Bulldog Investors, LLC., 250 Pehle Avenue, Suite 708, Saddle Brook, NJ 07663 //201-556-0092

To: The Staff of the Division of Investment Management

From: Phillip Goldstein, Managing Partner, Bulldog Investors, LLP

Re: SR-NYSE-2024-35 - 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

Date: July 30, 2022

The NYSE proposes to exempt registered closed-end funds from a requirement to hold annual shareholder meetings, a change that would disenfranchise shareholders. The proposal does not say how this change will benefit shareholders or why the NYSE decided to propose it. Having lost a series lawsuits on voting so-called "control shares" owned by large shareholders, we surmise that the closed-end management industry lobbied the NYSE to do its dirty work by eliminating annual meetings altogether. As Bernoulli said about Isaac Newton's anonymously submitted solution to Bernoulli's challenge to solve a mathematical problem, "*Tanquam ex ungue leonem*," or "I recognize the lion by his claw."

The NYSE's proposal is based upon the faulty premise that because the Investment Company Act of 1940 requires CEFs to put certain extraordinary matters to a shareholder vote, it permits shareholders to be divested of their age-old right to vote on the election of directors and proposals submitted by shareholders at annual meetings. As explained below, it is not plausible that the 1940 Congress would have countenanced diminishing the basic voting rights of shareholders as a tradeoff for the additional protections in the ICA like the ability to vote on certain enumerated matters. Therefore, if the Staff cared about protecting shareholders of CEFs, it would summarily reject the NYSE's ill-conceived and audacious proposal as contrary to the policy and purposes of the ICA. However, in light of the Staff's disgraceful withdrawal of the Boulder Letter, (obviously at the behest of fund managers), which correctly held control share provisions to be illegal, and its failure to reinstate the Boulder Letter despite court after court endorsing its reasoning, we infer that the Staff has become a captive of the fund industry, i.e., an ally of the fund industry rather than a protector of investors.[1] Consequently, despite broad opposition by CEF investors and others to the NYSE's proposed rule change, we would not be surprised if the Staff approves it, perhaps with some modest CYA tweaking to deflect public denunciation.

In its application, the NYSE correctly lists "a number of material matters with respect to which the 1940 Act requires registered investment companies, including CEFs, to obtain

[1] Regulatory capture occurs when a regulatory agency becomes more concerned with promoting the interest of the very industry it is charged with regulating than the public it is charged to protect.

shareholder approval." It then concludes: "In light of the above-described significant statutory protections under the 1940 Act provided to the shareholders of CEFs, for which there are no parallel legal protections for the shareholders of public operating companies, the Exchange believes that it is appropriate to exempt CEFs from the annual shareholder meeting requirements of Section 302.00 of the Manual." That is a *non sequitur*. Nothing in the ICA suggests the possibility of a tradeoff between the fundamental right of shareholders to elect directors and vote on shareholder proposals at annual meetings and the additional specified matters for which approval by shareholders is required. In other words, the investor protections provided in the ICA are *in addition to* the fundamental right of shareholders to elect directors and vote on shareholder proposals annually, *not in lieu of* it.

The main purpose of annual meetings is to allow shareholders to elect directors who are responsible for the oversight of a company and its strategic direction. In addition, shareholders may be asked to vote on matters proposed by management or by other shareholders. "The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests….[W]hether the vote is seen functionally as an unimportant formalism, or as an important tool of discipline, it is clear that it is critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own." *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988). The 1940 Congress unquestionably understood that principle when it adopted the ICA, and it is still true today.

Contrary to the 1940 Congress' understanding, the intended effect of the NYSE's proposal is to entrench directors of CEFs for life, thereby eliminating the only effective means for shareholders to hold directors accountable. It does not take a great deal of imagination to guess how Congress would have reacted to such a proposal.

We expect the Staff to rely on *John Nuveen & Co. Inc.* (pub. avail. Nov. 18, 1986), a no-action letter in which it took the position that the ICA is ambiguous as to whether it requires annual shareholder meetings for CEFs because Section 16 does not explicitly say so and concluded that the necessity for annual meetings is subject only to state law. We contend that that the *Nuveen* analysis was, to be charitable, less than thorough, and therefore led to an incorrect conclusion for the following reasons.

