Paul N. Roth
212.756.2450
Paul.Roth@srz.com

July 30, 2024

Via Electronic Mail: rule-comments@sec.gov

Sherry R. Haywood
Assistant Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: Notice of Filing of Proposed Rule Change Proposing to Amend Section 302.00 of the NYSE Listed Company Manual to Exempt Closed-End Funds From the Requirement to Hold Annual Shareholder Meetings (SR-NYSE-2024-35) (the "Notice")

Dear Ms. Haywood,

We respectfully submit this comment letter in response to the above-referenced Notice, which the U.S. Securities and Exchange Commission (the "Commission") issued regarding the New York Stock Exchange LLC's ("NYSE") proposed rule change (the "Proposal"), which would remove the current NYSE rule requirement for listed closed-end funds ("CEFs") registered under the Investment Company Act of 1940 (the "1940 Act") to convene annual shareholder meetings.

The current rule has been in place for more than a century since its adoption as the NYSE's first direct corporate governance standard.[1] The Proposal would violate the applicable rules governing national exchanges[2] and contravene and render ineffective key statutory requirements designed to protect shareholders under each of the 1940 Act and the Exchange Act. As an international law firm focused on representing a wide variety of clients in the asset management industry, we have serious concerns with the Proposal and believe it should be disapproved.

Overview

The Proposal, if implemented, would represent a significant blow to shareholder rights, overturn over a century of practice, and run contrary to the statutory requirement that the NYSE's

---

[1] *See* ABA Section of Business Law, Special Study on Market Structure, Listing Standards and Corporate Governance, 57 Bus. Law. 1487, 1498 (2002).

[2] *See* Section 6(b)(5) of the Securities Exchange Act of 1934, as amended, and the rules promulgated thereunder (the "Exchange Act") (requiring that the rules of national listing exchanges such as the NYSE be designed "to protect investors and the public interest"). *See also* Rule 19b-4 of the Exchange Act ("Rule 19b-4") (governing self-regulatory organizations proposals for rule changes, which requires that a rule change must "not significantly affect the protection of investors or the public interest").

rules be designed "to protect investors and the public interest" and that any rule change must "not significantly affect the protection of investors or the public interest."[3]

NYSE attempts to justify the drastic change it is proposing by pointing to the fact that the 1940 Act contains certain statutory provisions that provide "legal protections" to shareholders. As discussed in more detail below, these provisions do not replace the basic shareholder right to elect directors[4] annually.

In fact, if implemented, the Proposal would not only strip shareholders of this basic right, it would have the cascading effect of stripping or limiting additional rights and protections provided to shareholders under the Exchange Act and 1940 Act, namely those relating to Rule 14a-8 under the Exchange Act ("Rule 14a-8") and Section 15(a)(3) of the 1940 Act.

It is incongruous for the NYSE to extoll the critical protections that the 1940 Act provides and that Congress intended and yet propose to strip a key protection afforded CEF shareholders. The Proposal would significantly and adversely affect the protection of investors and the public interest.

The Proposal is Inconsistent with the Investor Protections of the 1940 Act

The Proposal is inconsistent with the rationale of investor protection set forth by the NYSE and unpersuasive. In fact, the Proposal actually has the opposite effect by removing a key protection for investors and the public interest.

The NYSE says it believes that the Proposal is consistent with the protection of investors and the public interest because of certain provisions in the 1940 Act that provide for the protection of CEF shareholders. Its rationale for the Proposal can be boiled down to its contention that there are "significant statutory protections under the 1940 Act provided to shareholders of CEFs, for which there are no parallel legal protections for the shareholders of public operating companies."

We disagree. As a general matter, the *additional* "protections" that CEFs are granted under the 1940 Act exist because CEFs have *additional* components that operating companies do not, for example an investment adviser, that require supplementary governing rules and protections to account for such components. These provisions are tailored to address specific and additional abuses that investment company shareholders may face and, put simply, have nothing to do with, and certainly cannot be said to replace, the basic shareholder right to elect directors annually, as enshrined under Section 302.00 of the NYSE Listed Company Manual (the "Manual"). As the Commission has noted, "[t]he purpose [of the 1940 Act] is not only to secure honesty and objective 'wisdom' in management, but to make it separately responsive to the wishes and judgment of those who depend upon its results."[5] The NYSE annual meeting requirement, which predated the adoption of the 1940 Act, we believe is essential to ensuring that CEF boards are responsive to shareholders.

---

[3] *Id.*

[4] "director", as such term is used throughout this letter, shall be deemed to include "trustee".

