

March 4, 2019

# SEC Staff Provides Relief for Registered Investment Company Boards Regarding Certain In-Person Voting Requirements

By Nancy P. O'Hara and Gloria Y. Liu

On February 28, 2019, the staff of the Securities and Exchange Commission (SEC) Division of Investment Management (Staff) issued a no-action letter to the Independent Directors Council (IDC) that provides relief, under certain circumstances, to registered investment company (fund) boards from the in-person voting requirements of the Investment Company Act of 1940 (1940 Act) relating to the approval and renewal of investment advisory and principal underwriting contracts, Rule 12b-1 plans, approval of interim advisory contracts, and selection of independent public accountants.<sup>1</sup>

This relief is another area that the IDC recommended that the Director of the Division of Investment Management review and reconsider with respect to the responsibilities and duties of fund directors.<sup>2</sup> This action follows a no-action letter issued in October that permits fund boards to rely on written representations from the fund's chief compliance officer regarding affiliated transactions effected in reliance on Rules 10f-3, 17a-7, and 17e-1 under the 1940 Act.

## Relief Provided by the IDC No-Action Letter

The IDC no-action letter provides that the Staff would not recommend enforcement action when directors do not adhere to certain in-person voting requirements, but instead give the required approvals telephonically, by video conference, or by other means by which all participating directors may participate in the meeting and communicate with each other simultaneously in either of the following circumstances:

### Relief 1

The directors needed for the required approval cannot meet in person due to **unforeseen or emergency circumstances**, if (i) no material changes to the relevant contract, plan and/or arrangement are proposed to be approved, or approved, at the meeting, and (ii) such directors ratify the applicable approval at the next in-person board meeting. Relief 1 applies only to the:

- renewal of an investment advisory contract or principal underwriting contract pursuant to Section 15(c) of the 1940 Act;
- selection of the fund's independent public accountant pursuant to Section 32(a) of the 1940 Act, where the accountant is the same one that was selected in the immediately preceding fiscal year; and
- renewal of the fund's 12b-1 Plan.

OR

### Relief 2

The directors needed for the required approval previously fully discussed and considered all material aspects of the proposed matter at an in-person meeting, but did not vote on the matter at that time, provided that no director requests another in-person meeting. Relief 2 applies only to the:

- approval or renewal of an investment advisory contract or principal underwriting contract pursuant to Section 15(c) of the 1940 Act;
- approval of an interim advisory contract pursuant to Rule 15a-4(b)(2) under the 1940 Act;
- selection of the fund's independent public accountant pursuant to Section 32(a) of the 1940 Act; and
- approval or renewal of the fund's 12b-1 Plan.

## Circumstances Triggering the Relief

Under Relief 1, unforeseen or emergency circumstances include any circumstances, as determined by the board, that could not have been reasonably foreseen or prevented and that make it impossible or impracticable for directors to attend a meeting in-person. Such circumstances include but are not limited to illness or death, weather events or natural disasters, acts of terrorism, and disruptions in travel that prevent some or all directors from attending the meeting in person.

<sup>1</sup> See IDC SEC No-Action Letter (Feb. 28, 2019).

<sup>2</sup> See Letter from Amy B.R. Lancellotta to Dalia Blass (Oct. 16, 2017). See also, IDC SEC No-Action Letter (Oct. 12, 2018).

The no-action letter gives the following examples of the circumstances in which Relief 2 could arise:

- directors prefer to wait to vote until after a contingent event takes place, such as the vote of shareholders of the investment adviser or a parent company of the investment adviser with respect to a proposed change of control of the adviser or parent company;
- a majority of independent directors have selected the independent public accountant for certain funds in a fund complex and subsequently select the same independent public accountant at a later date for other funds in the same fund complex that have different fiscal years, and a majority of the independent directors have concluded that no additional information is needed from the independent public accountant; or
- directors wish to wait to vote on a matter until further requested information is provided or previously provided information is confirmed, and they determine at the in-person meeting that the nature of the information to be provided or confirmed would not be likely to change the vote of any director needed for the required approval.

## Practice Points and Tips

This relief is a welcome improvement, given the advances in technology since the in-person meeting requirements were invoked in 1970. It will help funds and their boards avoid the burden and expense

of hastily called, in-person special meetings after unexpected events or special circumstances prevent or delay a required in-person vote. However, the no-action relief only applies in certain limited circumstances and still requires an in-person meeting to consider these matters either before or after the meeting at which the vote is taken telephonically or by video conference (a non-in-person vote). For example, a board may take a non-in-person vote only if the advisory contract, principal underwriting contract or 12b-1 plan does not contain material changes from when it was previously approved (Relief 1) or considered (Relief 2) at an in-person meeting. An additional in-person meeting would be needed under Relief 2 if a director requests another in-person meeting to vote on the matter or if the additional information provided or discovered results in a change in the vote of any director that is needed for the required approval. In addition, if a board combines its contract-renewal meeting with approvals relating to a new series or class and Relief 1 is triggered, the non-in-person vote taken at that meeting would not cover the new series or class because Relief 1 only applies to renewals of existing contracts. Further, the no-action relief does not extend to situations in which a change of control of an investment adviser to a fund results in the termination of a prior contract. In addition, boards should consult with counsel if they intend to implement Relief 2 in a manner not suggested by any of the three circumstances listed as examples above.

For more information on the IDC no-action relief, please feel free to call or email your contact within the Investment Management Group.

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