



ALERTS

Private Fund Manager COVID-19 Pandemic Issues: A Practical Checklist

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The COVID-19 pandemic continues to evolve, causing unprecedented challenges for the global economy. As the virus spreads, the impact to businesses, markets and everyday life is changing daily, making the forecasting of potential economic and market impacts very difficult. As fiduciaries, private fund managers must timely address the risks caused by the impact of this unfolding pandemic. Simply said, fund managers are required to take reasonable steps to prudently fulfill their duties and responsibilities to their investors.

This checklist identifies and outlines many of the practical and legal issues fund managers should consider as they manage private funds, investments and advisory businesses during this period of disruptive impact caused by the COVID-19 pandemic. It is worth noting that this list is not exhaustive, not tailored to any particular business sector or industry, and primarily focuses on private funds investing U.S. assets.

Fund Level Business Continuity

- Monitor government economic stimulus efforts, Federal Reserve actions, newly enacted federal legislation, federal agency guidance and local orders, as part of the response to the COVID-19 pandemic, including:
 - Impacts related to new tax relief under the 2020 Coronavirus Aid, Relief, and Economic Security Act (CARES Act). For example, the CARES Act temporarily suspends a number of the business loss limitations that were added to the Code in 2017, the U.S. Securities and Exchange Commission's

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pronouncements regarding delayed filing deadlines for annual updates and other required filings with the commission, and tax filing deadlines were delayed.

- Various state and local orders, mandates and outbreak response guidance
- Coordinate with your firm's human resources department regarding:
 - Employee benefit policies, health insurance benefits, and family medical leave compliance
 - Newly mandated federal and state employment benefits and/or protections
 - Available assistance for any firm or portfolio company displaced workers including the enhanced unemployment payments for furloughed employees and contractors under the recently enacted

CARES Act and COBRA

- Increase communication with your internal team and investors – especially when working remotely during the outbreak
 - Establish scheduled communications with those who are internally responsible for managing the fund's investment portfolio
 - Increase communications with investor relationships and outside business partners, providing prudent reassurance when possible
- Assess the impact of office closures, quarantines, transportation and critical service provider disruption from authoritative government and news sources
- Conduct employee training and periodic check-ins in situations where employees must work from home or be out of the office for extended periods of time
- Continually check on key functions, such as the firm's accounting, finance, asset and portfolio management, and investor-relations functions, are continuing without significant interruption
- Access cybersecurity risks
 - Monitor computer systems, cyber firewalls, and electronic document retention systems to ensure appropriate protections, protocols and procedures are in place and amend such protocols and procedures as needed
 - Coordinate periodically with internal information technology personnel
 - Consider engaging outside services providers to

better address cyber risks

- Monitor physical security of employees and assets
- Coordinate with key service providers, vendors and other third parties to verify their effectiveness and abilities to provide services during the disruptions caused by the COVID-19 pandemic and develop back-up plans accordingly
- Assure that the firm's services providers and vendors oversight and procurement policies are being followed and also determine that a firm procedure is in place for senior management approval of reasonable policy exceptions

Portfolio Investments and Assets

- Determine needs for portfolio investment capital or other resources required during the outbreak period
- Be opportunistic and continue to thoroughly review asset portfolio holdings, investing strategy and market opportunities
- Determine whether portfolio companies are eligible for emergency grants, Small Business Administration loans or other emergency loans under the CARE Act
 - Consider what the potential impact on taxes would be for any emergency grants or loans
 - Evaluate covenants in existing debt documents that need to be waived or modified in order to take advantage of emergency grants or loans

Investors and Stakeholders Communication

- Consider and prepare for the impact of COVID-19 on portfolio investment valuations, and prepare for investor inquiries
 - Evaluate fund document valuation procedures and internal compliance measures to be sure to take the impact(s) of the pandemic into consideration
 - Carefully review all fund documents and side letters regarding required steps for capital calls
 - Anticipate immediate and foreseeable future funding needs for continuing operations of the fund and its portfolio investments
 - Consult with available resources such as the fund advisory board or other outside service provider while evaluating the pandemic's impact
- Prepare for interruptions to your investors' business operations and the ability to timely respond to fund manager notices and communications

