

HB 7161

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## CHAMBER ACTION

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1 The State Administration Council recommends the following:

2  
3 **Council/Committee Substitute**

4 Remove the entire bill and insert:

5  
6 A bill to be entitled

7 An act relating to a public records exemption for  
8 alternative investments; amending s. 215.44, F.S.;  
9 providing definitions; defining "proprietary confidential  
10 business information" and specifying information which  
11 does not constitute proprietary confidential business  
12 information; creating an exemption from public records  
13 requirements for proprietary confidential business  
14 information held by the State Board of Administration  
15 regarding alternative investments; providing for limited  
16 duration of the exemption; providing for retroactive  
17 application of the exemption; authorizing the inspection  
18 and copying of confidential and exempt records if the  
19 proprietor of the information fails to verify that a  
20 record contains certain information within a specified  
21 period of time; authorizing a court to order the release  
22 of confidential and exempt records upon making certain  
23 findings; providing for future review and repeal;

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24 | providing a statement of public necessity; providing an  
25 | effective date.

26 |

27 | Be It Enacted by the Legislature of the State of Florida:

28 |

29 | Section 1. Paragraph (c) is added to subsection (8) of  
30 | section 215.44, Florida Statutes, to read:

31 | 215.44 Board of Administration; powers and duties in  
32 | relation to investment of trust funds.--

33 | (8)

34 | (c)1. As used in this paragraph, the term:

35 | a. "Alternative investment" means an investment by the  
36 | State Board of Administration in a private equity fund, venture  
37 | fund, hedge fund, or distress fund or a direct investment in a  
38 | portfolio company through an investment manager.

39 | b. "Alternative investment vehicle" means the limited  
40 | partnership, limited liability company, or similar legal  
41 | structure or investment manager through which the State Board of  
42 | Administration invests in a portfolio company.

43 | c. "Portfolio company" means a corporation or other  
44 | issuer, any of whose securities are owned by an alternative  
45 | investment vehicle or the State Board of Administration and any  
46 | subsidiary of such corporation or other issuer.

47 | d. "Portfolio positions" means individual investments in  
48 | portfolio companies which are made by the alternative investment  
49 | vehicles, including information or specific investment terms  
50 | associated with any portfolio company investment.

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51 e. "Proprietor" means an alternative investment vehicle, a  
52 portfolio company in which the alternative investment vehicle is  
53 invested, or an outside consultant, including the respective  
54 authorized officers, employees, agents, or successors in  
55 interest, which controls or owns information provided to the  
56 State Board of Administration.

57 f. "Proprietary confidential business information" means  
58 information that has been designated by the proprietor when  
59 provided to the State Board of Administration as information  
60 that is owned or controlled by a proprietor; that is intended to  
61 be and is treated by the proprietor as private, the disclosure  
62 of which would harm the business operations of the proprietor  
63 and has not been intentionally disclosed by the proprietor  
64 unless pursuant to a private agreement that provides that the  
65 information will not be released to the public except as  
66 required by law or legal process, or pursuant to law or an order  
67 of a court or administrative body; and that concerns:

68 (I) Trade secrets as defined in s. 688.002.

69 (II) Information provided to the State Board of  
70 Administration regarding a prospective investment in a private  
71 equity fund, venture fund, hedge fund, distress fund, or  
72 portfolio company which is proprietary to the provider of the  
73 information.

74 (III) Financial statements and auditor reports of an  
75 alternative investment vehicle.

76 (IV) Meeting materials of an alternative investment  
77 vehicle relating to financial, operating, or marketing  
78 information of the alternative investment vehicle.

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79 |       (V) Information regarding the portfolio positions in which  
80 | the alternative investment vehicles invest.

81 |       (VI) Capital call and distribution notices to investors of  
82 | an alternative investment vehicle.

83 |       (VII) Alternative investment agreements and related  
84 | records.

85 |       (VIII) Information concerning investors, other than the  
86 | State Board of Administration, in an alternative investment  
87 | vehicle.

