

CONFIDENTIALITY FOR UNIVERSITY INVESTMENTS

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Senate Bill 1032 as passed by the Senate
Sponsor: Sen. Valde Garcia
House Committee: Higher Education
Senate Committee: Commerce and Labor

First Analysis (3-31-04)

BRIEF SUMMARY: The bill would provide confidentiality for information from companies in which a Michigan public college or university has invested. The institution of higher education would be required to provide a public report of its investment activities annually.

FISCAL IMPACT: This bill would have no direct fiscal impact on state government, but could result in a minimal cost increase to state universities and community colleges due to the reporting requirement.

THE APPARENT PROBLEM:

Many of the state's public universities and colleges currently have large endowment funds consisting of funds donated by the private sector for the purpose of providing scholarships or other benefits to the students and schools. The colleges and universities employ investment fiduciaries who work to increase the value of the schools' portfolios. Traditionally, the investment fiduciaries have invested the endowment funds in securities such as stocks and bonds. Recently, however, the fiduciaries have begun investing a percentage of the funds directly in start-up companies, which have the potential to produce investment returns that are much higher than those seen from investments in securities such as stocks and bonds. The University of Michigan, for example, evidently has about 20 percent of its endowment funds invested in such enterprises as venture capital funds and buy-out funds, from which fund administrators claim the university is receiving a much higher rate of return on its capital than it earns from more conservative stock and bond investments.

It has been pointed out that these direct investments could create an issue for the companies involved because public university and college records are subject to review by interested members of the public under the Freedom of Information Act. The start-up companies often disclose confidential, proprietary information regarding their operations to fiduciaries managing the trust funds, in an effort to gain their backing and to keep them updated on existing capital investments. Reportedly, a number of those companies recently have begun rejecting offers of investment capital from university and college endowments due to concerns that the institutions' publicly-funded status could result in the companies' confidential, proprietary information being revealed to competing firms.

THE CONTENT OF THE BILL:

This bill would amend the Confidential Research Information Act to protect from public disclosure under the Freedom of Information Act (FOIA) certain confidential investment information received by a public university or college that had been provided by an investment fiduciary or portfolio company, if the institution provided a public report of its investment activities at least annually. The bill also would rename the act the "Confidential Research and Investment Information Act".

Under the bill, an exemption from FOIA would exist for a record received, prepared, used, or retained by an investment fiduciary in connection with an investment or a potential investment of a public university or college that related to investment information pertaining to a portfolio company in which the investment fiduciary had invested or had considered an investment that was considered by the portfolio company and acknowledged by the investment fiduciary as confidential. The bill also would exempt from FOIA investment information, whether prepared by or for the investment fiduciary, regarding loans and assets directly owned by the investment fiduciary and acknowledged by the investment fiduciary as confidential.

The exemption would apply only if the public university or college, at least annually, provided to its governing board and made available to the public a report of its investment activities that included: the name of the portfolio company in which the institution had invested; the aggregated amount of money invested in portfolio companies during the reporting period; the rate of return realized during the reporting period; and the source of any public funds invested by the institution during the reporting period.

The FOIA exemption would not cover those parts of agreements or instruments to which an investment fiduciary was a party that did not contain investment information.

The bill would define "investment fiduciary" as a person who exercises any discretionary authority or control over an investment of a public university or college or renders investment advice for a public university or college for a fee or other direct or indirect compensation.

"Investment information" would mean information that has not been publicly disseminated or that is unavailable from other sources, the release of which might cause a portfolio company or an investment fiduciary significant competitive harm. Such information would include financial performance data and projections, financial statements, lists of co-investors and their level of investment, product and market data, rent rolls, and leases.

"Portfolio company" would mean an entity in which an investment fiduciary has made or considered an investment on behalf of a public university or college. "Record" would mean all or part of a writing as that term is defined in Section 2 of FOIA, (i.e., handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, including pictures, sounds, symbols, magnetic or paper tapes,

microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content).

MCL 390.1551 et al.

HOUSE COMMITTEE ACTION:

The House Committee on Higher Education did not amend the bill. It remains in the form passed by the Senate.

ARGUMENTS:

For:

Reportedly, many of the requests for information on venture capital investments made by universities come from the competitors or potential competitors of the company in which the school is investing. The bill would reduce company concerns about the disclosure of their proprietary information to competitors through FOIA requests. The bill would give such information the same type of protection from FOIA that currently applies to proprietary information related to research conducted by the state's universities and colleges.

Against:

The bill contains no provision for any type of public oversight of how the endowment funds are invested. There would be little public accountability for poor or questionable investment decisions by the fund fiduciaries.

Response:

The substitute version of the bill states that, to be eligible for the proposed FOIA exemption, a public university or college, at least annually, would have to provide a public report of its investments, including information specified in the bill.

POSITIONS:

Representatives from the University of Michigan testified in support of the bill. (3-25-04)

Legislative Analyst: Chris Couch
Fiscal Analyst: Kyle Jen

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.