

September 2, 2021

Ms. Sarah ten Siethoff
Acting Director
Division of Investment Management
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: In-Person Voting Requirements

Dear Ms. ten Siethoff,

Thank you for our conversation earlier this summer regarding the impact of the “in-person” voting requirements for fund¹ boards, as set forth in Sections 12(b), 15(c) and 32(a) of the Investment Company Act of 1940 (1940 Act), as amended, and Rules 12b-1 or 15a-4(b)(2) thereunder.² We write to follow up on our discussion.

The Independent Directors Council (IDC) appreciates that the SEC responded promptly to the COVID-19 pandemic by suspending the in-person voting requirements subject to certain conditions.³

¹ The term “fund” may refer to a registered management investment company or a separate series thereof, or a business development company, as defined under Section 2(a)(48) of the 1940 Act.

² Section 15(c) of the 1940 Act requires that the terms of an investment advisory contract or principal underwriting agreement and any renewal thereof be approved by the vote of a majority of the fund’s directors who are not parties to the contract or agreement, or “interested persons” of any such party. Rule 12b-1 requires that a plan regarding distribution-related payments pursuant to that Rule be approved by a vote of the fund’s independent directors. Rule 15a-4(b)(2) requires that certain interim contracts be approved by the fund’s board of directors, including a majority of independent directors. Section 32(a) requires that independent public accountants be selected by a vote of a majority of the fund’s independent directors. In each case, the required votes must be cast in person.

³ Investment Company Act Release No. 33817 (Mar. 13, 2020), available at <https://www.sec.gov/rules/other/2020/ic-33817.pdf>, and Investment Company Act Release No. 33824 (Mar. 25, 2020), available at <https://www.sec.gov/rules/other/2020/ic-33824.pdf>, superseded by Investment Company Act Release No. 33897 (June 19, 2020), available at <https://www.sec.gov/rules/exorders/2020/ic-33897.pdf>. *See also* SEC Public Statement, “An Update on the Commission’s Targeted Regulatory Relief to Assist Market Participants Affected by COVID-19 and Ensure the Orderly Function of our Markets” (June 26, 2020, updated

In light of the substantial uncertainty caused by COVID-19 and its variants – and the broader goal to modernize the in-person voting requirements governing fund boards – IDC recommends the following at this time:

- To provide greater certainty to the fund director community and to facilitate the transition back to an in-person meeting environment for fund boards, we recommend that the staff of the Division of Investment Management (Staff) confirm that it will provide, at a minimum, six months of notice in advance of withdrawing the temporary relief. In addition to the recent resurgence of COVID-19, fund boards, like other members of the financial services industry, will require sufficient time to plan their transition from virtual to in-person meetings based on real-time conditions.⁴
- We recommend that the SEC modernize the in-person voting requirements by providing flexibility on a permanent basis.

I. In-Person Voting Requirements

Under the 1940 Act, a fund’s investment advisory contract, principal underwriting contract, Rule 12b-1 plans, and the selection of the fund’s independent public accountant must be approved by a vote – “cast in person” – of the majority of the fund’s independent directors. The legislative history of the 1970 amendments to the 1940 Act indicates that Congress intended the in-person voting requirements for the annual renewal of an advisory or principal underwriting contract or approval of the selection of an independent public accountant to “*assure informed voting* on matters which require action by the board of directors of registered investment companies, which is a practical necessity if unaffiliated directors are to effectively protect the interests of shareholders.”⁵ In addition, the proposing release for Rule 12b-1 noted that the procedural requirements for board approval of 12b-1 Plans were crafted in a similar

Jan. 5, 2021), available at <https://www.sec.gov/news/public-statement/update-commissions-targeted-regulatory-relief-assist-market-participants>.

⁴ It is unclear when COVID-19 – and accompanying concerns regarding the safety of travel and in-person congregation – will end. Moreover, fund boards will need time to develop vaccination, masking, and other safety protocols based on conditions at the time before in-person meetings can resume.

