COVID-19 Considerations for Private Investment Funds

The recent coronavirus (“COVID-19”) pandemic presents significant challenges for private investment fund sponsors (“Sponsors”). Navigating these challenges requires proactively addressing risks and thoughtfully considering the following issues.

**Operational Considerations**

**Business Continuity Plans**

Sponsors should carefully review existing business continuity plans to ensure they are operating in compliance with their internal policies and procedures. Further, Sponsors should stress test their IT systems to ensure business operations will continue without interruption if employees are required to continue to work remotely for extended periods of time, including by providing backup options to employees to the extent available. A written reminder should be distributed to Sponsor employees regarding confidentiality, recordkeeping and data privacy requirements applicable to investor information and Sponsor operations during periods of remote work.
Sponsors should also proactively reach out to their portfolio companies, as well as key third-party service providers (including accountants, lawyers and administrators), to help mitigate any interruption to their operations.

**Regulatory Reporting**

Sponsors should review the status of their regulatory filing obligations to determine if the outbreak of COVID-19 will cause them to be unable to meet such obligations in a timely fashion. In light of the outbreak, many regulators are granting extensions to assist Sponsors in meeting their obligations. For example, the US Securities and Exchange Commission announced on March 13, 2020, that subject to certain conditions, Form ADV and Form PF filing extensions will be granted.

**Increased Disclosures**

Sponsors should review existing disclosures in their fund offering documents, as well as their Form ADV, related to COVID-19 and other force majeure events. Sponsors, and especially those planning to close on commitments and/or contributions this year, should consider updating such disclosures to reflect the particular risks posed by events such as COVID-19. In particular, sector or geographic-focused funds should provide disclosure of specific risks related to such sectors or geographic areas.

**Insurance**

Sponsors should review their insurance policies and consult with counsel to confirm potential coverage for liabilities arising from issues caused by the outbreak and consequences of COVID-19.

**Investment Considerations**

**Additional and/or Follow-On Investments**

Sponsors should carefully review their fund operating documents to determine whether they permit the contribution of additional capital, whether in the form of equity and/or debt, by the fund(s) to portfolio companies. Key issues include follow-on investment restrictions, investment concentration limits and the expiration of a fund’s commitment period.

**Term**

In view of deteriorating economic conditions, Sponsors may be reluctant to sell portfolio investments at this time. Sponsors of closed-end funds nearing the end of their term should review their fund operating documents to determine the process by which a fund’s term can be extended and, if necessary, consider requesting consent from investors to an amendment permitting additional extensions if conditions warrant.

**Investment Purpose and Limitations**
In light of evolving market conditions, it’s likely that compelling investment opportunities will arise for a fund that may differ from the types of investments the Sponsor had historically made on behalf of such fund and/or those that are permitted by such fund’s operating documents. Sponsors should carefully review the disclosures and investment limitations included in their funds’ offering and operating documents to determine whether a particular fund is permitted to participate in such new investment opportunities. If the outbreak of COVID-19 has materially affected a fund’s investment strategy that was previously disclosed to investors, the Sponsor should consider whether to seek the consent of its investors to modify such fund’s investment objectives and/or limitations, or alternatively, raise a new fund designed to pursue such new opportunities.

**Borrowing**

Sponsors should consult with their counsel, and if appropriate, proactively reach out to lenders, both on behalf of their funds as well as portfolio companies, to discuss and/or renegotiate existing borrowing agreements and/or credit facilities, to the extent necessary to provide working capital over the next several months. In order to limit the number of defaulting borrowers, certain lenders may be willing to provide flexibility with respect to loan repayment terms, anti-hoarding provisions and financial covenants previously negotiated in existing borrowing agreements.

**Investor Defaults**

Sponsors should prepare for the possibility of an increase in potential investor defaults as a result of the COVID-19 outbreak, which may require Sponsors to work creatively with defaulting investors (or investors anticipating a possible default) in order to permit the affected funds to continue to operate without significant interruption.

**Time and Attention Obligations**

Sponsors should review fund offering and operating documents to prepare for any potential breaches of time and attention obligations included in those agreements, in the event that one or more Sponsor investment professionals contract COVID-19.

**Fundraising & Redemption Considerations**

**Extending Offering Periods**

In view of the deteriorating economic climate, as well as the logistical challenges in meeting with prospective investors, Sponsors of closed-end funds should prepare for a potential slowdown in fundraising activity. Accordingly, such Sponsors should review their fund offering and operating documents to determine whether to extend a particular fund’s offering period and/or seek consent from existing investors for an amendment in order to do so.

**Investment Performance Reporting**
Given the material effect that the current market environment is likely to have on portfolio company valuations, Sponsors that plan on holding closings prior to when annual and/or quarterly valuations are available should provide appropriate disclosures to investors.

**Electronic Documentation**

The ongoing transition toward the widespread use of electronic documentation, including electronic subscription agreements, in the investment funds space is likely to accelerate during COVID-19. Sponsors should work with their outside counsel to further develop electronic fund documentation to ensure that investors can continue to make commitments and/or contributions and execute agreements with Sponsors, including, where permitted, via the use of DocuSign and electronic notaries.

**Subsequent Closings**

Portfolio investments and other assets acquired by a closed-end fund prior to a fund’s final closing date may have materially decreased in value since the Sponsor acquired such portfolio investments and/or assets. Sponsors should review their fund offering and operating documents to determine whether they provide the Sponsor with any flexibility with respect to prospective investors coming into the fund at subsequent closings, such as by excluding such prospective investors from existing investments, adjusting interest payments required of prospective investors to existing investors and/or adjusting capital contributions amounts required of prospective investors at such subsequent closings.

**Redemptions**

Sponsors of open-end funds should review fund offering and operating agreements to pre-emptively determine downside risks to their funds as a consequence of an increase in redemption requests from investors, as well as to explore all potential options to help mitigate the impact of such redemption requests. Sponsors should consider proactively reaching out to investors, and in particular key investors, in order to help mitigate investor concerns, including over-exposure of certain investors to particular asset classes or industries within their overall portfolios in view of material valuation adjustments over the past few weeks.

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