclosed valuation process **led to overcharging management fees and carried interest** because such fees were based on inappropriately overvalued holdings." [ix] [emphasis added]

Nor is this report the first time the OCIE has discussed issues within private equity. In a May 6, 2014 speech by then-director of the OCIE Andrew Bowden, he discussed the results of examinations the OCIE had been conducting on private equity advisers. Among other things, he stated:

> By far, the most common observation our examiners have made when examining private equity firms has to do with the adviser's collection of fees and allocation of expenses. When we have examined how fees and expenses are handled by advisers to private equity funds, we have identified what we believe are **violations of law or material weaknesses in controls over 50% of the time**.[x] [emphasis added]

And

> So … when we think about the private equity business model as a whole, without regard to any specific registrant, we see **unique and inherent temptations and risks** that arise from the ability to control portfolio companies, **which are not generally mitigated, and may be exacerbated, by broadly worded disclosures and poor transparency.**[xi] [emphasis added]

Beyond these issues related to the treatment of investors are issues about what private equity funds are invested in and how the funds make profits. For example, a November 2020 report issued by the Institute for Policy Studies discusses twelve examples of companies and billionaires whose wealth increased during the pandemic, including five private equity firms:

> In recent years, private equity firms and their billionaire backers have moved into sectors of the economy such as health care, grocery provision, and pet supply. **With their singular focus on aggressive cost cutting and profit extraction, these private firms are not oriented toward protecting their essential workers during a pandemic.** Among the "Delinquent Dozen" are several private equity firms that own or have large ownership stakes in multiple companies with essential workers. They could use their significant power and wealth to direct corporate managers to protect essential workers, but they have fallen short.[xii] [emphasis added]

The people deserve the right to information about private equity investments. Please reject HB 930.

Thank you.

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[i] "Fees, Fees and More Fees:How Private Equity Abuses Its Limited Partners and U.S. Taxpayers," Center for Economic and Policy Research, May 2016, pg. 1. https://cepr.net/images/stories/reports/private-equity-fees-2016-05.pdf

[ii] "Fees, Fees and More Fees:How Private Equity Abuses Its Limited Partners and U.S. Taxpayers," Center for Economic and Policy Research, May 2016, pg. 3. https://cepr.net/images/stories/reports/private-equity-fees-2016-05.pdf

[iii] Risk Alert, SEC Office of Compliance Inspections and Examinations, June 23, 2020, pg. 1. https://www.sec.gov/files/Private%20Fund%20Risk%20Alert_0.pdf

[iv] Risk Alert, SEC Office of Compliance Inspections and Examinations, June 23, 2020, pg. 2. https://www.sec.gov/files/Private%20Fund%20Risk%20Alert_0.pdf

[v] Risk Alert, SEC Office of Compliance Inspections and Examinations, June 23, 2020, pg. 2. https://www.sec.gov/files/Private%20Fund%20Risk%20Alert_0.pdf

[vi] Risk Alert, SEC Office of Compliance Inspections and Examinations, June 23, 2020, pg. 5. https://www.sec.gov/files/Private%20Fund%20Risk%20Alert_0.pdf

[vii] Risk Alert, SEC Office of Compliance Inspections and Examinations, June 23, 2020, pg. 5. https://www.sec.gov/files/Private%20Fund%20Risk%20Alert_0.pdf

[viii] Risk Alert, SEC Office of Compliance Inspections and Examinations, June 23, 2020, pg. 5. https://www.sec.gov/files/Private%20Fund%20Risk%20Alert_0.pdf

[ix] Risk Alert, SEC Office of Compliance Inspections and Examinations, June 23, 2020, pg. 5. https://www.sec.gov/files/Private%20Fund%20Risk%20Alert_0.pdf

[x] "Spreading Sunshine in Private Equity," speech by Andrew J. Bowden, Director, Office of Compliance Inspections and Examinations, at the Private Equity International (PEI), Private Fund Compliance Forum, May 6, 2014. https://www.sec.gov/news/speech/2014--spch05062014ab.html

[xi] "Spreading Sunshine in Private Equity," speech by Andrew J. Bowden, Director, Office of Compliance Inspections and Examinations, at the Private Equity International (PEI), Private Fund Compliance Forum, May 6, 2014. https://www.sec.gov/news/speech/2014--spch05062014ab.html

[xii] "Billionaire Wealth vs. Community Health: Protecting Essential Workers from Pandemic Profiteers," by the Institute for Policy Studies, Bargaining for the Common Good and United for Respect, November 2020, pg. 5.

HB-930-SD-1
Submitted on: 4/1/2021 9:56:41 PM
Testimony for WAM on 4/6/2021 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Gerard Silva	Individual	Oppose	No

Comments:

Every thing needs to be out front no back door Deals. We are watching evert thing . To many crooks in the Government!!