⁵ H.R. Rep. No. 91-1382 at 77 (1970) (“House Report”) (quoting S. Rep. No. 91-184 at 39 (1969) (emphasis added) (“Senate Report”). House of Representatives, Mutual Fund Amendments Hearing, Part 1 (1969) at 162 contains substantially identical language. *See also* House Report at 26 (“... the bill would amend section 15(c) of the Act ... to provide that the voting requirements of the section can be satisfied only by directors who are personally present at a meeting at which their votes are taken. The proposed amendment is intended to assure informed voting on matters which require action by the board of directors of registered investment companies.”). The Senate Report contained similar language. *See* Senate Report at 39.

manner to the requirements for the approval of advisory contracts.⁶ Accordingly, there appears to be a similar policy intent underlying the in-person voting requirement under Rule 12b-1.

The 1970 statutory amendments⁷ were enacted long before the technological advances in communications that we now routinely use every day, and that have been significantly enhanced during the COVID-19 pandemic. Historically, the in-person voting requirements have been interpreted as requiring fund board members to be physically present when voting, as opposed to voting telephonically, through closed-circuit television conference, or otherwise.⁸ However, the many technological advances that have occurred in the 50 years *after* the requirements were implemented now enable fund board members to both see and hear other meeting participants as they conduct fund business. Indeed, fund boards,⁹ like federal courts¹⁰ and the SEC,¹¹ have seamlessly leveraged videoconferencing technologies

⁶ Bearing of Distribution Expenses by Mutual Funds, SEC Release No. IC-10862, 44 F.R. 54014 (Sept. 17, 1979). The Commission stated that “the procedural requirements of proposed rule 12b-1 are similar to those established by the [1940] Act for approval of advisory contracts” and that the approval requirements in Rule 12b-1(b) “are similar to those prescribed by sections 15(a) and (c) of the [1940] Act for approval of the advisory contract.” *Id.* at 54018.

⁷ See Pub. L. 91-547 (Dec. 14, 1970).

⁸ See, e.g., 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 Release No. IC-6336, 36 F.R. 2867, 2867 at n. 3 (Feb. 2, 1971). Corporate board meetings, which are governed by state law(s), are not subject to the in-person fund board meeting requirements set forth in the 1940 Act.

⁹ Former Division Director, Dalia Blass, noted, “boards have gained experience conducting virtual meetings while considering matters ordinarily reserved for in-person meetings. . . . As a result, a number of groups have expressed interest in extending the relief permanently. In my view, moving in this direction makes good sense.” Speech, “PLI investment Management Institute,” Dalia Blass, Former Director, SEC Division of Investment Management (July 28, 2020), available at <https://www.sec.gov/news/speech/bllass-speech-pli-investment-management-institute>.

¹⁰ In March 2020, the Judicial Conference of the United States “temporarily approved the use of video and teleconferencing for certain criminal proceedings and access via teleconferencing for civil proceedings during the COVID-19 national emergency” to “address health and safety concerns in federal courthouses and courtrooms.” Press Release, Administrative Office of the U.S. Courts, “Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic” (Mar. 31, 2020), available at <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic>.

¹¹ Likewise, the Federal Reserve Bank of Kansas City recently hosted its annual Economic Policy Symposium virtually. See Press Release, Federal Reserve Bank of Kansas City, “Kansas City Fed to host Economic Policy Symposium Online” (Aug. 20, 2021), available at <https://www.kansascityfed.org/newsroom/2021-news-releases/Kansas-City-Fed-to-host-Economic-Policy-Symposium-online/>.

during the COVID-19 pandemic for purposes of synchronous communications, to assure informed decision-making, and to take other required actions.

II. Request Regarding Temporary Relief from In-Person Voting Requirements

Over time, the Staff has recognized that it is appropriate to provide relief from the in-person voting requirements due to “physical impossibility or other justifiable inadvertence,”¹² or unforeseen or emergency circumstances.¹³ In that vein, in February 2019, the Staff issued a no-action letter (No-Action Letter) to IDC¹⁴ stating that it would not recommend enforcement action to the SEC in certain “situations where [in-person voting requirements] may create a significant or unnecessary burden for funds and their boards that outweigh any benefits to fund shareholders.”¹⁵ Subject to the facts and circumstances in IDC’s request for a no-action position, the No-Action Letter permits¹⁶ fund directors to approve agreements, plans, or arrangements telephonically, by video conference, or otherwise, so long as they can “participate and communicate with each other simultaneously during a meeting, instead of meeting in person.”¹⁷

¹² Public Policy Implications of Investment Company Growth (1966) (the “1966 Report”) at n. 37.

