

Legal Update

A Fund Manager's Guide to Navigating around COVID-19

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Introduction

The COVID-19 pandemic has caused an economic downturn and unprecedented market disruptions. The drastic impact on financial markets and across almost all asset classes means that funds are directly affected in the face of volatile asset prices and a gloomy investment outlook.

While Singapore has passed the COVID-19 (Temporary Measures) Act 2020 (the “**Act**”) in double-quick time to provide some temporary relief in some aspects to certain businesses and types of contracts, these measures are not specifically directed at funds. As such, funds and fund managers still need to consider their obligations and responsibilities under their contracts with third parties, investment management agreements, constituent documents and their disclosures to investors. This update focuses on some considerations that fund managers should take into account in the current economic climate.



The Fund's Investment Strategy and Objective

The economic impact of COVID-19 might tempt fund managers to change their investment strategy (for example, where the fund's investment strategy might prove to be less viable in the current economic climate). However, whether a fund can change its investment strategy depends on the provisions in its constituent documents (such as the trust deed or limited partnership deed), as well as the disclosures in its offer document to investors. Fund managers should be careful not to deviate from the fund's investment strategy if such deviation is not provided for in its constituent documents or offer document, as this might lead to accusations of having made false or misleading statements in the original offer document. Any changes to the investment strategy, or otherwise a restructuring or winding-up of the fund will likely require investors' and/or the authorities' approval.



Contractual Obligations

The Act provides some temporary relief for certain scheduled contracts. Funds might be party to certain scheduled contracts, such as loan facilities with a licensed bank or finance company which is secured on any commercial or immovable property in Singapore, or secured against any plant, machinery or fixed asset located in Singapore that is used for manufacturing, production or other business purposes.¹ Temporary relief for such scheduled contracts includes the freezing of certain court actions and arbitration proceedings, and stopping the enforcement of certain security.² Some bankruptcy and insolvency rules

¹ Section 4(1) of the Act.

² Section 5(3) of the Act.

have also been modified to increase the requisite thresholds needed for bankruptcy and insolvency applications.

However, funds will still have to fulfil most of its contractual obligations under its contracts with third parties. These might relate to making loan repayments that do not fall within the ambit of the Act, or maintaining certain financial ratios.

Fund managers should also review the fund's contracts to check whether the onset of COVID-19 constitutes a *force majeure* event (whether as a pandemic or resulting in impracticality of performance) or has a material adverse effect on the contracts, which might trigger certain contractual obligations or even termination of such contracts with third parties. This may affect the financial performance of the fund.



Duties of Fund Managers

While the Act provides temporary relief to some contractual obligations, there is no direct impact on fund managers. Fund managers are still subject to their contractual responsibilities and duties under their investment management agreements, like making investments in accordance with the fund's investment strategy and objectives. Fund managers' powers must still be exercised within the parameters of the investment management agreement and the constituent documents of the fund.

The directors of fund management companies are still subject to the same statutory and common law duties of directors, such as to act in the best interests of the company, to act honestly and to use reasonable diligence.

Fund managers should also note that with various forms of movement control, "shelter-in-place" or lockdown orders instituted by many governments around the world, and the accompanying temporary shutdown of non-essential businesses in these countries, there might be delays or difficulties in obtaining any valuations of, or effecting any acquisition or sale of assets. The fund may even have difficulties in selling ordinarily liquid assets for fair value. As a fund manager with duties and obligations to your fund, such difficulties may oblige you, in the interests of investors, to hold off selling assets in the current economic climate so as to preserve capital for all investors. If so, the prudent fund manager may then have to consider more drastic actions such as suspending or delaying redemptions in order to protect the interests of all other investors.



Valuation of the Fund and its Assets

The COVID-19 outbreak has led to significant market volatility, which might make it difficult for fund managers to obtain accurate prices to value funds. Further, fund managers should consider whether there is a need to undertake a current valuation to ensure that unit / share prices are updated, balancing this against the knowledge that any updated valuation of fund assets, if undertaken in the current climate, may not accurately reflect the value of the fund.