1. *Nuveen* ignores the interpretive mandate of Sections 1(b)(2) and (3) of the ICA "that the policy and purposes of this title, in accordance with which the provisions of this title *shall be interpreted*, are to mitigate and, so far as is feasible, to eliminate [these] conditions: (2) "when investment companies are organized, operated, managed, or their portfolio securities are selected, in the interest of directors, officers, investment advisers, depositors, or other affiliated persons thereof… rather than in the interest of all classes of such companies' security holders; and (3) "when investment companies issue securities containing inequitable or discriminatory provisions, or fail to protect the preferences and privileges of the holders of their outstanding securities." Congress included this

interpretive directive to prevent fund insiders from exploiting any purported ambiguities in the ICA for their own benefit. Specifically, it prevents the elimination of annual meetings by successfully lobbying state legislators, the NYSE, or the SEC. (Emphasis added.)

2. *Nuveen* also ignores the finding in Section 1(a)(5) that "the activities of such companies, extending over many States, their use of the instrumentalities of interstate commerce and the wide geographic distribution of their security holders, make difficult, if not impossible, effective State regulation of such companies in the interest of investors." This language euphemistically presumes that most state legislators only want to protect investors and face no conflicts in regulating funds to achieve that objective. Yet, it is abundantly clear that states compete for the revenue generated by fund registration fees, leading to lobbying by fund managers and a race to the bottom with respect to investor protection.[2] And, as the Staff well knows, the ICA has not prevented some states from trying to lure funds to register by authorizing boards to take actions that impair the voting rights of shareholders. Hence the need for the ICA. As the Second Circuit Court of Appeals noted in *Brown v. Bullock,*[3] "It is…unreasonable to suppose that Congress would have wished to permit its purpose to protect investors in all investment companies…to be frustrated if a particular state of incorporation should be satisfied with lower standards of [investor protection] than those prevailing generally."

3. In relevant part, Section 18(i) of the ICA states that "every share of stock hereafter issued by a registered management company…shall be a voting stock and have equal voting rights with every other outstanding voting stock." Section 2(a)(42) defines a "voting security" as "any security presently entitling the owner or holder thereof to vote for the election of directors of a company." It adds: "The vote of a majority of the outstanding voting securities of a company means the vote, at *the* annual or *a* special meeting of the security holders of such company duly called, (A) of 67 per centum or more of the voting securities present at such meeting, if the holders of more than 50 per centum of the outstanding voting securities of such company are present or represented by proxy; or (B) of more than 50 per centum of the outstanding voting securities of such company, whichever is the less." (Emphasis added.) By distinguishing between "the" annual meeting and "a" special meeting, Congress indicated that it expected CEFs to hold annual shareholder meetings. *Nuveen* did not consider this point.

4. Section 15(a)(3) of the ICA provides shareholders of a CEF with the right to vote to terminate its investment advisory agreement "at any time." According to Section 2(a)(42), such a vote must occur at "*the* [CEF's] annual or *a* special meeting." (Emphasis added.) Absent a requirement for CEFs to hold an annual meeting, that right would be impossible

[2] See *Liggett v. Lee*, 288 U.S. 517, 557-60 (1932) ("Lesser States, eager for revenue derived from that traffic in charters[,] had removed safeguards from their own incorporation laws…. The race was not one of diligence but of laxity…. [T]he great industrial States yielded in order not to lose wholly the prospect of the revenue and control incident to domestic incorporation.")

[3] 294 F.2d 415 (2d Cir. 1961).

to exercise and therefore, meaningless. In addition, Section 15(a)(2) authorizes shareholders of a CEF to approve "at least annually" the continuation of its investment advisory agreement, suggesting that Congress intended CEFs to conduct annual meetings. *Nuveen* did not consider either of these points.

5. *Nuveen* includes a footnote, the first paragraph of which reads as follows:

> Section 16(a) of the Act provides that directors of a registered investment company must be elected by shareholders "at *an* annual *or* a special meeting..." (Emphasis added by the Staff). The use of "an," instead of, for example, "the," and the use of the disjunctive "or," suggest that Congress did not intend the Act to impose an annual meeting requirement. On the other hand, the opposite intent might be inferred from the fact that Section 16(a) permits an investment company to have classes of directors subject to the requirement that no class have a term for more than five years and that at least one term expire each year.

The first sentence of that footnote does not reflect the complete context of Section 16(a). Here is the applicable sentence of Section 16(a) in full:

> No 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, at an annual or a special meeting duly called for that purpose; except that vacancies occurring *between such meetings* may be filled in any otherwise legal manner if immediately after filling any such vacancy at least two-thirds of the directors then holding office shall have been elected to such office by the holders of the outstanding voting securities of the company at such an annual or special meeting. (Emphasis added.)

A more reasonable inference is that the phrase "between such meetings" indicates an expectation that annual meetings will be held. An even stronger inference should be drawn in favor of annual meetings than the one contained in the footnote's last sentence because eliminating annual meetings means there will be no term at all for directors. That is, the initial directors, who are typically selected by management, will be "directors for life." Surely, that is contrary to Congress' intent.