¹³ Shortly after the terrorist attacks of September 11, 2001, the SEC issued an exemptive order that included short-term relief from certain in-person voting requirements. Commission Notice: Order Under Sections 6(c), 17(d) and 38(a) of the Investment Company Act of 1940 Granting Exemptions from Certain Provisions of the Act and Certain Rules Thereunder, SEC Release No. IC-25156 (Sept. 14, 2001).

¹⁴ SEC No-Action Letter, “Investment Company Act of 1940 - Sections 12(b), 15(c) and 32(a) and Rules 12b-1 and 15a-4(b)(2) Independent Directors Council,” (Feb. 28, 2019) available at <https://www.sec.gov/divisions/investment/noaction/2019/independent-directors-council-022819>.

¹⁵ IDC Letter, “Request for no-action position regarding in-person voting requirements” (Feb. 28, 2019), available at <https://www.sec.gov/divisions/investment/noaction/2019/independent-directors-council-022819-incoming.pdf> (IDC Letter).

¹⁶ See No-Action Letter.

¹⁷ See IDC Letter.

In response to COVID-19,¹⁸ the SEC granted temporary relief from the in-person voting requirements under specified circumstances.¹⁹ The relief period initially covered March 2020 through June 2020, but it was extended because “boards of directors of registered management investment companies and BDCs continue to face challenges traveling in order to meet the in-person voting requirements . . .”²⁰ The temporary relief will remain in effect until it is terminated by staff action, “which date will be at least two weeks from the date of the notice . . .”²¹

Importantly, fund boards, like other industry participants, continue to grapple with issues related to the COVID-19 pandemic, including transportation limitations, ongoing public health concerns regarding the efficacy of vaccines, and emerging coronavirus variants.²² In the meantime, fund boards have successfully leveraged videoconferencing technologies to carry out their duties.²³

¹⁸ SEC Staff Statement, “Division of Investment Management Staff Statement on Fund Board Meetings and Unforeseen or Emergency Circumstances Related to Coronavirus Disease 2019 (COVID-19)” (Mar. 4, 2020), available at <https://www.sec.gov/investment/staff-statement-im-covid-19>.

¹⁹ The Order, dated March 13, 2020 along with subsequent extensions, allows fund boards to meet by telephone or by video conference to vote on matters that otherwise would require in-person meetings, subject to certain conditions: (1) reliance is necessary or appropriate due to circumstances related to the current or potential effects of COVID-19; (2) 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 allow all directors participating to hear each other simultaneously; and (3) the board of directors, including a majority of the disinterested directors, ratifies the actions taken pursuant to the exemption by vote cast at the next in-person meeting. *See* Investment Company Act Release No. 33817 (Mar. 13, 2020), available at <https://www.sec.gov/rules/other/2020/ic-33817.pdf>.

²⁰ SEC Public Statement, “An Update on the Commission’s Targeted Regulatory Relief to Assist Market Participants Affected by COVID-19 and Ensure the Orderly Function of our Markets” (June 26, 2020, updated Jan. 5, 2021), available at <https://www.sec.gov/news/public-statement/update-commissions-targeted-regulatory-relief-assist-market-participants>.

²¹ Investment Company Act Release No. 33897 (June 19, 2020), available at <https://www.sec.gov/rules/exorders/2020/ic-33897.pdf>.

²² The COVID-19 pandemic is an evolving situation. In a recent interpretive summary, the Centers for Disease Control and Prevention (CDC) reported that the current seven-day moving average of daily new COVID-19 cases increased 2.8% compared to the previous seven-day moving average, and the current seven-day moving average is 107.2% higher compared to the peak observed on July 20, 2020. *See* “Interpretive Summary for August 27, 2021,” CDC, available at <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html> (last accessed Sept. 2, 2021).

