

**THIS ALERT SUMMARIZES ASPECTS** of the current public health crisis that we expect are of particular interest to private fund managers. It is meant to supplement additional alerts, including [COVID-19: Implications for Private Equity](#). Ropes & Gray's [Coronavirus Resource Center](#) has a comprehensive list of helpful resources, available at [www.ropesgray.com/en/coronavirus](http://www.ropesgray.com/en/coronavirus). As always, if there is a specific situation you want to talk over, please contact your Ropes & Gray team.

## FUNDRAISING CONSIDERATIONS

- **Fundraising Timing** We expect the timelines of fundraising, both those currently in process and those expecting to launch, may be impacted by the uncertainty stemming from the pandemic. The impact will likely depend on how far along sponsors are in pre-marketing versus actively raising a fund. Through the end of last week, we continued to see fundraisings launch, and in some cases, accelerate; however, sponsors will want to consider whether extensions to fundraising periods are needed if they are actively marketing. We encourage sponsors to have a plan for managing inbound investor questions about the pandemic's impact on the fundraising timeline, and to expect that investors will need more time from a logistical perspective to review and diligence the fund. For instance, we anticipate that investor onsite visits and ability to access virtual data rooms will be delayed, thereby impacting the timing of document review, negotiations and closings.
- **Other Timing Considerations** For funds that are fully operational, we encourage sponsors to review the investment periods, terms and other timing considerations of fund operating agreements to confirm such triggers

and deadlines continue to be feasible in the current environment. Such considerations should include, but are not limited to, when the investment period ends, deadlines of reporting obligations and repayment of capital call facilities when fundraising periods end, or when a fund's term ends. For example, sponsors with investment periods ending in the next 90 days may need additional time to proceed with investments that have stalled during this period of uncertainty. Investors may need more time to react to sponsor requests or proposed amendments due to business interruptions.

- **Other Fundraising Considerations** Because investors' outlook toward investment might change or their investment timelines may be delayed, sponsors should carefully consider the regulatory limitations of funds. For example, if a sponsor that does not intend to manage plan assets has investors drop out, it is important to recheck the ERISA 25% test based on the new, reduced investor base.

## DISCLOSURE CONSIDERATIONS

- **Offering Disclosures** Sponsors currently engaged in active fundraises should consider their current disclosure materials and whether and how they should be updated to address COVID-19 and related issues. For example, consider general market condition risk factors in current offering memoranda and whether they should be enhanced to cover pandemics generally and COVID-19 specifically. Consider also whether any business continuity disclosure in the offering memoranda should be revised. This will be particularly important for funds that launched prior to the global spread of COVID-19 and where the private placement memorandum did not specifically address the pandemic, but instead relied on generic macro-economic disclosures. Sponsors should also revisit their responses in due diligence questionnaires, in particular responses regarding business continuity, which may need to be revisited in light of steps taken presently to address the pandemic. In

addition, sponsors should carefully consider the issues associated with the selective disclosure of information to investors regarding either the effect of the crisis on investments or investment strategy, or the functioning of the adviser's business continuity plan. Finally, consider whether other policies and procedures shared with investors, such as conflicts policies, allocation policies and valuation policies warrant updates. We note that the pandemic disclosure should be consistent with the ADV annual update disclosure discussed below.

## REGULATORY CONSIDERATIONS

■ **Form ADV and Form PF** The SEC issued an order on March 13, providing relief from filing deadlines for investment advisers (including both registered investment advisers and exempt reporting advisers) with upcoming filing and delivery deadlines for Form ADV and Form PF, where an adviser is unable to meet a filing deadline or delivery requirement due to circumstances related to current or potential future effects of COVID-19. In order to claim relief under the order, an adviser must deliver a notice to the SEC and, in the case of Form ADV, provide a notice on its public website (or if it does not have a public website, it must deliver a notice to its clients and/or private fund investors) describing why the adviser is unable to file or deliver the applicable form on a timely basis, and stating the estimated date by which the adviser expects to file or deliver the form. The adviser then must file as soon as practicable after the filing deadline, but in any event, within 45 days after the original due date.

Additionally, we note with respect to filing the Form ADV, that advisers may wish to consider updating Part 2A to specifically include disclosure related to COVID-19 and related matters, such as the potential impact on sponsor operations and performance of a fund's investments. We note that as of today, the CFTC has not issued similar relief with respect to the filing deadline for Form CPO-PQR. Advisers that file Form CPO-PQR should seek to meet the applicable filing deadline.

■ **Custody Rule** We note that many registered investment advisers comply with the custody rule under the Investment Advisers Act (Rule 206(4)-2), in part by delivering audited financial statements to private fund investors within 120 days of the fund's fiscal year end. The SEC has not issued relief under the custody rule

specific to COVID-19 for private fund managers that are unable to deliver audited financial statements within the 120-day deadline as a result of circumstances related to COVID-19. However, the SEC has previously indicated that it would not recommend enforcement action for a violation of Rule 206(4)-2 against an adviser that reasonably believed that a fund's audited financial statements would be distributed within the 120-day deadline, but failed to have them distributed in time under certain unforeseeable circumstances. Advisers who have concerns with respect to timely delivery of private fund audited financial statements should consider the potential applicability of this SEC staff response. (Any such adviser should also consider any issues raised by late delivery of financial statements under their fund agreements and side letter agreements, as applicable.) In addition, for advisers that are registered commodity pool operators, we note that as of today, the CFTC has not issued relief from the requirement to deliver an annual report to fund investors within 90 days following the fund's fiscal year end.

■ **SEC Examinations** We understand the SEC has suspended on-site visits for exams, but continues to conduct exams remotely. Any adviser currently subject to an SEC examination should reach out to its Ropes & Gray teams with any questions.

