

February 28, 2019

Mr. Paul G. Cellupica
Deputy Director and Chief Counsel
Division of Investment Management
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: Request for no-action position regarding in-person voting requirements

Dear Mr. Cellupica:

The Independent Directors Council (“IDC”)¹ seeks assurance that the staff of the Division of Investment Management (“Staff”) of the Securities and Exchange Commission (“SEC” or “Commission”) will not recommend to the Commission that it take enforcement action for violations of Sections 12(b), 15(c) and 32(a) of the Investment Company Act of 1940, as amended (“1940 Act”), or Rules 12b-1 or 15a-4(b)(2) under the 1940 Act, if fund² boards do not adhere to certain in-person voting requirements in certain circumstances, as described below.

IDC believes that the current regulatory regime governing the role and responsibilities of fund directors can be modernized and improved to better allow directors to dedicate their time and attention to “areas where director oversight is most valuable.”³ We previously provided our preliminary recommendations regarding ways to recalibrate directors’ responsibilities and governance requirements in light of industry, technological and regulatory developments.⁴ The

¹ IDC serves the US-registered fund independent director community by advancing the education, communication, and policy positions of fund independent directors, and promoting public understanding of their role. IDC’s activities are led by a Governing Council of independent directors of Investment Company Institute (“ICI”) member funds. ICI is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI’s members manage total assets of US\$20.7 trillion in the United States, serving more than 100 million US shareholders, and US\$7.0 trillion in assets in other jurisdictions. There are approximately 1,700 independent directors of ICI-member funds.

² As used herein, the term “fund” may refer to a registered management investment company or a separate series thereof, as the context requires.

³ See Dalia Blass, Director, Division of Investment Management, SEC, Keynote Address: ICI Securities Law Developments Conference (Dec. 7, 2017).

⁴ See Letter from Amy B.R. Lancellotta, Managing Director, IDC, to Dalia Blass, Director, Division of Investment Management, SEC (Oct. 16, 2017). See also IDC, SEC No-Action Letter (Oct. 12, 2018).

purpose of this letter is to request from the Staff a no-action position with respect to certain statutory and regulatory provisions for certain situations where the provisions may create significant or unnecessary burdens for funds and their boards that outweigh any benefits to fund shareholders.

I. Requested Position

We are requesting a no-action position for directors to give Required Approvals⁵ telephonically, by video conference or by other means by which all participating directors may participate and communicate with each other simultaneously during a meeting, instead of meeting in person as required under the 1940 Act and rules thereunder, in cases where:

1. the directors needed for the Required Approval cannot meet in person due to unforeseen or emergency circumstances, provided that (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 (“Request for Relief 1”); or
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 (“Request for Relief 2”).⁶

We are requesting a no-action position only with respect to the following actions (collectively, “Board Actions”):

- a. renewal (or approval or renewal in the case of Request for Relief 2) of an investment advisory contract or principal underwriting contract pursuant to Section 15(c) of the 1940 Act;
- b. approval of an interim advisory contract pursuant to Rule 15a-4(b)(2) under the 1940 Act (with respect to Request for Relief 2 only);

⁵ 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” (as defined in Section 2(a)(19) of the 1940 Act) of any such party. Rule 12b-1 under the 1940 Act requires that a plan regarding distribution related payments pursuant to that Rule (“12b-1 Plan”) be approved by a vote of the fund’s board of directors, and of the directors who are not interested persons of the fund (“independent directors”) and have no direct or indirect financial interest in the operation of the 12b-1 Plan or in any agreements related to the 12b-1 Plan. Rule 15a-4(b)(2) under the 1940 Act requires that certain interim contracts be approved by the vote of 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. For purposes of this letter such approvals are referred to as the “Required Approvals.”

⁶ See Section III, *infra*, for examples of when directors may determine not to vote on a matter.

- c. selection of the fund’s independent public accountant pursuant to Section 32(a) of the 1940 Act (with respect to Request for Relief 1, such accountant must be the same accountant as selected in the immediately preceding fiscal year); and
- d. renewal (or approval or renewal in the case of Request for Relief 2) of the fund’s 12b-1 Plan.

II. Background

Sections 15 and 32 of the 1940 Act and Rule 15a-4 under the 1940 Act

Section 15(a)(2) of the 1940 Act provides that an investment advisory contract with a fund “shall continue in effect for a period of more than two years from the date of its execution, only so long as such continuance is specifically approved at least annually by the board of directors or by a vote of a majority of the outstanding voting securities of such company.” Section 15(b) of the 1940 Act provides an identical requirement for a principal underwriting contract for a fund. Section 32(a)(1) and Rule 32a-3 thereunder effectively require board approval of the selection of an independent public accountant for a fund at least annually. Under Sections 15(c) and 32(a), respectively, the annual renewal of an advisory or principal underwriting contract or approval of the selection of an independent public accountant is required to include the vote of a majority of the fund’s independent directors “cast in person.”