²³ In fact, the ability to meet remotely as well as in-person may support an expansion of the pool of independent director candidates who represent a broad range of perspectives.

It is vital that the SEC refrain from withdrawing the current temporary relief prior to the conclusion of the pandemic, particularly with an insufficient notice period. IDC respectfully requests that the Staff act, and clarify in writing, that it will provide, at a minimum, six months²⁴ of notice prior to terminating the temporary relief. The current temporary relief requires only that the termination date, “which will be specified in a public notice, will be at least two weeks from the date of the notice.”²⁵

An extended notice period would provide fund boards with more time to shift to an in-person meeting format. Among other things, fund boards, their advisers, and other stakeholders will need to develop and/or adapt protocols and procedures to safely and effectively conduct in-person meetings. Given that the conditions caused by COVID-19, the Delta variant and other variants will likely remain fluid for some time, the current two-week notice period is insufficient. Staff action that significantly increases the notice period will provide greater certainty to fund directors and fund advisers, while supporting an orderly transition – based on the conditions at the time – to a post-pandemic environment.

III. Modernizing the In-Person Voting Requirements

We would welcome Staff action that would provide additional assurance during these uncertain times. Beyond such clarification, we recommend greater flexibility on a permanent basis under the in-person voting requirements, as appropriate.

To be clear, we believe that in-person meetings are essential to fund board operations. In-person meetings undoubtedly facilitate and support board communications. The nuances of communication, verbal and otherwise, are more readily apparent during in-person interactions. By extension, in-person meetings facilitate social interaction and can strengthen professional collegiality, which, in turn, can support a board’s effectiveness. Consequently, we understand that fund directors are eager to resume meeting in-person and will seek to do so once it is prudent. Absent adverse public health considerations, there are strong incentives for boards to meet in person.

The experience during the pandemic, however, strongly suggests that not all meetings need to take place with directors gathered in the same physical location. Virtual meetings that utilize what are now ubiquitous technologies have proven to be effective in helping board members to fulfill their responsibilities without having to be physically present at the same location. As the Staff has previously indicated, virtual board meetings may “remove significant or unnecessary burdens” without “diminish[ing] the board’s ability to carry out its oversight role or other specific duties.”²⁶

²⁴ IDC would support a notice period greater than six months, given the advanced planning and extensive preparations that are necessary for in-person board meetings.

²⁵ See *supra* note 20.

²⁶ See No-Action Letter.

In light of the experience with and effectiveness of virtual meetings, IDC urges the SEC to provide flexibility as to the in-person voting requirements under the 1940 Act. We believe that permanent relief would be appropriate in helping directors fulfill their oversight responsibilities by providing additional tools to conduct board business, subject to certain core conditions.²⁷ In our view, these conditions should include the following:

- Fund boards would develop written policies and procedures governing board meetings with virtual participation that are subject to review and approval by a majority of the board's independent directors.
- Policies and procedures for board meetings where directors participate virtually would establish appropriate technology and security protocols, subject to periodic review.
- Directors who participate virtually in board meetings are able to engage in synchronous communications (*i.e.*, directors can communicate with one another contemporaneously).
- The identity of each individual casting a vote virtually during a board meeting is known contemporaneously to the other directors participating in the meeting.

Separately, where it would be impracticable to attend a board meeting physically, the relief should allow for directors to vote virtually and be treated as present for the board's purposes.

To the extent that the Staff believes other requirements or conditions may be appropriate, IDC would welcome the opportunity to discuss and provide feedback on them. Regardless, SEC relief that relies on the above guardrails, in our view, would modernize in-person meeting requirements, consistent with the informed voting objective articulated in their legislative history, and help fund directors continue to fulfill their responsibilities in the interests of fund shareholders.

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²⁷ IDC understands that the SEC could pursue this type of relief utilizing various regulatory paths.

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Thank you for your consideration. We look forward to continuing our dialogue regarding these matters and possible paths forward. In the meantime, if you have any questions or comments, please contact me at (202) 326-5463, or Nicole Baker at (202) 326-5822.

Sincerely,

/s/ Thomas T. Kim

Thomas T. Kim
Managing Director
Independent Directors Council