The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE
1401 H Street, NW, Washington, DC 20005 USA

October 31, 2024

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

Re: Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend 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 (Release No. 34-101257; **File No. SR-NYSE-2024-35**)

Dear Ms. Countryman:

The Investment Company Institute[1] is writing in response to issues raised by the Securities and Exchange Commission (SEC) in the order instituting proceedings issued on October 4, 2024, (the "Order")[2] and to provide further information 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 (the "Proposal").[3] In the Order, the SEC stated it had questions related to

[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 $37.1 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 $8.7 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London.

[2] Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend 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. 101257, 89 Fed. Reg. 82277 (Oct. 10, 2024), *available at* www.govinfo.gov/content/pkg/FR-2024-10-10/pdf/2024-23417.pdf.

[3] 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* 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

whether the Proposal was consistent with Section 6(b)(5) of the Securities Exchange Act of 1934 ("Exchange Act") and its requirement that the rules of a national securities exchange be designed "to protect investors and the public interest."

ICI's Letter submitted in response to the Proposal thoroughly addresses how removing the annual meeting would protect investors and the public interest.[4] As described in the Letter, the annual meeting requirement is being abused to implement a targeted investment strategy by institutional hedge fund raiders masquerading as "activists" (collectively, "predatory activists") that benefits themselves at the expense of long-term retail shareholders. The harms conducted by predatory activists and being borne by long-term retail shareholders are the same harms that Congress and the SEC analyzed prior to adopting the Investment Company Act of 1940 (the "1940 Act") and sought to prevent with the enactment of the 1940 Act. Congress and the SEC explicitly considered an annual meeting as a possible governance measure, and each consciously decided against including it in the 1940 Act as it would allow an outsized minority interest to exploit the proxy machinery, elect its own board to oversee a fund, and implement changes that were in contrast to the best interests of long-term retail shareholders. Approving the NYSE's proposed amendment would align listed CEF governance measures with those Congress believed would best protect retail shareholders and that are followed by all other types of investment companies.[5]

Aligning investor protections with Congressional intent is clearly in the public interest. To provide further data that highlight the harm that predatory activists are causing to both long-term retail shareholders and the market as a whole, ICI submits this second letter. This letter addresses the specific concerns raised by the SEC, such as whether the fact that listed CEF shares may trade at a discount to net asset value (NAV) would raise any investor protection concerns with eliminating the annual shareholder meeting requirement, and the extent to which listed CEF investors participate in, and benefit from, annual shareholder meetings.

At the outset though, ICI notes that many of the concerns reflected in the Order appear derived from comment letters written by academics in response to the Proposal. The most prominent

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Memo for NYSE Domestic Companies (Jan. 12, 2016), *available at* 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.

[4] Letter from Paul G. Cellupica, General Counsel, and Kevin Ercoline, Assistant General Counsel, ICI, to Vanessa Countryman, Secretary, SEC (July 30, 2024), *available at* www.sec.gov/comments/sr-nyse-2024-35/srnyse202435-502415-1467842.pdf ("Letter").

[5] *See* Letter at 9–13 (discussing how, 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" (as defined in the 1940 Act)). The Proposal does not seek to remove shareholder voting rights or entrench management, but rather return shareholder voting rights and director oversight to those standards enumerated by Congress, which were decided after analyzing the harm that an annual meeting could allow—the same harms ICI outlines in its Letter and this subsequent letter. The Proposal seeks to ensure retail shareholders in listed CEFs are protected by re-aligning voting rights and director oversight with those that every other shareholder in every other registered fund is provided.

academic to co-author such a comment letter, who was commissioned by one of the activist firms to do so, also testified in support of that same firm in a recent trial in Massachusetts state court regarding the propriety of CEF governance measures.[6] The judge there found him to be "not an expert on shareholder solicitation in CEFs[.]"[7] As the judge noted, while the academic is certainly an expert with regard to operating companies, CEFs are different from operating companies.[8] Similarly, the SEC should weigh commenters' area of expertise accordingly in considering the comments.

Further, while ICI supports removal of the NYSE's requirement for listed CEFs to hold annual meetings, approval of the Proposal by no means *prevents* listed CEFs from holding annual meetings if funds have or otherwise choose to enact bylaws requiring an annual meeting. The Proposal merely returns to funds and their shareholders the decision as to whether to align shareholder protections with Congressional intent or allow funds and shareholders to continue to be subject to predatory activist attacks and the harms outlined in this letter. The Proposal merely lets shareholders determine if annual meetings are essential to the shareholder experience. If truly essential, then only those funds with annual meetings would attract and retain assets.

Section 1 of this letter clarifies certain aspects of listed CEFs to address the misconception that exiting at NAV is: (i) an expectation of retail investors; or (ii) promoted and/or asserted by listed CEFs. Section 2 summarizes retail investor voting data collected from contested proxy campaigns to demonstrate the limited benefit that annual meetings bring to retail investors. Section 3 provides further data analysis visualizing the harm to market integrity and retail shareholders that predatory activists are causing. Removing the annual meeting would prevent these harms from occurring and "promote just and equitable principles of trade, . . . remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, . . . protect investors and the public interest"[9] consistent with the requirements of Section 6(b)(5) of the Exchange Act.