These in-person voting requirements were added as part of the Investment Company Amendments Act of 1970 (“1970 Amendments”) and have historically been viewed as requiring directors to be “physically present” when voting.⁷ As stated in the House of Representatives Committee Report regarding the 1970 Amendments, “[t]he purpose of [the amendments adding the in-person voting requirement to Sections 15(c) and 32(a)] is 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.’”⁸

⁷ Pub. L. 91-547 (Dec. 14, 1970). *See* 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) (“[The in-person voting requirement of Section 15(c)] is also a new requirement imposed by the [1970 Amendments] which cannot be complied with by voting over the telephone, through the use of a closed-circuit television conference, by proxy or otherwise than by personal appearance.”).

⁸ H.R. Rep. No. 91-1382 at 77 (1970) (“House Report”) (quoting S. Rep. No. 91-184 at 39 (1969) (“Senate Report”)). House of Representatives, Mutual Fund Amendments Hearing, Part 1 (1969) at 162 contains substantially identical language. *See also* House Report at 26 (“Section 8(c) of 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 almost identical language. *See* Senate Report at 39.

The Staff recognized in a 1966 report that it may be appropriate to provide relief from this requirement if, due to “physical impossibility or other justifiable inadvertence,” a fund’s directors are not able to meet in person.⁹ Since the release of the 1966 Report and the enactment of the 1970 Amendments, the Commission and the Staff have continued to recognize the appropriateness of flexibility in certain circumstances in exemptive rules and orders as well as no-action letters.¹⁰

Indeed, the Commission has adopted two rules easing the in-person requirement under Section 15 and Section 32 under certain conditions. First, when the Commission amended Rule 15a-4 to permit a board to approve certain interim investment advisory contracts at a meeting occurring after termination of the previous contract, it provided that the directors could participate in the meeting “by any means of communication that allows all participants to hear each other at the same time.”¹¹ The Commission noted that “with no prior notice of the assignment, members of the board may not be immediately available to meet [in person] to approve the interim advisory contract.”¹² In a case where the prior advisory contract was terminated by assignment and the adviser receives money or other benefit in connection with the assignment, instead, Rule 15a-4(b)(2) only permits the adviser to operate under an interim contract if the board, including a majority of the independent directors, approves the interim contract in person before the termination of the prior contract.¹³

⁹ Public Policy Implications of Investment Company Growth (1966) (the “1966 Report”) at n. 37 (“[w]here advisory or underwriting contracts lapse due to failure of directors to meet the proposed physical attendance requirements because of physical impossibility or other justifiable inadvertence, the Commission could permit the extension of already-existing contracts by order under sec. 6(c) of the [1940] Act.”).

¹⁰ See, *infra*, *Exemptive and No-Action Relief in Cases of Unforeseen or Emergency Circumstances*.

¹¹ *Temporary Exemption for Certain Investment Advisers*, SEC Release No. IC-24177, 64 F.R. 68019, 68020 (Dec. 6, 1999). Rule 15a-4(b)(1) allows a person to act as investment adviser for a fund under an interim contract after the termination of a previous contract by the board or by shareholders, by a failure of the board to renew the prior contract, or by an assignment by the adviser or a controlling person of the adviser in connection with which neither the adviser nor the controlling person directly or indirectly receives any money or other benefit if: “(i) the compensation to be received under the interim contract is no greater than the compensation the adviser would have received under the previous contract; and (ii) the fund’s board of directors, including a majority of the independent directors, approved the interim contract within 10 business days after the termination, *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.*” (Emphasis added). *But see* Rule 15a-4(b)(2) (requiring in-person board approval where an adviser receives money or other benefit in connection with the assignment of an advisory contract).

¹² *Temporary Exemption for Certain Investment Advisers*, Proposed Rule, SEC Release No. IC-23325, 63 FR 40231, 40232 (Jul. 28, 1998).

¹³ See Rule 15a-4(b)(2)(ii).

