Saba | Capital

July 30, 2024

VIA ELECTRONIC SUBMISSION

Ms. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549–1090

Re: Proposal 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. 34-100460; File No. SR-NYSE-2024-35)

Dear Ms. Countryman:

Saba Capital Management, L.P. ("Saba") is writing to comment on the New York Stock Exchange's (the "NYSE") proposal that would eliminate the longstanding annual shareholder meeting requirement to which registered closed-end funds ("CEFs") listed on the NYSE are subject (the "Proposal") — through an amendment to Section 302.00 of the NYSE Listed Company Manual.[1] In addition to removing the annual meeting requirement, the Proposal would allow CEFs to remove the ability of shareholders to elect directors annually[2] and to otherwise participate in those meetings. **The consequences of the Proposal are clear: without annual meetings, directors will be able to serve in perpetuity and shareholders will be left powerless to effect change. CEFs will trade at larger discounts, and shareholders will ultimately face economic losses.**

Saba strongly objects to the Proposal for the reasons set forth below and believes the Commission must disapprove the Proposal and preserve shareholders' most fundamental right – the right to elect directors annually and otherwise participate in annual meetings.[3]

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[1] *See* Notice of Filing of Proposed Rule Change Amending Section 302.00 of the NYSE Listed Manual To Exempt Closed-End Funds, 89 Fed. Reg. 56447 (July 9, 2024) ("Proposal").

[2] *See infra* p.9. According to the Institutional Shareholder Services ("ISS"), "[t]he ability to elect directors is the single most important use of the shareholder franchise, and all directors should be accountable on an annual basis." Institutional Shareholder Services (ISS), Taft-Hartley Proxy Voting Guidelines: 2024 Policy Recommendations, 16 (Effective February 1, 2024).

[3] Saba is a registered investment adviser that advises directly or indirectly millions of retail and pension fund investors. Saba is the largest single investor in CEFs.

Consequences of the Proposal for Shareholders

The Proposal is far from the innocuous change the NYSE portrays it to be. Instead, it represents a destruction not only of the very rights shareholders were told they had when they bought these funds but also of the terms on which they purchased these funds. Millions of CEF shareholders, including countless retirees, purchased their shares in these funds on the basis that there would be annual meetings to hold managers accountable for poor performance – but now, this Proposal would allow CEFs to strip them of that right.

If approved, the impact the Proposal would have on shareholders is unambiguous:

- It would be nearly impossible for shareholders to unseat directors, as doing so would require calling a special meeting;
- It would be similarly difficult to pursue other changes regarding CEF governance; and
- CEF discounts would widen if the prevailing economic view is correct,[4] making it even more costly for retirees to exit underperforming funds.

True Intentions of CEF Directors and Managers Are on Display

The Proposal was designed to benefit and entrench CEF directors and CEF managers at the direct expense of shareholders. Although the NYSE has not disclosed the constituencies who approached it to make the Proposal, the comment letters submitted by its proponents reveal its true intentions and beneficiaries:

- As of the date of our letter, the comment letters in support of the Proposal were either (i) submitted by employees of (or lobbyists for) the very same CEF managers this Proposal would benefit or (ii) prepared as a form letter that has been bulk processed hundreds of times by coordinated efforts of CEF managers and their lobbyists.[5]
- Comment letters submitted by employees of CEF managers or their lobbyists cite activism as a reason to deprive shareholders of their right to elect directors annually and otherwise

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[4] *See, e.g.*, Matthew E. Souther, The Effects of Takeover Defenses: Evidence from Closed-End Funds, 119 J. Fin. Econ. 420 (2016) (providing evidence that, in closed-end funds, "[takeover] [d]efenses are associated with lower fund market values … [and] higher compensation levels for both fund managers and directors"); Michael Bradley, Alon Brav, Itay Goldstein & Wei Jiang, Activist Arbitrage: A Study of Open-Ending Attempts of Closed-End Funds, 95 J. Fin. Econ. 1 (2010) (noting that CEF fund activism has "a substantial effect on discounts, reducing them, on average, to half of their original level").

[5] We noticed that the comment file was populated pursuant to a form letter writing campaign. Reliance on form letter comments has been questioned in the past. Press Release, U.S. Senator Chris Van Hollen (D-Md.), Van Hollen Presses Clayton, SEC on Fraudulent Comment Letters (June 29, 2020).

participate in annual meetings while failing to acknowledge the benefits that activism brings to these funds and their shareholders.[6]

- What none of these comment letters address is the negative economic impact the Proposal would have on retail investors nor do they acknowledge the positive economic impact it would have for these exact CEF managers who seek to preserve capital and fees.

