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Global Legal and Professional Services

COVID-19 – Important considerations for asset management companies and investment funds

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In light of the global COVID-19 pandemic, there are a variety of issues that asset management companies and investment funds should be actively considering in the current environment. We set out below a number of key issues and practical solutions for asset management companies and investment funds to consider in these unprecedented times.

1. Corporate governance

The majority of fund boards meet on a quarterly basis and any alternative investment funds which meet on a less regular basis are required to explain this decision in accordance with the Irish Funds Corporate Governance Code. The Central Bank of Ireland (the "Central Bank")'s Fund Management Company Guidance states that boards of fund managers (including self-managed funds) should meet at least quarterly and that it is expected that at least these four meetings are held in Ireland.

With travel between countries currently severely restricted it is increasing likely that directors may not be willing and/or physically able to travel to meetings in Ireland. It is important to look at the entity's constitutional documentation to determine whether the entity (fund manager or fund) has the ability to hold telephonic board meetings. If the constitutional document is silent on this matter and the entity is a company the provisions of the Irish Companies Act 2014, as amended, (the "Act") will apply. In this respect the Act states that board meetings may take place by telephonic, video or other electronic communication means provided all persons participating in the meeting can speak to and hear each other. Where a board meeting is held by telephonic, video or electronic means, unless the company's constitution provides otherwise, the meeting will be deemed to take place:

a. where the largest group of those participating in the conference is assembled;

b. if there is no such group, where the chairperson of the meeting then is;

c. if neither (a) or (b) applies, in such location as the meeting itself decides.

Given the fast paced nature of current events, a decision may need to be taken on very short notice to hold an emergency ad hoc meeting to consider the impact of the COVID-19 pandemic including to discuss matters such as liquidity management techniques or to receive updates from the service providers on the effectiveness of their business continuity processes bearing in mind the content of the outsourcing policy and/or procedures which are in place in accordance with the Central Bank's findings in its outsourcing discussion paper. In addition, given the heightened risk environment and the greater opportunities for criminal exploitation, it may be necessary for the board to be provided with an update on cyber security and anti-money laundering matters.

Given that many of these matters may require urgent attention, boards should consider whether alternative mechanisms for contacting the directors during these periods should be put in place (for example, by directors providing their mobile telephone numbers or using instant messaging platforms). Awaiting confirmation from directors as to their availability for meetings through email may not be appropriate in the event of an emergency so board contingency arrangements should be put in place as soon as practicable.

The tax implications of the location of the board meeting should also be borne in mind in arranging telephonic board meetings as further considered in the section entitled "Irish corporate tax residence".

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2. Irish corporate tax residence

Companies which are incorporated in Ireland on or after 1 January 2015 (including Irish regulated investment funds constituted as body corporates such as ICAVs and Authorised Investment Companies within the meaning of Part 24 of the Act) are automatically regarded as Irish tax resident unless treated under the terms of a double tax treaty with Ireland as resident in a treaty jurisdiction and not in Ireland[1].

As a matter of practice, for a company to establish itself as resident for tax purposes in Ireland generally its central management and control and its place of effective management need to be located in Ireland. All decisions affecting matters of policy, strategy and overall management of the company's affairs should be taken at meetings of the board of directors held in Ireland. Accordingly, directors of Irish funds and fund managers are required, where possible, to attend board meetings in person in Ireland to ensure that the company remains Irish tax resident.

The inability of directors to physically attend board meetings in Ireland and holding of board meetings via electronic means as a result of Covid-19 travel restrictions may pose a risk that the place of effective management of the company is deemed to be in a jurisdiction other than Ireland. However, the Irish Revenue Commissioners ("Revenue") published a briefing on 23 March 2020 which contains a confirmation that if an individual is present in another jurisdiction (or Ireland) as a result of COVID-19 related travel restrictions, and would otherwise have been present in Ireland (or that other jurisdiction), Revenue will be prepared to disregard such presence in or outside Ireland (as applicable) for corporation tax purposes for a company in relation to which the individual is an employee, director, service provider or agent and records of the facts and circumstances should be maintained and made available to Revenue on request. The impact of Covid-19 travel restrictions on the Irish corporate tax residence rules are further detailed in an advisory by our Tax team.

3. Execution of documentation and use of electronic signatures

In the current environment, it may be difficult to arrange for the execution of documents and to obtain wet-ink signatures. The Irish Electronic Commerce Act 2000 ("ECA") provides that information "shall not be denied legal effect, validity or enforceability solely on the grounds that it is wholly or partly in electronic form or has been concluded wholly or partly by way of an electronic communication." In order to execute a document using an electronic signature ("e-signature") it is important to review the relevant constitutional document and the document itself to ensure that there is no specific prohibition on the use of e-signatures. If the document is being signed by a number of parties, it is prudent to ensure that all counterparties to the document consent to execution by way of e-signature and, for example, wording to this effect can be included in the counterparts clause of the document.

If a signature is required to be witnessed, consideration should be given to the practicalities of having a physical signature witnessed in the current environment of social distancing.

Certain types of documents cannot be executed by e-signature (for example, wills, trusts, enduring powers of attorney, certain documents relating to interests in real property) and alternative measures will need to be considered in respect of such documentation.

Documents which are required to be executed as deeds are generally required to be executed under seal although the ICAV Act 2015 states that a document has the same effect as if executed under the common seal of the ICAV if it is expressed (in whatever form of words) to be executed by the ICAV and it is signed on behalf of the ICAV (a) by 2 authorised signatories, or (b) by a director of the ICAV in the presence of a witness who attests the signature.

As it is unlikely that the entity will have an electronic seal in place, consideration should be given to whether the document actually needs to be executed as a deed and the execution formalities set out in the entity's constitutional document in respect of deeds (i.e. does the deed need to be signed by two individuals before the seal is affixed).

