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

January 28, 2025

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**)

Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Exempt Closed-End Management Investment Companies Registered Under the Investment Company Act of 1940 From the Annual Meeting of Shareholders Requirement Set Forth in Exchange Rule 14.10(f) (Release No. 34-101322; **File No. SR-CboeBZX-2024-055**)

Dear Ms. Countryman:

The Investment Company Institute[1] appreciates the opportunity to provide additional comments on the New York Stock Exchange's ("NYSE") and Cboe BZX Exchange, Inc.'s ("CBOE" and together with the NYSE, the "Exchanges") proposed amendments to their listing requirements that would exempt closed-end funds ("CEFs") from holding an annual shareholder meeting.[2] ICI

[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 $39.0 trillion invested in funds registered under the US Investment Company Act of 1940 (the "1940 Act"), serving more than 120 million investors. Members manage an additional $9.6 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] 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 ("NYSE Proposal"); Notice of Filing of a Proposed Rule Change, as Modified by Amendment No. 1, To Exempt Closed-End Management Investment Companies Registered Under the Investment Company Act of 1940 From the Annual Meeting of Shareholders Requirement Set Forth in Exchange Rule 14.10(f), Exchange Act Release No. 100473, 89 Fed. Reg. 57491 (July 15,

reiterates its strong support for the proposed amendments for the reasons described in our previously submitted letters.[3] The annual meeting requirement for listed CEFs is superfluous given the itemized voting protections and independent director requirements in the 1940 Act, and it unnecessarily burdens listed CEF shareholders with the costs associated with printing, mailing, and solicitation.[4] Further, the annual meeting requirement is the primary mechanism used by predatory activists to facilitate the very harms to listed CEFs that the 1940 Act seeks to prevent, as outlined in ICI's Letters.

Several commenters have expressed a view that the Exchange Proposals strip shareholders of a "right" to vote for directors at shareholder meetings.[5] These arguments are without merit.

The Exchange Proposals do not strip away shareholders' ability to vote for directors but rather change the timing as to when voting occurs. Instead of creating an annual outlet for predatory activists to enact their agenda against investment products primarily held by retail investors, the Exchange Proposals align the timing of election of directors with that delineated by Congress in the 1940 Act for all registered investment companies.

As to whether changing *when* voting occurs deprives a shareholder of a "right," the federal securities laws contemplate securities exchanges modifying their listing standards from time to time. Thus, there is no reasonable basis for an investor to expect the ongoing availability of such a "right" given that the rules of the Exchanges are subject to amendment.

2024), *available at* www.govinfo.gov/content/pkg/FR-2024-07-15/pdf/2024-15404.pdf ("CBOE Proposal," and with the NYSE Proposal, the "Exchange Proposals").

[3] Although ICI submitted separate comment letters to the NYSE and CBOE comment files, they present substantially the same facts and arguments. Letter from Paul G. Cellupica, General Counsel, and Kevin Ercoline, Assistant General Counsel, ICI, to Vanessa Countryman, Secretary, Securities and Exchange Commission ("SEC" or "Commission") (July 30, 2024), *available at* www.sec.gov/comments/sr-nyse-2024-35/srnyse202435-502415-1467842.pdf; Letter from Paul G. Cellupica, General Counsel, and Kevin Ercoline, Assistant General Counsel, ICI, to Vanessa Countryman, Secretary, SEC (Aug. 2, 2024), *available at* www.sec.gov/comments/sr-cboebzx-2024-055/srcboebzx2024055-503595-1466622.pdf (collectively, "ICI's First Letter"); Letter from Paul G. Cellupica, General Counsel, and Kevin Ercoline, Assistant General Counsel, ICI, to Vanessa Countryman, Secretary, SEC (Oct. 31, 2024), *available at* www.sec.gov/comments/sr-nyse-2024-35/srnyse202435-536435-1537902.pdf; Letter from Paul G. Cellupica, General Counsel, and Kevin Ercoline, Assistant General Counsel, ICI, to Vanessa Countryman, Secretary, SEC (Nov. 5, 2024), *available at* www.sec.gov/comments/sr-cboebzx-2024-055/srcboebzx2024055-537995-1541842.pdf (collectively, "ICI's Second Letter," and with ICI's First Letter, "ICI's Letters").