6. The second paragraph of the same footnote in *Nuveen* reads as follows:

> A related provision of the Act, Section 32(a), is also ambiguous regarding whether Congress intended the Act to require investment companies to hold shareholders' meetings annually. Section 32(a)(2) states that the selection of an independent public accountant shall be submitted for ratification or rejection "at the next succeeding annual meeting of stockholders *if such meeting be held...*" (emphasis added). On the other hand, this section also makes provision for filling vacancies of accountants "occurring between annual meetings," suggesting that Congress assumed that all funds would hold shareholders' meetings annually.

A fuller reading of Section 32(a) adds weight to the conclusion that the CEFs are required to hold annual meetings. Specifically, Section 32(a)(1) states: "It shall be unlawful for any [CEF] to file with the Commission any financial statement signed or certified by an independent public accountant, unless such accountant shall have been selected at a [board] meeting held…before the annual meeting of stockholders in that year...." (Emphasis added). The phrase "at the next succeeding annual meeting of stockholders *if such meeting be held...*" expressly acknowledges that annual meetings are the norm. The italicized phrase may have been intended to allow for extraordinary developments like the merger or dissolution of a fund before its next annual meeting, not a license to forgo the next annual meeting. In sum, the most reasonable interpretation of Section 32(a) is that Congress expected every CEF to hold an annual meeting barring extraordinary circumstances**.**

7. Lastly, Sections 18(a)(1)(C) and (2)(C) entitle the holders of senior securities of a CEF to elect a minimum of two, and in certain cases, a majority of the members of the board of directors. These provisions would be meaningless in the absence of annual meetings.

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To reiterate, Congress' rationale for adopting the ICA was its finding that the states had failed to protect the interests of investors. We can now add to states like Maryland, Delaware, and Massachusetts, the NYSE, and those staff members of the SEC's Division of Investment Management who hope to be employed by, or advise, fund managers in the future. At a minimum, the latter should recuse themselves from consideration of the proposed rule.

To conclude, it is inconceivable that the 1940 Congress believed that the ICA would allow a "directors for life" model of CEF governance. For the above reasons, and in particular, *Nuveen's* cramped reading of the ICA and its failure to apply the interpretive mandate of Sections 1(b)(2) and 1(b)(3) of the ICA in its analysis, the proposed rule should not be approved. Moreover, *Nuveen* should be rescinded, and its flawed conclusion reversed.

If the Staff actually cared about protecting shareholders of CEFs, the NYSE's proposal would be dead on arrival. The unwarranted withdrawal of the Boulder letter suggests otherwise. In that event, the silver lining will likely be a lawsuit in which a federal court will be asked to determine if the ICA permits "directors for life" by allowing CEFs to forego annual meetings entirely, a lawsuit in which the SEC will no longer be able to claim *Chevron* deference.

Very truly yours,

Phillip Goldstein
Managing Partner

SEC No-Action Letters, John Nuveen & Co. Inc., Securities and Exchange Commission, (Nov. 18, 1986)

SEC No-Action Letters
WSB File No. 120186019

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86-87 CCH Dec., FSLR ¶78,383, John Nuveen & Co. Inc.

86-87 CCH Dec., FSLR ¶78,383

Headnote

Investment Companies--Directors--Elections--State Law.--
Applicable state law governs the timing of shareholders' meetings to elect investment company directors in situations other than the two set forth in Section 16(a) of the Investment Company Act. This deference to state law is consistent with the regulatory structure intended by Congress under which investment companies are incorporated and operated pursuant to state law subject to certain federal requirements.
Investment Companies--Directors--Selection of Accountant.--
Mutual funds incorporated in Maryland could file financial statements with the SEC certified by an independent accountant selected at a board of directors meeting held more than 30 days before the annual meeting of shareholders. However, the independent directors of funds incorporated in Minnesota, which does not require annual shareholder meetings, could not select an independent accountant at the regular board meeting in January of each year since Section 32(a)(1) of the 1940 Act expressly calls for selection of the accountant at a "meeting held within thirty days before or after the beginning of the fiscal year or before the annual meeting of stockholders .--.--.".
See FSLR ¶49,643, "Investment Companies--Reports; Records; Liabilities"

John Nuveen & Co. Inc.