Rule 32a-3 extends the 60-day statutory period for in-person board approval of the selection of a fund's independent public accountant.¹⁴ In the proposing release for Rule 32a-3, the Commission recognized the costs of in-person meetings, noting that some fund families were "required to hold more frequent meetings, sometimes for the sole purpose of selecting the accountant" and that the in-person voting requirement "adds to the expense of time and money."¹⁵

Rule 12b-1 under the 1940 Act

Section 12(b) of the 1940 Act prohibits an investment company from acting as a distributor of its own securities in contravention of any rule promulgated by the SEC. The SEC adopted Rule 12b-1 to allow an investment company to make distribution related payments out of its assets, subject to certain conditions and pursuant to a 12b-1 Plan. Rule 12b-1(b)(2) requires that a fund's 12b-1 Plan be approved by a vote of its board of directors, including the fund's independent directors, "cast *in person* at a meeting called for the purpose of voting on such plan . . ."¹⁶ The language in the rule regarding the in-person voting requirement is substantially identical to the language in Section 15(c). This similarity was by design. In the proposing release for Rule 12b-1, the Commission noted that it specifically crafted the procedural requirements for board approval of 12b-1 Plans in a similar manner as the requirements under Sections 15(a) and 15(c) of the 1940 Act for the approval of advisory contracts.¹⁷ Accordingly, we believe it is reasonable to conclude that the regulatory intent underlying the Rule 12b-1 in-person voting requirement was similar to the legislative intent for the in-person voting requirement of Section 15(c) – to ensure informed voting by fund directors.

¹⁴ Section 32(a) of the 1940 Act requires board approval within 30 days before or after the beginning of the fund's fiscal year or before the annual meeting of stockholders in that year. Thus, as a practical matter, there is a 60-day period within which the board must approve the selection of an independent public accountant. Under Rule 32a-3, a fund organized in a jurisdiction that does not require regular annual meetings of stockholders and which does not hold a regular annual stockholders' meeting in a given fiscal year is exempt from the 60-day statutory requirement provided that the fund is either: (i) in a set of investment companies, if not all the members of such set have the same fiscal year end and if such fund selects an accountant at a board meeting within 90 days before or after the beginning of the fiscal year, or (ii) not in a set of investment companies, or in a set whose members have the same fiscal year end, and if such fund selects an accountant at a board meeting within 30 days before or 90 days after the beginning of the fiscal year.

¹⁵ See *Time Period During Which the Board of Directors of a Registered Management Investment Company Must Select the Company's Independent Public Accountant*, SEC Release No. IC-16842, 54 F.R. 9843, 9844 (Mar. 8, 1989); and SEC Release No. IC-17077, 54 F.R. 31329 (Jul. 28, 1989).

¹⁶ 17 CFR § 270.12b-1. (Emphasis added.)

¹⁷ *Bearing of Distribution Expenses by Mutual Funds*, SEC Release No. IC-10862, 44 F.R. 54014 (Sept. 17, 1979). Specifically, the Commission stated in the proposing release 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 Act for approval of the advisory contract." *Id.* at 54018.

Exemptive and No-Action Relief in Cases of Unforeseen or Emergency Circumstances

The Commission and the Staff have previously granted exemptive and no-action relief from the in-person voting requirements in unforeseen or emergency circumstances. In the weeks following the terrorist attacks of September 11, 2001, the Commission issued an exemptive order that included relief from the in-person voting requirements of Sections 15(c) and 32(a) and Rules 12b-1 and 15a-4(b)(2) (the “9/11 Relief”).¹⁸ The exemptive order provided that, for 30 calendar days from the date the relief was issued, funds and any investment advisers or principal underwriters for such funds were exempt from the requirement that votes of the funds’ boards of directors be cast in person if certain conditions, similar to those in Request for Relief 1, were met.¹⁹ In addition to the 9/11 Relief, the Staff has provided no-action relief from the in-person voting requirements in other emergency or unforeseen circumstances, including in connection with the 2008 financial crisis.²⁰

III. Discussion of Relief Requested

Request for Relief 1: Relief from In-Person Voting Requirements in Unforeseen or Emergency Circumstances

While in-person meetings generally are an important and effective tool for fund boards, certain unforeseen or emergency circumstances can make it impossible or impracticable for directors to attend a meeting in-person. To remove unnecessary burdens in those circumstances, a fund’s board of directors would be able to rely on the no-action position taken in response to Request for Relief 1.

¹⁸ 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).

