

# COVID-19

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## CORPORATE GOVERNANCE FOR ASSET MANAGERS AND PRIVATE EQUITY HOUSES

The 2019 novel coronavirus (**COVID-19**) pandemic is forcing both management and boards of directors and partners in asset managers and private equity houses to navigate uncharted and stormy seas. Whilst management will be in the front line of deciding and actioning the firm's response to the pandemic, boards' oversight responsibility makes it vital that they closely monitor management's actions and offer appropriate guidance and direction. Given that environmental, social and governance matters are already high on boards' agendas, they are likely to find their feet are held to the fire on governance during the COVID-19 crisis. Indeed, some have already suggested COVID-19 represents an opportunity for "*companies [to] demonstrate that they have effective leadership. In times of crisis that becomes more apparent, not less apparent.*"<sup>1</sup>

Below are some of the key issues that boards and partners in asset management and private equity firms should be considering:

- **Appointment of a crisis management team:** The FCA will expect firms to have contingency plans in place to ensure that they can continue to operate effectively and deliver key services. To the extent that firms have a crisis management policy, they should be reviewing and amending it as necessary in light of the particular challenges that COVID-19 poses. Firms should consider the appointment of a cross-functional crisis management team to identify specific risks and formulate a plan to mitigate them. The firm's board should be kept informed of significant issues in a timely fashion and be provided with sufficient information to allow them to exercise oversight and make key decisions where necessary. Firms should also be mindful of their continued fiduciary duties and should satisfy themselves that corporate governance arrangements at the level of investee companies are similarly robust.
- **Board continuity:** The board should review the meetings scheduled for the next three months plus with a view to determining which can be cancelled or postponed to create time for regular and emergency meeting on COVID-19 related matters. In-person meetings should be replaced with conference calls to help prevent cross-contagion within the board. Boards should also consider whether (i) the firm's constitution requires that at least some of the board be present to run annual general meetings, (ii) there provisions are in place if a quorum of the board is unachievable and (iii) alternative directors and/or partners been identified who can step in should a director or partner become unavailable.
- **Business as usual compliance:** FCA regulated firms should be mindful that their conduct of business obligations remain unchanged. Mass remote working will raise a number of issues for regulated firms: phone lines will still need to be recorded, orders will need to be entered into the appropriate system promptly, the IT infrastructure will need to be robust and staff will need to continue to be supervised by and have access to compliance. Firms should review their policies and procedures and systems and controls around information management to ensure not only that client confidentiality and insider lists are maintained but that information barriers are effective and the risk of inside information being inappropriately disseminated is not affected by remote working. Indeed, the FCA have reminded listed companies to continue to be mindful of their obligations to update the market under the Market Abuse Regulation and the need to meet regulatory deadlines as regards the publication of financial results.<sup>2</sup> ESMA has similarly noted that "*asset managers should continue to apply the requirements on risk management, and react accordingly.*"<sup>3</sup>

Whilst the FCA is likely to accept that firms faced with sudden and extreme events will need a short time in the initial phase to react to them, they will be unlikely to accept COVID-19 as a defence to a firm's failure to comply with their regulatory obligations or the criminal law. Firms' performance and alleged failings may be judged several years hence. Experience suggests that during times of extreme market volatility and dislocation there can also be enhanced regulatory scrutiny of issues such as fund liquidity, CASS compliance, complaints handling, and trading practices such as the marking of books, market abuse and insider dealing. It is vitally important that firms' operational controls over key risk areas like these continue to operate robustly (and that can be evidenced if required).

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<sup>1</sup> "BlackRock to target companies on governance despite coronavirus", Financial Times, 18 March 2020, text available [here](#).

<sup>2</sup> Primary Market Bulletin Issue No. 27 – Coronavirus update, 17 March 2020, available [here](#).

<sup>3</sup> See ESMA recommends action by financial market participants for COVID-19 impact, 11 March 2020, available [here](#).

- **Succession plan for significant influence functions:** Key governance and senior management roles within the firm should be identified. This should include members of the board, management, key risk takers, compliance and IT support. In the case of asset managers, key portfolio managers should be identified. Deputies for each of these key individuals should be nominated and hand-over procedures and notes prepared to mitigate against the risk of illness making such individuals unavailable. The FCA rules permit the temporary appointment, for up to 12 weeks, of a substitute person for significant influence functions before FCA approved person status is sought.
- **Aftermath:** In the aftermath of COVID-19, the board should assess how the firm has navigated the crisis and what lessons can be learnt. Times of crisis are an opportunity for the board and management to demonstrate robust corporate governance.

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If you have any questions, please do not hesitate to contact your usual AG contact or one of the lawyers listed below:

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