

July 30, 2024

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1091

Re: Notice of Filing of Proposed Rule Change Amending Section 302.00 of the NYSE Listed Company Manual to Exempt Closed-End Funds from the Requirement to Hold Annual Shareholder Meetings (Release No. 34-100460; **File No. SR-NYSE-2024-35**)

Dear Ms. Countryman:

The Investment Company Institute¹ is writing in support of the New York Stock Exchange's (NYSE) proposed amendments to Section 302.00 of the NYSE Listed Company Manual ("Manual") that would exempt closed-end funds ("CEFs") listed on the NYSE from holding an annual meeting.² ICI supports eliminating the NYSE's annual meeting requirement for listed CEFs because it is superfluous to the requirements in the 1940 Act, unnecessarily burdens listed CEF shareholders with millions of dollars in expenses,³ and has been misused to facilitate the

¹ The [Investment Company Institute](#) (ICI) is the leading association representing the asset management industry in service of individual investors. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage \$35.2 trillion invested in funds registered under the US Investment Company Act of 1940 (the "1940 Act"), serving more than 100 million investors. Members manage an additional \$9.4 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through [ICI Global](#).

² Notice of Filing of Proposed Rule Change Amending Section 302.00 of the NYSE Listed Company Manual to Exempt Closed-End Funds Registered Under the Investment Company Act of 1940 From the Requirement to Hold Annual Shareholder Meetings, Exchange Act Release No. 100460, 89 Fed. Reg. 56447 (July 9, 2024), *available at* <https://www.govinfo.gov/content/pkg/FR-2024-07-09/pdf/2024-15037.pdf>. While the requirement is for a CEF to hold an annual meeting, the NYSE has previously stated that in "interpreting this rule, the [NYSE] considers an annual shareholders' meeting to be one at which directors are elected." NYSE, Listed Company Compliance Guidance Memo for NYSE Domestic Companies (Jan. 12, 2016), *available at* https://www.nyse.com/publicdocs/nyse/regulation/nyse/2016_NYSE_Listed_Company_Compliance_Guidance_Memo_for_Domestic_Companies.pdf. Thus, for the purposes of this comment letter, "annual meeting" shall presume to include director or trustee elections.

³ See ICI, ANALYSIS OF FUND PROXY CAMPAIGNS: 2012-2019 at 2 (Dec. 2019), *available at* https://www.ici.org/system/files/attachments/19_ltr_proxyanalysis.pdf (finding that cost estimates across 145 proxy campaigns totaled \$373 million in accrued costs).

very harms the 1940 Act seeks to prevent. Among all investment companies registered with the Securities and Exchange Commission (SEC) under the 1940 Act, which includes mutual funds, ETFs, unlisted CEFs, UITs, and money market funds (MMFs), only listed CEFs are required to hold annual meetings. This annual meeting requirement is not derived from federal or state law, but rather is a vestige of exchange listing standards that predates the 1940 Act and reflects the bygone thinking that investment companies—which were then in their infancy and not well understood—should be treated as generally akin to operating companies.⁴ Since then, Congress passed the 1940 Act, which explicitly enumerates the specific instances in which shareholder voting is required in lieu of imposing annual meetings, and every major state where investment companies incorporate or organize has removed any annual meeting requirement for registered investment companies, including CEFs.⁵

The annual meeting requirement for listed CEFs is creating an end-run around the very investor protections the 1940 Act is intended to provide and enables the very harms that Congress and the SEC identified when formulating the 1940 Act. Further, annual meetings frequently lack fulsome retail investor participation and allow for a paradigm where a minority investor with an outsized influence over the proxy machinery can engage in conduct that harms other listed CEF shareholders.⁶ More broadly, emboldened by short-term profit-seeking, activist activity has soared recently and is rendering unsustainable the listed CEF market.⁷ At a time when the unlisted CEF market is booming and demand for ETFs shows little signs of slowing down, there were no listed CEF launches in 2023 and 2024 listed CEF IPO activity has been *de minimis*.⁸ These developments are to the detriment of long-term retail shareholders who use listed CEFs to gain exposure to a wide array of income-producing assets in the public and private global markets, including many assets that are difficult to access in other investment products and a wrapper that allows asset managers to maintain investment strategy conviction during market volatility. The CEF wrapper also allows investors to gain levered exposure to asset classes beyond the leverage levels permitted by other registered fund wrappers. To protect long-term shareholder interests in a manner consistent with Congressional intent, we urge the SEC to adopt

⁴ See *infra* note 63 (discussing the history of NYSE’s requirement to hold annual shareholder meetings for listed CEFs).

⁵ See *infra* note 61 (discussing the state laws of Maryland, Delaware, and Massachusetts, which are the states where the vast majority of CEFs are organized, and the lack of any annual meeting requirement).

⁶ As shown *infra* Section 4.3, in a recent annual meeting, more than 33% of shareholders did not participate, an average that is consistent with the lack of shareholder participation noted by the SEC in the 1930s. See INVESTMENT TRUSTS AND INVESTMENT COMPANIES – REPORT OF THE SEC PURSUANT TO SECTION 30 OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935: PART TWO, STATISTICAL SURVEY OF INVESTMENT TRUSTS AND INVESTMENT COMPANIES at 401 (1939) (“[T]he proportion of outstanding votes represented at annual meetings of stockholders of investment companies averaged approximately 60%.”).

⁷ See James Duvall, *et al.*, *The Closed-End Fund Market 2023*, ICI RESEARCH PERSPECTIVE, Vol. 30, No. 5 at 1, 5 & 7 (May 2024), available at www.ici.org/files/2024/per30-05.pdf (showing that as activist activity has increased, the number of listed CEFs has fallen for 12 consecutive years and is down 36 percent from year-end 2011).

⁸ From year-end 2022 to year-end 2023, the number of ETFs offered to investors increased by 261 and the number of non-traditional CEFs, inclusive of unlisted CEFs and BDCs, increased by 29, while the number of listed CEFs decreased by 25 with no new listed CEFs launched in 2023. See ICI, 2024 INVESTMENT COMPANY FACT BOOK at 66, 70-71 & 76 (64th ed. 2024), available at <https://www.icifactbook.org/pdf/2024-factbook.pdf>.

the NYSE’s proposed rule change to eliminate the annual meeting requirement for listed CEFs. Further, while ICI supports the NYSE rule filing, we also urge the NYSE to expand the exemptive relief and associated protections to listed business development companies (BDCs), which are subject to many of the same regulatory requirements and shareholder protections as traditional CEFs and are generally governed as such under the NYSE Manual.⁹

Section 1 of this letter describes the harms the SEC investigated as part of the Investment Trusts and Investment Companies – Report of the SEC Pursuant to Section 30 of the Public Utility Holding Company Act of 1935 (“1935 Investment Company Study”) that served as the basis of the 1940 Act. Section 2 focuses on the Congressional intent behind omitting an annual meeting requirement from the 1940 Act. Section 3 outlines the protections the 1940 Act provides for all CEF investors, including voting rights tailored to protect CEF shareholders. Section 4 details the burdens that the annual meeting requirement imposes on listed CEF investors. Section 4 also provides a case study on how minority arbitrage investors are leveraging the annual meeting requirement to engage in the same types of practices analyzed by the SEC and Congress prior to the enactment of the 1940 Act, resulting in the very harms the SEC and Congress sought to prevent.

Section 1. Harms the 1940 Act Sought to Protect Against as Identified in the 1935 Investment Company Study

Section 1.1 The 1940 Act Favored Specified Voting Criteria as Opposed to Annual Meetings as the Lower Voting Threshold for Elections Allowed for an Outsized Influence by a Self-Interested Minority Investor

One of the key concerns raised by the 1935 Investment Company Study was that an investment company shareholder with an outsized minority interest could control the shareholder vote and potentially harm long-term investors. This outcome resulted from the fact that retail investors participated at lower rates on average and were so dispersed it was difficult to organize their vote to prevent a minority investor with an outsized influence over the proxy machinery from controlling the vote to its benefit.¹⁰ This concern was particularly acute in certain votes, such as

⁹ Among other regulations, *see, e.g.*, Section 59 of the 1940 Act (“Notwithstanding the exemption set forth in section 6(f), sections 1, 2, 3, 4, 5, 6, 9, 10(f), 15(a), (c), and (f), 16(b), 17(f) through (j), 19(a), 20(b), 32(a) and (c), 33 through 47, and 49 through 53 of this title shall apply to a business development company to the same extent as if it were a registered closed-end investment company.”). Additionally, NYSE Manual Section 102.04 categorizes a BDC as a “[c]losed-end management investment company,” recognizing the similar protections allotted to BDC investors. While BDCs are not “registered investment companies” as the term is utilized in the 1940 Act, they are closed-end companies that elect to be regulated by the 1940 Act. For purposes of this letter, “registered investment companies” refers to the 1940 Act term and does not include BDCs.