Section 1. Retail Investment Patterns Undercut Any Argument Regarding an Expectation to Redeem at NAV

The argument that retail investors seek to exit their investment at NAV pre-supposes that they purchased shares with that expectation. Because many investors purchase on the secondary market when listed CEF shares are trading at a discount, investor activity undercuts that

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[6] *See* Eaton Vance Senior Income Trust v. Saba Capital Master Fund, Ltd., Case No. 2084-CV-01533 (Mass. Super. Ct. Oct. 21, 2024).

[7] *Id.* at 37. *See also id.* at 50 ("Finally, I did not find [the Professor] to be an expert on shareholder solicitation in CEFs. He is certainly an expert in corporate governance and shareholder rights in connection with operating companies. He does not have significant expertise, however, in CEFs or in the means and methods of conducting proxy contests and turning out shareholder votes in CEF proxy contests.").

[8] *See id.* at 36 (analyzing the weight to be given to the academic's expert opinions and finding that "[m]ost of [expert's] academic work on corporate governance and shareholder rights, including his research and publications, has focused on operating companies and not CEFs").

[9] Order, 89 Fed. Reg. at 82278.

assumption and ignores an operational aspect of a listed CEF—that it may trade at a "discount" or "premium."[10]

Listed CEFs allow retail investors to access less-liquid investments through a retail-focused wrapper that provides the protections inherent in the 1940 Act. Such funds may trade at premiums or discounts for a number of reasons unrelated to management.[11] For example, some academics have argued, in line with neoclassical finance theories, that the discount may reflect the uncapitalized expenses and time value that would be required to liquidate a less liquid portfolio and unwind a leveraged position, in addition to investor sentiment.[12] Additionally, a listed CEF trading at a discount may be due to investors having priced in any perceived tax liability resulting from large, unrealized capital gains.[13]

The majority of listed CEFs generally trade at a discount, demonstrating that such discounts are an operational aspect—not a flaw—of listed CEFs. In many cases, the discount represents a buying opportunity as investors can acquire listed CEF shares or reinvest dividends at a discount to NAV.[14] This, in turn, boosts their dividend yield and allows for a potential enhanced total return. Indeed, among an estimated 3.6 million households owning CEFs in 2024, eight out of 10 are glad they reinvest dividends when a CEF they own is trading at a discount, and seven out of 10 households consider buying more shares.[15]

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[10] Because listed CEFs trade at market price, there is often divergence between that price and the underlying 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." As discussed in *infra* note 16, listed CEFs can provide more upside when appreciation of the underlying securities occurs and the CEF discount simultaneously narrows.

[11] Many predatory activist comment letters, or those funded by predatory activists, filed in response to the Proposal argue that discounts are *solely* reflective of management. As shown by the academic articles cited in the Letter and this subsequent letter, discounts being *solely* reflective of management is simply not supported by the bulk of the academic literature on listed CEFs.

[12] *See, cf.*, Martin Cherkes, Jacob Sagi, and Richard Stanton, *A Liquidity-Based Theory of Closed-End Funds*, The Review of Financial Studies, Vol. 22, Issue 1 at 257–97 (Jan. 2009) ("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.").

[13] *See, cf.*, 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) ("The tax explanation argues that capital gains tax liabilities on unrealized appreciations (at the fund level) are not captured by the standard calculation of NAV.").

[14] *See, e.g.*, Catherine Gillis, *Are Discounts Really a Problem?*, Morningstar Closed-End Funds (Mar. 13, 1992) ("The funds' inclination to trade at premiums and more often than not, at discounts to their net asset values, has yielded many profit opportunities to astute investors[.]").

[15] ICI conducts the Annual Mutual Fund Shareholder Tracking Survey each year to gather information on the demographic and financial characteristics of households in the United States. The most recent survey was conducted from May to June 2024 and was fielded on the KnowledgePanel®, a probability based online panel designed to be representative of the US population. The KnowledgePanel® is designed and administered by Ipsos. The Annual

The fact that these households buy listed CEF shares trading at a discount and then reinvest dividends when shares continue to trade at a discount underscores that many shareholders buy and hold shares for the yield and distribution CEFs offer as opposed to any future opportunity to exit at NAV. Further, the listed CEF wrapper allows the possibility to trade at a premium to NAV, thus allowing for an exit above NAV. The listed CEF wrapper is advertised and operated with these potential outcomes in mind, a point missed in opposing comment letters previously submitted to the SEC.[16]

Finally, some listed CEFs have term dates that allow investors to exit at NAV if they wait until the fund's liquidation date.[17] The primary entities expecting to exit at NAV prior to any such termination date are predatory activist investors (as well as other sophisticated, institutional investors using a discount-arbitraging investment strategy).[18] And that makes sense, given the profits, as discussed in *infra* Section 3, that these predatory activists would stand to lose if the SEC approved the Proposal and aligned listed CEF shareholder protections with those Congress intended.

Section 2. Removing the Annual Meeting Requirement Would Not Materially Disadvantage Retail Shareholders as Retail Shareholders Are Less Engaged in Governance Matters

It has long been recognized that retail shareholder engagement at listed CEF annual meetings is limited.[19] About half of CEF-owning households indicated they "rarely" or "never" voted their

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Mutual Fund Shareholder Tracking Survey sample for 2024 included 9,011 US households drawn from the KnowledgePanel®. Of the households contacted, 2.7 percent owned CEFs.