[4] *See* ICI's Second Letter at 9, Figure 2 (noting that, on average, a contested proxy contest can cost a CEF $761,000 in a single year, which can multiply quickly if a predatory activist conducts subsequent contests in subsequent years).

[5] *See, e.g.*, Letter from Saba Capital Management, L.P. ("Saba") to Vanessa Countryman, Secretary, SEC (Nov. 14, 2024), *available at* www.sec.gov/comments/sr-cboebzx-2024-055/srcboebzx2024055-540455-1547642.pdf; Letter from Professors Lucian A. Bebchuk and Robert J. Jackson, Jr. to Vanessa Countryman, Secretary, SEC (July 30, 2024), *available at* www.sec.gov/comments/sr-cboebzx-2024-055/srcboebzx2024055-498895-1462342.pdf; and Letter from Robert J. Jackson, Jr. to Vanessa Countryman, Secretary, SEC (Nov. 14, 2024), *available at* www.sec.gov/comments/sr-cboebzx-2024-055/srcboebzx2024055-540555-1547742.pdf.

More importantly, CEFs are valuable to retail investors because of their track record in providing stable income and the potential for superior long-term investment returns—participation in annual shareholder meetings is likely not the primary investment intent when purchasing shares. For those CEF investors who do value shareholder meetings, however, the 1940 Act will continue to require CEFs—like other management investment companies—to provide meetings for shareholders to consider various matters of importance, including proposed changes to certain fundamental policies, the engagement of a new investment adviser, and the election of directors at certain specified times.[6]

Nevertheless, to the extent that the Commission has concerns that removing the annual meeting requirement may take away an ability that some retail shareholders in CEFs value, we believe that the proposed amendments may be modified in a way that addresses that concern, while still achieving the objectives of the Exchange Proposals.[7] ICI would support an amendment to the Exchange Proposals whereby the annual meeting requirement would be removed from the Exchanges' listing standards as proposed, but for CEFs listed as of the effective date of the amendments, such CEFs would first be required to ask shareholders whether they wish to retain holding annual shareholder meetings. This annual meeting retention mechanism would provide existing CEF shareholders the opportunity to decide what is in their own best interest—continue to hold annual meetings, pay for the subsequent costs, and allow the CEF to be more easily attacked by predatory activists *or* align the CEF with the numerous and effective protections that Congress intended and expressly enacted in the 1940 Act. Proposed modifications to both Exchange Proposals are included at Appendix A for the Exchanges to consider.[8]

This meeting retention proposal is similar to existing mechanisms found in state corporate and trust law. For example, a control shareholder of a CEF organized as a Delaware statutory trust may take steps to request a shareholder meeting to restore voting rights on its control shares.[9] Such meeting must be held, and voting rights on control shares must be restored, if a sufficient number

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[6] *See* ICI's First Letter at 9-12 (describing the 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)).

[7] We note that, based on the comment file to the NYSE Proposal, retail comment letters *in favor* of the NYSE Proposal far outweighed retail comment letters *against* the NYSE Proposal by a factor of more than 6:1, as ICI counted 1,154 retail comment letters *in favor* of the NYSE Proposal and 181 retail comment letters *against* the NYSE Proposal. While we believe the comment letter file reflects that retail investors, by a significant percentage, do **not** value annual meetings, allowing all investors the ability to vote on whether to retain annual meetings before annual meetings are removed would satisfy any legitimate concerns that have been raised.