[5] *In the Matter of Prudential Insurance Co. of America*, 41 S.E.C. 335 (1963), *aff'd sub nom. Prudential Insurance Co. of America v. SEC*, 326 F.2d 383 (3d Cir.), *cert. denied* 377 U.S. 953 (1964).

Further, the NYSE tries to argue that certain board-related independence safeguards prescribed by the 1940 Act obviate the need for the annual election of directors by shareholders, which is misguided, as explained below. Specifically the NYSE points to the fact that the 1940 Act requires (i) that a board of directors not have more than 60% of its directors qualify as "interested persons"[6] (as such term is defined under the 1940 Act) and (ii) that the approval of certain significant actions, such as the approval of a new investment management agreement or proposed merger, be approved by a majority of non-interested directors.[7]

This posits that because there exist certain tailored protections aimed at preventing boards of directors from being *completely* interested (even the 1940 Act provides that they can be majority interested) and amplifying independent voices over interested voices in connection with the approval of certain significant actions, such boards should not be subject to annual elections.

To argue that the shareholder right to vote at the annual shareholder meeting, which is the bedrock of shareholder rights and the central mechanism by which shareholders can hold directors accountable, is somehow extra or redundant, is illogical and flies in the face of the 1940 Act's mandate that all common shares of an investment company must be "voting stock," which is defined to mean stock "presently entitling the owner… to vote for the election of directors of a company."[8] If a shareholder cannot presently, or possibly ever, vote on the election of directors, such stock cannot be said to be "voting stock."[9] Indeed, the Commission itself has taken the position that shareholder voting for fund directors is part of "the very essence of the [1940] Act."[10]

It is also worth noting that a fundamental premise of the Proposal is that shareholders of CEFs are ostensibly *more protected* than those of operating companies because, according to the NYSE, shareholders of operating companies do not enjoy any protections under "federal law" with respect to the election of directors.

The truth is that investors in CEFs are *less protected and more vulnerable*. The NYSE fails to discuss the fact that shareholders of U.S. based listed operating companies typically enjoy *broad* protections under state law, protections that extend beyond anything the 1940 Act provides. For example, in Delaware, where the majority of publicly traded U.S. corporations reside,[11] the Delaware General Corporation Law *requires* all companies subject to its jurisdiction to hold annual shareholder meetings, even providing that shareholders may petition its state Court of Chancery

---

[6] We note that the 1940 Act's definition of "interested persons" does not contemplate or view as problematic the concept of an overboarded director, including one who may serve on hundreds of other boards, including in the same fund family and on behalf of the same manager, as is the case with certain CEF directors, as further described later in this letter.

[7] For example, matters requiring approval by a majority of a CEFs non-interested directors under the 1940 Act include: (i) approval of investment management agreement and principal underwriter agreement; (ii) selection of an independent public accountant; (iii) certain purchase or sale transactions between an investment company and certain affiliated persons.

[8] *See* Section 2(a)(42) of the 1940 Act.

[9] *See* Section 18(i) of the 1940 Act.

[10] *See Prudential*, supra note 5.

[11] According to Delaware Division of Corporations, approximately 79% of all U.S. initial public offerings in the calendar year 2022 were registered in Delaware and more than 66% of the current Fortune 500 are incorporated in Delaware (https://corp.delaware.gov/).

to compel an annual shareholder meeting if a period of 13 months has gone by without one having been held.[12] This is in stark contrast to CEFs, the majority of which are formed as trusts under the state trust statutes which *do not* require the holding of annual director elections at a shareholder meeting.[13]

It bears mentioning as well that shareholders who purchased stock in NYSE-listed CEFs, whether at IPO or later, did so on the basis of and with the explicit understanding that the CEFs were required to hold annual meetings, as mandated by the NYSE for over a century. To simply take this fundamental right away without shareholder approval would be inequitable. For example, a corporation seeking to reincorporate requires shareholder approval to do so, because shareholders bought in with a fundamental understanding regarding the rules the corporation was subject to. If that understanding is to materially change, shareholders would need to approve. The same logic should apply here.

A Comparison of CEFs to ETFs is Misplaced

Section 302.00 of the Manual currently exempts securities listed under NYSE Rule 5.2(j), including Exchange-Traded Fund Shares ("ETFs") from the requirement to hold annual shareholder meetings. We understand some may argue that ETFs and CEFs should be viewed alike, and that just as ETFs are exempt from the annual meeting requirement, so too should CEFs. We strongly disagree and find this argument lacks sufficient justification.