In these letters, proponents of the Proposal cite activism as the reason they believe CEF issuances are at a low, but the truth is that activism is not the cause of this problem. Instead, the real reason behind the decline in CEF issuances is the lack of shareholder demand to buy these products at IPO because these products (1) have historically underperformed; (2) have the industry's highest fees; (3) have boards that are beholden to management; (4) have traditionally included load fees at IPO (typically 3%)[7]; and (5) generally trade at large and sustained discounts immediately after IPO. The unfortunate reality for shareholders is that buying these products at IPO typically results in an immediate economic loss.

This Isn't the First Time Shareholders' Rights Have Come Under Fire

Over the last few years, CEF managers and directors have taken a number of increasingly aggressive and desperate steps to eliminate shareholders' voice in CEFs – in an attempt to lock in their capital and management fees while entrenching leadership.

In the last five years alone, there are numerous examples of how these managers have used their power and influence to strip CEF shareholders of their voice, including the adoption of vote-stripping,[8] the effective elimination of Rule 14a-8, the adoption of poison pills, and the implementation of impossible-to-achieve majority of shares outstanding voting requirements – as

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[6] See Comment Letters of Kim Anderson (SVP, Voya Investments, LLC) and Kevin Coroneos (Director, Digital Strategy at the Investment Company Institute) (2024). Available at https://www.sec.gov/comments/sr-nyse-2024-35/srnyse202435.htm.

[7] *See Wealth Disclosures on Closed-End Funds*, Morgan Stanley, https://www.morganstanley.com/content/dam/msdotcom/en/wealth-disclosures/pdfs/closed-end-funds.pdf (last visited July 29, 2024) ("Although closed-end funds may charge a sales load, recent closed-end funds have not charged clients an upfront fee in primary offerings.")

[8] Following the revocation of the Boulder no-action letter and the adoption of vote stripping by CEF managers, Saba brought two lawsuits against several CEFs for their use of control shares and, in both cases, the U.S. District Court for the Southern District of New York invalidated their use of control shares in summary judgment proceedings and the U.S. Court of Appeals for the Second Circuit has affirmed both rulings. In one of the suits, Judge Oetken (in *Saba Capital CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund*) discussed the Boulder No Action Letter and stated, "Nor does [the SEC's statement revoking the Boulder no-action letter] contain any legal analysis of Section 18(i). This contrasts with the Boulder Letter, which examined the Investment Company Act in detail and explained why closed-end funds opting into control share statutes violated the plain language of both Section 18(i)'s 'voting stock' and 'equal voting rights' requirements." No. 21-CV-327, 2022 WL 493554, at *3 (S.D.N.Y. February 17, 2022). Judge Oetken additionally noted that "Section 18(i)'s requirements that every stock be voting and have equal voting rights **are clear and unambiguous**." *Id.* at *6 (emphasis added).

well as various state efforts to strip voting rights and proposed federal legislation to limit share ownership.[9]

Now, with these restrictions already in place, CEF managers and directors have turned their attention to exchange listing standards, including the NYSE rulebook, where they are seeking to eliminate the annual meeting requirement for CEFs, a move that will further thwart shareholder participation and take away shareholder rights.

Annal Shareholder Meetings Are Among the Most Important, Longstanding Shareholder Rights

Annual shareholder meetings are among the most important shareholder rights—one that exchanges, including the NYSE, have long recognized by requiring such meetings as a listing condition. Not only do annual meetings provide a reliable and accessible platform for shareholders to voice their views, but they also provide shareholders the crucial ability to vote on a company's directors and management. The Proposal would enable CEFs to undermine that right and eliminate this important protection.