[16] In its Order, the SEC seems focused on the difference between ETFs and CEFs. One of the material differences is that ETFs, as open-end funds, represent the ability to be able to redeem at, or close to, NAV. That is neither the marketing nor representations made with regard to a listed CEF. Listed CEFs provide the ability of a shareholder to have more upside when price appreciation of the underlying securities occurs and the discount simultaneously narrows. However, there is the possibility of more downside risk when price depreciation occurs and the discount simultaneously widens. If investors were seeking an investment opportunity that allows guaranteed NAV liquidity, there are other products available that provide that and advertise that. Again, the argument that CEF investors seek to exit their investment at NAV pre-supposes that they purchased shares with that expectation.

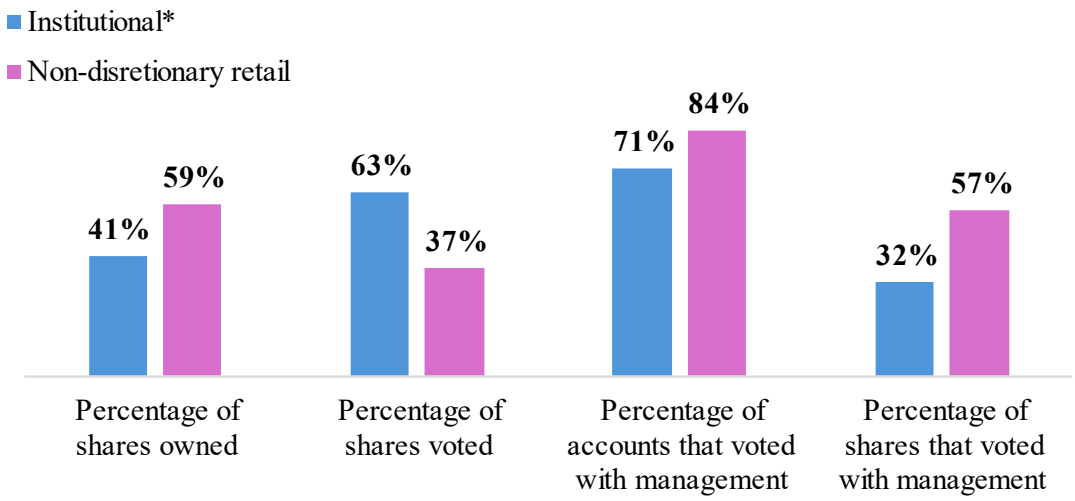
[17] According to Morningstar data, between 2015 and 2023, the majority (53 percent) of all listed CEFs launched as "term" funds. *See* James Duvall, *et al.*, *The Closed-End Fund Market 2023*, ICI Research Perspective, Vol. 30, No. 5 at 19 (May 2024), *available at* www.ici.org/files/2024/per30-05.pdf.

[18] Additionally, the predatory activist argument that activism is the only check against discounts is quite unfounded. Independent directors and boards, as part of their oversight responsibility, constantly monitor discounts and engage with management as to how to assess and support listed CEF market trading prices.

[19] *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 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.").

CEF proxy in 2024.[20] Recent data on proxy voting in contested elections also show 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 percent of the listed CEF shares involved in these elections, they accounted for only 37 percent of the votes cast (Figure 1). Additionally, when non-discretionary retail shareholders did vote in these contests, they leaned heavily toward supporting management—84 percent of non-discretionary retail accounts voted in favor of management with 57 percent of the total non-discretionary retail ballots being cast in favor of management.

Figure 1
Predatory Activists Are Able to Exploit the Fact that Retail Participation in Listed CEF Proxy Contests Is Limited
But retail investors that do vote their shares tend to align with fund management



*Includes discretionary retail accounts where an adviser or broker votes for the beneficial retail owner.
Note: Data from an analysis of 94 CEF proxy contests from July 2019 to June 2024.
Source: Broadridge

These data highlight an important point: that retail shareholders have limited engagement in annual meetings. Further, the minority who do take the time to review the proxy materials and vote are overwhelmingly voting *against* activist plans and *with* existing management. As such, the data demonstrate that there would be no material disadvantage to retail shareholders to remove the annual meeting requirement as they have limited engagement, and when they do engage, it is to support the existing fund investment strategy, investment manager, and board.

While removing the annual meeting requirement would not materially disadvantage retail shareholders, the annual meeting requirement creates a recurring opportunity for an outsized minority shareholder to force through changes that harm retail shareholders. As outlined in detail in ICI's prior Letter, when looking at the Voya Prime Rate Trust takeover, approximately one-

[20] *See supra* note 15. Data exclude respondents that selected their financial adviser votes on their behalf.

third of shareholders did not vote, which allowed a minority interest to take over the fund and change the investment strategy and portfolio composition.[21] One-third of shareholders not voting is particularly noteworthy, as approximately one-third of outstanding voting shares did not participate in the shareholder meetings analyzed by the SEC and Congress in the 1930s when similar takeovers were occurring.[22] That lack of retail engagement and resulting takeover activity led the SEC and Congress in 1940, when drafting the 1940 Act, to determine that an annual meeting requirement could potentially cause more harm to retail investors than any hypothetical protective benefit. Despite all the technological developments in the past 90 years—computers, internet, cell phones—retail investors' reluctance to vote has not changed and the potential for the same harms continues to exist.