CEF boards of directors and their duties more closely reflect the active duties and responsibilities of boards of directors of operating companies, not ETFs, which are typically registered as open-end investment companies under the 1940 Act. This is due to the ubiquitous discount to net asset value ("NAV") that is a feature of CEFs and which generally does not exist in ETFs.[14]

The majority of CEFs trade at a discount to their NAV, with such discount oftentimes reaching double digits. This can have a negative effect on shareholder value and shareholder liquidity and in turn requires CEF boards and management to continuously "manage the discount".

[12] 8 Del. Code. § 211(c).

[13] We note that the Commission Staff took the position that the annual meeting requirements are a question of state law in a 1986 no-action letter. *John Nuveen & Co. Inc*. (pub. avail. Nov. 18, 1986). In reaching such position, the Staff determined that the text of the 1940 Act was ambiguous and that the legislative history—which suggested that Congress believed annual meetings were required—was not dispositive. Although the Staff acknowledged that it had previously characterized Section 16(a) as imposing "a requirement . . . that directors of an investment company be elected annually," it nonetheless determined that state law should control. *See* SEC, Report on the Public Policy Implications of Investment Company Growth, H. R. Rep. No. 2337, 89th Cong., 2d Sess., 335 (1966). As a practical matter, this decision largely had no impact on closed-end funds because most list their shares on stock exchanges and are therefore still required to hold annual meetings under stock exchange rules. NYSE's proposal, if adopted, would upend this state of affairs and draw into question the propriety of the Staff's interpretative preference in the *John Nuveen* letter, which conflicts with the plain text of the 1940 Act (including Section 16(a)'s requirement that "the term of office of at least one class shall expire each year").

[14] *See Updated Investor Bulletin: Exchange-Traded Funds (ETFs)*, SEC (Feb. 23, 2023) ("ETF's market price is generally kept close to the ETF's end-of-day NAV per share because of the arbitrage function inherent to the structure of the ETF").

This can be a tall task, as reducing or eliminating a NAV discount often requires a multi-pronged approach by a board of directors that involves some combination of:

- An increase and change in fund marketing and related efforts,
- Improving a fund's corporate governance,
- Seeking out potential new buyers for the fund's shares,
- Repurchasing the fund's shares,
- Conducting a tender offer for the fund's shares at a price near NAV,
- Proposing to change the fund's structure, and
- Re-evaluating the fund's investment mandate and/or changing the investment team.

These efforts, which may involve management, are generally board-driven, ongoing and aimed at boosting the market's confidence in the CEF's board and investment team, thereby making the shares more attractive in the public market which would then lead to a reversal of the supply (too much) and demand (too little) gap that is usually responsible for a CEF's NAV discount. Because of the conflict between CEF advisers' interests in keeping assets under management as high as possible, shareholders necessarily rely on CEF boards taking an active role in narrowing a discount and must be able to hold boards to account.[15] Even when a board is successful in narrowing or closing a NAV gap, continual attention and oversight is necessary to try and maintain the NAV equilibrium, as a narrowed or closed NAV gap can easily widen if not continuously tended to.

None of this exists in the context of ETFs or their boards of directors, whose shares typically trade close to NAV.[16] The NYSE itself previously acknowledged that ETFs are different: In its 2019 proposal seeking to exempt ETFs from Section 302.00 of the Manual, the NYSE made the case that ETFs should be exempt from holding annual meetings because *"the net asset value of the categories of ETFs and other derivative securities products [...] is determined by the market price of each fund's underlying securities."* The NYSE concluded that *"because shareholders can value their investments on an ongoing basis, the Exchange believes that there is less need for shareholders to engage management at an annual meeting."*

This is in stark contrast to CEFs where shareholders are constantly engaging with management and boards in an effort to close NAV discounts and recoup lost shareholder value. The Commission has previously remarked that a CEF board's active oversight is uniquely required to take certain actions to narrow the NAV discount because CEF advisers have a "potential conflict [that] is not present with other investment companies."[17] Whereas ETF shareholders can sell their shares at any time and receive the approximate value of the underlying assets of the fund as a result of ETFs' structural arbitrage mechanism, CEF shareholders are often faced with the ultimatum of selling at a significant discount or engaging with a fund's board of directors regarding closing the NAV discount. If the discount persists or the board fails to take appropriate actions, the annual

---

[15] *See* Repurchase Offers by Closed-End Management Investment Companies, 58 Fed. Reg. 19,330, 19,340 (Apr. 14, 1993).
[16] *See* https://corporate.vanguard.com/content/corporatesite/us/en/corp/articles/etf-premiums-and-discounts-explained.html
[17] *Id.*

meeting represents the principal tool through which shareholders can hold directors accountable and meaningfully express their preferences.

