Senate Bill No. 439

CHAPTER 258

An act to add Section 6254.26 to the Government Code, relating to public records.

[Approved by Governor September 22, 2005. Filed with Secretary of State September 22, 2005.]

LEGISLATIVE COUNSEL'S DIGEST

SB 439, Simitian. Public records: disclosure: public investment funds.

The California Public Records Act provides that, except for exempt records, every state or local agency, upon request, shall make records available to any person upon payment of fees to cover costs.

This bill would provide that, notwithstanding these provisions, specified records regarding alternative investments, as defined, in which public investment funds invest are not subject to disclosure under these provisions, unless the information is already publicly released by the keeper of the information. The bill would subject specified information contained in these records regarding alternative investments in which public investment funds invest to public disclosure and would provide that the information is not to be considered a trade secret exempt from disclosure.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that Section 2 of this act, which adds Section 6254.26 of the Government Code, imposes a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies within the meaning of Section 3 of Article I of the California Constitution. Pursuant to that constitutional provision, the Legislature makes the following findings to demonstrate the interest protected by this limitation and the need for protecting that interest:

(a) Access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state pursuant to subdivision (b) of Section 3 of Article I of the California Constitution and Section 6250 of the Government Code. The public has a paramount interest in knowing how public money is spent and invested.

(b) Public pension and retirement systems and public endowments and foundations have a fiduciary duty to invest the assets of these funds with care, skill, prudence, and diligence. This fiduciary duty includes diversifying the investment of assets in a manner so as to minimize the risk of loss and maximize the rate of return. Investment in high performing

alternative investments is a component of diversifying the pension assets and maximizing the rate of return.

(c) At the same time, a certain narrow class of public investments, alternative investments, involves some information that historically has been kept confidential because confidentiality is essential to their success. The disclosure of certain information pertaining to alternative investments could be harmful to generating sustainable and profitable rates of return for the investments of the pension or retirement system and of the public endowment or foundation. Public pension systems desire to invest a portion of their portfolio in alternative investments to boost return.

(d) Following recent litigation seeking to require public pension funds and retirement systems and public endowments or foundations to disclose certain information about alternative investments, the funds risk being excluded from participation in certain alternative investments. Exclusion from investing pension or retirement system assets in alternative investments may impose substantial costs on state public pension funds and the public employees who are their beneficiaries.

(e) It is the intent of this legislation to balance the public's right of access to information and the ability of public pension funds to continue to invest in alternative investment funds. It is also the intent of this legislation to allow the public to monitor the performance of public investments; for public bodies to avoid payment of excessive fees to private individuals or companies; and for the public to be able to know the principals involved in management of alternative investment funds in which public investment funds have invested so that conflicts of interest on the part of public officials can be avoided. This legislation is not intended to reverse the general presumption of access and openness of the California Public Records Act and subdivision (b) of Section 3 of Article I of the California Constitution.

(f) It is not the intent of this legislation to overrule or invalidate any court orders in or stipulated resolutions of prior litigation relating to any public entity's obligation to disclose information about its alternative investments to narrow the information disclosed as a result of those decisions, or in any other way to apply retroactively. It is, rather, the intent of this legislation to establish predictability about what should and should not be disclosed regarding private equity funds so that public pension funds will be able to continue to invest in private equity funds.

SEC. 2. Section 6254.26 is added to the Government Code, to read:

6254.26. (a) Notwithstanding any provision of this chapter or other law, the following records regarding alternative investments in which public investment funds invest shall not be subject to disclosure pursuant to this chapter, unless the information has already been publicly released by the keeper of the information:

(1) Due diligence materials that are proprietary to the public investment fund or the alternative investment vehicle.

(2) Quarterly and annual financial statements of alternative investment vehicles.

(3) Meeting materials of alternative investment vehicles.

(4) Records containing information regarding the portfolio positions in which alternative investment funds invest.

(5) Capital call and distribution notices.

(6) Alternative investment agreements and all related documents.

(b) Notwithstanding subdivision (a), the following information contained in records described in subdivision (a) regarding alternative investments in which public investment funds invest shall be subject to disclosure pursuant to this chapter and shall not be considered a trade secret exempt from disclosure:

(1) The name, address, and vintage year of each alternative investment vehicle.

(2) The dollar amount of the commitment made to each alternative investment vehicle by the public investment fund since inception.

(3) The dollar amount of cash contributions made by the public investment fund to each alternative investment vehicle since inception.

(4) The dollar amount, on a fiscal yearend basis, of cash distributions received by the public investment fund from each alternative investment vehicle.

(5) The dollar amount, on a fiscal yearend basis, of cash distributions received by the public investment fund plus remaining value of partnership assets attributable to the public investment fund's investment in each alternative investment vehicle.

(6) The net internal rate of return of each alternative investment vehicle since inception.

(7) The investment multiple of each alternative investment vehicle since inception.

(8) The dollar amount of the total management fees and costs paid on an annual fiscal yearend basis, by the public investment fund to each alternative investment vehicle.

(9) The dollar amount of cash profit received by public investment funds from each alternative investment vehicle on a fiscal yearend basis.

(c) For purposes of this section, the following definitions shall apply:

(1) "Alternative investment" means an investment in a private equity fund, venture fund, hedge fund, or absolute return fund.

(2) "Alternative investment vehicle" means the limited partnership, limited liability company, or similar legal structure through which the public investment fund invests in portfolio companies.

(3) "Portfolio positions" means individual portfolio investments made by the alternative investment vehicles.

(4) "Public investment fund" means any public pension or retirement system, and any public endowment or foundation.

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