Thus, retail shareholders today may find themselves in the same position as those shareholders who gave rise to the concerns of the SEC and Congress in the 1930s: in a completely different fund than originally purchased, often reaching out to their financial adviser upset or confused why they were ever placed in that investment. This is the exact harm that Congress and the SEC sought to avoid when adopting the 1940 Act, yet it is happening today because of the annual meeting requirement. Retail investors buy shares for a fund's investment strategy, distributions, and total returns—not because they want to immerse themselves in a fund's corporate governance matters. As a court found recently, "most retail shareholders and non-activist investors likely invest in CEFs with investment objectives that align with the CEFs' investment goals. [The] activist agenda . . . is contrary to and inconsistent with the stated investment objectives of the [CEFs]. [Shareholders] may not have voted for [these proposals] because [shareholders] are in opposition to the [activist's] strategy."[23] Retail investors—when unhappy—would likely just sell their shares rather than engage in proxy campaigns.

Section 3. Additional Data Visualizing Predatory Activist Harm Against Retail Shareholders and Market Integrity

The annual meeting listing standard is a requirement that draws limited participation among retail shareholders yet saddles them with millions of dollars in expenses. Further, the types of proposals submitted by predatory activists often help facilitate activists' agenda for large liquidity events and takeovers that are in opposition to a fund's investment strategy and the interest of shareholders that bought their fund for that strategy.[24] In particular, forced tender

[21] *See* Letter at 17–25. Similar to the harms analyzed by Congress and the SEC in the 1930s, after the predatory activist took over the fund, the fund had its investment strategy and portfolio holdings substantially changed from what investors had originally bought. Also, expenses went up with the changes in portfolio holdings, due to acquired fund fees and expenses and expenses related to short selling activity, while distributions shifted from income distributions to return of capital. As outlined in ICI's Letter, as well as Congress and the SEC in the 1930s, it was the annual meeting requirement that allowed these harms to be facilitated.

[22] INVESTMENT TRUSTS AND INVESTMENT COMPANIES, *supra* note 19, at 1875.

[23] Eaton Vance Senior Income Trust v. Saba Capital Master Fund, Ltd., Case No. 2084-CV-01533, at 47 (Mass. Super. Ct. Oct. 21, 2024).

[24] *See, e.g., id.* (making a finding of fact that the activist at issue had objectives that were generally inconsistent with the investment objectives of the funds under attack and that the "goal of monetizing the discount to NAV differs

offers primarily benefit predatory activist shareholders (and other discount-arbitraging institutional investors) while leaving long-term retail shareholders in a fund with reduced economies of scale and fewer assets to carry out its strategy. Once predatory activists crystalize their profit, they typically exit the targeted CEFs within a year and the discounts they claim to improve tend to widen back out. Long-term retail shareholders are left to shoulder the additional costs (*e.g.*, tender offer costs, proxy costs, reduced economies of scale) resulting from the actions of well-funded predatory activists, who mostly avoid bearing any such costs because they have sold their position. Predatory activist activity has, however, chilled the initial public offering (IPO) market for listed CEFs, which has historically provided unique opportunities (*e.g.*, access to private and less-liquid markets) to retail investors.[25] As the tactics of predatory activist investors have become significantly more aggressive and more well-resourced in recent years, the annual meeting requirement for CEFs has come to facilitate harm to long-term retail CEF shareholders and the market as a whole. Removing the annual meeting requirement would "protect investors and the public interest" as required by Section 6(b)(5) of the Exchange Act.

Section 3.1 Significant Costs Are Being Borne by Retail Shareholders

While Section 2 addressed the limited engagement from retail shareholders in annual meetings, it is important to discuss the costs retail shareholders are incurring because of this requirement. While most annual meetings are routine, contested matters from predatory activist engagement strain a fund's resources and cost investors a significant amount of money. In a given year, contested matters cost retail shareholders in a listed CEF an average of $761,000 (Figure 2). Not only must the fund incur additional legal, solicitation, and engagement costs, but contested matters divert employees of the fund's investment adviser from the roles and functions where they add the most value for investors (*e.g.*, such as researching, selecting, and monitoring investments). It is unfair to saddle retail shareholders with these costs for something that primarily benefits well-funded predatory activists.

