

Article

Captive Board Meetings in the Time of COVID

In extraordinary times such as the present COVID-19 pandemic, the importance of a captive insurance company focusing on fundamentals like the proper calling, conduct and recording of board meetings cannot be overstated. Responsibility for properly coordinating board meetings is typically delegated to the insurance manager who usually also acts as company secretary. In their role as company secretary, clients rely on their insurance manager to keep the minute books of the company properly updated and to make all necessary filings with CIMA and the Registrar of Companies. Here are a few things for managers and captive boards to keep in mind.

Compliance with Cayman Economic Substance Legislation

Captive boards and managers should be fully aware of their captives' obligations under the International Tax Co-operation (Economic Substance) Law (2020 Revision) and associated Guidance Notes (the "ES Law"). By this stage, every captive board should have met to discuss the application of the ES Law and should have meeting minutes or resolutions on file documenting at least the following:

- The scope and application of the ES Law to the company and its activities;
- The company's classification under the ES Law and whether it will need to comply with the Economic Substance Test (the "ES Test") as a result of its classification; and
- Instructions to the insurance manager to make any necessary filings with the relevant authorities.

Although most Notifications should already have been filed, the Registrar of Companies and the Department for International Tax Co-operation ("DITC") have extended the deadlines for entities to complete their annual return and Economic Substance Notification filings until 30 June 2020, after which penalties will begin to accrue.

The COVID pandemic has caused some consternation for captive boards who were hoping to hold board meetings in Cayman this year with a view to complying with the "directed and managed" requirements under the ES Test where applicable.

With the Cayman airport closed until September 2020 at the earliest, most of those meetings will not be able to go ahead with board members physically present in Cayman. However, the Ministry of Financial Services (the "Ministry") has released a notice stating that the DITC is aware of the challenges and where the board of director meetings are required to be held virtually during this period of uncertainty, the DITC will take that into consideration on a case-by-case basis when determining whether an entity has passed or failed the ES Test.

The Ministry also took the opportunity to remind those concerned that the "directed and managed" limb of the ES Test is but one element and all other elements of the ES Test will need to be complied with regardless of any COVID disruption.

In practice, we're finding that captive boards are anxious to have a discussion, particularly on topics like the captive's investment situation and potential loans/distributions to parents during these challenging economic times. COVID has made that difficult, especially for those captives whose articles of association restrict the ability of the board to hold meetings in the US, where those board members are physically located. In these situations we have seen some boards propose that an information sharing/Q&A discussion (NOT a board meeting!) take place via phone or video but it is made absolutely clear that it is not a board meeting and no decisions are taken. Routine/non material board matters are then dealt with by proxy meetings facilitated by the insurance manager in Cayman or elsewhere outside of the US. Material/significant board matters that necessitate in person board meetings are often being delayed (where possible) until after the crisis when those meetings can be convened outside the US.

Procedures for the calling and conduct of meetings

The company's articles of association usually set out the prescribed procedures for the calling and conduct of board and shareholder meetings as well as the procedures for a number of corporate actions which might be on the meeting agenda for decision. Although these provisions often follow a conventional format, they can differ from one set of articles to another so it's important for captives and their managers to be familiar with the specific provisions in each case. Failure to properly follow prescribed procedures and requirements could leave decisions taken at meetings open to future legal challenge, or may be considered invalid from the outset. It is recommended that at least the following sections in the memorandum and articles are reviewed ahead of any board or shareholder meeting to ensure proper compliance:

- the objects of the company including:
 - any limitations on its business activities
 - the ability to merge, redomesticate, convert to an SPC or enter into a scheme of arrangement
- the authorised share capital of the company
- restrictions on the issue and transfer of shares
- alteration of share capital
- shareholder reserved matters
- requirements for passing of ordinary and special resolutions
- appointment and removal of directors and officers
- board and shareholder meeting procedures
- dividends and distributions
- Any "anti-US business language" restricting the company's ability to conduct business (including holding board and shareholder meetings) in the USA, usually included for USA tax and/or regulatory reasons. We would often expect to see this language included for Cayman captives which have not made a 953(d) election, but be aware that it does differ from captive to captive and some 953(d) captives will also have this language included.

Watch out for actions approved at meetings which require prior-approval from or notification to the Cayman Islands Monetary Authority ("CIMA")

Both the Insurance Law (Revised) and CIMA's Regulatory Procedure – Approval and Notification of Changes list actions of the company that will require either prior approval from CIMA or notification. These include but are not limited to a change in name, updates to the memorandum and articles, and a change in ownership and control. Although ultimate responsibility for compliance rests with the board of directors, the company will usually look to the insurance manager to guide them on when prior approval or a notification will be required. So both managers and clients should familiarize themselves with these requirements.

Remember to make prescribed filings with the Registrar of Companies

In addition to the usual annual return and beneficial ownership filings which need to be made, the Companies Law (Revised) contains a number of requirements in relation to filings which need to be made to the Registrar following corporate actions including, but not limited to, a change in any directors or officers, change in name, and any updates to the memorandum and articles. You will note that the examples given also require separate approval with CIMA as mentioned above, so be careful to meet your filing and/or approval obligations with both CIMA and the Registrar of Companies. Be mindful of the deadlines for completing such filings after which penalties will begin to accrue. Special resolutions for example need to be filed with the Registrar within 15 days, and the time period for notifying the Registrar of any change to the directors and officers has recently been reduced from 60 to 30 days!

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