

## SEC Staff Relaxes Certain In-Person Board Voting Requirements for Registered Investment Companies

The SEC's Division of Investment Management has relaxed certain in-person voting requirements for fund boards, subject to certain conditions, in a [no-action letter](#) to the Independent Directors Council (the IDC) issued on February 28, 2019. Under the new relief, subject to certain conditions, fund boards, including independent directors, may choose to rely on the letter to

- make board approvals relating to certain contract approvals under Section 15(c),
- select independent auditors, and
- approve plans of distribution via telephone, video conference or other means of meeting by which all participating directors can participate and communicate simultaneously.

Previously, as required by Sections 15(c) and 12(b) and Rules 12b-1 and 15a-4(b)(2) under the Investment Company Act of 1940 (the 1940 Act), investment advisory contracts (and certain interim advisory contracts), principal underwriting agreements, and plans regarding distribution and related payments from fund assets (Rule 12b-1 Plans) required approval at an in-person meeting by a vote of a fund's board, including a majority of the fund's independent directors. Similarly, Rule 32(a) and Rule 32a-3 previously required the annual approval of a fund's independent public accountants by an in-person vote of a majority of a fund's independent directors.

The relief represents an important development in the ongoing board outreach initiative begun by Dalia Blass, Director of the SEC's Division of Investment Management, in 2017.

### Conditions for Relief

The no-action letter provides the following relief from the 1940 Act's in-person meeting requirements, based on two different scenarios:

- **Condition 1:** The directors needed for the required approval cannot meet in person due to unforeseen or emergency circumstances, provided that (1) no material changes to the relevant contract, plan and/or arrangement are proposed to be approved, or approved, at the meeting, and (2) such directors ratify the applicable approval at the next in-person board meeting; and
- **Condition 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.

Each form of relief is subject to meeting one of these two conditions:

**Relief**

**Condition to Meet  
for Relief**

Section 15(c) - Renewal of an Advisory/Principal Underwriting Contract	Condition 1
Section 15(c) - Renewal <b>or Approval</b> of an Advisory/Principal Underwriting Contract	Condition 2
Rule 15a-4(b)(2) - Approval of an Interim Advisory Contract	Condition 2
Renewal of a Fund's Rule 12b-1 Plan	Condition 1
Renewal <b>or Approval</b> of a Fund's Rule 12b-1 Plan	Condition 2
Section 32(a) - Approval of a Fund's Independent Public Accountant ( <b>only if</b> the accountant selected <b>is the same</b> as in the previous fiscal year)	Condition 1
Section 32(a) - Approval of a Fund's Independent Public Accountant ( <b>not the same</b> accountant as in the previous fiscal year)	Condition 2

## Background

**Historical Legal Requirements and Recent Reevaluation of Board Responsibilities.** Fund boards have long been held to in-person voting standards, as noted in the legislative history of several of the provisions referenced above, to "assure informed voting on matters which require action by the board[s] of directors of registered investment companies." [2] The legislative history of some of these same requirements, circa 1969-1970, rationalized in-person voting as "a practical necessity if unaffiliated directors are to effectively protect the interests of shareholders." [3] This bright-line (and arguably hard-line) legislative stance was reinforced shortly thereafter by the SEC itself in 1971, with the assertion that, at least in the context of advisory agreement approvals, the in-person voting requirement "cannot be complied with by voting over the telephone, through the use of a [videoconference], by proxy or otherwise than by personal appearance." [4]

Over the ensuing decades, however, the SEC and its staff gradually began to ease the in-person requirements of certain related rules and acknowledged that relief from certain in-person voting requirements may be appropriate where it could be impractical for a board to immediately meet. Most recently, since 2017, the SEC's Division of Investment Management has been conducting a board outreach initiative, acknowledging the substantially growing list of board responsibilities since the passage of the 1940 Act, directly engaging with fund boards to determine where their focus can be most efficiently directed, and conducting holistic reviews of current board responsibilities and accordingly providing boards relief from certain aspects of the SEC's regulatory regime. [5]

In the spirit of the board outreach initiative, the IDC submitted its no-action request relief from these in-person voting requirements. In the letter, the SEC staff acknowledges that "the position you are requesting from us would remove significant or unnecessary burdens for funds and their boards. We also do not believe the position would diminish the board's ability to carry out its oversight role or other specific duties."

# A Welcome Development

The relief granted in the letter reflects significant recognition by the SEC staff of the challenges faced by modern fund boards and the ways that modern technology can be used to improve upon antiquated portions of the 1940 Act's regulatory framework; the letter acknowledges that the staff did consider the requested relief "[i]n light of market, regulatory and technological developments." While it is too early to determine what further board relief will come from the staff's outreach initiative, the letter is a welcome development for boards, in consultation with counsel, to further discuss their possible options where circumstances either make in-person appearances unfeasible or might otherwise force a board to schedule an in-person meeting (outside of its regular meeting schedule) solely to hold a vote on a single matter.

## ENDNOTES

[1] As used in the letter and herein, a "fund" refers to a registered investment company, and specifically includes business development companies.

[2] Pub. L. 91-547 (Dec. 14, 1970).

[3] H.R. Rep. No. 91-1382 at 77 (1970) (quoting S. Rep. No. 91-184 at 39 (1969)).

[4] Provisions of Investment Company Amendments Act of 1970 Concerning Approval of Advisory Contracts and Other Matters for Consideration by Registrants at 1971 Annual Meetings, SEC Rel. No. IC-6336 (Feb. 2, 1971).

[5] *See* Dalia Blass, Director, Division of Investment Management, SEC, [Keynote Address: ICI Securities Law Developments Conference](#) (Dec. 7, 2017). *See also* Independent Directors Council, [SEC No-Action Letter \(Oct. 12, 2018\)](#) (allowing boards to rely on quarterly representations of a fund's chief compliance officer regarding fund compliance with certain affiliated-transaction exemptive rules, removing the explicit requirement of direct board approval of such transactions' compliance with applicable regulations).

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