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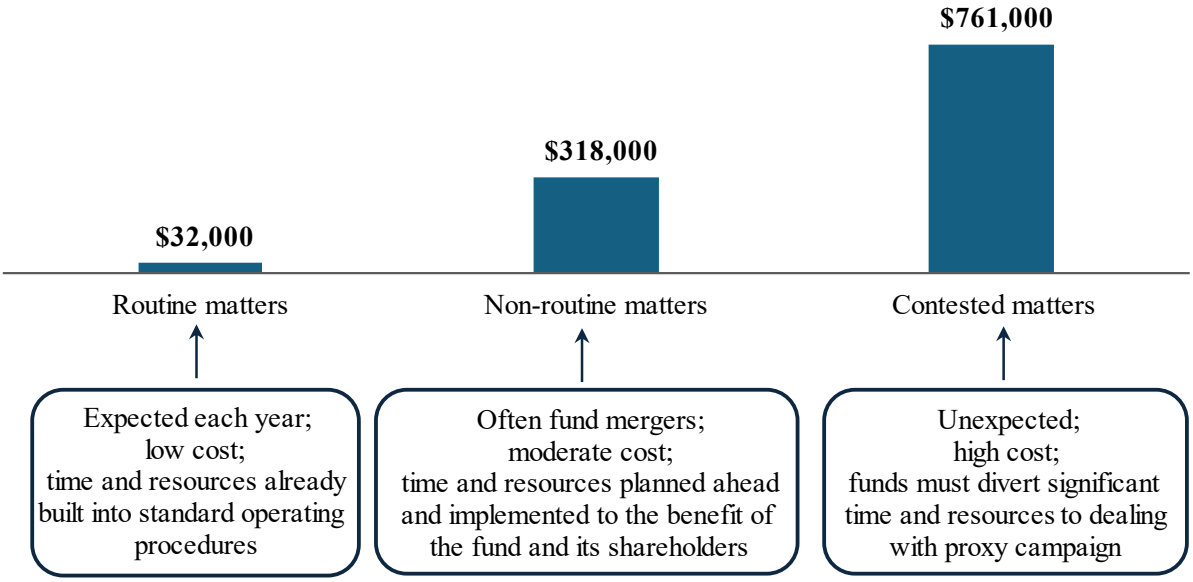
from the goal of managing a stable pool of assets for a steady income stream over a long period of time"). Further, if predatory activist investors lose a proxy campaign one year, our members have told us that the predatory activist often returns the next year with the same proposals and/or director nominees. Predatory activists need a significant liquidity event to further their investment objective, which as the *Eaton Vance* court noted can be at odds with the investment objective of the CEF.

[25] Retail investors value CEFs' access to less-liquid investments and use of leverage to enhance income distributions. Before purchasing their most recent CEFs, seven out of 10 CEF-owning households thought the ability to enhance performance by using leverage was important and six out of 10 thought the ability to hold less-liquid assets was important. *See supra* note 15.

Figure 2
Contested Proxies Burden Retail Shareholders with Substantial Costs
Average annual fund-level cost in dollars, 2019–2023



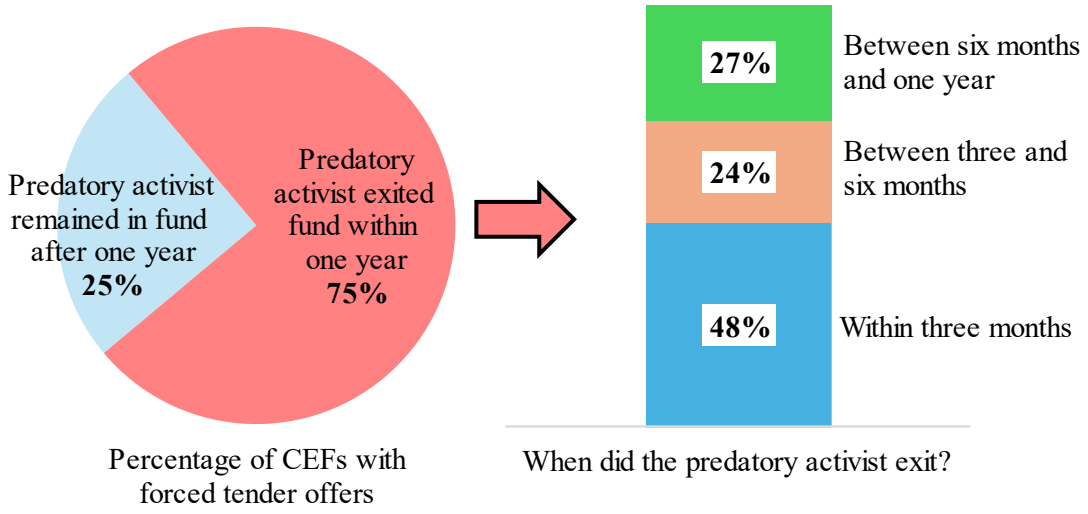
Note: Data are based on responses to a survey distributed to ICI CEF members in May 2024. Survey participation represented 62 percent of CEF assets and 50 percent of the total number of CEFs.
Source: Investment Company Institute

Section 3.2 Forced Tender Offer Data Demonstrate That Predatory Activists Are Strictly Self-Serving

One common predatory activist tactic is to use its outsized position in a listed CEF—an average of 16 percent of a CEF's outstanding shares—to force the fund to hold a tender offer. Predatory activist shareholders have historically claimed that they try to force tender offers in listed CEFs to benefit long-term retail shareholders—but the data show otherwise. Predatory activists tend to abandon the CEF shortly after it holds a tender offer (Figure 3) while receiving the bulk of tender offer proceeds (Figure 4). The annual meeting is creating a scenario where predatory activists can wield the power of their holdings to elect their own directors and/or force actions that benefit themselves while leaving long-term retail shareholders shouldering the costs the fund is forced to bear.[26]