Congress' History of Support for Annual Shareholder Meetings Under the Investment Company Act

In enacting the foundational federal statute at issue, Congress itself recognized the importance of such protections. Section 1 of the Investment Company Act of 1940 (the "Investment Company Act") recognizes that "the national public interest and the interest of shareholders are adversely affected" … "when investment companies are organized, operated, managed […] in the interest of directors […] and investment advisers"[10] and when investment companies "fail to protect the preferences and privileges of the holders of their outstanding securities."[11]

To protect shareholders from this possibility, the Investment Company Act mandates shareholder voting rights, stating that "[n]o person shall serve as a director of a registered investment company unless elected to that office by the holders of the outstanding voting securities of such company."[12]

The Commission's History of Support for Annual Shareholder Meetings

The Commission itself has likewise emphasized the importance of annual shareholder meetings at which shareholders can exercise their voting rights. In 2016, the SEC put it plainly when considering a proposal by Nasdaq to allow for an ability to extend a Nasdaq-listed company's time to comply with Nasdaq's annual meeting requirement:

> The development and enforcement of meaningful corporate governance listing standards for a national securities exchange is of

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9 Expanding Access to Capital Act of 2023, H.R. 2799, 118th Congress (2023).

10 15 U.S.C. §80a-1(b)(2).

11 15 U.S.C. §80a-1(b)(3).

12 15 U.S.C. §80a-16(a).

> substantial importance to financial markets and the investing public, especially given investor expectations regarding the nature of companies that have achieved an exchange listing for their securities. In particular, **the Commission believes that the goal of ensuring that listed companies have met their requirement to hold an annual meeting of shareholders under the [Nasdaq] Exchange's Listing Rules is of critical importance to allow shareholders the ability to exercise their rights to participate in corporate governance matters, such as the election of directors.** As a publicly listed company, it is at a company's annual meeting that shareholders will typically exercise their right to vote on such important corporate matters as the election of directors. For these same reasons, it is also important that companies that have failed to timely hold an annual meeting of shareholders do not remain listed on a national securities exchange if such deficiency is not cured in a timely manner.[13]

Nasdaq, IEX, LTSE and Other Exchanges' History of Support for Annual Shareholder Meetings

Shareholders' right to annual meetings has long been recognized not only by the Commission, but also by other national securities exchanges as well. The listing standards of more recently registered national securities exchanges such as IEX and LTSE include a requirement that any issuer seeking to list its voting securities on the exchange must hold an annual shareholder meeting.[14] Similarly, Nasdaq's listing standards include an annual shareholder meeting requirement that actually predates its registration as an exchange.[15]

The NYSE's 100+ Years of Support for Annual Shareholder Meetings

For more than 100 years, the NYSE itself has required providing shareholders with a financial report in advance of an annual shareholder meeting as a condition to listing.[16] Now, the NYSE is

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[13] Order Granting Approval of Proposed Rule Change To Amend Rules 5810(4), 5810(c), 5815(c) and 5820(d), 81 Fed. Reg. 8582, 8584 (Feb. 19, 2016) (emphasis added). Courts have also recognized the importance of shareholder voting rights to affect corporate governance. *See Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988) ("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests. Generally, shareholders have only two protections against perceived inadequate business performance. They may sell their stock (which, if done in sufficient numbers, may so affect security prices as to create an incentive for altered managerial performance), or they may vote to replace incumbent board members."); *Hubbard v. Hollywood Park Realty Enterprises, Inc.*, No. 11779, 1991 WL 3151, at *11 (Del. Ch. Jan. 14, 1991) (recognizing "the fundamental nature of the shareholders' right to exercise their franchise, which includes the right to nominate candidates for the board of directors").

[14] *See* IEX Rule 14.408; LTSE Rule 14.408.

[15] *See* Nasdaq Rule 5620. Previously, the National Association of Securities Dealers ("NASD") required an issuer to "hold an annual meeting of shareholders and [to] provide notice of such meeting to [NASD]" in order for the issuer's securities to be designated as a NASDAQ National Market System security. *See* NASD Manual, Schedule D, Sec. 5(e) (NASD Manual, ed. Apr. 1992).

[16] *See* Birl E. Schultz, *Stock Exchange Procedure* 18 (1936) (noting that the listing agreements in 1909 between the NYSE and the American Woolen Company and the E. I. duPont de Nemours Powder Co. required that

taking a 180-degree turn by proposing to remove this obligation for CEFs, thereby depriving CEF shareholders of this long-standing right. Despite the significance of this change, the NYSE provides no explanation as to why the removal of this decades-old mandate from its listing standards is consistent with the requirement that its rules "protect investors and the public interest" other than its attempt to argue it is no longer necessary given certain shareholder protections in the Investment Company Act that have existed for decades.[17]

The NYSE Proposal Fails to Meet the Exchange Act's Burden

For the six primary reasons discussed below, Saba does not believe that the NYSE has met its burden under the Securities Exchange Act of 1934 ("Exchange Act"). In fact, Saba believes the Proposal is contrary to the requirements of the Exchange Act and, therefore, strongly urges the Commission to disapprove the Proposal.

