

LP notices: self-isolation, defaults and capital call security

Service area / [Investment Funds and Banking and Finance](#)

Location / [Cayman Islands](#)

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As the COVID-19 pandemic continues to cause disruption at unprecedented levels, we have received an uptick in enquiries from private equity and venture fund managers seeking to ensure that important notices are validly delivered to investors in the face of mounting logistical challenges and liquidity concerns.

For example:

- do certain types of notices need to be delivered in hard copy form, or can notices be delivered by e-mail?
- What should a fund do if an investor has temporarily closed its offices or individuals that have been designated for the purposes of receiving notices are suddenly unavailable (eg due to self-isolation or illness)?
- What approach should be taken with respect to notifying investors of borrowing facilities or security arrangements?

General principles and practice points

The starting point is to ensure that notices are delivered in accordance with the notice provisions in the fund's governing documents, eg the limited partnership agreement, subscription agreements and side letters (together, the "Fund Documents").

Funds should also check:

- if the Fund Documents contain any specific delivery requirements or deadlines with respect to certain types of notices or investors;
- the procedure set out in the Fund Documents for changing

addressee information (eg to a different physical address or to a different e-mail address);

- (if used) if investor portal platforms or fund administrators have implemented any changes with respect to the submission of notices; and
- if the Fund Documents contain provisions that deem notices to have been received (eg are emails delivered during working hours deemed to have been received on the same business day?)

Special considerations

With fewer distributions being made by funds and some rumours of investors defaulting on capital calls, we anticipate that both funds and investors will seek to exercise rights and remedies available to them under the Fund Documents in order to recover moneys or try to excuse themselves from obligations.

As with any potential dispute, parties should seek specific advice from legal counsel at an early stage to determine the appropriate strategy and to ensure that any communications are validly delivered.

Borrowing facilities and security

Funds will need to consider whether borrowing facilities (including upsizes, amendments or extensions) need to be disclosed to investors in accordance with any requirements in the Fund Documents.

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Capital call security notices

Lenders will require that investors are notified of any security granted over uncalled LP commitments.

This notice will result in the lenders' security interests having priority against competing equitable interests. In addition, if drafted accordingly, it may provide lenders with recourse in the event that an investor's commitment is unilaterally released or waived by the fund.

Legal advice should be obtained as to whether additional security notices are required in connection with upsizes, amendments or extensions to existing borrowing facilities.

Funds should also check with lenders at any early stage what their requirements are with respect to the delivery of security notices and plan accordingly. It is likely that a lender's requirements may go above and beyond any "deemed notice" provisions contained in the Fund Documents. For example, will evidence of e-mail delivery to all investors suffice (eg by read receipts), or do the lenders require hard copies to be delivered by courier?

Market practice can differ on this, however we anticipate that in light of current market conditions, lenders will seek a high level of comfort that notices have actually been delivered to all investors (rather than relying on any deemed notice provisions) and may not agree to advance new funds until evidence of delivery has been provided.

Key contacts

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