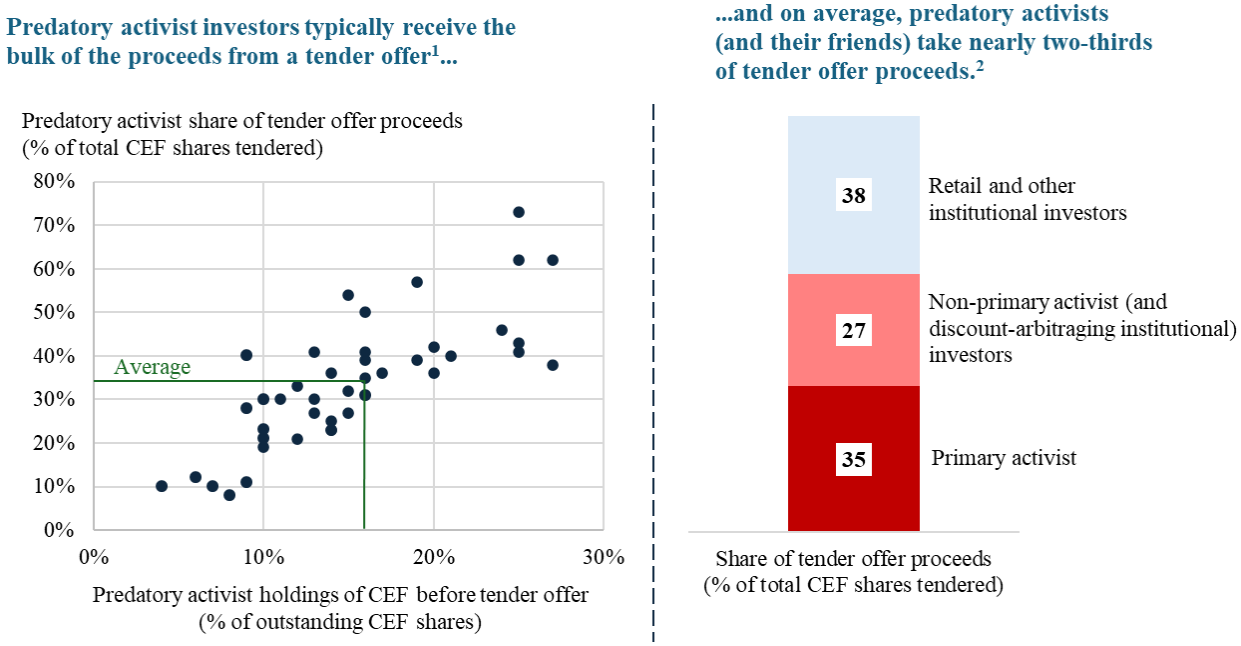
[26] One key benefit of listed CEFs is that they can be fully invested in their strategies—since they do not need to meet daily redemptions and maintain cash reserves—allowing them to manage a long-term investment strategy view during volatile market periods, particularly for yield-based strategies. Indeed, nearly nine out of 10 US households owning CEFs consider them to be medium- or long-term investments. However, as predatory activists continue to abuse listed CEFs, they inhibit a CEF's ability to properly execute its strategy.

Figure 3
Predatory Activists That Successfully Force Tender Offers Typically Exit the Fund Within a Year
And nearly half of those exited the fund within three months



Note: Data include 44 forced tender offers between 2015 and June 2023. For listed CEFs with multiple tender offers, exiting after the final tender offer is used. Two listed CEFs are counted twice because separate entities made distinct Schedule 13D filings.
Source: ICI calculations of publicly available SEC EDGAR data

Figure 4
Predatory Activists Receive the Bulk of Tender Offer Proceeds
And they get by with a little help from their friends—many of the top holders of targeted listed CEFs are discount-arbitraging hedge funds or other well-known institutional activists



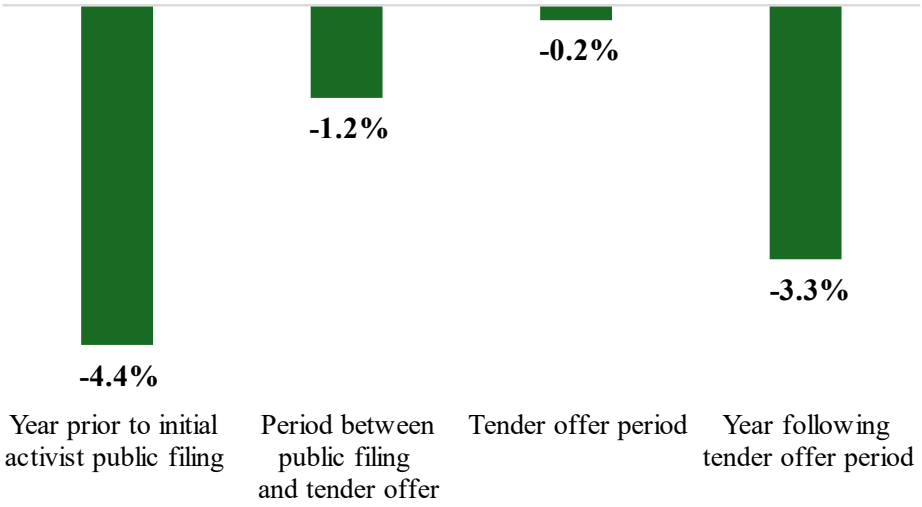
[1]Data include 52 forced tender offers between 2015 and October 2024. Data for one fund include the holdings of two predatory activists because two 13D filings were made on the same day. Data include funds targeted more than once if tender offers were more than 3 years apart.
[2]Data include 45 forced tender offers between 2015 and June 2024. Data for one fund include the holdings of two predatory activists because two 13D filings were made on the same day. Data include funds targeted more than once if tender offers were more than 3 years apart, but data exclude tender offers of less than 10 percent of the fund's outstanding shares, tender offers completed after June 2024, and follow-on tender offers that occurred because of a discount-managing policy.
Note: Non-primary activist and discount-arbitraging institutional investors primarily include hedge funds among the top 10 institutional holders of a fund. "Other institutional investors" tend to be institutions that act on behalf of retail clients. Data exclude tender offers with missing data. Data for non-primary activist (and discount-arbitraging institutional) investors only include those with a decrease in the number of shares held—in line with the size of the prorated distribution of tender offer proceeds—in the quarters before and after the tender offer. Data assume all shares are tendered, which is consistent with observed changes in the number of shares held by institutional investors.
Source: ICI calculations of SEC EDGAR (13D filings) and Refinitiv (13F filings) data.