1. ***CEF shareholders have purchased their shares with the understanding that there will be an annual meeting of shareholders – and as a result, the elimination of this requirement will create a race to the bottom to the detriment of all CEF shareholders.*** Over the years, millions of shareholders have invested in CEFs pursuant to a prospectus that disclosed that these funds would hold annual meetings.[18] The Proposal does not address, and indeed cannot justify, the result of stripping these shareholders of their right to participate in the annual election of directors. As noted above, the Proposal would build on the other harmful anti-shareholder measures that many CEF managers have recently adopted in various attempts to erode or eliminate shareholder rights and entrench their own directors and management.[19]

The Proposal fails to acknowledge the benefits that accrue to shareholders through the annual meeting requirement or address how the elimination of that requirement will affect CEF shareholders, particularly in the current environment where CEFs have already taken measures

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the company "will publish at least once in each year, and submit to the Stockholders at the annual meeting of the Company, a detailed statement of its physical and financial condition [. . .]").

[17] Others have similarly recognized the importance of annual shareholder meetings at which board members can be elected. For example, ISS, a leading proxy advisor service, states in its Voting Guidelines that "[b]oards should be sufficiently accountable to shareholders, including through transparency of the company's governance practices and regular board elections, by the provision of sufficient information for shareholders to be able to assess directors and board composition, and through the ability of shareholders to remove directors." *See* ISS, United States Proxy Voting Guidelines 9 (effective February 1, 2024). According to ISS, where there is no ability to elect and remove directors, there is no board accountability.

[18] *See, e.g.*, Liberty All-Star Equity Fund, Prospectus Dated October 13, 2021: 22,383,932 Shares of Beneficial Interest Issuable Upon Exercise of Rights to Subscribe for Such Shares (Form 424B1) (Oct. 15, 2021) ("The fund holds annual meetings of shareholders to vote on, among other things, the election or re-election of the Trustees whose terms are expiring with that meeting."); Cohen & Steers Infrastructure Fund, Inc., Prospectus Supplement: Cohen & Steers Infrastructure Fund, Inc. Up to 7,750,000 Shares of Common Stock (Form POS Ex) (Aug. 9, 2021) ("At the annual meeting of stockholders in each year, the term of one class will expire and Directors will be elected to serve in that class for terms of three years.").

[19] Such changes include fifty percent outstanding share voting standards, stripping voting rights, poison pill measures, obstacles to the ability to amend fund charters and staggered board memberships. Some CEFs have also taken measures that result in the effective elimination of non-binding 14a-8 proposals. Against the backdrop of this attack on shareholder rights, annual shareholder meetings are among the few remaining safeguards in place to protect investor rights.

that act to derogate from shareholder rights.[20] Like many other CEF shareholders, Saba, for instance, relies on its voting rights to ensure that its voice is heard in corporate governance matters.

The NYSE also inaccurately asserts that the Proposal creates no undue burden on competition in part because "[a]ny other market that lists CEFs could seek to amend its own annual meeting requirements applicable to CEFs."[21] As noted above, other listing exchanges have adopted annual shareholder meeting requirements, and approval of the Proposal would thus create a "race to the bottom" as other exchanges seek to eliminate that requirement for CEFs in order to avoid them moving their listing to the NYSE to avoid holding annual meetings.[22] Indeed, some CEFs specifically note that they hold annual meetings at least in part *because* the listing exchange requires it.[23]

2. ***The NYSE has not met its burden to demonstrate that the Proposal protects investors and is in the public interest or that it is consistent with the Exchange Act***. Both