- Consider the need to make any capital calls in the near term
- Develop alternatives for inability of investors to respond to capital calls
- Check on credit line availability in the event that investors are unable to respond to capital calls for an extended time period
- Assess risk of default under any credit line agreement in the event that investors are unable to respond to capital calls for an extended time period
- Prepare to receive and respond to investor requests to exit – It is vital to consider fiduciary obligations to all investors as a whole when responding to any exit requests.
- Review applicable entity governing documents, including side letters, when considering implementing any fee deferrals or other adjustments at the fund or portfolio investment
 - Determine if any governing document amendments are necessary
 - Evaluate any potential adverse tax implications before implementing any fee deferrals or other adjustments
- Evaluate existing firm disaster or succession plans' key management provisions that will apply in the event any sudden sustained illness or death of senior firm management occurs.
- Consider previewing any firm relevant succession plans with your funds' advisory board as well as other key investor relationships and external business partners
- Update, to the maximum extent practicable, fund investors as to how the fund and the fund's portfolio investments are responding to the COVID-19 pandemic
 - Investor updates should include the impact the outbreak is having on the industries in which the fund invests
 - Consider including in updates to fund investors any risk factors relating to the impacts of COVID-19
- Determine whether any notices are required to some or all fund investors under governing documents and any side letters
- Review investor liquidity provisions in fund documents in order to avoid potential disputes.
 - Hedge fund (or other fund) investors with investor liquidity options must carefully review applicable provisions requirements and procedures (i.e., gate,

notice periods, redemption queues and so on)

- Update any fund risk factors and other disclosures as necessary
 - Consider the circumstances in which liquidity or redemption right suspension may be necessary and, to the extent practicable, keep investors notified well in advance
 - Remain aware of fiduciary duties to investors as a whole before waiving investment agreement terms and conditions or agreeing to deviate from standard fund policies and procedures
- Review your firm's contracts for any force majeure, excuse, and other similar provisions that may apply during and after the COVID-19 outbreak
 - Carefully consider the implications of foreign law requirements when the fund has investors from outside of the United States or has non-United States portfolio investments

Capital Raise and Offering Process

- Consider the COVID-19's impact on the short and long term prospects of the fund and its portfolio investments
- Critically review all risk factors in offering materials and other disclosure documents, and update them as needed – especially with regards to the actual and potential impacts of the pandemic
- Assure delivery to investors any offering materials supplement well in advance of any closing
- For registered investment advisers, update Form ADV Part 2, if applicable, to address this outbreak
- Develop alternative communication methods for use when in-person meetings are difficult during this period
- Be as transparent with prospective investors as possible regarding any potential impacts COVID-19 may have on the offering, the fund and its portfolio investments

Post-COVID-19 Recovery Planning

- Anticipate, as much as possible, the fluidity and scope of the economic recovery that will likely occur in the months immediately after the worst of the impact of the COVID-19 pandemic subsides
- Prepare a firm recovery plan that stresses flexibility in dealing with dynamics of post-outbreak economic conditions
- Communicate the firm's post-outbreak economic recovery plan with stakeholders, lenders, key partners and

employees

Conclusion

During this period of outbreak driven market turmoil, fund managers should be fully engaged with their firm's businesses while also being disciplined stewards of their stakeholders' capital. Managers of private funds and fund sponsors should proceed with diligence and act with reasonable prudence in dealing with the immediate effects of the COVID-19 pandemic on their firms, as well as their funds' investment portfolios' performance and operations to mitigate related risk.

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work, or John Dickey at 214-258-4130 or jdickey@btlaw.com, or Reid Johnson at 214-258-4144 or RJohnson2@btlaw.com.

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