

May 7, 2020

## **INVESTOR COMMUNICATIONS BY PRIVATE EQUITY AND REAL ESTATE FUND MANAGERS IN LIGHT OF COVID-19**

To Our Clients and Friends:

As COVID-19 continues to spread throughout the globe, the ultimate effect on businesses and financial markets remains uncertain. At the same time, certain risks and disruptions to operations and performance have materialized, and investment advisers should consider their disclosure obligations and determine appropriate steps in communicating evolving circumstances to investors. This alert offers practical guidance for the managers of private equity and real estate funds weighing such considerations.

### **Interim and Proactive Disclosure to Existing Investors**

In evaluating disclosure obligations to existing investors regarding the ongoing and potential impacts of COVID-19, investment advisers should distinguish between effects that relate to the following:

1. a fund's financial performance (e.g. disruptions to a portfolio company's business); and
2. an investment adviser's ability to manage a fund (e.g. a diminished capacity to source, diligence or complete deals due to work-from-home or other limitations).

*Fund's Financial Performance:* Contractual obligations in existing fund documents and side letters typically address the timing and form of reporting and/or notice obligations relating to changes in a fund's financial performance. Interim disclosure regarding fund performance or risks to performance may also be appropriate if investors have ongoing or impending investment decisions in connection with a fund, such as for open-ended funds.

In providing normal course or interim fund performance disclosure, investment advisers should consider whether to include specific COVID-19 disclaimers to indicate that future performance remains uncertain and prior period results may have been obtained in an environment that differs materially from the current economic climate. Funds that are actively marketing to prospective investors and/or seeking additional commitments from existing investors must take into account additional disclosure considerations; please see our related alert "COVID-19: Fundraising Considerations for Private Investment Fund Sponsors" for additional information.

*Investment Adviser Operations:* Changes to an investment adviser's own operational abilities and performance implicate a deeper set of fiduciary and regulatory considerations, even before running into typical contractual guardrails (e.g. key person and time commitment clauses applicable to senior personnel). Timely disclosure of any material disruptions to operations is important, but investment

advisers would be well served to communicate the state of the firm and any risks to their own operations to investors proactively during the crisis.

## **Oral Versus Written Disclosure**

Investment advisers may reasonably differ in their approach to communicating information to investors, subject to any contractual notice or reporting obligations. Phone conversations with investors can be appropriate (and are often preferred from an investor relations perspective), provided that messaging remains consistent, is supported by underlying facts and avoids selective disclosure (as further discussed below). Alternatively, written communications offer uniformity, precision in message and provide a documentary record for regulatory and compliance purposes.

## **Avoid Selective Disclosure**

Investment advisers should take care to ensure that messaging remains consistent and complete across the investor base. Selective disclosure to certain limited partners risks not only running afoul of partnership agreement or side letter provisions, but also undermining the adequacy of disclosure made to other investors.

## **Consider Categorizing Investment Risk Levels**

SEC Chairman Jay Clayton and William Hinman, Director of the Division of Corporate Finance, released a joint statement encouraging “companies strive to provide, and update and supplement, as much forward-looking information as is practicable” and noted “that we would not expect good faith attempts to provide appropriately framed forward-looking information to be second guessed by the SEC.”<sup>[1]</sup> Although directed to public companies, this guidance offers insight into the SEC’s expectations around disclosure during the COVID-19 crisis, and the message appears intended to encourage forward-looking disclosure even in the face of uncertainty.

In light of this message, each investment adviser should consider categorizing the level of investment risk and volatility associated with COVID-19 across its portfolio and communicating its analysis to investors, in particular for funds with multi-sector investment strategies. Advisers should weigh the value of this enhanced disclosure against the risk attendant in forecasting performance, and any such disclosure should be appropriately qualified.

## **Responding to Investor Inquiries**

Existing investors and prospective investors have begun to, and will continue to, make inquiries regarding the impact of COVID-19 on fund performance and operations. Preparing a script and drafting form responses (e.g. an FAQ) in anticipation of such inquiries is the surest route to achieve accuracy and conformity in communications. Consider also having a dedicated compliance member tasked with reviewing communications for COVID-19-related disclosure.

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## Keep Records of Communications and Supporting Materials

As noted in our March 26, 2020 alert “SEC Enforcement Focus on Fallout from COVID-19: Insights for Public Companies and Investment Advisers During a Crisis”, prior periods of market volatility have been typically followed or accompanied by heightened SEC investigative risk. Investment advisers should maintain contemporaneous records of communications with investors regarding the crisis and any supporting materials, with a view towards a post hoc assessment by the SEC of actions taken during this time. For oral communications, calendaring calls and maintaining an internal written summary of conversations may be appropriate.

## LP or Limited Partner Advisory Committee Notices

A detailed review of fund documents and side letters should be undertaken to assess potential notice requirements. Adhering to such requirements is particularly important during this period of heightened scrutiny.

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[1] Public Statement, “The Importance of Disclosure – For Investors, Markets and Our Fight Against COVID-19, Public Statement” (April 8, 2020), available at, <https://www.sec.gov/news/public-statement/statement-clayton-hinman>



*Gibson Dunn lawyers regularly counsel clients on the issues raised in this alert, and we are working with many of our clients on their response to COVID-19. Please feel free to contact the Gibson Dunn lawyer with whom you usually work, any member of the firm’s Investment Funds Practice Group, or the authors:*

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