¹⁹ The conditions of the exemptive order provided that: “(i) 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 communicate with each other simultaneously during the meeting; (ii) the action does not result in any material change to the existing contract, plan or arrangement under consideration; and (iii) the Board of Directors, including a majority of the Directors who are not interested persons of the investment company, ratifies the action taken pursuant to this exemption by vote cast at an in-person meeting within 90 calendar days of the date that the action is taken.” *Id.*

²⁰ *Fortis Investment Management SA*, SEC No-Action Letter (Jan. 27, 2009); *JPMorgan Chase/Bear Stearns Asset Management I*, SEC No-Action Letter (July 14, 2008). In *Fortis*, the Belgian government took over a company on an emergency basis during the 2008 financial crisis, which resulted in a change in control and assignment of the funds’ investment advisory contracts. The Staff granted no-action relief, citing in particular, “the emergency nature of the Belgian government’s action.” *Id.*

In *JPMorgan Chase/Bear Stearns Asset Management I*, JPMorgan Chase took control of Bear Stearns Asset Management (“BSAM”) under emergency circumstances during the 2008 financial crisis, resulting in a change of control and the automatic termination of BSAM’s advisory contracts. The Staff granted no-action relief from the in-person voting requirement of Section 15(c) where BSAM continued to serve as investment adviser under these “extraordinary circumstances.” *Id.*

Unforeseen or emergency circumstances include any circumstances that, as determined by the board, 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 would include, but not be limited to, illness or death, including of family members, weather events or natural disasters, acts of terrorism and disruptions in travel that prevent some or all directors from attending the meeting in person.

We believe that this no-action position would be consistent with prior positions taken by the Commission and the Staff in exemptive orders and no-action letters and would not undermine the legislative and regulatory intent behind the in-person voting requirements. The terms of our request are consistent with the 9/11 Relief and relief granted during the 2008 financial crisis, as discussed above in Section II. The requested no-action position would remove uncertainty among industry participants regarding the availability of the type of relief granted in the past and minimize any need for individual fund families or trade associations to seek relief in future unforeseen or emergency situations. In addition, the no-action position would ease the burden on Staff resources in responding to unforeseen or emergency circumstances, as responses to such requests are typically needed on an ad hoc and expedited basis.

The requested no-action position would only apply to Board Actions where a fund's board is renewing an existing contract, plan, or arrangement and no material changes are proposed or made to the contract, plan or arrangement.²¹ Absent relief, if an investment advisory contract, principal underwriting contract, engagement with an independent public accountant, or 12b-1 Plan were allowed to lapse because directors needed for the Required Approval were unable to timely meet to approve its continuance at an in-person meeting, a fund would be unable to reinstate these arrangements without obtaining shareholder approval (or, with respect to a principal underwriting contract, until the next in-person board meeting).²² In such a case, the costs, including the cost of a proxy solicitation, would greatly outweigh any benefits to shareholders, given that there would have been no substantive changes to the terms of the contract, plan, or arrangement on which shareholders would be asked to vote. Moreover, unlike with regard to an advisory contract where a fund can rely on Rule 15a-4 to enter into an interim contract, in the case of a principal underwriting contract or 12b-1 Plan, there would be no legal mechanism for proceeding under interim arrangements until an in-person meeting is held (and, with respect to a 12b-1 Plan, shareholder approval can be obtained), which could harm funds and their shareholders.

²¹ The requested no-action position would not apply in situations such as a change in control of an investment adviser to a fund that results in the termination of the prior contract. As done in the past, funds and their boards could seek individualized relief. *See supra* note 20.

²² *See* Rule 12b-1(b)(1), Section 15(c), and Section 32. Although Rule 15a-4 may allow for the board to approve an interim advisory contract in a case where a prior advisory contract had lapsed, shareholder approval would be required to replace that interim contract with a non-interim contract. *See* Rule 15a-4(a)(2).

Request for Relief 2: Relief from In-Person Voting Requirements after an In-Person Meeting Has Been Held

The rigid application of the in-person voting requirements also would require fund directors to reconvene in person to take Board Actions in a case where the directors needed for the Required Approvals have already met in person and fully discussed and considered all material matters related to such actions, but did not take a vote at the prior in-person meeting. This could arise, for example: (i) if 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; (ii) if 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 (iii) if 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.²³

We believe Relief 2 is appropriate because under the circumstances described above, the board would have effectively met the in-person voting requirements. We see no benefit to a fund or its shareholders in mandating that directors convene again in person simply to cast their votes on a matter the material aspects of which the directors needed for the Required Approval fully discussed and considered in person at a prior meeting.

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If you have any questions about our comments, please contact Annette Capretta, Deputy Managing Director, at (202) 371-5436 or me at (202) 326-5824, or our counsel, Douglas P. Dick at (202) 261-3305, Corey F. Rose at (202) 261-3314, or Robert J. Rhatigan at (202) 261-3329, at Dechert LLP.

Sincerely,



Amy B.R. Lancellotta
Managing Director

²³ In the event that information provided or discovered after the in-person meeting in fact results in a change in the vote of any director needed for a Required Approval, or any director requests another in-person meeting in order to vote, the directors would meet in-person an additional time to reconsider the matter.