[8] As with most matters of corporate governance, ICI notes that the operational aspects, unless specifically governed by state, federal, or self-regulatory organization law or regulation, would be governed by the CEF's operating documents, including the CEF's charter and bylaws (or similar documents). Because shareholders are on notice as to the operational aspects of the CEF in which they invest, such as notice period, quorum, and vote standards, ICI believes it is appropriate for CEFs to rely on those disclosed aspects in administering the retention vote.

[9] Delaware Statutory Trust Act §§3881-88 (2025), *available here*: https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocumentEngrossment?engrossmentId=25234&docTypeId=6.

of shares approve the proposal.[10] Similarly, while the Exchange Proposals would mean that a CEF no longer is required[11] to hold annual shareholder meetings under the Exchanges' listing standards, an existing listed CEF's shareholders can retain the annual meeting requirement if such a measure is approved by shareholders.

In summary, ICI continues to support NYSE and CBOE modernizing their CEF listing standards by removing the annual meeting requirement, and thereby restoring to retail CEF shareholders the protections Congress intended for them. However, we believe that a retention vote modification to the Exchange Proposals would provide a meaningful opportunity for shareholders to decide to retain annual shareholder meetings, notwithstanding the amendments to the Exchanges' listing standards. For these reasons, ICI would support amended or reproposed, as necessary, Exchange Proposals that include a retention vote measure as described herein.

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[10] *Id.*

[11] As noted in ICI's Second Letter at 3, even if the Exchanges amend their listing standards, that would by no means *prevent* listed CEFs from holding annual meetings if funds have or otherwise choose to enact bylaws requiring an annual meeting. The amendment that ICI is suggesting 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 ICI's Letters.

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
General Counsel

/s/ Kevin Ercoline
Kevin Ercoline
Assistant General Counsel

cc: The Honorable Mark T. Uyeda, Acting Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
David Saltiel, Acting Director, Division of Trading and Markets
David Shillman, Associate Director, Division of Trading and Markets
Natasha Vij Greiner, Director, Division of Investment Management
Kaitlin Bottock, Co-Chief Counsel, Division of Investment Management
Patrick Troy, Associate General Counsel, NYSE
Sarah Tadtman, Senior Counsel, CBOE

APPENDIX A

The NYSE Proposal[12] could be amended (in **bold**) to read as follows:

302.00 Annual Meetings

*This Section 302 is not applicable to closed-end management investment companies listed under Section 102.04A**, other than a retained closed-end management investment company,** or to .... **For purposes of Section 302, a "retained closed-end management investment company" means a closed-end management investment company that was listed on a national securities exchange prior to the date of [INSERT DATE OF RULE APPROVAL] and that either (1) has not held a meeting of shareholders to ask whether the company should continue to hold an annual shareholder meeting (a "retention vote meeting") or (2) has held a retention vote meeting and the shareholders entitled to vote at such meeting voted to continue to hold annual meetings in accordance with Section 302 unless, at a subsequent meeting of shareholders, a subsequent retention vote meeting is held and the shareholders then entitled to vote at such subsequent meeting do not vote to continue to hold annual meetings.*

Commentary: If notice is made for a retention vote meeting and proxies are solicited but quorum is not achieved, a closed-end management investment company that is deemed a retained closed-end management investment company shall no longer be deemed a retained closed-end management investment company and the requirements of Section 302 shall no longer be applicable.

The CBOE Proposal[13] could be amended (in **bold**) to read as follows:

Rule 14.10. Corporate Governance Requirements

(e) Exemptions from Certain Corporate Governance Requirements

(1) Exemptions to the Corporate Governance Requirements

(A)-(D) No change.

(E) Management Investment Companies. Management investment companies (including business development companies) are subject to all the requirements of Rule 14.10, except that management investment companies registered under the Investment Company Act of 1940 are exempt from the requirements relating to:

(i)-(iii) No change.

[12] Underlined language is the current proposed amended language from the NYSE Proposal.

[13] Underlined language is the current proposed amended language from the CBOE Proposal.