Fund managers may also want to check if any decrease in the value of the fund assets may result in loan covenants, particularly in relation to financial ratios, being breached. If so, the fund manager may want to start engaging with the lender to work out a suitable compromise.



Dealing with Investors

In the current economic climate, the uncertain valuation of fund assets may affect the redemption value of the fund's units. If the operations of the fund are substantially impacted, or where the fund assets

become illiquid, the fund manager may have to consider whether to suspend redemptions to protect the interests of all investors, or whether changes need to be made to applications, distributions and distribution re-investments, subject to notifying or obtaining the consent of investors and the authorities. However, prior to notifying or obtaining the consent of investors and the authorities for any such changes, fund managers must still commit to the distribution policies they have adopted and previously disclosed to investors.

Where the consent of investors are required, fund managers should also note that the Act has provided for alternative arrangements for the conduct of any meeting (whether under written law or legal instrument) that requires personal attendance³. Pursuant to Section 27 of the Act, the COVID-19 (Temporary Measures) (Alternative Arrangements for Meetings for Companies, Variable Capital Companies, Business Trusts, Unit Trusts and Debenture Holders) Order 2020 was issued on 13 April 2020, which prescribes alternative arrangements for the conduct of general meetings of certain entities. The Accounting and Corporate Regulatory Authority, the Monetary Authority of Singapore and the Singapore Exchange Regulation have also published an "Additional Guidance on the Conduct of General Meetings During Elevated Safe Distancing Period", which includes a checklist to guide listed and non-listed entities on the conduct of general meetings during this period.

Some of these alternative arrangements include: (a) the issuance of notices of meeting via SGXNET or the issuer's corporate website (for listed entities) or via electronic means (for non-listed entities); (b) if the general meeting is to be conducted by electronic means (e.g. "live" webcast), the notice must provide details such as the link to access the webcast, any details of pre-registration, and instructions on how to access relevant documents, submit questions and cast votes (for both listed and non-listed companies); (c) shareholders / members may only vote via electronic means if the company's constituent documents allows it (for both listed and non-listed companies), otherwise voting is by proxy only, with members / shareholders being allowed to submit proxy forms electronically; and (d) despite social distancing measures, there is an exemption for listed entities who require key personnel to be in the same physical location for the purposes of a meeting (e.g. the CEO, company secretary, cameraman), albeit with a limit of up to 6 people.



Other Pertinent Issues

Other pertinent questions that fund managers may need to consider for the continued efficient running of the fund during the pandemic may include:

(a) Are my business continuity plan, disaster recovery plan and investor relations handling procedures in order and adequately resourced?;

(b) Is my fund capable of transitioning fully to an electronic environment? For example, can I accept digital signatures and scanned copies of verification documents for Anti-Money Laundering and Counter-Terrorism Financing (AML / CTF) purposes? Have investors agreed to receive financial reports and other fund information electronically or do I still need to post these documents to investors?;

(c) Is the fund still able to draft, print and post documents to investors if required during the lockdown period?;

(d) How severely have the fund's service providers been affected by the COVID-19 pandemic and the ensuing counter-measures instituted by the authorities? Has the pandemic triggered any responsibilities, obligations or other issues under my fund's agreements (e.g. investment management agreement, distribution agreements, registry, administration and custody agreements)? Are any of these service providers now seeking relief from their obligations under their agreements with the fund?;

(e) Do any of the fund's material contracts contain *force majeure* or material adverse change clauses? If so, what are the impacts of these clauses?

³ Section 27 of the Act.



Conclusion

The COVID-19 pandemic has resulted in unprecedented economic impact, rendering the future uncertain for many funds and companies. Fund managers should remain alert in keeping up with their contractual obligations, as well as their responsibilities and duties to the fund and to investors.

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