¹⁰ *See* INVESTMENT TRUSTS AND INVESTMENT COMPANIES – REPORT OF THE SEC PURSUANT TO SECTION 30 OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935: PART THREE, CHAPTERS I AND II, ABUSES AND DEFICIENCIES IN THE ORGANIZATION AND OPERATION OF INVESTMENT TRUSTS AND INVESTMENT COMPANIES at 32 (1940) (“An analysis of the distribution of ownership of common and preferred stocks of a group of large investment companies . . . shows that the great majority of stockholders held relatively small blocks of stock. In terms of market value, somewhat over 50% of all the common stockholders of these companies, individually held shares aggregating \$500 or less at the end of 1936, and nearly 70% held shares worth \$1,000 or less. . . . Thus it appears that a considerable

director elections, where the election threshold was significantly lower than the two-thirds requirement often found under state law for mergers or consolidations.¹¹

Based on calculations performed as part of the 1935 Investment Company Study, less than two-thirds of outstanding voting shares were represented at meetings.¹² Thus, 30% stock ownership represented an invulnerable position and in many cases as little as 10% stock ownership constituted practical control.¹³ Further, the dispersed ownership of retail shareholders allowed for a minority interest to control the vote, as due to apathy, inertia, or the inability to organize retail investors, there was often limited participation among those shareholders.¹⁴ In terms of market value, according to the 1935 Investment Company Study, nearly 70% of all the common stockholders of investment companies surveyed held shares worth \$1,000 or less.¹⁵

Because the great bulk of investment company shareholders owned individually a limited number of shares of voting stock,¹⁶ working control of elections and other votes was allowed to concentrate in the hands of a minority shareholder who often had an outsized influence over the

portion of the capital raised by investment trusts and companies represents the participation of widely scattered small security holders, who were virtually powerless to exercise any concerted effort to prevent or eliminate various malpractices and deficiencies.”)

¹¹ INVESTMENT TRUSTS AND INVESTMENT COMPANIES, *supra* note 6, at 401 (“The minimum proportion of outstanding votes required for absolute control is determined by the provisions governing a quorum. If a simple majority of outstanding votes constitutes a quorum under the charter or by laws of the corporation, then at least 25.1% of the outstanding votes is required for absolute control. In an extreme case, where 25% of the outstanding votes constitutes a quorum, then at least 12.6% of the outstanding votes is required for absolute control.”).

¹² INVESTMENT TRUSTS AND INVESTMENT COMPANIES – REPORT OF THE SEC PURSUANT TO SECTION 30 OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935: PART THREE, CHAPTERS III, IV, AND V, ABUSES AND DEFICIENCIES IN THE ORGANIZATION AND OPERATION OF INVESTMENT TRUSTS AND INVESTMENT COMPANIES at 1875 (1940) (“As a rule less than two-thirds of the outstanding voting shares have been represented, either in person or by proxy, at annual stockholders’ meetings. It is thus apparent that 30% stock ownership would constitute a degree of control which would ordinarily be invulnerable to attack by any outside group. In many cases, as little as 10% stock ownership constituted working or practical control.”).

¹³ *Id.* See also INVESTMENT TRUSTS AND INVESTMENT COMPANIES, *supra* note 6, at 401 (“[T]he proportion of outstanding votes represented at annual meetings of stockholders of investment companies averaged approximately 60%. Thus, a block of stock representing more than about 30% of the outstanding votes would be tantamount to absolute control, since such a block would ordinarily constitute a majority of the votes represented at stockholders’ meetings.”).

¹⁴ INVESTMENT TRUSTS AND INVESTMENT COMPANIES, *supra* note 12, at 1876 (“An opposing group . . . would be confronted with the task of overcoming the inertia of the usually apathetic stockholder in its effort to accumulate the required voting power. . . . A factor which has emphasized this condition has been the increase in number of small stockholders[.]”).

¹⁵ INVESTMENT TRUSTS AND INVESTMENT COMPANIES, *supra* note 10, at 32.

¹⁶ INVESTMENT TRUSTS AND INVESTMENT COMPANIES, *supra* note 12, at 1499-1502 (“Typically the great bulk of stockholders in management investment companies own individually only a few shares of voting stock. Thus, an analysis of the distribution of the securities of 14 large investment companies at the end of 1936 reveals that approximately one-fourth of all the common stockholders held only 10 shares or less and well over one-half of the stockholders held only 50 shares or less.”).

proxy machinery and could enact measures for its own self-interest.¹⁷ “Large blocks . . . when assembled may form a substantial nucleus of voting power, while the widely distributed stock is usually ineffective[.]”¹⁸ Such “concentration of ownership, together with the wide diffusion of the balance of the stock, has perpetuated the control of dominant personalities and has constituted a factor contributing to the development and continuance of abuses.”¹⁹

Those abuses, opportunities allowed by the annual meeting requirement, are discussed *infra* Section 1.2.

Section 1.2 The 1935 Investment Company Study Analyzed Discount Arbitrage by Special Interests Acting for Their Own Gain, Leading to Protections in the 1940 Act Designed to Protect Long-Term Retail Shareholders

One of the harms detailed in the 1935 Investment Company Study was the scenario where an external arbitrage investor would take over an existing fund utilizing a minority position with an outsized influence over the proxy machinery.²⁰ The investment strategy would focus on listed CEFs trading at a discount. The arbitrager often liquidated the fund, locking in losses for long-term retail investors while making a quick profit on the difference between the market price of the fund’s shares and the underlying assets.²¹ If the fund was not liquidated, the external arbitrager generally took over the fund by becoming its adviser, and then would dramatically change the fund’s investment strategy and underlying holdings.²²

¹⁷ INVESTMENT TRUSTS AND INVESTMENT COMPANIES – REPORT OF THE SEC PURSUANT TO SECTION 30 OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935: PART FOUR, CONTROL AND INFLUENCE OVER INDUSTRY AND ECONOMIC SIGNIFICANCE OF INVESTMENT COMPANIES at 14 (1942) (“Working control, to be effective, must exist of necessity by sufferance of the remaining voting shares or interests, which either acquiesce . . . or are widely scattered and have no incentive or means strong enough to bring them together effectively. Working control may [also] be exercised by . . . use of the proxy machinery.”).

¹⁸ INVESTMENT TRUSTS AND INVESTMENT COMPANIES, *supra* note 6, at 400.

¹⁹ INVESTMENT TRUSTS AND INVESTMENT COMPANIES, *supra* note 10, at 32-33.

²⁰ As explained in the 1935 Investment Company Study, the “crash in the securities markets in 1929 and the resultant sharp losses [resulted in] market prices of investment company securities [beginning] to sell at substantial discounts from their asset values. . . . The aggregate market values of shares in investment companies following the close of 1929 was approximately 35% less than the actual value of the assets of these companies. In this situation a profit equivalent to the difference between the market and asset values of investment company shares would be made by acquiring the outstanding shares of investment companies for a consideration equivalent to or less than their market value. . . . By the utilization of the legal processes of dissolution, merger, or consolidation, the purchasing corporation could realize the actual asset value of the shares acquired. . . . In other cases the acquisition of control of an investment company did not have for its purpose the waste and dissipation of the corporate assets but represented an integral procedural step in a process of voluntary reorganization by which the rights and privileges and the participating interest of the acquired company’s stockholders in the assets of their company were to be substantially modified.” INVESTMENT TRUSTS AND INVESTMENT COMPANIES, *supra* note 12, at 1017-24. “An era of transfers of control and acquisition and amalgamation of investment companies ensued. . . . [Many of] the shifts in control and the amalgamation of investment companies were inspired by motives of pecuniary gain to the vendors of control which were not necessarily consonant with the interest of the public investors.” *Id.* at 1017-19.

²¹ *Id.* at 1017-24.

²² *Id.*

While the SEC analyzed several case studies of this harm in the 1935 Investment Company Study, ICI wants to highlight one such case study that bears many of the same hallmarks as scenarios that occur today, which are enabled and facilitated by the current annual meeting requirement.

Section 1.2.1 The Atlas Corporation

One of the primary case studies analyzed by the SEC in the 1935 Investment Company Study involved the actions of the Atlas Corporation. After the 1929 stock market crash, upon the realization that listed CEF shares were trading around 35% less than the net value of their portfolio securities, the operators of the Atlas Corporation embarked on a campaign to acquire control of these funds.²³ As Atlas Corporation acquired control of 22 funds, Atlas Corporation would liquidate the fund (with few exceptions) and realize a profit differential between the asset value of the underlying portfolio and the market price of the funds' shares. Funds that were not liquidated had their investment strategy and underlying portfolio substantially changed from that of a diversified investment company to a fund that would acquire other investment companies to further Atlas Corporation's investment strategy.²⁴ These fund liquidations or investment objective changes deprived other fund shareholders of the very fund that they originally purchased and presumably wished to hold on an ongoing basis.

The SEC's review determined that a minority position provided working control to realize the Atlas Corporation's investment strategy "because of the general inertia of the public stockholders"²⁵ and that "control of the proxy machinery will usually enable it to obtain the required percentage of stockholders' assents to its plan, even if such plan is unfair to shareholders."²⁶ A working control position was

a necessary prerequisite to the successful consummation of the purpose of the acquiring corporation . . . to acquire the securities of the company at discounts from their actual asset value. . . Further, control of the portfolio would enable the acquirer to pyramid the process of acquisition by using the funds of one acquired investment company to acquire the securities of other investment companies eventually to be absorbed.²⁷

²³ INVESTMENT TRUSTS AND INVESTMENT COMPANIES, *supra* note 12, at 1056 ("During 1930, Mr. Odium's investigation of investment companies had led to the discovery that the market value of investment company securities was at least 35% less than the actual value of the assets owned by the holders of such securities. . . . [T]he fundamental purpose of the Atlas Corporation's campaign [was then] to acquire control of, and to amalgamate with itself, the assets of other investment companies.").

²⁴ *Id.* at 1059 ("With few exceptions, as control of each of the 22 companies ultimately absorbed by Atlas Corporation was acquired, their diversified portfolios were liquidated and the funds so derived were used to acquire . . . securities of other investment companies control of which Atlas Corporation was then in the process of acquiring.").

²⁵ *Id.* at 1067.

²⁶ *Id.* at 1506.

²⁷ *Id.* at 1080-81.