(iv) Management investment companies that are Closed-End Funds, as defined in Rule 14.8(a), ***other than a retained Closed-End Fund,*** *are exempt from the requirements relating to Meetings of Shareholders (as set forth in Rule 14.10(f)).* ***For purposes of this section, a "retained Closed-End Fund" means a Closed-End Fund listed on a national securities exchange prior to the date of [INSERT DATE OF RULE APPROVAL] and that either (1) has not held a meeting of shareholders to ask whether the company should continue to hold an annual shareholder meeting (a "retention vote meeting") or (2) has held a retention vote meeting and the shareholders entitled to vote at such meeting voted to continue to hold annual meetings in accordance with Rule 14.10(f) unless, at a subsequent meeting of shareholders, a subsequent retention vote meeting is held and the shareholders then entitled to vote at such subsequent meeting do not vote to continue to hold annual meetings.***

Interpretations and Policies

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.13 Management Investment Companies

Management investment companies registered under the Investment Company Act of 1940 are already subject to a pervasive system of federal regulation in certain areas of corporate governance covered by 14.10. In light of this, the Exchange exempts from 14.10(c)(2), 14.10(c)(4), 14.10(c)(5) and 14.10(d) management investment companies registered under the Investment Company Act of 1940. Business development companies, which are a type of closed-end management investment company defined in Section 2(a)(48) of the Investment Company Act of 1940 that are not registered under that Act, are required to comply with all of the provisions of Rule 14.10. Management investment companies defined as Derivative Securities under Rule 14.10(e)(1)(F)(ii) are exempt from additional requirements of Rule 14.10 as outlined in Exchange Rule 14.10(e)(1)(F)(i) above. Management investment companies that are Closed-End Funds as defined in Rule 14.8(a), ***other than retained Closed-End Funds as defined in Rule 14.10(e)(1)(E)(iv),*** *are exempt from the requirements relating to Meetings of Shareholders (as set forth in Rule 14.10(f))) as outlined in Rule 14.10(e)(1)(E)(iv) above.*

.14 No change.

.15 Meetings of Shareholders or Partners

Rule 14.10(f) requires that each Company listing common stock or voting preferred stock, and their equivalents, hold an annual meeting of Shareholders within one year of the end of each fiscal year. At each such meeting, Shareholders must be afforded the opportunity to discuss Company affairs with management and, if required by the Company's governing documents, to elect directors. A new listing that was not previously subject to a requirement to hold an annual meeting is required to hold its first meeting within one-year after its first fiscal year-end following listing. Of course, the Exchange's meeting requirement does not supplant any applicable state or federal securities laws concerning annual meetings.

This requirement is not applicable to issuers whose only securities listed on the Exchange are nonvoting preferred securities, debt securities, shares of Closed-End Funds as defined in Rule 14.8(a) ***(other than retained Closed-End Funds as defined in Rule 14.10(e)(1)(E)(iv))****, Derivative Securities as defined in Rule 14.10(e)(1)(F)(ii) or securities listed pursuant to Rule 14.11(h) (such as Trust Preferred Securities), unless the listed security is a common stock or voting preferred stock equivalent (e.g., a callable common stock). Notwithstanding, if the Company also lists common stock or voting preferred stock, or their equivalent, the Company must still hold an annual meeting for the holders of that common stock or voting preferred stock, or their equivalent.*

.14-.21 No change.

.22 Retention Vote Meeting

If notice is made for a retention vote meeting, as defined in Rule 14.10(e)(1)(E)(iv), and proxies are solicited but quorum is not achieved, a Closed-End Fund, as defined in Rule 14.8(a), that is deemed a retained Closed-End Fund, as defined in Rule 14.10(e)(1)(E)(iv), shall no longer be deemed a retained Closed-End Fund and the requirements relating to Meetings of Shareholders (as set forth in Rule 14.10(f)) shall no longer be applicable.