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[20] For example, the Dividend and Income Fund, a CEF, voluntarily delisted from the NYSE because of, among other things, "the burden of governance, shareholder meeting, and reporting requirements of the NYSE." Press Release, Dividend and Income Fund, Dividend and Income Fund Announces Intention to Voluntarily Delist Common Shares of Beneficial Interest from the NYSE (September, 18, 2020). Subsequent to delisting, it has traded at a significantly wider discount going from 23% at the time of delisting to 36.5% today. *Fact Sheet,* Bexil Investment Trust (June 30, 2024), https://www.bexilinvestmenttrust.com/fact-sheet. Since its IPO, DNI has lagged its self-selected benchmark by 484%. Shareholders are now powerless to change the way DNI is run and there is no catalyst to recoup these losses. Another example of a fund that voluntarily delisted from an exchange is FXBY, which, like DNI, chose to delist because of "ongoing corporate governance requirements of the AMEX and Sarbanes-Oxley Act." Press Release, MorningStar Foxby Corp (FXBY) (October 3, 2008). Foxby now trades at an over 40% discount. Foxby Corp (FXBY), MorningStar, https://www.morningstar.com/cefs/pinx/fxby/performance (Last accessed on July 29, 2024). These experiences strongly suggest that many CEFs would see similarly significant impacts to their share prices and discounts, with deleterious effects on their holders. Taking away the discipline that comes from the possibility of direct oversight by shareholders only plays out to the detriment of those shareholders.

[21] Proposal at 56448.

[22] In fact, shortly after the NYSE filed the Proposal, the Cboe BZX Exchange filed its own proposal to exempt CEFs from the annual meeting requirement. See Notice of Filing of a Proposed Rule Change, as Modified by Amendment No. 1, to Exempt Closed-End Management Investment Companies, 89 FR 57175 (July 12, 2024). We will be submitting comments to this proposal as well.

[23] *E.g.*, Nuveen S&P 500 Dynamic Overwrite Fund, Prospectus: 1.6 million Common Shares Nuveen S&P 500 Dynamic Overwrite Fund (Form 497), p.56 (June 13, 2018) ("The Common Shares are listed on the NYSE and trade under the ticker symbol 'SPXX.' The Fund intends to hold annual meetings of shareholders so long as the Common Shares are listed on a national securities exchange and such meetings are required as a condition to such listing."); Ecofin Sustainable and Social Impact Term Fund, Tortoise Essential Assets Income Term Fund (Form 497), p.75 (Mar. 26, 2019) ("Under the rules of the NYSE applicable to listed companies, we will be required to hold an annual meeting of shareholders in each fiscal year. If we are converted to an open-end company or if for any other reason the shares are no longer listed on the NYSE (or any other national securities exchange the rules of which require annual meetings of shareholders), we may amend our Bylaws so that we are not otherwise required to hold annual meetings of shareholders."); Insured Municipal Income Fund Inc., Prospectus (Form 497), p.33 (Dec. 17, 2003) ("Under the rules of the NYSE applicable to listed companies, the Fund is normally required to hold an annual meeting of Stockholders in each year. If the Fund is converted to an open-end investment company or if for any other reason the Fund's shares are no longer listed on the NYSE (or any other national securities exchange the rules of which require annual meetings of Stockholders), the Fund may decide not to hold annual meetings of Stockholders.").

Section 6(b)(5) of the Exchange Act and Section 201.700(b)(3) of the SEC's Rules of Practice require an SRO to demonstrate that a proposed rule change is consistent with the Exchange Act so that the Commission can assess whether it is consistent with the requirement that an exchange rule protects investors and is in the public interest. In particular, Section 201.700(b)(3) provides that "[t]he burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization is on the self-regulatory organization that proposed the rule change."[24] As a threshold matter, the Proposal falls woefully short of an SRO's requirements to

> [d]escribe the reasons for adopting the proposed rule change, any problems the proposed rule change is intended to address, the manner in which the proposed rule change will operate to resolve those problems, the manner in which the proposed rule change will affect various persons (e.g., brokers, dealers, issuers, and investors), and any significant problems known to the self-regulatory organization that persons affected are likely to have in complying with the proposed rule change; and
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> [e]xplain why the proposed rule change is consistent with the requirements of the [Exchange] Act and the rules and regulations thereunder applicable to the self-regulatory organization. *A mere assertion that the proposed rule change is consistent with those requirements is not sufficient.*[25]

The Proposal fails to meet either of these SRO requirements. Instead, the NYSE merely decides to claim that, because of various provisions of the Investment Company Act, annual shareholder meetings are now unnecessary for CEF shareholders.[26] The NYSE's unwritten assumption appears to be that annual shareholder meetings provide no benefit to CEF shareholders – an assumption that could not be more untrue. Even if this were true, which it is not, it does not demonstrate, as is required, how the elimination of annual meetings *protects* investors or is in the *public* interest and is therefore consistent with the Exchange Act. <u>As a result, the Proposal is flawed on its face and, for this reason alone, must be disapproved</u>.