The Proposal is seeking to remove the primary avenue used by CEF shareholders, to engage with CEF management and the board. Again, we fail to see how this would further investor protection or the public interest, instead we believe it would have the opposite effect.

Rule 14a-8 Will be Severely Weakened

If the Proposal is approved, it will have the unintended impact of making Rule 14a-8 as it pertains to CEFs almost non-existent. Simply, if there are no annual meetings, shareholders cannot submit proposals to be presented and voted on by shareholders, outside of certain limited contexts.[18]

It is important to note that Rule 14a-8 was enacted by the Commission for the purpose of preserving and protecting corporate democracy—namely, by giving shareholders an effective means of presenting their proposals to other shareholders.[19] In the words of the Staff: "[t]he [Rule 14a-8] shareholder proposal process has become a cornerstone of engagement between shareholders and company management. It provides an important mechanism for investors to express their views, provide feedback to companies, exercise oversight of management, and raise issues for their fellow shareholders' consideration."[20]

CEF shareholders are particularly reliant on Rule 14a-8 as the CEF governance landscape is uniquely challenging for CEF shareholders on several fronts. For example, whereas the majority of U.S. listed corporations elect their directors annually,[21] more than 70% of CEFs have classified boards that insulate directors into three year terms.[22] Further, control share provisions and statutes, which function like a poison pill and strip the voting rights of shareholders (usually those who hold shares >10%) are commonplace in the CEF world. In fact, in just the last few years, multiple federal court rulings have found that CEF boards of directors violated the 1940 Act by purporting to strip shareholders of their voting rights through control share adoptions.[23] And recently, in a bid to make it harder for CEF shareholders to nominate directors, certain CEFs have amended their organizational documents to provide a different, many would argue impossible, voting standard

[18] While Rule 14a-8 proposals may be presented at special meetings, as noted below it is difficult for shareholders to call special meetings and special meetings are rarely, if ever, called by funds unless there is a significant action being considered that requires shareholder approval.
[19] *See Roosevelt v. E.I. DuPont de Nemours & Co.*, 958 F.2d 416, 421-22 (D.C. Cir. 1992) (Ginsburg, J.).
[20] SEC, Fact Sheet: Shareholder Proposals under Rule 14a-8: Proposed Rules, https://www.sec.gov/files/34-95267-fact-sheet.pdf.
[21] ~90% of the S&P 500, ~73% of the S&P 1,500 and ~60% of the Russell 3,000 companies hold annual elections for all of their board members. *See* Matteo Tonello et al., *Corporate Board Practices in the Russell 3000, S&P 500 and S&P Mid-Cap 400* (Nov. 2022); Ernst & Young, *EY Center for Board Matters: Corporate Governance by the Numbers* (Mar. 2022).
[22] *See* Investment Company Institute/Independent Directors Counsel, *2023 Directors Practices Study — Board Policies and Practices,* at 3.11 (Of the 53 fund complexes reporting that they have closed-end funds, 39 (73.6%) responded that they have staggered boards).
[23] In June 2024, U.S. Court of Appeals for the Second Circuit affirmed a December 2023 S.D.N.Y. ruling that certain closed-end funds adopted control share provisions in violation of the 1940 Act. *Saba Capital Master Fund, Ltd. v. BlackRock ESG Capital Allocation Trust*, No. 23-8104 (L) (2d Cir. June 26, 2024).

for shareholder proposed nominees in a contested election. In other words, CEFs are changing their director election voting standards such that when CEF directors are running for election unopposed, they need a mere plurality of the votes to get elected or re-elected, but when facing shareholder-nominated director candidates the CEF changes the standard to the much higher majority of the outstanding shares. This ensures that the CEF-nominated slate of directors remain as "holdover directors" even when they fail to reach that threshold and even when a shareholder nominated candidate received more votes than them.

Additionally, CEF shareholders must contend with the fact that, in certain cases, CEF directors sit on dozens, *even hundreds*, of other boards of funds managed by the same advisor. In recent filings, one CEF disclosed that its directors sat on the boards of between 68 and 98 other funds, while another CEF disclosed that its directors sat on the boards of ~210 other funds.[24] As the 1940 Act does not proscribe multi-board membership, CEF shareholders rely on annual meetings to express their views on whether fund management and directors are devoting sufficient attention to overseeing their investment.

