

Alert

Board Meetings — SEC Staff Issues Coronavirus Guidance to Registered Investment Companies Regarding In-Person Board Meeting Approvals

March 10, 2020

Recognizing the challenges posed by travel restrictions in connection with efforts to contain the potential spread of coronavirus, the staff of the Division of Investment Management of the Securities and Exchange Commission has issued a staff statement (“Staff Statement”)¹ addressing approvals typically required to be made by registered fund boards at in-person board meetings. With respect to meetings scheduled to be held from the date of the Staff Statement through June 15, 2020 (subject to possible extension), the approval or renewal of investment advisory and sub-advisory agreements and the selection of independent public accountants may be undertaken at meetings held by telephone, video conference or other similar means. Also covered by the statement are approvals relating to distribution plans and interim advisory agreements.

The Staff Statement extends relief previously provided in a no-action letter to the Independent Directors Council in February 2019 (“IDC Letter”)², which addressed unforeseen or emergency circumstances making it impossible or impracticable for all or some fund directors to attend a meeting in person, including as a result of illness, weather events, acts of terrorism and disruptions in travel. In that letter, the staff said it would not recommend enforcement action for violations of the Investment Company Act of 1940 against a fund where, due to such circumstances, its board met by telephone or video conference and approved, among other things, the renewal of an advisory agreement or the selection of the fund’s independent public accountants, provided that the advisory agreement was materially unchanged from the existing agreement and the accounting firm was the same firm selected in the previous year.

In addition to making it clear that the no action relief contained in the IDC Letter would apply to the current coronavirus situation, the Staff Statement goes a step further in expanding the relief to approvals of all advisory agreements, including new agreements and those with material changes, as well as to the selection of independent public accountants, including where such accountant is not the same accountant as was selected in the previous year. Consistent with the IDC relief, ratification of such approvals at the next in-person meeting of the board would also be required.

With the flexibility provided by the Staff Statement, boards with upcoming in-person approvals should consider how best to proceed. Options may include holding meetings via telephone or videoconference

¹ Division of Investment Management Staff Statement on Fund Board Meetings and Unforeseen or Emergency Circumstances Related to Coronavirus Disease 2019 (COVID-19) (March 4, 2020), <https://www.sec.gov/investment/staff-statement-im-covid-19>.

² Independent Directors Council, SEC No-Action Letter (pub. avail. Feb. 28, 2019), <https://www.sec.gov/divisions/investment/noaction/2019/independent-directors-council-022819>.

or considering the feasibility of having a majority of the independent directors meet in one location in person, with other individuals participating remotely. We are seeing clients assessing the situation on an ongoing basis and encouraging board members and other meeting participants to participate in meetings in the manner that they feel is most feasible for them.

As noted in the IDC request letter, such a response by the SEC staff is not unprecedented and similar relief regarding the need for in-person approvals was provided after the Sept. 11, 2001 terrorist attacks. However, as noted in the Staff Statement, the guidance has no legal force or effect and is not a statement of the SEC itself. While unlikely, the legality of actions taken by a fund in reliance on the statement could be challenged. As a result, funds that intend to rely on the Staff Statement should consider what steps may be appropriate to more closely mirror a typical in-person meeting of the board, including the use of technology and similar means where available.

The current coronavirus situation raises significant business continuity issues for funds and their directors and investment advisers, all of whom must consider the plans and procedures that are in place to deal with emergency circumstances. For assistance with business continuity planning, or if you have any questions about the content of this *Alert*, please contact your attorney at SRZ or one of the authors. If you would like the materials from SRZ's recent webinar addressing key considerations for fund managers' business continuity planning, including in light of the coronavirus situation, please contact events@srz.com.

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