Upon analysis of the Atlas Corporation's investment strategy, which constituted acquiring a minority position in listed CEFs, electing its own directors and/or itself as investment adviser, and either liquidating funds or completely changing their investment strategies to further Atlas Corporation's investment strategy, the SEC concluded:

The Study has demonstrated that comparatively rarely does the purchaser of control from a previous sponsor seek control for the purpose of strengthening the position of the investor in the company. The motive, or at least the result, has generally been the utilization of the investment company for the special designs of the purchaser of control, often in disregard of the interests of the investor. . . .²⁸

Although the majority of amalgamations of investment companies occurred in an era of depressed securities prices, the methods and techniques for acquiring control of investment companies are equally workable at any time.²⁹

This case study, among others, provided the basis of Section 12(d)(1) of the 1940 Act, which prevented layering of investment companies and fees, but also, as outlined *infra* Section 3, demonstrated Congress' focus on providing delineated protections for retail investors with specified voting rights requiring a "vote of a majority of the outstanding voting securities of such company"³⁰ so as to prevent minority control. And as discussed *infra* Section 2, Congress used such abuses to inform the Congressional Record as to the risk annual meetings imposed with regard to the possibility of an outsized minority interest creating the very harms that retail investors needed protection against.

Section 2. Congressional Intent Behind Not Including an Annual Meeting Requirement

The initial draft of the 1940 Act included an annual meeting requirement for registered investment companies. However, after debate, Congress intentionally removed any such requirement. As stated in the Congressional Record, the harm that a controlling shareholder could cause by electing different trustees, who in turn would change the investment management contract or the fund's investment policies, was thought to be too great to retail shareholders, who generally invested based on a fund's investment strategy, relied on continuity of the fund's management and who were statistically less likely to participate in annual meetings.³¹

²⁸ *Id.* at 1641.

²⁹ *Id.* at 1023.

³⁰ The vote of a majority of the outstanding voting securities of a company means "the vote, at the annual or a special meeting of the security holders of such company duly called, (A) of 67 per centum or more of the voting securities present at such meeting, if the holders of more than 50 per centum of the outstanding voting securities of such company are present or represented by proxy; or (B) of more than 50 per centum of the outstanding voting securities of such company, whichever is the less." Section 2(a)(42) of the 1940 Act.

³¹ See *Bill to Provide for the Registration and Regulation of Investment Companies and Investment Advisers, and For Other Purposes: Hearing on S. 3580 Before a Subcomm. of the Comm. on Banking and Currency, 76th Cong. 504 (1940)* (statement of Merrill Griswold, Chairman, Massachusetts Investors Trust of Boston) ("[A] change in management is a major matter vitally affecting the interests of those shareholders who bought into the trust in

Because director elections generally have a lower quorum and election threshold requirement, annual meetings were viewed as a potential end-run around the protections the 1940 Act provided as an investor with only a minority position could get its directors elected and have those directors remove the adviser. As stated in the Congressional Record,

When an investor buys a share in the fund, whom does he want to control his money? . . . Does he want to have it possible for a group, alien to our management, by buying some shares to start a proxy fight and try to get control of his money, or does he want the assurance of continuity of management in those persons he has selected? Bear in mind, please, that this investor, himself, has the right to change the management, by redeeming his shares at any time[.]³²

Continuity of management was deemed paramount for investors, as even in the 1930s, investors made investment decisions on the basis of the fund’s strategy and management and had less frequent participation in annual meetings.

[C]ontinuity of management is something for which an investor naturally looks when seeking to invest his money. . . . [T]o require annual approval of, or permit the change of, management by a percentage of stockholders may . . . be bringing about a contrary result, in leaving management the football of a proxy fight to be thrown out by some unscrupulous group having no responsibility to the shareholders in the original sales of the shares.³³

The 1940 Act, as enacted, did not contain an annual meeting requirement, instead focusing on allowing shareholders to terminate the advisory contract by a “vote of a majority of the outstanding voting securities of such company.”³⁴ This was the balance determined by Congress between ensuring long-term retail investors had a check over management, in tandem with the protections outlined *infra* Section 3, and preventing the abuses that a minority controlling influence may be able to exert, consistent with the findings of the 1935 Investment Company Study.

reliance on that kind of a management. A change in management under such circumstances should not be lightly treated, as it would be, for example, if only the majority of a quorum were necessary—which would only be 26 percent if a bare majority attending a meeting. Matters that are major in the case of corporations, such as the sale of all of the company’s assets, or a change in the general character of the business, or an increase or change in the capitalization, usually require the affirmative vote of a majority or of two-thirds of all of the outstanding shares, in order that the rights of minority shareholders, who went into the corporation on a certain basis, shall not be lightly overruled.”).

³² 76th Cong., *supra* note 31, at 598 (statement of Charles F. Eaton, Jr., President, Eaton & Howard, Inc.).

³³ *Id.* at 599.

³⁴ See *supra* note 30 (stating the definition of “vote of a majority of the outstanding voting securities” under Section 2(a)(42) of the 1940 Act).

Section 3. To Ensure Retail Investor Protection, Congress Enshrined Specified Governance Protections in the 1940 Act Rendering the Need for an Annual Meeting Superfluous

In lieu of an annual meeting, Congress enshrined specific governance protections in the 1940 Act as it relates to director elections, director independence requirements, and specified governance and policy changes requiring a “vote of a majority of the outstanding voting securities.” These protections reflect an important distinction from operating companies, which are not subject to such requirements and whose shareholders do not have these rights. Such distinctions illustrate the differences between funds and traditional operating companies and exemplifies the 1940 Act’s more tailored protections for fund shareholders, which in turn renders the annual meeting superfluous given the already robust and tailored protections fund shareholders have under the 1940 Act. Congress analyzed the potential abuse an annual meeting requirement could create and instead decided upon itemized protections for retail shareholders. Each of these protections—director elections, director independence requirements, and specified governance and policy changes requiring a shareholder vote—are elaborated in turn below.

Section 3.1 Director Elections

The 1940 Act protects CEF shareholders by preserving their ability to elect directors, who have oversight responsibility for the management of a fund’s affairs and are, among other things, intended to monitor a fund’s potential conflicts of interest. Specifically, the following three sections of the 1940 Act govern the election of directors by fund shareholders:

- Section 16(a) requires a fund to hold a shareholder meeting in two instances: (1) to elect the initial board of directors; and (2) to fill all existing vacancies on the board if shareholders have elected less than a majority of the board. Further, shareholders must fill any director vacancies if shareholders have elected less than two-thirds of the directors holding office.³⁵
- Section 18(a)(1)(C) requires a shareholder meeting for a CEF issuing senior securities that represent debt if on the last business day of each of twelve consecutive calendar months such debt shall have an asset coverage of less than 100%. The holders of such senior securities voting as a class are entitled to elect at least a majority of the members of the board of directors, with such voting right to continue until such debt shall have an asset coverage of 110% or more on the last business day of each of three consecutive calendar months.³⁶
- Section 18(a)(2)(C) requires a shareholder meeting for a CEF issuing senior securities that represent preferred stock if at any time dividends on such class of senior securities

³⁵ Section 16(a) of the 1940 Act.

³⁶ Section 18(a)(1)(C) of the 1940 Act.

shall be unpaid in an amount equal to two full years' dividends. The holders of such securities can elect a majority of the directors.³⁷

These provisions are designed to strengthen shareholders' control over management by preventing a board of directors from ceding control of an investment company to a new board without any shareholder notice or action. Further, these specified director election requirements provide a check over management and the fund's directors without enabling the abuses outlined *supra* Sections 1 and 2 that may occur as a result of annual meetings. Section 16(a), in particular, provides balance between long-term safeguards regarding shareholders having a check over any significant change in director oversight without enabling the potential for a minority investor to exercise a controlling influence annually to extract short-term profits for itself like the situations analyzed in the 1935 Investment Company Study.

Section 3.2 Director Independence Requirements

A CEF's board is responsible for overseeing the fund's management and operations, and each director has a duty to act in the best interests of the fund. Congress intended for independent directors to be "independent watchdogs" whose role is to be an independent check on management and represent shareholder interests.³⁸ For this reason, the 1940 Act requires that independent directors comprise at least 40 percent of an investment company's board and relies on fund boards to represent investors and protect their interests.³⁹ In reality, the vast majority of CEF boards are comprised of more than a majority of independent directors as a number of SEC exemptive rules upon which CEFs frequently rely have director independence requirements as well.⁴⁰ According to ICI research, on average CEF boards are 84 percent independent and 75 percent of CEF boards are at least 78 percent independent.⁴¹

We recognize that the regulatory requirement for independent directors is not unique to the investment company industry. As further protection for shareholder interests, however, the 1940 Act requires that significant actions be approved by a majority of independent directors, especially those that involve a potential conflict of interest, such as approval of the investment advisory agreement between a fund and its investment adviser. Specifically, a majority of a fund's independent directors must approve:

- Initiation and renewal of the advisory agreement;⁴²

³⁷ Section 18(a)(2)(C) of the 1940 Act.

³⁸ See *Burks v. Lasker*, 441 U.S. 471, 484 (1979) (quoting *Tannenbaum v. Zeller*, 552 F.2d 402, 406 (2d Cir. 1979) and *Hearings on H.R. 10065 before a Subcomm. of the H. Comm. on Interstate and Foreign Commerce*, 76th Cong. 109 (1940) (statement of David Schenker, Chief Counsel, SEC)).

³⁹ See Section 10(a) of the 1940 Act.

⁴⁰ See, e.g., Rule 10f-3; Rule 15a-4(b)(2); Rule 17a-7; Rule 17a-8; Rule 17d-1(d)(7); Rule 17e-1; Rule 17g-1(j); and Rule 23c-3 under the 1940 Act.

⁴¹ ICI/IDC, *DIRECTORS PRACTICES STUDY* (2023).

⁴² Section 15(a)(2) & (c) of the 1940 Act.