3. ***The NYSE's stated reasons for the Proposal are insufficient, flawed, and irrational.***
The NYSE bases the Proposal on the facts that (1) the Investment Company Act mandates director elections in specific circumstances; (2) a majority of the independent directors of the

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[24] 17 CFR 201.700(b)(3)(i).

[25] Form 19b-4 (emphasis added). This is reiterated in the SEC's Rules of Practice. *See* 17 CFR 201.700(b)(3)(i) ("[T]he description of the proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. Any failure of the self-regulatory organization to provide the information elicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization.").

[26] Proposal at 56447.

board must approve certain important decisions of a CEF; and (3) CEF shareholders have certain approval rights under the Investment Company Act.[27]

All of this is true and has been true for decades – however, simply reciting other protections does not explain why any of these considerations, or all of them collectively, are adequate substitutes for an annual meeting of shareholders.

In the Proposal, the NYSE attempts to negate the importance of annual meetings by failing to acknowledge the following:

- **Director independence alone is no substitute for annual meetings**. Section 303A.01 of the NYSE Listed Company Manual generally requires that boards of operating companies must have a majority of independent directors. Yet these operating companies are required to hold annual meetings under Section 302.

- **Operating companies are still required by the NYSE to hold annual meetings**, even though shareholders of operating companies generally have approval rights over key decisions (e.g., approval rights over the amendment of charter documents and business combination transactions) that are similar to the statutory rights of CEF shareholders.

- **The Investment Company Act emphasizes the importance of investment company shareholder voting rights**. Section 16(a) of the Investment Company Act provides that no person may serve as a director of a registered investment company unless **elected at an annual or a special meeting**.[28] However, without annual meetings, shareholders will be stripped of their ability to exercise their right to vote on the board's members, which would eliminate the accountability of the board.

- **CEF shareholders have always had, and should continue to have, the right to annual meetings** at which directors are elected because the role of CEF directors is so critical.

If the Proposal is approved, CEF directors could effectively serve in perpetuity without any real scrutiny as to how they have fulfilled their obligations. Even if their fund were performing poorly and trading at a substantial net asset value ("NAV") discount, shareholders would be left with no practical ability to remove and replace these directors. The NYSE fails to address how a change to its rules that would foster such a harmful result could possibly be in the interest of shareholders.

4. ***The NYSE incorrectly treats CEFs the same as other registered investment companies, such as Exchange Traded Funds ("ETFs").*** The Proposal follows other recent NYSE changes to the Listed Company Manual to exempt certain issuers, including certain registered investment

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[27] Proposal at 56447–448.

[28] Courts have also previously agreed with Saba that CEFs seeking to prevent the exercise of shareholder voting rights violated Section 18(i) of the Investment Company Act. *See Saba Cap. Master Fund, Ltd. v. BlackrockMun. Income Fund, Inc.*, No. 23-cv-5568, 2024 WL 43344 (S.D.N.Y Jan. 4, 2024), *aff'd Saba Cap. Master Fund, LTD. v. Blackrock ESG Cap. Allocation Tr.*, No. 23-8104, 2024 WL 3174971 (2d Cir. June 26, 2024).

companies, from the annual meeting requirement. In doing so, however, it fails to acknowledge the unique differences between CEFs and other registered investment companies.

For example, in 2019, the SEC approved a NYSE proposed rule change (the "2019 Amendment") to exempt from the annual meeting requirement (i) issuers whose only securities listed on the exchange were non-voting preferred and debt, (ii) passive business organizations, and (iii) issuers whose securities are listed pursuant to a number of NYSE rules, including equity-linked notes, investment company units, certain trust shares, managed fund shares (such as ETFs), and others.[29] In approving the 2019 Amendment, the SEC noted that, according to the NYSE, shareholders of these types of securities "either do not have the right to elect directors at annual meetings or have the right to elect directors only in very limited circumstances."[30] In the 2019 Amendment, the NYSE noted the following features of ETFs as justifying the annual meeting exemption:

- ETF shareholders "do not have the right to vote on the annual election of a board of directors, further eliminating the need for an annual meeting."[31]

- ETF shareholders receive regular disclosure (i.e., full daily transparency) into the ETF portfolio and how it is valued.[32]

- ETF holdings are valued by the market prices of the underlying securities or other reference assets and, therefore, shareholders can value their investments on an ongoing basis (i.e., they are not illiquid).[33]

CEFs are not the same as ETFs – they are different for the following reasons, among others.[34]

- **CEFs do NOT provide ongoing and regular transparency** into portfolio holdings and their valuations. Portfolio disclosure is provided only four times a year with a 60-day lag.