88 |       g. "Proprietary confidential business information" does  
89 | not include:

90 |       (I) The name, address, and vintage year of an alternative  
91 | investment vehicle and the identity of the principals involved  
92 | in the management of the alternative investment vehicle.

93 |       (II) The dollar amount of the commitment made by the State  
94 | Board of Administration to each alternative investment vehicle  
95 | since inception.

96 |       (III) The dollar amount and date of cash contributions  
97 | made by the State Board of Administration to each alternative  
98 | investment vehicle since inception.

99 |       (IV) The dollar amount, on a fiscal-year-end basis, of  
100 | cash distributions received by the State Board of Administration  
101 | from each alternative investment vehicle.

102 |       (V) The dollar amount, on a fiscal-year-end basis, of cash  
103 | distributions received by the State Board of Administration plus  
104 | the remaining value of alternative-vehicle assets that are  
105 | attributable to the State Board of Administration's investment  
106 | in each alternative investment vehicle.

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107        (VI) The net internal rate of return of each alternative  
108 investment vehicle since inception.

109        (VII) The investment multiple of each alternative  
110 investment vehicle since inception.

111        (VIII) The dollar amount of the total management fees and  
112 costs paid on an annual fiscal-year-end basis by the State Board  
113 of Administration to each alternative investment vehicle.

114        (IX) The dollar amount of cash profit received by the  
115 State Board of Administration from each alternative investment  
116 vehicle on a fiscal-year-end basis.

117        2. Proprietary confidential business information held by  
118 the State Board of Administration regarding alternative  
119 investments is confidential and exempt from s. 119.07(1) and s.  
120 24(a), Art. I of the State Constitution for 10 years after the  
121 termination of the alternative investment. This exemption  
122 applies to proprietary confidential business information held by  
123 the State Board of Administration before, on, or after October  
124 1, 2006.

125        3. Notwithstanding the provisions of subparagraph 2., a  
126 request to inspect or copy a record under s. 119.07(1) which  
127 contains proprietary confidential business information shall be  
128 granted if the proprietor of the information fails, within a  
129 reasonable period of time after the request is received by the  
130 State Board of Administration, to verify the following to the  
131 State Board of Administration through a written declaration in  
132 the manner provided by s. 92.525:

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133        a. That the requested record contains proprietary  
134 confidential business information and the specific location of  
135 such information within the record;

136        b. If the proprietary confidential business information is  
137 a trade secret, a verification that it is a trade secret as  
138 defined in s. 688.002;

139        c. That the proprietary confidential business information  
140 is intended to be and is treated by the proprietor as private,  
141 is the subject of efforts of the proprietor to maintain its  
142 privacy, and is not readily ascertainable or publicly available  
143 from any other source; and

144        d. That the disclosure of the proprietary confidential  
145 business information to the public would harm the business  
146 operations of the proprietor.

147        4. Any person may petition a court of competent  
148 jurisdiction for an order for the public release of those  
149 portions of any record made confidential and exempt by  
150 subparagraph 2. Any action under this subparagraph must be  
151 brought in Leon County, Florida, and the petition or other  
152 initial pleading shall be served on the State Board of  
153 Administration and, if determinable upon diligent inquiry, on  
154 the proprietor of the information sought to be released. In any  
155 order for the public release of a record under this  
156 subparagraph, the court shall make a finding that the record or  
157 portion thereof is not a trade secret as defined in s. 688.002,  
158 that a compelling public interest is served by the release of  
159 the record or portions thereof which exceed the public necessity  
160 for maintaining the confidentiality of such record, and that the

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161 release of the record will not cause damage to or adversely  
162 affect the interests of the proprietor of the released  
163 information, other private persons or business entities, the  
164 State Board of Administration, or any trust fund, the assets of  
165 which are invested by the State Board of Administration.

166 5. This paragraph is subject to the Open Government Sunset  
167 Review Act in accordance with s. 119.15 and shall stand repealed  
168 on October 2, 2011, unless reviewed and saved from repeal  
169 through reenactment by the Legislature.