- Initiation and renewal of the underwriting agreement;⁴³
- Selection of independent public accountant;⁴⁴
- Acquisition of securities by a fund from an underwriting syndicate of which the fund's adviser or certain other affiliates are members;⁴⁵
- The purchase or sale of securities between investment companies that have the same investment adviser;⁴⁶
- Mergers or asset acquisitions involving investment companies that have the same investment adviser;⁴⁷
- Use of an affiliated broker-dealer to effect portfolio transactions on a national securities exchange;⁴⁸ and
- Fidelity bond coverage for the fund.⁴⁹

The SEC has observed that in many circumstances independent directors can provide greater protection to shareholders than could an annual shareholder vote, such as when the SEC adopted Rule 32a-4 under the 1940 Act, which provides a limited exemption from the requirement to obtain ratification of the fund's independent public accountant at an annual meeting.⁵⁰ Congress also demonstrated this policy choice when it amended the 1940 Act to allow the SEC to regulate BDCs in a manner which relies on a greater percentage of independent directors in lieu of many of the shareholder voting requirements outlined *infra* Section 3.3.⁵¹

⁴³ Section 15(c) of the 1940 Act.

⁴⁴ Section 32(a)(1) of the 1940 Act.

⁴⁵ Rule 10f-3(c)(10) under the 1940 Act.

⁴⁶ Rule 17a-7(e) under the 1940 Act.

⁴⁷ Rule 17a-8(a)(2) under the 1940 Act.

⁴⁸ Rule 17e-1(b) under the 1940 Act.

⁴⁹ Rule 17g-1(d) under the 1940 Act.

⁵⁰ Role of Independent Directors of Investment Companies, Investment Company Act Release No. 24816, 66 Fed. Reg. 3734, 3747 (Jan. 16, 2001) ("Section 32(a)(2) of the Act requires that the selection of a fund's independent public accountant be submitted to shareholders for ratification or rejection. New rule 32a-4 exempts a fund from this requirement if the fund has an audit committee consisting entirely of independent directors to oversee the fund's auditor. The new rule could provide significant benefits to shareholders. Many believe shareholder ratification of a fund's independent auditor has become a perfunctory process, with votes that are rarely contested. As a consequence, we believe that the ongoing oversight provided by an independent audit committee can provide greater protection to shareholders than shareholder ratification of the choice of auditor.").

⁵¹ Many of the itemized shareholder voting requirements discussed *infra* Section 3.3 are not applicable to BDCs. Instead, Congress required BDCs to have a higher percentage of independent directors to protect retail investors. *See, e.g.*, Section 56 of the 1940 Act ("A majority of a business development company's directors or general partners shall be persons who are not interested persons of such company.").

Section 3.3 Vote of a Majority of the Outstanding Voting Securities for Specified Governance and Policy Changes

In addition to director election and director independence requirements, the 1940 Act explicitly requires registered investment companies to obtain shareholder approval for specified governance or policy changes. To obtain shareholder approval for these changes, registered investment companies must hold shareholder meetings. Matters that require shareholder approval include:

- A new investment management agreement or a material amendment to an investment management agreement;⁵²
- A change from closed-end to open-end status, or vice versa;⁵³
- A change from a diversified company to a non-diversified company;⁵⁴
- A change in a policy with respect to borrowing money, issuing senior securities, underwriting securities that other persons issue, purchasing or selling real estate or commodities or making loans to other persons, except in each case in accordance with the recitals of policy contained in its registration statement in respect thereto;⁵⁵
- A deviation from a policy in respect of concentration of investments in any particular industry or fundamental investment policy;⁵⁶ and
- A change in the nature of the investment company's business so as to cease to be an investment company.⁵⁷

Shareholders of registered investment companies must approve these specified items by “vote of a majority of its outstanding voting securities” as defined in the 1940 Act, which is a standard that is more stringent than that used by most standard operating companies.⁵⁸ In particular, a simple majority vote of shares present at a meeting could not approve a proposal unless the total shares voting in favor also represented a majority of all outstanding voting securities. Further, subject to that same voting threshold, the 1940 Act provides shareholders the ability to terminate an advisory agreement.⁵⁹ Through these requirements, the 1940 Act ensures that fund

⁵² Section 15(a) of the 1940 Act.

⁵³ Section 13(a)(1) of the 1940 Act.

⁵⁴ Section 13(a)(1) of the 1940 Act.

⁵⁵ Section 13(a)(2) of the 1940 Act.

⁵⁶ Section 13(a)(3) of the 1940 Act.

⁵⁷ Section 13(a)(4) of the 1940 Act.

⁵⁸ See *supra* note 30 (stating the definition of “vote of a majority of the outstanding voting securities” under Section 2(a)(42) of the 1940 Act).

⁵⁹ Section 15(a)(3) of the 1940 Act.

shareholders retain the direct ability to meet and determine important corporate governance decisions when, as Congress determined, they are appropriate.

Section 4. The NYSE Requirement for Annual Meetings is a Vestige from an Earlier Time that Allows Activist Investors to Exert an Outsized Influence and Cause the Very Harms the 1940 Act Sought to Prevent

Listed CEFs are subject to the requirements discussed above and their shareholders benefit from the protections and disclosure requirements that the 1940 Act mandates for investment companies generally, yet they are the only form of registered investment company required to hold annual shareholder meetings. Further, that requirement stems solely from exchange rules—not federal or state law.⁶⁰ Since the adoption of the 1940 Act, every major state of incorporation or organization for investment companies has amended its laws to remove an annual meeting requirement for investment companies, including CEFs, to align their statutes with the extensive, tailored 1940 Act protections and Congressional intent.⁶¹ Additionally, many of the arguments given for exempting other exchange-listed pooled investment products from NYSE's annual meeting requirement are equally applicable to listed CEFs.⁶²

⁶⁰ Unlike listed CEFs, mutual funds and unlisted CEFs are not listed on an exchange. Similarly, UITs do not typically list their shares on an exchange unless structured as an ETF. ETFs already are exempted from the exchange annual meeting requirement. The main counter-argument for requiring annual meetings for listed CEFs over other forms of registered investment companies is that listed CEF shareholders cannot redeem their shares directly from the fund at net asset value, and fund shares may trade at a discount to net asset value. A similar argument does not apply to ETFs, as they are hybrid open-end/closed-end vehicles designed through efficient market arbitrage mechanisms to minimize the likelihood of their shares trading at a discount to net asset value. We, however, do not believe that this difference alone should subject listed CEFs to different, more onerous annual meeting requirements. Many listed CEF shareholders intentionally acquire their shares at a discount, which seemingly undercuts the argument. This leaves listed CEFs as the only registered investment companies that are required to hold annual shareholder meetings.

⁶¹ The vast majority of CEFs are organized under Delaware, Maryland or Massachusetts law, which do not require that registered investment companies, including CEFs, hold annual meetings. Some states, such as Maryland, required registered investment companies to hold annual shareholder meetings until the 1980s, when these requirements were eliminated. Currently, Maryland law permits investment companies registered under the 1940 Act to adopt charter and bylaw provisions that eliminate annual meetings, except in years that the 1940 Act requires an election of directors. *See* Section 2-501 of Maryland General Corporation Law. Massachusetts and Delaware law do not require annual shareholder meetings, as the statutes defer to an entity's organizational documents. This is indicated by the lack of any affirmative requirement under Chapter 182 of the Massachusetts General Laws and the Delaware Statutory Trust Act.

⁶² *See, e.g.*, Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend NYSE Arca Rule 5.3-E to Exclude Certain Categories of Issuers from the Exchange's Annual Meeting Requirement, Exchange Act Release No. 83324, 83 Fed. Reg. 25076, 25077 (May 31, 2018) (citing shareholder receipt of regular disclosure, the net asset value being determined by underlying portfolio securities and clarity into such portfolio and valuation, ability for shareholders to determine their investment's value on an ongoing basis, and state and federal law, such as the 1940 Act, mandating when special meetings must be held as justifications for why other exchange-traded pooled investment products should not be subject to an annual meeting requirement).

Due to this vestigial requirement in the NYSE's listing standards for CEFs,⁶³ activists are utilizing annual meetings to follow the same investment strategy as Atlas Corporation, as outlined in the 1935 Investment Company Study, resulting in the same harms the 1940 Act sought to prevent. These actions are actively harming long-term retail investors currently invested in listed CEFs while also generally disincentivizing the creation of new listed CEFs and reducing investor investment options. This Section first analyzes how the burdens of an annual meeting outweigh any potential benefit. Second, the benefits of the listed CEF are analyzed while detailing how the listed CEF market is being dismantled by activist activity enabled by the annual meeting requirement. Finally, a case study of a recent listed CEF takeover by an activist is provided, demonstrating the existential harm allowed to occur due to the annual meeting requirement and drawing a parallel between current acts and those of the Atlas Corporation. For these reasons, the ICI supports NYSE modernizing its CEF listing standards by removing the annual meeting requirement, and thereby restoring to retail CEF shareholders the protections Congress intended for them.

Section 4.1. Burdens Outweigh Any Potential Benefits

The annual meeting requirement can impose significant costs on a listed CEF, including legal and accounting fees associated with the preparation of proxy materials, proxy solicitor fees, and printing and mailing costs. For contested proxy campaigns, this can sometimes total in excess of millions of dollars per fund.⁶⁴ Listed CEFs and their shareholders ultimately bear the costs of these shareholder meetings, and the cumulative cost of routine annual meetings can compound the costs to long-term retail shareholders. These expenses affect the ability of listed CEF's to deliver positive investment outcomes to their shareholders over time.

