

Checklist of Considerations for Private Investment Fund Managers

MARCH 19, 2020

The recent outbreak of a respiratory illness caused by COVID-19 has caused significant social, economic, and labor instability, and it cannot be predicted in what ways this current outbreak could impact your firm in the short or long term.

As fiduciaries, it is not just prudent that fund managers take steps to address the risks caused by outbreaks such as the one we are facing now, it is a legal requirement.

The following is a brief list of certain items for fund managers to address with regard to their investment management and advisory businesses. The list below is not exhaustive.

Continue to monitor your firm's business continuity and disaster recovery plan.

- Monitor the impact of office closures, quarantines, and transportation and critical service provider disruption. Consider conducting staff trainings and/or check-ins for situations where employees cannot return to the office for extended periods of time.
- Monitor your firm's communication plan and key personnel (and back-up personnel) to seek to ensure the firm's accounting, finance, asset and portfolio management, and investor-relations functions are continuing without significant interruption.
- Monitor both cyber and physical security. Seek to ensure that employees are able to continue to work securely and safely from home. Monitor your firm's physical assets, documents, and data to ensure protection. Refer back to and follow your firm's privacy, confidentiality, and cybersecurity policies.
- Continue to coordinate with key vendors and other key third parties (including administrators, etc.) to test the effectiveness of their ability to continue operations during disruption (e.g., to make capital calls and provide critical services). Review back-up plans for improvements if services are disrupted. Refer back to and follow your firm's vendor oversight and review policy.

- For private equity, real estate, and other managers actively involved in the management of portfolio investments, continue to provide guidance to your portfolio companies and property managers to seek to ensure that their business continuity and disaster recovery plans are operating in a satisfactory manner.
- Continue to coordinate with your firm’s human resources staff to review employee benefit policies, such as sick days, health benefits, etc.

Consider how this outbreak may impact your relationships with current investors.

- Your investors’ business operations may be interrupted. Consider whether you will need to make any capital calls in the near future. If so, confirm whether you will be able to bridge capital calls through a subscription line lending facility. Check early to see if you are at risk of default under any credit agreement if your investors are unable to respond to capital calls for an extended period of time.
- Consider the impact of COVID-19 on the valuation of your portfolio investments. Closely review the valuation procedures in your fund documents and compliance manual. Extra consideration will need to be taken when setting quarterly valuations. Consider consulting with the limited partner advisory board or outside service providers in connection with your valuation process.
- If your firm is considering any fee deferrals or other similar adjustments at the fund or portfolio company level, be sure to review your governing documents, including side letters, and consider whether any amendments are required or if there may be any adverse tax implications.
- Prepare to respond to requests to exit. Be sure to consider your fiduciary obligation to all investors as a whole before giving any response.
- Review applicable key person provisions. In the event of an unexpected sustained illness or death, refer back to your firm’s succession plans. Consider whether to preview any succession plans with your funds’ limited partner advisory boards and other key internal and external partners.
- Stay engaged and be transparent. To the extent practicable, give your funds’ investors an update as to how your business and those businesses in which you invest are responding to this outbreak. It is important to provide investors with an update on the impact that this outbreak has had on the industries in which your funds invest. It may be helpful to include risk factors relating to COVID-19 similar to those you would find in an offering memorandum.
- Consider whether any notices are required to all or certain investors under your governing documents, including side letters.
- If you manage hedge funds or other funds that give investors a liquidity option, carefully review your liquidity terms and review and update risk factors and other disclosures. Review gates, applicable notice periods, and redemption queues. Consider at what point a suspension may be necessary. Keep in mind the lessons of 2008 and, to the extent practicable, keep your investors aware and notified well in advance to minimize future disputes. Again, be sure to remember that you owe a fiduciary duty to each fund and its investors as a whole before authorizing any waivers or departures from standard policies and procedures.
- Review your firm’s contracts for force majeure, excuse, and other similar provisions.
- If your firm raises money or invests outside of the United States, remember to consider the potential impact of applicable foreign laws, rules, and regulations, including the “10% rule” under MiFID II and applicable short-selling bans implemented in the EU, Turkey, China, and South Korea.

Consider how this outbreak may impact your offering.

- Review and update the risk factors in your offering materials and other disclosure documents (such as your Form ADV Part 2, if applicable) to address this recent outbreak.

- It will be important to deliver a supplement to your offering memorandum well in advance of a targeted closing.
- Review and reconsider key terms such as key person provisions, withdrawal and excuse terms, investment restrictions, etc. Consider how this outbreak might impact your business in the short and long term and, to the extent possible, try to address any contingency options that may be prudent or necessary before documents are finalized.
- Consider alternative communication methods and enhancing investor presentation materials in lieu of in-person meetings. Coordinate with your firm's IT staff to take advantage of, and expand the use of, technology to facilitate virtual pitch meetings, and, as with current investors, stay engaged and be transparent with prospective investors about any potential impacts that COVID-19 may have on your business, including any current fundraising activities.

All fund managers should continue to carefully review their own contracts and business continuity and disaster recovery plans and fund documents to determine how to best address this outbreak. There is no one-size-fits-all approach. For further information about how to develop a tailored strategy for your firm, or for more information on the topics included herein, please contact [Meg Frey](#), [Megan Devaney](#), or another member of [Winston & Strawn's Private Investment Funds group](#).

View all of our COVID-19 perspectives [here](#). Contact a member of our COVID-19 Legal Task Force [here](#).

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