Fundamental Shareholder Termination Right in Section 15(a)(3) of the 1940 Act Would be Severely Weakened

If approved, the Proposal would severely impede the ability of shareholders to exercise a fundamental CEF shareholder right under Section 15(a)(3) of the 1940 Act—the right to terminate, "at any time", the investment management agreement between the CEF and its investment adviser "by vote of a majority of the outstanding voting securities of such company."[25] In the words of the Staff, "Section 15(a)(3) confers independent authority on a fund's stockholders to terminate the investment advisory agreement at any time"[26] with the goal of "protect[ing] the interests and expectations of fund shareholders."[27]

Shareholders have historically exercised this "termination proposal" right in one of two ways: by submitting a termination proposal under Rule 14a-8 under the Exchange Act or by submitting a termination proposal as a "business" proposal pursuant to a CEF's organizational documents. Without annual meetings, shareholders will have no practical means of proposing, and having fellow shareholders, vote on a termination proposal, outside of certain limited contexts.[28]

---

[24] *See, e.g.,* BlackRock Innovation & Growth Term Trust, Definitive Proxy Statement, at 8-10 (filed April 25, 2024); Nuveen Real Asset Income & Growth Fund, Definitive Proxy Statement, at 9-16 (filed March 12, 2024).
[25] Section 15(a)(3) of the 1940 Act.
[26] The New Germany Fund, Inc., SEC No Action Letter, 1998 WL 229600 (May 8, 1998).
[27] *See* 68 FR 61720, 61721 (Oct. 29, 2003) (providing that "Section 15(a) of the [1940 Act] was designed to protect the interests and expectations of fund shareholders by requiring that they approve advisory contracts.").
[28] Special meetings cannot be said to offer any sort of viable substitute, as most CEFs impose burdensome requirements on shareholders requisitioning a special meeting, for example by mandating that the requesting shareholder(s) own at least 10% (and oftentimes significantly more) of the CEF's outstanding stock or, in other cases, don't allow shareholders to call a special meeting at all. This would effectively preclude almost all shareholders from calling a special meeting to put forth a termination proposal. And special meetings are rarely, if ever, called by funds unless there is a significant action being considered that requires shareholder approval. Further, a written consent solicitation cannot be said to function as a viable path in lieu of submitting a termination proposal at an annual meeting. This is because written consent is often forbidden or severely limited under a CEF's governing documents, and even if it were allowed, running a written consent solicitation seeking the votes of a

Thus, approval of the Proposal would, from a practical perspective, eliminate this fundamental tenet of the 1940 Act, further weakening shareholder protections, including those that NYSE claims support the Proposal.

NYSE Fails to Meet the Burden for Commission Approval

Section 6(b)(5) of the Exchange Act requires, under its rules governing national listing exchanges such as the NYSE, that the rules of the applicable exchanges be designed "to protect investors and the public interest." Rule 19b-4, which governs an exchange's proposed rule change, requires that a rule change must "not significantly affect the protection of investors or the public interest." The burden to demonstrate that a rule change is consistent with securities laws is on the NYSE. "A mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient."[29] We believe the NYSE has not met this burden.

Removing the most fundamental of shareholder rights does not protect investors or the public interest. It does the opposite, as outlined in this letter. Further, the NYSE fails to offer any explanation as to why or how the Proposal would protect investors or the public interest. NYSE is attempting to argue that *removing* a protection that CEF investors have had for the better part of a century is somehow consistent with and furthers the objective of protecting those investors.

To reiterate, it is the NYSE's burden to demonstrate to the Commission that the proposed rule change is consistent with the applicable rules of the Exchange Act, including by demonstrating that the Proposal would "protect investors and the public interest." It has not done so and the Proposal should be disapproved.

Conclusion

In sum, the Proposal does not further the protection of investors or the public interest, in fact it undercuts both and would upend and represent a severe blow to the CEF shareholder rights landscape. For the foregoing reasons, we strongly believe that the Proposal should not be approved.

We appreciate the opportunity to provide these comments. We would be pleased to respond to any inquiries the Commission or its Staff may have regarding this letter or if we can be of further assistance in this matter. Please do not hesitate to contact me by email at Paul.Roth@srz.com.

Respectfully submitted,

---

majority of the outstanding securities of a CEF outside of an annual meeting would be an exceptionally time consuming and costly endeavor that few if any shareholders would have the wherewithal to undertake. And this would be compounded by the fact that many CEFs refuse to turn over shareholder lists, making a shareholder-run solicitation even more difficult.

[29] 17 C.F.R. § 201.700(b)(3).

SCHULTE ROTH & ZABEL LLP

/s/ Paul N. Roth

Paul N. Roth
Founding Partner Emeritus, of Counsel

cc: **Marc E. Elovitz**, Partner (Marc.Elovitz@srz.com)
Ele Klein, Partner (Ele.Klein@srz.com)
Michael S. Didiuk, Partner (Michael.Didiuk@srz.com)