## VALUATION CONSIDERATIONS

As they prepare for March 31 valuations, in light of substantial market volatility, sponsors and investors will undoubtedly be focused on March quarter end valuations. This focus is likely to be sharpened in the case of sponsors for which valuations of unrealized investments are being used in connection with active fundraising. Certainly, sponsors will want to take particular care to be sure their valuation processes are in compliance with any fund operating agreement or other contractual requirements and their valuation policies. Beyond any formal requirements, sponsors should give consideration to the particular methodologies and weighting of methodologies in their valuation process, and in many cases will want to seek input from their valuation and other advisers. For example, in cases where precedent transaction analysis plays an important role in valuation, consideration may need to be given as to how best to incorporate such analysis where the earnings multiples and other elements of such precedent

transactions may not necessarily reflect the most up-to-date market information. Sponsors would be well served to ensure that documentation prepared with respect to March 31 valuations clearly addresses why a change in methodology was or was not warranted.

Following this crisis, we believe the SEC will look closely at valuations to confirm that the latest valuations reflect recent market conditions on a timely basis, especially in marketing materials. We saw the SEC focus on valuation after other crises, such as the 2008 financial crisis (both with respect to securities and real estate) and the energy crisis of 2015. Presently, sponsors might consider adding narrative disclosure regarding potentially stale valuations (e.g., as of 12/31) that appear in current marketing materials and/or financial statements.

## BUSINESS CONTINUITY

■ **Adviser Activities** Sponsors should ensure that they continue to follow their standard diligence process for investments (and document compliance), even if doing so may be more challenging due to employees working remotely. Sponsors should further confirm that all of their operations (e.g., investing, trading, investor relations, compliance, required recordkeeping) are all functioning as anticipated under their business continuity plans, even if such functions are occurring remotely. We have already seen the SEC focus on business continuity plans in exams, including whether appropriate cybersecurity precautions have been taken for employees working remotely. Sponsors should consider putting contingency plans in place to prepare for investors having difficulty meeting capital call or other obligations in a timely manner. Sponsors may also want to consider drawing on credit facilities or making capital calls in order to be able to support existing portfolio companies with extraordinary funding needs due to the pandemic. Finally, to the extent sponsors have upcoming limited partner or limited partner advisory committee meetings, there may be a shift to holding these meetings electronically. Sponsors should consider the extent to which fund operating agreements permit that these meetings be held electronically, and whether it is desirable to amend the fund operating agreement to provide such flexibility.

■ **Service Providers** Sponsors should be comfortable that their critical service providers have appropriate business continuity planning in place, and are prepared to continue providing essential services through the crisis. Key service providers include, but are not limited to: accountants, administrators, prime brokers, outsourced traders, IT systems (including cybersecurity), compliance consultants, auditors, lawyers and custodians. We recommend reaching out to critical service providers to confirm how their firms are responding to COVID-19 and whether any disruption should be anticipated. Also, consider what back-up services are available if one or more service providers were to experience an ongoing interruption of service.

■ **United Kingdom Considerations** The key issue for any adviser regulated in the United Kingdom is having contingency plans in place. The UK FCA issued a statement earlier in the month that reiterated this and explained that, together with the Bank of England, the FCA is actively reviewing the contingency plans of a wide range of firms. This includes assessments of operational risks, the ability of firms to continue to operate effectively, and the steps firms are taking to serve and support their customers. To the extent any U.K.-regulated firm has not yet done so, they should review their procedures and plans accordingly.

The FCA expects advisers to take all reasonable steps to meet their regulatory obligations. It has given specific examples of reasonable steps advisers should take. These included that they would expect advisers to be able to enter orders and transactions promptly into the relevant systems, use recorded lines when trading (which may be more challenging in a remote working scenario) and give staff working remotely access to the compliance support they need. If advisers are able to meet these standards and undertake these activities from backup sites or with staff working from home, the FCA will not object. Operational resilience is a key focus generally for the FCA, and this major event will focus the attention there to a greater degree.

## OPEN-END FUNDS

In addition to the foregoing considerations, advisers to open-end private funds and other accounts that actively trade should be mindful of the following issues:

- **Trading and Investments** Spain, Italy and South Korea have implemented bans of short selling certain publicly traded equity stocks. Investment managers who engage in short selling should be mindful of the possibility of such restrictions in additional markets. Additionally, investment managers should consider whether there have been violations of investment restrictions as a result of volatile markets, and document how any violations were addressed or will be addressed. Moreover, ISDA, prime brokerage and other counterparty agreements should be reviewed for potential events of default or termination events, or requirements to provide additional margin, resulting from significant decreases in net asset value or other changes in financial position. Investment managers may consider contacting counterparties to request waivers. Finally, administrators should specifically confirm whether they will have any issues providing an April 1 net asset value and whether they anticipate any delays in providing information to sponsors or investors.
- **Trading Operations** Investment managers should confirm offsite backup trading desks are fully operational, including any at-home sites. Employees should be reminded of the need to continue to comply with firm compliance procedures when trading outside the office.
- **Liquidity** Open-end fund managers should continue to analyze the current liquidity of fund portfolios, including whether they anticipate any challenges in meeting redemption requests or striking a NAV at quarter-end. For certain managers, it may be appropriate to consider whether and how funds could suspend redemptions or invoke a gate to limit redemptions. Note that any fund that is unable to strike a NAV at quarter-end will also be unable to accept new subscriptions. Given market volatility and uncertainty, in certain circumstances investors who submit redemption requests ahead of upcoming subscription dates could request to revoke their subscriptions. Advisers may wish to consider how they would handle or address any such requests.

## CONTACT

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