170 Section 2. The Legislature finds that it is a public  
171 necessity that proprietary confidential business information  
172 held by the State Board of Administration regarding alternative  
173 investments be held confidential and exempt from s. 119.07(1),  
174 Florida Statutes, and s. 24(a), Art. I of the State Constitution  
175 for 10 years after the termination of the alternative  
176 investment. Disclosing proprietary confidential business  
177 information, including trade secrets as defined in s. 688.002,  
178 Florida Statutes, used in determining how private equity  
179 investments are made or managed by private partnerships  
180 investing assets on behalf of the State Board of Administration  
181 would negatively affect the business interests of private  
182 partnerships that rely heavily on their information advantage to  
183 generate investment returns, and competitor partnerships could  
184 gain an unfair competitive advantage if provided access to such  
185 information. Maintaining the information advantage of highly  
186 skilled private equity investment managers is necessary in order  
187 for the State Board of Administration to generate an adequate  
188 return from its assets committed to this high-risk segment of

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189 | the market, since only those managers having a strong  
190 | information advantage have generated adequate risk-adjusted  
191 | returns. Research shows that 60 percent of all private equity  
192 | partnerships have delivered a return less than that of the  
193 | lower-risk public markets. Only 30 percent of all private equity  
194 | partnerships have been able to produce the State Board of  
195 | Administration's required premium over public-market returns to  
196 | justify incurring the risks associated with these investments.  
197 | The ninth and tenth deciles of private equity managers are those  
198 | having a substantial information advantage and they have  
199 | generated sizable premiums over the public markets, with net  
200 | returns of 19.4 percent and 29.7 percent, respectively. The  
201 | Legislature finds that the exemption of proprietary confidential  
202 | business information used in or implying how private equity  
203 | investments are made or managed is necessary for the effective  
204 | and efficient administration of the State Board of  
205 | Administration's asset-management program. Assets of the Florida  
206 | Retirement System must grow rapidly in order to keep pace with  
207 | growth in the system's liabilities and to manage the costs of  
208 | employer contributions. In order to meet its investment  
209 | objectives, the State Board of Administration must invest in  
210 | diversified asset types, including high-return, high-risk  
211 | private equity partnerships. Those partnerships that have and  
212 | are able to maintain a substantial information advantage over  
213 | their competitors are likely to provide an adequate return. The  
214 | release of proprietary confidential business information,  
215 | including trade secrets, revealing how private equity  
216 | investments are made or managed could result in inadequate

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217 returns and ultimately frustrate attainment of the investment  
218 objective of the State Board of Administration, subsequently  
219 increasing contribution costs for employers in the Florida  
220 Retirement System and lowering the system's funded ratio. It is  
221 the Legislature's intent to allow the public access to  
222 sufficient information in order to be informed regarding the  
223 alternative investments of the State Board of Administration and  
224 to balance the public's right to information against the right  
225 of private business entities to be protected from harmful  
226 disclosure of confidential and exempt proprietary confidential  
227 business information, the disclosure of which would injure them  
228 in the marketplace, impair the ability of the State Board of  
229 Administration to invest in the best performing alternative  
230 investment vehicles, and diminish investment earnings in the  
231 Florida Retirement System Trust Fund. It is also the  
232 Legislature's intent to establish consistency with regard to the  
233 classification of information relating to alternative  
234 investments by the State Board of Administration as either  
235 confidential or suitable for public disclosure. In finding that  
236 the public records exemption created by this act is a public  
237 necessity, the Legislature finds that the public and private  
238 harm in disclosing proprietary confidential business information  
239 relating to alternative investments by the State Board of  
240 Administration significantly outweighs any public benefit  
241 derived from disclosure; that the exemption created by this act  
242 will enhance the ability of the State Board of Administration to  
243 fulfill its duties as an investment fiduciary by making it more  
244 effective and competitive in the marketplace as an investor that

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245 | is able to gain access to the best alternative investment  
246 | vehicles; and that the public's ability to be informed regarding  
247 | the alternative investments made by the State Board of  
248 | Administration is preserved by the disclosure of information  
249 | excepted from the created exemption.

250 |       Section 3. This act shall take effect October 1, 2006.