While the burden is readily apparent, the benefits of an annual meeting that some claim to exist are illusory.⁶⁵ It long has been recognized that retail shareholder engagement at annual meetings

⁶³ The NYSE first began requiring annual meetings for operating companies in 1909, as a provision of individually negotiated listing agreements. See Special Study Group of the Committee on Federal Regulation of Securities, ABA Section of Business Law, *Special Study on Market Structure, Listing Standards and Corporate Governance*, 57 BUS. LAW. 1487, 1497 (2002). The NYSE began listing investment companies in 1929, only after adopting special listing requirements that included annual financial reporting requirements for those investment companies. See *New York Stock Exchange to List Securities of Investment Trusts—Tentative Requirements Announced*, THE COMMERCIAL & FINANCIAL CHRONICLE, Vol. 128, No. 3337, 3764-65 (June 8, 1929); *The Regulation of Management Investment Trusts for the Protection of Investors*, 46 YALE L. J. 1211, 1218 (1937). The special listing requirements assumed that an investment company would have an annual meeting, as financial reporting and annual meetings had become inextricably intertwined under the NYSE's governance requirements. See Douglas C. Michael, *Untenable Status of Corporate Governance Listing Standards Under the Securities Exchange Act*, 47 BUS. LAW. 1461, 1467-68 (1992). Given that the NYSE requirement first was applied to CEFs before the enactment of the 1940 Act, the necessity of the continued application of the annual meeting requirement to CEFs must be re-evaluated in light of the 1940 Act's protections.

⁶⁴ See ANALYSIS OF FUND PROXY CAMPAIGNS: 2012-2019, *supra* note 3 at 9-15 (detailing the difficulties with proxy campaigns and noting that cost estimates for 145 campaigns over a seven-year period totaled over \$373 million).

⁶⁵ See *cf. generally* William K. Sjostrom, *The Case Against Mandatory Annual Director Elections and Shareholders' Meetings*, TENNESSEE LAW REVIEW, Vol. 74 (2006), available at <https://ssrn.com/abstract=907474> (concluding that while the requirement for corporations to hold annual shareholders' meetings for the election of

has been limited.⁶⁶ Recent data on proxy voting in contested elections of listed CEF directors shows that retail investors who direct their own vote and do not have an adviser or broker vote for them (*i.e.*, “non-discretionary retail”) often participate in the proxy process at lower rates. While these investors held 59% of the CEF shares involved in these elections, they accounted for only 37% of the votes cast.⁶⁷ Also, when non-discretionary retail shareholders did vote in these contests, they leaned heavily towards supporting management—nearly 85% of non-discretionary retail accounts voted in favor of management with over 57% of the total non-discretionary retail ballots being cast in favor of management.⁶⁸

Retail shareholders generally invest based on a fund’s investment strategy and rely on continuity of the fund’s management. Instead of annual meetings, retail investors rely on shareholder reports and other disclosure for updated information about their investment. In the case of listed CEFs, shareholders receive periodic reports that contain the information most important to an investor—such as investment performance, expenses, and portfolio holdings.⁶⁹ The SEC additionally requires listed CEFs to include disclosure related to proxy voting policies, the background of portfolio managers, and any affiliated purchaser acquisitions of the fund’s shares in their shareholder reports.⁷⁰ The annual meeting is merely a costly burden that allows one, or a group of, minority shareholder(s) acting for its own short-term pecuniary interest to have an outsized controlling influence to the detriment of long-term retail investors.

Section 4.2 Benefits of the Listed Closed-End Fund

Listed CEFs allow retail investors to access less-liquid investments through a retail-focused wrapper that provides the protections inherent in the 1940 Act. Because listed CEFs trade at market price, there is often divergence between the market price and the underlying net asset value (NAV). A listed CEF trading at a share price higher than its NAV is said to be trading at a premium, while a listed CEF trading at a share price lower than its NAV is said to be trading at a discount. Listed CEFs may trade at premiums or discounts for a number of potential reasons,

directors may have made sense at one time, it no longer does and results in meetings that are meaningless, arguing instead for a more flexible path forward).

⁶⁶ See INVESTMENT TRUSTS AND INVESTMENT COMPANIES, *supra* note 12, at 1876 (discussing the limited participation at annual meetings by retail shareholders).

⁶⁷ ANALYSIS OF CLOSED-END FUND PROXY CONTESTS (June 18, 2024), *available at* Appendix A.

⁶⁸ *Id.*

⁶⁹ Further, the SEC itself has acknowledged that for registered investment companies, proxy statements are an “ineffective vehicle for communicating information to fund shareholders on a regular basis because funds generally are no longer required to hold annual meetings.” Role of Independent Directors of Investment Companies, 66 Fed. Reg. at 3742.

⁷⁰ Analogous information appears in open-end fund prospectuses. Listed CEFs include the information in shareholder reports because, unlike open-end funds, they usually do not annually update their prospectuses. See Rule 8b-16(b) under the 1940 Act (allowing registration updates required for open-end funds to be made in the annual report to shareholders for listed CEFs).

such as market perceptions or investor sentiment.⁷¹ For example, some academics have argued that the discount is representative of neoclassical finance theories and may reflect, in addition to investor sentiment, the uncapitalized expenses and time value that would be required to liquidate a less liquid portfolio and unwinding a leveraged position.⁷² As another example, a listed CEF trading at a discount due to investors having priced in any perceived tax liability resulting from large unrealized capital gains. However, activist arbitrageurs have inaccurately asserted that any discount is *solely* reflective of management and have used this false narrative in the press to contend they are unlocking shareholder value when targeting listed CEFs.

A majority of listed CEFs trade at a discount,⁷³ and such discount is a feature, not a flaw, of listed CEFs. In many cases, the discount can represent a buying opportunity as investors are able to buy listed CEF shares or reinvest dividends at a discount to net asset value, which in turn boosts their dividend yield and allows for the potential of an enhanced total return.⁷⁴ Beyond the potential increased yield opportunity that listed CEFs can offer long-term shareholders—via dividend reinvestments or other reinvestment opportunities—there are many structural advantages that the listed CEF offers to retail investors. Listed CEFs often utilize leverage to enhance income distributions to retail shareholders to an extent not available to mutual funds or ETFs.⁷⁵ Additionally, and importantly for long-term retail investors, is the long-term strategy conviction that a listed CEF wrapper allows a portfolio manager to maintain during volatile market periods, particularly for yield-based strategies.⁷⁶ Listed CEFs also allow for full

⁷¹ See, e.g., Charles Less, Andrei Shleifer, and Richard Thaler, *Investor Sentiment and the Closed-End Fund Puzzle*, JOURNAL OF FINANCE, Vol. 46, No. 1 at 75-109 (March 1991); Martin Cherkas, Jacob Sagi, and Richard Stanton, *A Liquidity-Based Theory of Closed-End Funds*, THE REVIEW OF FINANCIAL STUDIES, Vol. 22, Issue 1 at 257-297 (Jan. 2009); and Martin Cherkas, *Closed-End Funds: A Survey*, ANNUAL REVIEW OF FINANCIAL ECONOMICS, Vol. 4 at 431-445 (2012).

⁷² See, cf., Cherkas, Sagi, and Stanton, at *supra* note 71, at 257-297 (“This paper develops a rational, liquidity-based model of closed-end funds (CEFs) that provides an economic motivation for the existence of this organizational form: They offer a means for investors to buy illiquid securities, without facing the potential costs associated with direct trading and without the externalities imposed by an open-end fund structure. Our theory predicts the . . . observed behavior of the CEF discount, which results from a tradeoff between the liquidity benefits of investing in the CEF and the fees charged by the fund’s managers.”). While the Cherkas, Sagi, and Stanton paper is focused on premiums appearing during a listed CEF’s IPO due to the capitalized costs of purchasing illiquid assets that an investor would not have to pay if investing indirectly in an illiquid pool of assets by purchasing shares of the CEF, the inverse would be true for listed CEFs further along in their lifecycle that are trading at a discount as they may be needing to allocate new capital or exit existing positions and such transactional costs have not yet occurred nor been capitalized.

⁷³ Cf. Duvall, *supra* note 7, at 3-4 (providing data demonstrating that a majority of listed CEFs trade at a discount).

⁷⁴ See, e.g., Stuart Kirk, *What I learnt from your open-ended wisdom on closed-end funds*, FINANCIAL TIMES, June 14, 2024 (arguing that discounts, in particular large discounts, represent a buying opportunity).

⁷⁵ See Duvall, *supra* note 7, at 10 (noting that nearly 62 percent of traditional listed CEFs utilize leverage).

⁷⁶ For example, because listed CEFs do not face daily redemptions or subscriptions, unlike open-end funds, a listed CEF does not need to buy and sell underlying portfolio holdings to meet subscriptions and redemptions, respectively. This means that a listed CEF portfolio manager does not have to sell or buy assets under unfavorable market conditions to meet redemptions and subscriptions, thus allowing the listed CEF portfolio manager to maintain the strategy’s investment conviction during market cycles, providing the potential for a steadier yield, particularly for credit strategies, during market volatility.

investment in the investment strategy as compared to many other registered products because, as listed CEFs do not face daily redemptions, there is little need to maintain cash reserves.

Section 4.3 Activist Case Study

Despite the benefits the listed CEF provides to long-term retail investors, activists have attacked listed CEFs in an attempt to arbitrage the discount, similar to the activities of Atlas Corporation outlined in the 1935 Investment Company Study. This activity has not only led to the types of actual harms that the 1940 Act sought to prevent, but has contributed to a notable reduction in the number of listed CEFs in the market.⁷⁷ To illustrate these harms, we provide a case study of what occurred with the Voya Prime Rate Trust (“Trust”).