Section 3.3 Predatory Activism Does Not Improve Governance or Affect the Discount in the Long-Term

Predatory activist shareholders have historically claimed that their actions benefit all CEF shareholders, including long-term shareholders, and will lead to improvements in the discount. These improvements, however, tend to be short-lived. After examining listed CEFs that held an activist-induced tender offer between 2015 and June 2023, the data show that, on average, these

funds' excess discounts (*i.e.* a fund's discount relative to the discount of other CEFs in the same asset class) narrowed in the window between the initial predatory activist public filing and the completion of the tender offer (Figure 5).[27] However, predatory activist involvement did not appear to improve listed CEF discounts in the long-term. Average excess discounts widened to close to pre–predatory activist levels within the first year after CEFs held an activist-induced tender offer.[28]

Figure 5
Generally, Predatory Activism Does Not Improve Discounts Over the Long-Term
On average, excess discounts* on CEFs widen back out after predatory activist involvement



**Excess discount* is the simple average discount of the given CEF over the specified period minus the simple average discount of all funds in the same investment objective over the specified period.
Note: Sample includes 34 funds with forced tender offers between 2015 and June 2023.
Sources: Investment Company Institute, Bloomberg, and Refinitiv

[27] The narrower discount is likely related to the tender offer event because the CEF will be buying back some percentage of shares at or close to NAV. All else equal, one should see the CEF's market price move closer to its NAV.

[28] The data show that discounts for some listed CEFs do not widen out in the year following the tender offer. In most of these cases, however, the listed CEF had in place measures, adopted either before or during the predatory activist attack, that have been shown to have an impact on a fund's market price depending on the market conditions. For example, some listed CEFs implement managed distribution plans (MDPs) to ensure that investors received stable levels of income for some pre-defined period. MDPs have been shown to have an elongated impact on discounts, unlike the temporary effect associated with predatory activist attacks more generally. For more information, *see* Martin Cherkes, Jacob S. Sagi, and Z. Jay Wang, *Managed Distribution Policies in Closed-End Funds and Shareholder Activism*, Journal of Financial and Quantitative Analysis, Vol. 49, Nos. 5/6 at 1311–37 (Oct./Dec. 2014).

Section 3.4 Rise in Predatory Activist Activity Has Contributed to a Nearly Frozen Listed CEF IPO Market

Activism in listed CEFs has been present for decades, as certain investors have sometimes identified arbitraging discounts as a viable profit-making opportunity. Over the past decade, however, activism has become much more predatory and much more successful for predatory activists for a number of reasons, including the following:

- Predatory activists have more capital invested in listed CEF discount-arbitraging strategies than they ever have previously (Figure 6);

- Data are more readily available via EDGAR and other platforms (*e.g.*, Bloomberg, Refinitiv, Factset) that provide a clear picture of other institutional investors in CEFs and how many shares they hold;[29] and