4. Liquidity management tools

As boards meet to discuss the impact of COVID-19 on funds, fund managers and legal advisers should be highlighting to fund directors the liquidity management tools such as redemption gates and suspensions available to the funds they act for and when such mechanisms can be applied. Directors should consider whether the boards they sit on have procedures in place in relation to applying any liquidity management

1 Companies incorporated pre 1 January 2015 are generally regarded as resident for tax purposes in Ireland if their central management and control is in Ireland (subject to certain conditions).

tools available to the funds. In addition to suspending and gating, other techniques such as swing pricing, the imposition of anti-dilution levies as well as the use of side pockets, where available, should also be considered.

The fund's constitutional document and offering documents should be reviewed carefully to determine the liquidity management tools available to the fund including the circumstances in which dealing in the fund can be temporarily suspended and the timeframe within which investors in the fund need to be notified of the suspension. Any temporary suspension of dealing needs to be communicated to the Central Bank and in the case of a UCITS to the competent authorities in the member states in which shares/units of the fund are marketed. Where the Central Bank has been notified of the suspension of dealing of a UCITS it must be immediately notified of the lifting of the temporary suspension and where the suspension lasts longer than 21 business days an update needs to be provided to the Central Bank at the expiration of this 21 day period and each subsequent 21 day period while the suspension continues to apply. Where a fund is listed on a stock exchange it will be necessary to notify the exchange of the temporary suspension and generally a stock exchange announcement will be required.

While there is generally no requirement to notify all investors of the intention to impose a redemption gate, the constitutional document of the relevant fund should be reviewed to confirm that no such notification is required. However, if the funds are registered for sale in foreign jurisdictions, particularly those outside of the EEA, it will be necessary to carefully consider whether there are any additional local regulatory requirements that need to be adhered to, such as investor notification requirements.

In addition to the legal and regulatory mechanisms available to directors, it is also important for the boards of funds and fund managers to receive more frequent and detailed reporting on liquidity and to be provided with updates on any material changes to how liquidity is being managed within the funds. Liquidity has been a key area of focus for the Central Bank.

5. Force majeure clauses

Force majeure clauses are express terms that provide for discharge of obligations, or other relief, in pre-defined circumstances. To rely on a force majeure clause, a party would need to be able to prove that the COVID-19 pandemic (or a secondary event, which falls within the clause) was the cause of the inability to perform the obligations set out in the agreement. Causation is a necessary element of reliance on such a clause. Related to this, it is generally the case that force majeure clauses do not excuse failure to pay (as opposed to failure to perform substantive obligations). As a matter of Irish law, the effect of any particular force majeure clause will turn on its own wording, nevertheless a number of general observations can be made as further detailed in an advisory by our Insolvency and Dispute Resolution team.

6. Contractual provisions and investment triggers

Various documentation which is entered into by or on behalf of funds may contain various covenants and/or investment limits which may be triggered as a result of market conditions associated with the COVID-19 pandemic. Examples may include asset or collateral coverage ratios under derivative documentation triggering additional margin financing or loan to value ratios under financing documentation. In addition, offering documents may include certain investment triggers which may have implications for how the fund may be managed. Such documentation should be reviewed carefully to determine whether any trigger events exist and may be triggered as a result of the current market environment. Contingency planning around the triggering of such clauses should be considered.

7. Updates from regulatory authorities and other bodies:

a. Central Bank

Through an update to Irish Funds, the Central Bank has advised that it has business continuity plans to ensure that they continue to work effectively to deliver on their important public interest mandate during this period, in what is an evolving situation. In a separate statement on 19 March 2020 the Central Bank noted that they are working constructively with all the sectors regulated by the Central Bank, recognising the challenges entities are facing to maintain continuity of business and provision of service to customers. In this statement the Central Bank highlighted that they will also maintain appropriate regulatory oversight throughout this period. In this regard the Central Bank has been in touch with a number of larger fund managers requesting daily updates on the impact of COVID-19 and details of the business continuity arrangements in place.

Specifically on the question of in person board meetings the Central Bank noted through its update to Irish Funds that there are no Central Bank or legal rules regarding in person voting for contractual or other arrangements and that the ability of a board to hold telephonic (or other remotely held) meetings is a matter typically addressed by the constitutional documentation of the entity (or by the Act if the entity is a company in default of such provision set out in the entity's constitution). For further guidance on board meetings see the section above entitled "Corporate governance".

b. European Securities and Markets Authority ("ESMA")

ESMA has published the following recommendations to financial market participants:

1. Business Continuity Planning – All financial market participants, including infrastructures should be ready to apply their contingency plans, including deployment of business continuity measures, to ensure operational continuity in line with regulatory obligations;
2. Market disclosure – issuers should disclose as soon as possible any relevant significant information concerning the impacts of COVID-19 on their fundamentals, prospects or financial situation in accordance with their transparency obligations under the Market Abuse Regulation;
3. Financial Reporting – issuers should provide transparency on the actual and potential impacts of COVID-19, to the extent possible based on both a qualitative and quantitative assessment on their business activities, financial situation and economic performance in their 2019 year-end financial report if these have not yet been finalised or otherwise in their interim financial reporting disclosures; and
4. Fund Management – asset managers should continue to apply the requirements on risk management, and react accordingly.

c. Companies Registration Office ("CRO")

The CRO has advised that all annual returns due to be filed by any company between now and 30th June 2020 will be deemed to have been filed on time if all elements of the annual return are completed and filed by that date. The CRO has asked all companies to file as normal during this period if in a position to do so.

Contacts

If you have any questions on any of the information set out in this advisory, please speak to your usual contact in Walkers or connect with:

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