- **CEFs do NOT have illiquidity limits.** 100% of the portfolio may be invested in illiquid securities, and market prices are not available to value these securities.

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[29] Order Granting Approval of SR-NYSE-2019-20, 84 Fed. Reg. 35431 (July 23, 2019). In 2022, the NYSE filed a proposed rule change for immediate effectiveness extending the exemption to ETFs listed pursuant to Rule 5.2(j)(8) of the Listed Company Manual. *See* NYSE Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Listed Company Manual Section 302.00 To Exempt ETFs, 87 Fed. Reg. 74681(Dec. 6, 2022).

[30] 2019 Amendment, 84 Fed. Reg. at 35432.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Indeed, in approving the 2019 Amendment, the SEC specifically noted that "closed-end management investment companies are still required to hold annual meetings under Section 302 of the [NYSE Listed Company] Manual." *Id*. at 35433, n.20.

- **CEFs traditionally trade at wide discounts to their NAV.** As a consequence, CEF shareholders are NOT able to value their CEF investments on an ongoing basis and generally can sell their shares only at a material discount to NAV.

- **CEF shareholders DO have the right to vote on the election of a board of directors**.

In short, the reasons supporting the exemption for ETFs do not apply to CEFs. In approving the 2019 Amendment, the SEC concluded that "the right of shareholders to vote at an annual meeting is an essential and important one"; however, "[it] believes that the requirement to hold an annual shareholder meeting may not be necessary for certain issuers of specific types of securities because the holders of such securities do not directly participate as equity holders and vote in the annual election of directors or generally on the operations or policies of the listed companies."[35]

Further, the SEC has acknowledged in other contexts the important distinctions between ETFs and CEFs, including specifically noting the practice of holding annual meetings for CEF shareholders and pointing to the discount to NAV at which shares of CEFs often trade.[36] Yet, the Proposal simply cites protections provided to CEF shareholders under the Investment Company Act and ignores the distinctions between different types of funds and the previously acknowledged need and practice for CEFs to hold annual meetings.

5. ***The Proposal inappropriately distinguishes between CEFs and Business Development Companies ("BDCs") when both CEFs and BDCs deserve the same protections for annual shareholder meetings.*** As refiled on June 21, 2024, the Proposal states that the NYSE is not proposing at this time to exempt BDCs from the annual meeting requirements of Section 302.00.[37] The NYSE offers no reason for distinguishing between CEFs and BDCs and continuing to provide BDC shareholders with the protections of an annual shareholder meeting while removing that protection from CEF shareholders.

In fact, unlike ETFs, under the Investment Company Act, both CEFs and BDCs are permitted to hold an unlimited percentage of illiquid securities and neither provides portfolio-level transparency nor details on valuation. Furthermore, unlike ETFs, both CEFs and BDCs trade at significant discounts to their NAV. If the reasons offered by the NYSE to exempt CEFs from the annual meeting requirement were cogent, they would apply equally to BDCs. As demonstrated above, however, those reasons are unconvincing, either as to BDCs or CEFs.

6. ***The NYSE has not provided adequate information either for meaningful public comment or for the SEC's consideration of whether to approve the Proposal.*** Under the SEC's Rules of Practice and Form 19b-4, a national securities exchange proposing a change to its rules must furnish sufficient information so that the public can intelligently comment on the proposed rule change and so the SEC can make an informed decision whether to approve or disapprove the

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35 *Id.* at 35432.

36 *See* Disclosure of Hedging by Employees, Officers and Directors, 80 Fed. Reg. 8486, 8493–94 (Feb. 17, 2015).

