Board Meetings In Times of COVID-19: SEC Relaxes Certain In-Person Meeting Requirements Under 1940 Act

In light of the recent novel coronavirus (COVID-19) outbreak and the challenges it presents for boards of directors to safely travel, the Securities and Exchange Commission (SEC) issued an order on March 13, 2020, (the order) exempting all registered investment companies and business development companies (BDC), including their advisers and principal underwriters, from the in-person meeting requirements of certain provisions under the Investment Company Act of 1940 (the 1940 Act).

Specifically, the order states that boards are exempt from the in-person meeting requirements pertaining to all approvals and renewals of contracts, plans, or arrangements imposed under Sections 15(c) and 32(a) of the 1940 Act and Rules 12b-1(b)(2) and 15a-4(b)(2)(ii) thereunder, provided that the following criteria are met:

- Reliance on the order is necessary or appropriate due to circumstances related to current or potential effects of COVID-19
- The votes required to be cast at an in-person meeting are instead cast at a meeting in which directors may participate by any means of communication that allows all directors participating to hear each other simultaneously during the meeting
- The board of directors, including a majority of the directors who are not interested persons of the registered management investment company or BDC, ratifies the action taken pursuant to this exemption by vote cast at the next in-person meeting

This in-person meeting relief applies to all board meetings through June 15, 2020, and the SEC indicated that it may be extended, with additional conditions if appropriate, as circumstances warrant.

The SEC's order essentially supersedes guidance issued by the staff of the Division of Investment Management (the staff) on March 4, in which it extended prior no-action relief to the same in-person meeting requirements. However, unlike the staff's guidance, the SECs order has legal force and effect pursuant to the powers conferred on the SEC under Sections 6(c) and 38(a) of the 1940 Act to take necessary and appropriate action in the public interest.

Boards should consider the following tips when conducting meetings remotely.

Planning

Boards should start planning now, especially for video meetings. Many board members are not familiar with video conferencing technology, but most platforms are easy-to-use provided the board members have the right tools and training.

- **Confirm Computer Access.** Check now whether each board member has a computer and/or tablet with a camera. If the board uses a board portal such as Diligent, it may be helpful to have both a laptop and a tablet, to access the video conference while following along on the tablet.
- **Determine Video Platform.** If using video, determine the preferred platform (e.g., WebEx, Zoom, BlueJeans, etc.) and take steps to assist board members with installation of any apps or software. Open any necessary accounts and ensure that all board members have login credentials if required.
- **Schedule a Practice Session.** Organize a dry run, during which board members can log on and test their proficiency with the software. Common problems include an inability to activate the camera and confusion over whether to dial in and use the telephone for audio. Have technical staff available to walk the board

members through any difficulties.

- **Prepare a Tip Sheet.** Provide all board members with a list of troubleshooting best practices.

Selecting a Format

- **Video Format.** A video conference may be harder and less familiar initially. However, participants generally prefer it once they are familiar with the technology, as it allows for smoother control of questions and discussion if attendees can see each other. In addition, it is generally possible to display the relevant pages of the board materials under discussion along with video of those speaking. A video format also allows for trustees to raise their hands to be called on. Many video conferencing platforms also allow hosts to control access—a useful feature if conducting executive sessions or where different individuals are presenting. Finally, individuals can turn their cameras off and participate in the meeting (including seeing others or materials), if they are initially uncomfortable with their appearance on the video.
- **Telephonic Format.** Conference calling may be more familiar and easier to use, especially for shorter meetings. In this case, it is important for speakers to clearly identify themselves. It is also important to set up a method for the trustees to indicate to the chairperson that they would like to speak so that people aren't talking over each other. If trustees are dialing into the board meeting, consider setting up a separate dial-in number for the executive session to ensure that members of management do not accidentally participate. Special effort should be made to ensure that presenters refer to the location of the material they are presenting in the board materials so that all the trustees are viewing the correct pages.

Meeting Tips

- **Review Agenda Items.** Review the agendas of board meetings and committee meetings to determine if there are any non-actionable or educational items that could be moved to a later in-person meeting.
- **Review Agenda Format.** Review the agenda format to ensure that each agenda item includes the name of the person presenting and page references to the board book. Hyperlinks like those available on board portals such as Diligent make navigation easier.
- **Hard Copies.** Boards that rely heavily on hard copies of board materials may wish to explore whether a supplemental PDF version may be appropriate as well. As always, follow good practices for timely delivery of materials.
- **Running an Orderly Meeting.** In general, best practices for running a meeting apply, even when the meeting is virtual. The chair should clearly indicate what the topic is and the location in the materials. On video, individuals can raise their hands to be recognized. It is a good practice for the chair to recognize the individuals who will be speaking and the order in which speakers will be heard. The chair should also ask if there are others who would like to comment before concluding a discussion, so that people feel comfortable speaking up, if they were hesitant to interrupt in the virtual format.
- **Audio.** A common problem with video conferencing is an echo that arises when an individual dials into the call but also has an active microphone on the video application. Because the audio on the telephone is generally better, board members should be instructed how to turn off the microphone on the video application if they elect to use a phone. Alternatively, they should know how to use the application microphone and not dial in. These matters can be sorted out in the dry run training referenced above.

Presentation of Board Books and Materials

- **Board Book.** Many presenters at board meetings (e.g., auditors, service providers, internal business personnel) work from hard copies of the materials they have submitted for inclusion in the board book—particularly those who do not have access to the board book application—and therefore reference page numbers in their presentations rather than those in the board book. To the extent possible, it may be helpful to send such presenters a PDF of their presentation from the board book to avoid confusion and ask them to refer to the correct page number. Page numbers should be prominently displayed, and page orientation should remain consistent throughout the materials.

For assistance with preparation and planning for remote meetings, companies may wish to seek advice from trusted counsel.

© 2020 Perkins Coie LLP

Authors

Explore more in

[Investment Management](#)

Related insights

Update

[HHS Proposal To Strengthen HIPAA Security Rule](#)

Update

[California Court of Appeal Casts Doubt on Legality of Municipality's Voter ID Law](#)