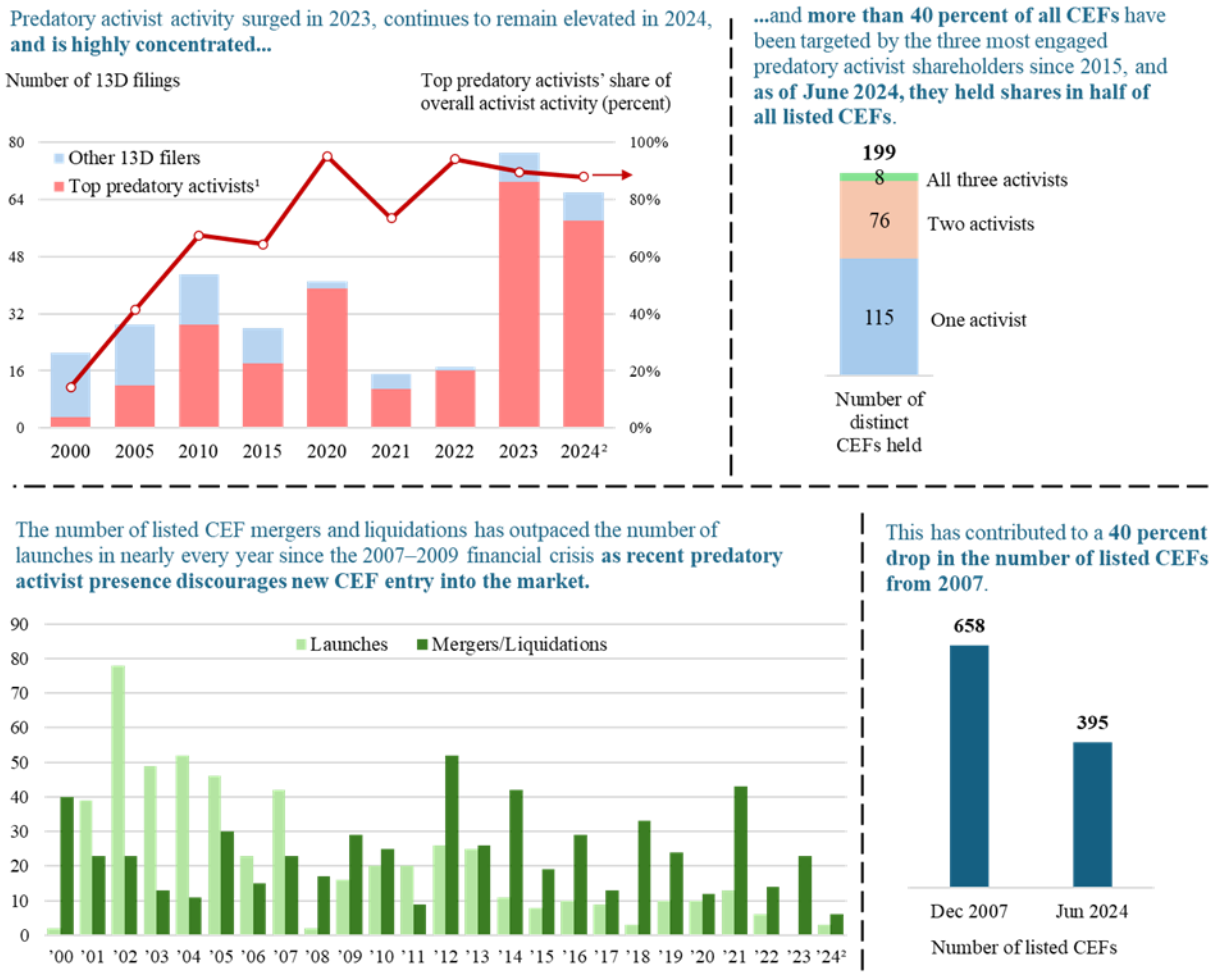
- Predatory activists often receive favorable support from proxy advisory services and certain institutional investors rely strongly on the recommendations of these services.[30]

The substantial success that predatory activists have experienced in recent years has contributed to a chilling of the listed CEF IPO market. While one can always point to many factors that may affect the market, and perhaps no one cause can be identified as solely or primarily responsible, the heightened threat that predatory activists now pose has undeniably discouraged entry into the listed CEF market.

[29] *See supra* Figure 4, which shows the percentage of tender offer proceeds that go to non-primary activist (and discount-arbitraging institutional) investors. All data are viewable via publicly available SEC Form 13F data.

[30] *See* Kenneth Fang and James Duvall, *Proxy Advisory Firms—Killing Closed-End Funds Softly with Their Policies*, ICI (Oct. 25, 2023), *available at* www.ici.org/viewpoints/23-view-cef-proxy-advisory-services.

Figure 6
Predatory Activist Presence is Detrimental to Listed CEF Market



[1] Top predatory activists are the three most engaged activists since 2015 as measured by the number of Schedule 13D filings.
[2] Data are through September 30, 2024.
Note: Data prior to 2018 for number of funds and launches/mergers/liquidations may include a small number of tender offer funds.
Sources: Investment Company Institute, Refinitiv, and calculations of publicly available SEC filings

Conclusion

These aforementioned harms are allowed to occur because predatory activists exploit the NYSE's requirement for CEFs to hold annual meetings. As ICI's prior Letter explains, predatory activists have formed a concentrated voting block who use their influence over the proxy machinery to elect their directors and enact the very harms the 1940 Act was designed to prevent. As the preceding data show, long-term retail shareholders are bearing millions in expenses for a process in which they have limited engagement—and when they do engage it is primarily to *oppose* predatory activists. Further, many are not participating in the forced tenders

but are still bearing the costs as well-funded predatory activist investors take a profit for themselves. Such activism has chilled the listed CEF IPO market and, in turn, negated the ability of retail shareholders to use listed CEFs that would have otherwise launched and provided access to private and other less liquid markets during a time when such markets have experienced extraordinary growth. Given the detrimental effects of this activity, it is difficult to imagine a self-regulatory organization rule change that is focused more directly on protecting investors, promoting market integrity, and benefitting the public interest than the amendments proposed by the NYSE.

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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,

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cc: The Honorable Gary Gensler, Chair
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The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Mark T. Uyeda, Commissioner
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