Freedom of Information Act
and
Public Disclosure Issues

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Agenda

— Affected Institutional Investors
— Impact of Disclosure of Confidential Information
— Goals of Private Equity Funds
— Balancing Need for Confidentiality and Public Disclosure
Scope of Public Records Acts

- State statutes vary
  - No uniform rule
  - Some states’ statutes disclosure requirements are extremely broad
    - California
  - New legislation in some states is narrowing disclosure requirements
    - Michigan, Colorado, Virginia
General Scope of Public Records Act

- Disclose all information in investor’s possession
  - California is much broader
    - It covers anything the institution may have used
      - Read only Websites probably do not work
      - Hand outs at annual meetings are probably subject to disclosure even if the hand outs are returned to the fund

- To the public

- Upon request

- Some states make exceptions for trade secrets
  - Portfolio company information may be protected in some states
Scope of Public Records Acts (Cont.)

— California

— “Public Record” includes any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

— “Writing” means any handwriting . . . And every other means of recording . . . Any form of communication or representation . . . Regardless of the manner in which the record has been stored.
Upon receipt of a request for a copy of records, an agency must, within 10 days, determine whether a disclosable record is in its possession. An extension may be available in “unusual circumstances” such as when the agency must collect the requested records from “other establishments that are separate from the office processing the request.”
Scope of Public Records Acts (Cont.)

— Michigan
  — Applies to public universities and colleges
  — Exempts most confidential information from disclosure
  — Requires disclosure of:
    - Names of portfolio companies in which private equity firms have invested during the reporting period
    - Aggregate sums invested in portfolio companies in a reporting period
    - Aggregate annual rates of return of funds in which public entity was invested

— Massachusetts
  — Governor recently vetoed similar legislation
What is Disclosable?

Depending on the state statute in question, the following information may be disclosable

- Fund Data
  - Private Placement Memorandum
  - Limited Partnership Agreement
  - Performance (IRR) data
  - List of Limited Partners

- Portfolio Company Data
  - Valuations
  - Financial Information
  - State statutes may treat confidential portfolio company information as a trade secret
What Can Be Protected?

- Many states consider confidential portfolio company information to be a trade secret
  - Fund needs to take appropriate steps to keep information confidential

- Disclosure of portfolio company information could have an adverse affect on portfolio company
  - Competitors could gain access to information
  - Reduce portfolio company’s ability to obtain funding on favorable terms
    - Negative impact to IRR and investors’ returns
Investors Subject to Public Disclosure Requirements

— Public Pension Plans
  — State plans
  — County plans
  — Municipal plans

— State University Endowments

— Funds-of-Funds
  — If a public institution is an investor in a fund-of-funds, a private equity funds’ confidential information may be subject to disclosure
  — Funds-of-funds have attempted to structure around this
    - Aggregating underlying fund performance
Impact of Public Records Acts

- Funds may be reluctant to permit FOIA investors to conduct detailed due diligence with respect to prospective investments
- New partnership agreements limit the information being reported and disclosed to limited partners
  - Portfolio company data limited to information included in Funds’ financial statements
  - Some funds are attempting to aggregate valuation information
- Pressure on valuations
  - Could affect portfolio company’s ability to raise additional capital
- Some funds are wary of public institutions as limited partners
  - Generally rare, but some top tier funds are excluding some long-time public investors

Charles River, Sequoia
Goals of Private Equity Funds

— Protect confidential portfolio company data
  — This generally would be achieved by eliminating right of limited partners to receive or review such data

— Discourage limited partners from calculating/deriving IRRs or “multiples” for specific periods rather than the life of the fund
  — Difficult to achieve because limited partners can calculate IRR based on capital contributions and distributions
Balancing Confidentiality with Keeping Investors Informed

— Create expectation of privacy and confidentiality

— New partnership agreements permit General Partners to restrict the amount of confidential information to limited partners
  — Limit the amount of information about portfolio company data in written reports

— Withhold certain information from FOIA investors
  — May create issues as FOIA limited partners are treated differently than other limited partners

— Do not distribute written information or summaries
Balancing Confidentiality with Keeping Investors Informed

- Existing Partnership Agreements
  - Seek amendment to restrict the amount of confidential information reported to limited partners
  - Lobby state governments to modify existing public disclosure acts
- Consider the disclosure of a private equity fund’s IRR
This presentation is intended only as a general discussion and should not be regarded as legal advice. For more information, please contact your Fund Services Group attorney.

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