Public Availability Date: November 18, 1986

WSB File No. 120186019

Fiche Locator No. 1134E3

WSB Subject Categories: 136

References:

Investment Company Act of 1940, Section 16(a)

Investment Company Act of 1940, Section 32(a)

_____Washington Service Bureau Summary_____

Headnote

...The staff will not recommend Commission action under Investment Company Act section 32(a) against certain mutual funds incorporated in the state of Maryland ("Maryland funds"), of which this company is the principal underwriter, if the Maryland funds file with the Commission financial statements signed or certified by

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an independent accountant selected at a board of directors meeting held more than 30 days before the annual meeting of shareholders. The staff states that it is not clear from the statute or from legislative history whether the 30-day period described in section 32(a)(1) applies only to fund's fiscal year or to both a fund's fiscal year and its annual meeting. The staff is unable to assure the company that it will not recommend Commission action under section 32(a) against certain mutual funds incorporated in Minnesota ("Minnesota funds") of which the company is the principal underwriter if the disinterested directors of the Minnesota funds select an independent accountant more than 30 days before or after the funds' fiscal year-end. The staff advises the company that although the staff has declined to take a no-action position with respect to the Minnesota funds, the arguments presented by the company may support an application for an exempting order under Investment Company Act section 6(c). In this regard, the staff refers the company to Release No. IC-14492, dated April 30, 1985. The staff expresses no view as to whether it would support such an application. The staff also states its views on the recurring question of whether Investment Company Act section 16(a) requires investment companies to hold shareholders' meetings to elect directors on an annual basis, irrespective of the requirements of applicable state law. The staff states that section 16(a) makes clear that Congress intended the Investment Company Act to require investment companies to hold an annual or special meeting to elect directors in two situation: 1) to elect the initial board of directors, and 2) to elect directors to fill existing vacancies on the board in the event that less than a majority of directors were elected by shareholders. The staff is of the view that in other than these two specific situations, applicable state law governs the timing of shareholders' meetings to elect investment company directors. The staff notes that this view is consistent with the regulatory structure intended by Congress whereby investment companies are incorporated and operate pursuant to state law subject to certain requirements imposed by the Investment Company Act.

[INQUIRY LETTER]

JOHN NUVEEN & CO. INC.

October 06, 1986

Securities and Exchange Commission

450 5th Street, N.W.

Washington, D.C. 20549

Attention: Division of Investment Management

Re: *Request for "No-Action" Letter - 1940 Act/Section 32(a)(1)*

Ladies and Gentlemen:

On behalf of the mutual funds for which John Nuveen & Co. Incorporated ("Nuveen") acts as principal underwriter, we hereby respectfully request that the Staff, with respect to those funds incorporated in the State of Maryland, confirm that Section 32(a)(1) of the Investment Company Act of 1940, as amended (the "Act"), permits a registered investment company to file with the Commission financial statements signed or certified by an independent accountant selected at a board of directors meeting held more than 30 days before the annual meeting of shareholders or, in the alternative, and with respect to those funds incorporated in the State of Minnesota, that the Staff will not recommend enforcement action to the Commission if such funds continue to file financial statements signed or certified by an independent accountant so selected.

FACTS

Nuveen is sponsor and principal underwriter of Nuveen Municipal Bond Fund, Inc., Nuveen Tax-Exempt Money Market Fund, Inc., Nuveen Tax-Free Reserves, Inc., Tax-Free Accounts, Inc. and Nuveen California Tax-Free Fund, Inc. (collectively, the "Maryland Funds"), as well as Nuveen Tax-Free Bond Fund, Inc., Nuveen Insured Tax-Free Bond Fund, Inc. and Nuveen Tax-Exempt Money Market Fund, Inc. (collectively, the "Minnesota Funds") (the Maryland Funds and the Minnesota Funds collectively referred to herein as the "Funds"), all

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registered open-end management investment companies under the Act. Nuveen Advisory Corp., a wholly-owned subsidiary of Nuveen, acts as investment adviser to the Funds.

The Maryland Funds were incorporated under the laws of the State of Maryland. The oldest Maryland Fund, Nuveen Municipal Bond Fund, Inc., was incorporated on October 8, 1976; the newest Maryland Fund, Nuveen California Tax-Free Fund, Inc. was incorporated on October 3, 1985. The Minnesota Funds were each incorporated under the laws of the State of Minnesota on July 14, 1986. Registration statements for the Minnesota Funds have been filed with the Commission, but, as of the date hereof, have not been made effective by the Commission.