The Trust was established in 1987.⁷⁸ The Trust was a diversified listed CEF with an investment objective “to provide investors with as high a level of current income as is consistent with the preservation of capital.”⁷⁹ The Trust accomplished this objective by “investing, under normal market conditions, at least 80% of its net assets (plus borrowings for investment purposes) in U.S. dollar-denominated floating rate secured senior loans.”⁸⁰

An activist began buying shares of the Trust in 2019 and by April 2020 held 24.6% of the Trust’s outstanding shares.⁸¹ The activist instituted a proxy battle by filing its own slate of nominees to change all eight of the Trust’s board members, terminate the current adviser to the Trust, and conduct a tender offer.⁸² While the activist could not satisfy the 1940 Act voting threshold to

⁷⁷ See Duvall, *supra* note 7, at 1, 5 & 7 (showing that as activist activity has increased, the number of listed CEFs has fallen for 12 consecutive years and is down 36 percent from year-end 2011). Further, at a time when the unlisted CEF market is booming and ETFs show no sign of slowing down, there were no listed CEF launches in 2023 and 2024 activity has been *de minimis*. See 2024 INVESTMENT COMPANY FACT BOOK, *supra* note 8, at 66, 70-71 & 76 (providing data demonstrating that while the number of ETFs offered between 2022 and 2023 increased from 2,847 to 3,108 and the number of non-traditional CEFs, inclusive of unlisted CEFs and BDCs, offered between 2022 and 2023 increased from 293 to 322, the number of listed CEFs decreased between 2022 and 2023 from 427 to 402 with no new listed CEFs launching in 2023).

⁷⁸ Voya Prime Rate Trust, Registration Statement (Form N-2) at 1 (filed June 26, 2020), available at <https://www.sec.gov/Archives/edgar/data/826020/000168386320011390/f6225d1.htm>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Compare Voya Prime Rate Trust, Schedule 13G filed by Saba Capital Management, L.P. (filed Jan. 18, 2019), available at <https://www.sec.gov/Archives/edgar/data/826020/000106299319000277/schedule13g.htm> (reporting 5.16% of the Trust’s voting securities held) with Voya Prime Rate Trust, Schedule 13D filed by Saba Capital Management, L.P. (filed April 30, 2020), available at <https://www.sec.gov/Archives/edgar/data/826020/000121465920003912/p20-0994sc13da.htm> (reporting 24.6% of the Trust’s voting securities held).

⁸² Voya Prime Rate Trust, Proxy Statement of Saba Capital Management, L.P. (Schedule 14A) at 1-2 (filed May 8, 2020), available at <https://www.sec.gov/Archives/edgar/data/826020/000121465920004168/p20-1033defc14a.htm>.

terminate the advisory agreement, the activist was able to get its board nominees elected.⁸³ Of approximately 147 million shares outstanding, 39% voted for the activist's board slate, 25% voted for the existing board members, and 34% (presumably retail investors) did not vote.⁸⁴

The activist could not satisfy the vote of the majority of outstanding voting securities standard that Congress intended when there is a change of investment adviser and instead leveraged the mandated annual meeting and the lower vote threshold to elect directors to end-run the 1940 Act protections. Given that the activist owned nearly 25% of the Trust's outstanding voting securities, the activist was able to enact its agenda with only 14% of outstanding shares in support of its board slate. Once the activist's board members were seated, the board replaced the existing adviser and the board appointed the activist as manager.⁸⁵ During that time period, the Trust engaged in two tender offers, which the activist participated in to secure a profit.⁸⁶

⁸³ Voya Prime Rate Trust, Semi-Annual Report for Period Ending August 31, 2020 (Form N-CSR) at 52 (filed Nov. 6, 2020), available at https://www.sec.gov/Archives/edgar/data/826020/000110465920122351/tm2031566-11_ncsrs.htm.

⁸⁴ See Voya Prime Rate Trust, Supplement to the Trust's Prospectus (Form 497) (filed Aug. 11, 2020), available at <https://www.sec.gov/Archives/edgar/data/826020/000168386320012471/f6646d1.htm> (noting that as of June 5, 2020, the Trust had 147,130,780.50 shares outstanding); Voya Prime Rate Trust, Form N-CSR, *supra* note 83, at 52 (listing the shares voted in favor or against various proposals). The numbers do not add up to 100% because some investors voted against the activist's or management's board slate as opposed to voting *for* one of the slates.

⁸⁵ See Voya Prime Rate Trust, Annual Report for the Period Ending February 28, 2021 (Form N-CSR) at 26 (filed May 6, 2021), available at https://www.sec.gov/Archives/edgar/data/826020/000110465921062317/tm219046d11_ncsr.htm (noting that the board determined to replace the former adviser and sub-adviser with Saba Capital Management, L.P. on March 22, 2021, and approved such agreement on April 1, 2021). While under the 1940 Act an investment adviser can be appointed as a temporary adviser for 150 days under certain circumstances, *see* Rule 15a-4 under the 1940 Act, shareholders approved the management agreement between the Trust and Saba Capital Management, L.P. on May 21, 2021, with the prior adviser and sub-adviser officially resigning on June 4, 2021, with Saba Capital Management, L.P. taking over on such date. *See* Saba Capital Income & Opportunities Fund (formerly Voya Prime Rate Trust), Semi-Annual Report for the Period Ending August 31, 2021 (Form N-CSR) at 27 (filed Nov. 5, 2021), available at https://www.sec.gov/Archives/edgar/data/826020/000139834421020990/fp0069915_ncsrs.htm. While the activist did obtain the necessary shareholder vote, because the option was either approve the advisory agreement or the Trust would have no adviser, shareholders generally vote for approval over no management at all.

⁸⁶ See Saba Capital Income & Opportunities Fund, Schedule TO (June 21, 2021), available at https://www.sec.gov/Archives/edgar/data/826020/000139834421013205/fp0066366_sctoi.htm (tender offer for 30% of outstanding shares); Voya Prime Rate Trust, Schedule TO (Dec. 3, 2020), available at <https://www.sec.gov/Archives/edgar/data/826020/000119312520309656/d18387dsctoi.htm> (tender offer for 15% of outstanding shares). According to Form 13Fs, the activist sold its holdings of the Trust during both tender offers. *Compare* Saba Capital Management, L.P., Form 13F for the Period Ending September 30, 2021 (filed Nov. 15, 2021), available at https://www.sec.gov/Archives/edgar/data/1510281/000106299321010900/xslForm13F_X01/form13fInfoTable.xml (showing 11,009,359 of the Trust's shares held) *with* Saba Capital Management, L.P., Form 13F for the Period Ending June 30, 2021 (filed Aug. 16, 2021), available at https://www.sec.gov/Archives/edgar/data/1510281/000106299321007571/xslForm13F_X01/form13fInfoTable.xml (showing 26,099,9964 of the Trust's shares held); *compare* Saba Capital Management, L.P., Form 13F for the Period Ending March 31, 2021 (filed May 17, 2021), available at https://www.sec.gov/Archives/edgar/data/1510281/000106299321004752/xslForm13F_X01/form13fInfoTable.xml (showing 27,457,299 of the Trust's shares held) *with* Saba Capital Management, L.P., Form 13F for the Period

Additionally, the activist changed the investment restrictions of the Trust, including changing the Trust's sub-classification under the 1940 Act from "diversified" to "non-diversified" and removing the Trust's fundamental investment restriction relating to investing in other investment companies.⁸⁷ Further, the activist drastically changed the Trust's portfolio holdings: Whereas previously the Trust held approximately 96% of its assets in senior loans, after the takeover by the activist, the fund held approximately 23% in other CEFs, 8% in foreign investment trusts (including foreign crypto trusts), 11% in private funds, 5% in crypto trusts, 5% in SPACs, 6% in common stocks, 10% in corporate bonds, and only 10% remaining in senior loans, with significant short sale exposure occurring in the portfolio.⁸⁸

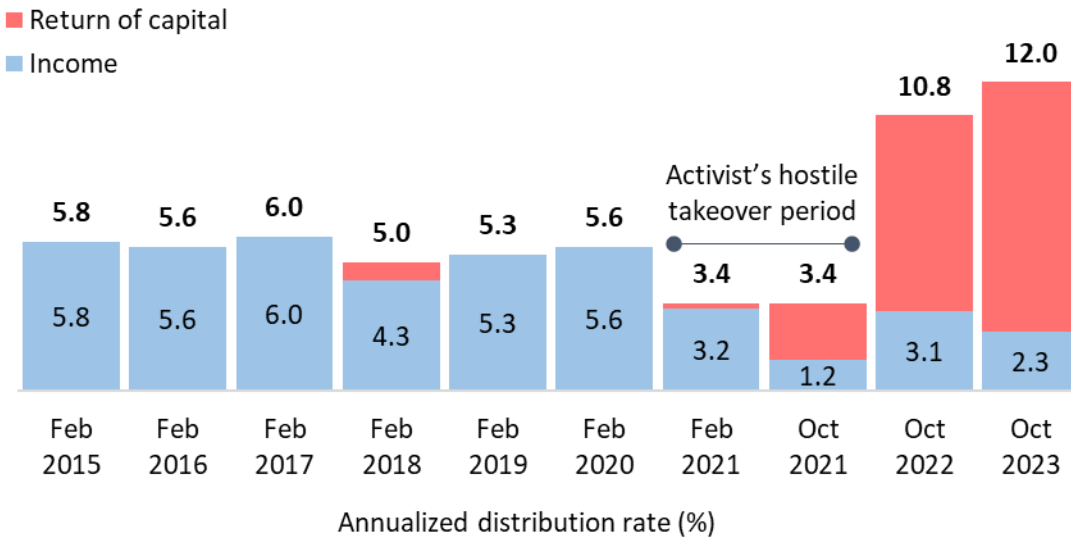
Once the activist takes over the fund, the Trust's track record speaks for itself as far as investor harm:

Ending December 31, 2020 (filed Feb. 16, 2021), available at https://www.sec.gov/Archives/edgar/data/1510281/000106299321001543/xslForm13F_X01/form13fInfoTable.xml (showing 36,320,674 of the Trust's shares held).