37 Proposal at 56447.

change.[38] The NYSE's explanation in the Statutory Basis of the Proposal explaining how the Proposal is consistent with the Exchange Act includes only two sentences, and the first is simply a conclusory statement that the Proposal is consistent with the Exchange Act.[39] Among the information that the NYSE has failed to provide in those two sentences is:

- An explanation of why it is necessary, sensible, or appropriate at this time to exempt CEFs from Section 302.00.[40] The Proposal identifies no change in conditions or circumstances that warrants a modification in 2024 to a practice that has served shareholders of CEFs well. Nor does the NYSE indicate what has changed since 2019 when it exempted *ETFs* from the annual shareholder meeting requirement but specifically did not include CEFs in that proposed rule change. The NYSE also has not indicated that it considered any alternatives other than a complete exemption from the annual meeting requirement for CEFs, regardless of the issues that would be considered at such a meeting.[41] Such alternatives could include, for example, lowering quorum requirements; exempting a CEF from the annual meeting requirement if the sole issue up for a vote involves the election of unopposed directors;[42] or even modernizing the election process to rely on electronic ballots (instead of costly printing and mailing of ballots).

- A statement of whether the NYSE has undertaken any economic or financial analysis of the effects of the proposed rule change on CEF shareholder value, and if not, why the NYSE did not think it necessary to do so. Without such an analysis, the public and the SEC will have no way of knowing whether a change in Section 302.00 to exempt CEFs from the annual meeting requirement might erode the trading prices of CEF shares and expand existing NAV discounts, potentially erasing billions of dollars in value.[43]

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38 *See supra* at pp.6-7.

39 Proposal at 56448. *Cf.* Form 19b-4 (requiring SROs to "[e]xplain why the proposed rule change is consistent with the requirements of the [Exchange] Act and the rules and regulations thereunder applicable to the self-regulatory organization" and noting that "[a] mere assertion that the proposed rule change is consistent with those requirements is not sufficient").

40 *See* Securities Exchange Act § 3(f) ("Whenever pursuant to this chapter the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.").

41 We note that, as part of its approach to proposed rulemaking, FINRA has long taken the following position: "How FINRA's economic impact assessment informs rulemaking should be clear in our public notices for rulemaking. Proposed rule changes should be transparent about why we seek to establish or amend a rule, *how the specific rule proposal addresses a regulatory need better than reasonable alternatives*, and what evidence or assumptions we relied upon in reaching that judgment." FINRA, Framework Regarding FINRA's Approach to Economic Impact Assessment for Proposed Rulemaking, at 5 (Sept. 2013) (emphasis added).

42 Closed-end funds are permitted to rely on an exemption that allows for broker voting in uncontested election which is already a significant cost savings.

43 In a memorandum titled "Current Guidance on Economic Analysis in SEC Rulemakings" (March 16, 2012), the Commission recognized that "high-quality economic analysis is an essential part of SEC rulemaking," and that the Commission has "long recognized that a rule's potential benefits and costs should be considered in making a reasoned determination that adopting a rule is in the public interest."

- A statement of whether the proposed change to Section 302.00 may benefit certain third parties. If so, the proposed rule change should identify any parties that could benefit so that the public and the Commission can judge whether the interests of those parties are aligned with, or in opposition to, the interests of CEF shareholders.

Conclusion

The rights of tens of millions of CEF shareholders, including retirees, are on the line. If the Proposal is approved, these shareholders will lose their right to elect directors and will be left effectively voiceless and powerless to effect change. Without annual elections, CEF managers and directors will further entrench themselves, funds will trade at larger discounts and shareholders will ultimately face economic losses.

For the reasons we have outlined in this letter, Saba strongly urges the SEC to disapprove the Proposal and protect this fundamental right of CEF shareholders. The Proposal is deficient on its face and does not include sufficient information to meet the applicable statutory and SEC requirements for proposed rule changes under the Exchange Act.

Moreover, these deficiencies require the SEC to deny the Proposal in a straightforward application of Judge Garland's decision in *Susquehanna Int'l Group v. SEC*[44] which requires the SEC to conduct an independent analysis of exchange rule proposals.

If the SEC were nevertheless to approve the Proposal despite its infirmities, we do not believe any court would uphold such approval under the statutory standard or prevailing precedent once it is challenged.[45]

Saba is available to discuss these issues with representatives of the SEC or its staff or to appear in a proceeding of the SEC convened to address the Proposal. Saba can be reached by contacting Michael D'Angelo, 212-542-4635, mdangelo@sabacapital.com. Thank you.

Very truly yours,

M. D'Angelo

Saba Capital Management, LP

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[44] *See, e.g., Susquehanna Int'l Grp., et al. v. SEC*, No. 16-1061, Doc. No. 1687695, 10 (D.C. Cir. August 8, 2017) (per curiam).

[45] *Id.*