⁸⁷ See Saba Capital Income & Opportunities Fund, Form N-CSR, *supra* note 85, at 27 (disclosing that, in addition to changing the investment adviser, Saba Capital Management, L.P. recommended, and was approved by shareholder vote, 1) removal of the Trust's fundamental investment restriction relating to investing in warrants; 2) removal of the Trust's fundamental investment restriction relating to purchasing or selling equity securities, engaging in short-selling and the use of certain option arrangements; 3) removal of the Trust's fundamental investment restriction relating to investing in other investment companies; 4) change of the Trust's sub-classification under the 1940 Act from "diversified" to "non-diversified"; 5) change of the Trust's investment objective; and 6) make the Trust's investment objective non-fundamental).

⁸⁸ Compare Voya Prime Rate Trust, Form N-CSR, *supra* note 85, at 28-53 (Portfolio of Investments) with Saba Capital Income & Opportunities Fund, Annual Report for the Period Ending October 31, 2023 (Form N-CSR) at 19-42 (filed Jan. 5, 2024), available at https://www.sec.gov/Archives/edgar/data/826020/000139834424000237/fp0085976-1_ncsr.htm (Consolidated Schedule of Investments).

Figure 1
Activist Halved Income Distributions to Investors and Initiated a Managed Distribution Plan Where Return of Capital, in a Substantial Change for the Trust, Constituted the Majority of Distributions

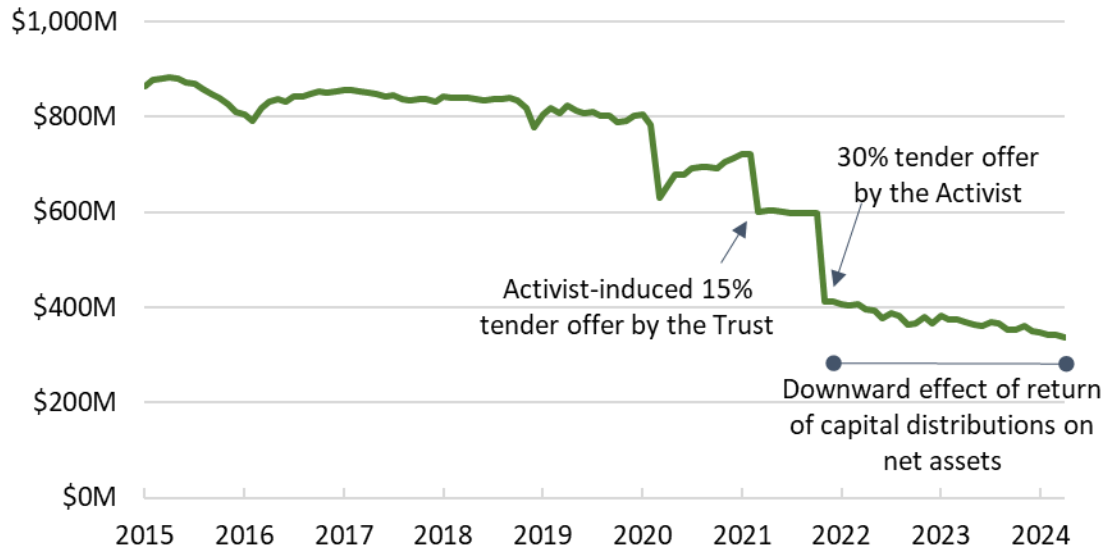


Note: Annualized distribution rate is the Trust's annual distributions per share as a percentage of the net asset value at the beginning of the reporting period. "Return of Capital" means returning to investors a distribution in excess of the income generated by investment securities (*i.e.*, returning investment capital).

Source: ICI calculations of SEC EDGAR data

Figure 2
Between Two Tender Offers and Return of Capital Distributions, the Activist is Depleting the Trust's Assets

Total net assets are less than half of what they were prior to activist involvement

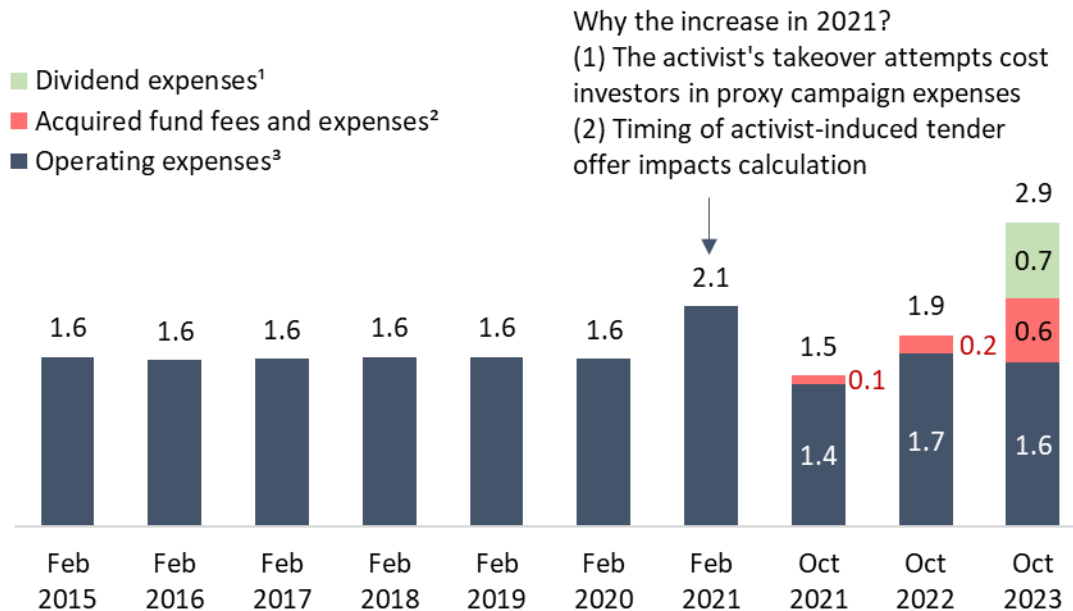


Source: ICI calculations of Refinitiv data

Figure 3

The Activist’s Short Selling Activity and Investments in Other CEFs Has Increased the Trust’s Fees and Costs for Investors

Costs related to short-selling are new for the Trust in 2023 and passed onto investors



Expenses expressed as a percentage of average Trust assets

¹Dividend expenses are the dividends paid out by an investment that the short-seller must cover.

²Acquired fund fees and expenses are not reported in the annual report. ICI estimates this expense by applying general averages (e.g., 1.2 percent for CEFs, 2.0 percent for private funds) to average total net assets and the average share held at mid-year and year-end.

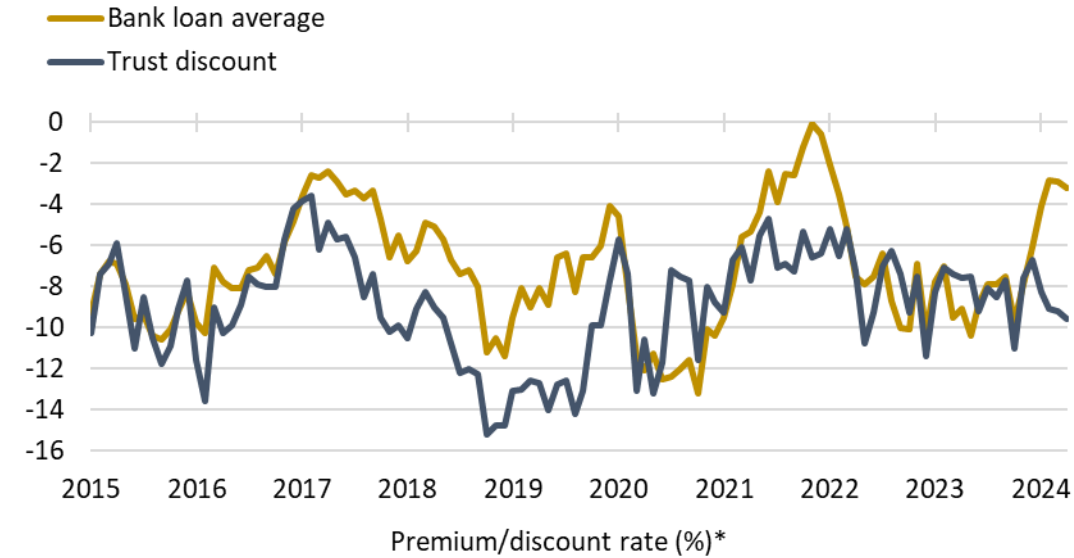
³The operating expense ratio is the management fee plus other fixed costs related to running the fund.

Source: ICI calculations of SEC EDGAR data

Figure 4

The Trust's Discount Is Still Wide Despite the Managed Distribution Plan and Drastic Strategy Change

In recent months, the Trust's discount has moved to be significantly wider than the average for bank loan CEFs, which was the Trust's peer category



*The premium/discount rate is the simple average of the percent difference between the share price and net asset value at month-end.

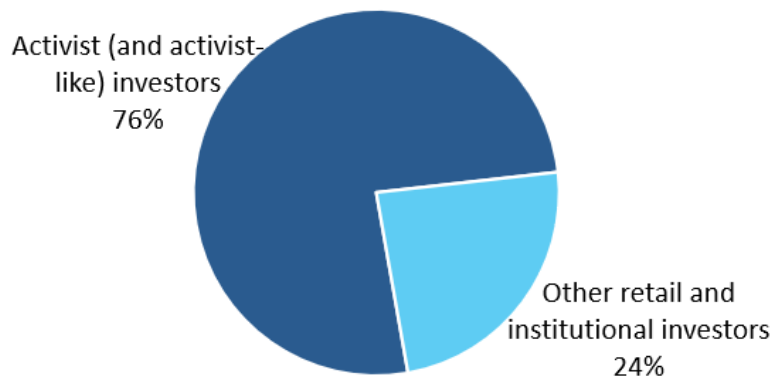
Source: ICI calculations of Refinitiv data

Meanwhile, the activist investor exits its position, benefitting its clients at the detriment, as shown above, to long-term retail investors that invested in the Trust expecting preservation of capital with consistent dividend yield.

Figure 5

Activist Shareholders Received Bulk of Proceeds From Second Tender Offer by the Trust

Percentage of total shares tendered



Source: ICI calculations of Refinitiv data

While this is just one example, this is the playbook increasingly being used by activist arbitrageurs.⁸⁹ When a listed CEF trades at a wider discount after a period of significant market volatility, such as in reaction to COVID or the Federal Reserve raising interest rates, an activist need only establish a minority position and utilize their outsized influence to enact the very harms the 1940 Act sought to prevent. If this sounds similar to the activities of the Atlas Corporation from the 1935 Investment Company Study, it is because this is the same investment strategy. Just as the Atlas Corporation did during the Great Depression, activists are using primarily other fund money to profit from the discount of market price to NAV by acquiring interests in, and ultimately taking over, listed CEFs. Just as SEC and Congress found 90 years ago, the lower average voting rates of retail investors in annual meetings is providing an outlet for these harms to occur.⁹⁰ Just as in the case of the Atlas Corporation, once the fund has been captured, the fund's investment strategy is being dramatically changed from what long-term retail investors originally invested in.

⁸⁹ Most recently, an activist took over another fund following the same strategy. Although the activist was not able to obtain the requisite vote to terminate the advisory agreement, the activist was able to obtain the lower vote threshold to get its director slate elected as it owned over 30% of the fund's outstanding shares. Annual Report for the Period Ending December 31, 2022 (Form N-CRS) at 39-40 (filed Feb. 28, 2023), *available at* <https://www.sec.gov/Archives/edgar/data/828803/000186842023000025/primary-document.htm>; *see also* Schedule 14A (filed Sept. 26, 2023), *available at* <https://www.sec.gov/Archives/edgar/data/828803/000090266423004929/p23-2478def14a.htm> (noting that the activist, via funds it managed, owned approximately 30.68% of the outstanding shares of the fund, with discretionary voting authority over 27.26%). According to a press release, over 90% of the voted shares were voted in favor of the management's nominees, other than those owned by the activist or those subject to private agreements with the activist. *See* Form 8-K, Exhibit 99.1 (filed Feb. 15, 2023), *available at*

As stated in the 1935 Investment Company Study:

Although the majority of amalgamations of investment companies occurred in an era of depressed securities prices, the methods and techniques for acquiring control of investment companies are equally workable at any time.⁹¹

In conclusion, the annual meeting requirement, coupled with the lowered thresholds required for electing directors, have allowed activists to legally end-run the 1940 Act's protections designed for retail investors. Further, it is significant that Congress intentionally did not include an annual meeting requirement in the 1940 Act, consistent with the view that such a requirement would not enhance investor protection and in fact would be susceptible of being abused. Accordingly, ICI urges the SEC to approve the NYSE's proposed rule change filing to align listing standards for CEFs with the protections the 1940 Act sought to provide to long-term retail investors. We also urge the NYSE to expand relief to listed BDCs as well.

* * * *

https://www.sec.gov/ix?doc=/Archives/edgar/data/828803/000093041323000400/c105650_8k-ixbri.htm. Once the activist had its director slate seated, and subject to shareholder approval, it replaced the existing adviser with that of the activist, made the fund's investment objective non-fundamental, and removed a fundamental investment policy. Annual Report for the Period Ending October 31, 2023 (Form N-CSR) at 38 (filed Feb. 28, 2023), *available at* <https://www.sec.gov/Archives/edgar/data/828803/000186842023000209/primary-document.htm>. Additionally, the board directed that the fund's portfolio begin being liquidated to cash and cash equivalents prior to the activist starting as adviser. *Id.* at 28. Further, a tender offer, announced on October 10, 2023, and expiring on November 9, 2023, for 45% of issued and outstanding shares was conducted, which the activist used to exit a significant portion of its more than 30% holdings of the fund's shares. *Id.* at 27; *compare* Form 13F for the Period Ending June 30, 2023 (filed Aug. 14, 2023), *available at* https://www.sec.gov/Archives/edgar/data/1510281/000106299323016431/xslForm13F_X02/form13fInfoTable.xml (showing 38,597,813 shares held) *with* Form 13F for the Period Ending December 31, 2023 (filed Feb. 14, 2024), *available at* https://www.sec.gov/Archives/edgar/data/1510281/000106299324003153/xslForm13F_X02/form13fInfoTable.xml (showing 8,792,605 shares held).

⁹⁰ Based on voting patterns analyzed in the 1935 Investment Company Study, less than two-thirds of outstanding voting shares were represented at investment company shareholder meetings. INVESTMENT TRUSTS AND INVESTMENT COMPANIES, *supra* note 12, at 1875. As shown by the voting results for the Trust, all the technology of the last nearly 100 years has not changed that inertia as only two-thirds of outstanding voting shares, with the activist owning nearly 25% of the outstanding total, participated in the contested proxy for the Trust. *See supra* notes 81 & 84 and accompanying text.

⁹¹ INVESTMENT TRUSTS AND INVESTMENT COMPANIES, *supra* note 12, at 1023.

Ms. Vanessa Countryman

July 30, 2024

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We appreciate the opportunity to comment and urge the SEC to approve the proposed amendments. If you have any questions, please contact Paul G. Cellupica, General Counsel, at paul.cellupica@ici.org, and Kevin Ercoline, Assistant General Counsel, at kevin.ercoline@ici.org.

Regards,

/s/ Paul G. Cellupica
Paul G. Cellupica
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/s/ Kevin Ercoline
Kevin Ercoline
Assistant General Counsel

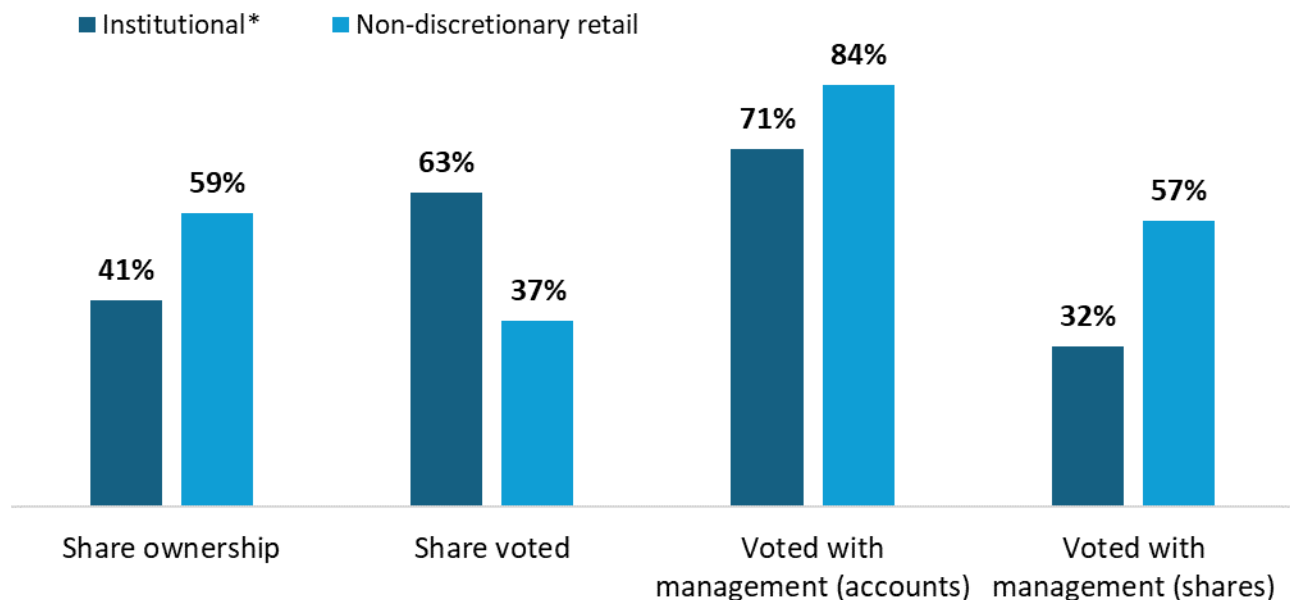
cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Mark T. Uyeda, Commissioner
The Honorable Jaime Lizárraga, Commissioner
Haoxiang Zhu, Director, Division of Trading and Markets
Natasha Vij Greiner, Director, Division of Investment Management
Patrick Troy, Associate General Counsel, NYSE

Appendix A

Analysis of Closed-End Fund Proxy Contests

- Dataset – Closed-end fund proxy contests in the last five years (since July 2019 to current). 94 contests reviewed.
- Share Ownership – Aggregated across these 94 contests, Retail held 59% of outstanding shares while Institutional held 41% of outstanding shares.
 - “Retail” is defined as non-institutional accounts (*i.e.*, natural persons) where the shareholder directs their own vote and does not have an adviser or broker vote for them (*i.e.*, “non-discretionary retail”).
- Shares Voted – Of the total amount of shares voting in the 94 contests, Institutional constituted 63% of the voting shares while retail constituted 37% of the voting shares.
- Voting With Management – On an account-by-account basis, in the dataset, 84% of Retail accounts voting voted with management while 57% of total Retail shares voting voted with management.

Figure 6
Closed-end Fund Proxy Contests in the Last Five Years
Percentages



* Includes discretionary retail accounts—accounts where an adviser or broker votes for the beneficial retail owner.

Source: Broadridge