The Maryland Funds, which by state law are required to hold an annual meeting of shareholders, hold such meetings in April of each year. The immediately preceding regularly scheduled board of directors meeting for each Maryland Fund is convened annually in January, at which meeting an independent accountant for each such Maryland Fund is selected by the vote, cast in person, of a majority of those members of the board who are not interested persons of such Fund. The Minnesota Funds are not required by state law to persons of such Fund. The Minnesota Funds are not required by state law to hold annual meetings of shareholders but may do so every two or three years. Each Minnesota Fund's board of directors currently is scheduled to similarly select an independent accountant at its regular board of directors meeting each January. The Maryland Funds hold annual shareholders' meetings on the same day in April each year. The Minnesota Funds, in years in which annual meetings are held, will hold such meetings on the same date in April as the Maryland Funds. The regular January board of directors meeting for each Fund is held on the same day. Each Fund is governed by an identical board of directors.

Nuveen Municipal Bond Fund, Inc., Nuveen Tax-Exempt Money Market Fund, Inc. and Nuveen Tax-Free Reserves, Inc. have a fiscal year-end of September 30. Nuveen Tax-Free Reserves, Inc. and Tax-Free Accounts, Inc. have a fiscal year-end of June 30. Nuveen Tax-Free Bond Fund, Inc., Nuveen Tax-Free Insured Bond Fund, Inc. and Nuveen Tax-Free Money Market Fund, Inc. have a fiscal year-end of November 30, April 30 and February 28, respectively.

DISCUSSION

Section 32(a)(1) of the Act makes it unlawful for any registered management company to file with the Commission any financial statement signed or certified by an independent accountant unless such accountant shall have been selected at a meeting held within 30 days before or after the beginning of the fiscal year *or before the annual meeting of shareholders in that year* by the vote, cast in person, of a majority of those members of the board of directors who are not interested persons of such registered company. The language is ambiguous as to whether the "30 days" modifies only "before or after the beginning of the fiscal year" or whether "30 days" also modifies "before the annual meeting of shareholders."

We are of the view that said Section 32(a)(1) permits such filing by an independent accountant selected by the proper vote either (1) at a meeting held within 30 days before or after the beginning of a Fund's fiscal year (February 28, April 30, June 30. September 30 or November 30 in the case of the Funds) or (2) at a meeting held before the annual meeting of shareholders in that year. Since the Maryland Funds select independent accountants at the board meeting held in January each year, which is the regular board meeting immediately preceding the annual shareholders' meeting, we feel that the Maryland Funds are in compliance with Section 32(a)(1).

This opinion is supported by the Commission in Investment Company Act Release No. 6336 (February 2, 1971) (the "Release") which was issued shortly after the Act was amended to include Section 32(a)(1), among others. The Release was issued to advise the boards of directors of registered investment companies on ways to comply with the new requirements of the Act in 1971, the year the amendments took effect. In the Release, the Commission stated that:

"Many registered investment companies may not have a board of directors complying with amended Section 10 requiring a board of directors comprised of 60% or less of interested persons *before* their 1971 annual meetings or within 30 days

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before or after the beginning of their present fiscal year, and, therefore, may be unable to meet the requirements of amended Section 32(a) with respect to financial statements filed on or after December 14, 1971 the date of effectiveness of the 1970 amendments to the Act."

The above language indicates that the Commission interpreted new Section 32(a) (now Section 32(a)(1)) to mean that the "30 days" applies only to "before or after the beginning of the fiscal year" without also applying to "before the annual meeting of stockholders." Such interpretation is rational when one considers the time needed to prepare for the annual shareholders meeting after the board has met to establish a date and agenda therefor. After such board meeting, proxy statements must be printed, filed with the Commission and mailed to shareholders. Time for shareholders to return their proxies must also be allowed. Although conceivably the entire process could be completed in 30 days, it is more likely, and more practical in the case of a fund with thousands of shareholders, to allow more than 30 days to complete a solicitation.

CONCLUSION

In the light of the foregoing, we request confirmation, with respect to the Maryland Funds, that Section 32(a)(1) of the Act permits a registered investment company to file with the Commission financial statements signed or certified by an independent accountant selected at the regular board of directors meeting immediately preceding the annual shareholders' meeting held in that year. In the alternative, and with respect to the Minnesota Funds which are not required to hold annual meetings, we respectfully request that the Staff take a no-action position if the board of directors of each of the Funds continues to select an independent accountant by a vote cast in person of a majority of those members who are not interested persons of such Fund at the regular board meeting in January of each year, rather than 30 days before or after the fiscal year-end (or 30 days before the annual shareholders' meeting held in April of each year for the Maryland Funds). In support of this request, we submit that the members of the boards of directors are the same for each Fund, that each Fund has and has had since its respective incorporation the same independent accountant and that the regular boards of directors meetings and annual shareholders' meetings (when convened in the case of the Minnesota Funds) are held on the same day for all Funds. It is logical and practical for the boards, which are made up of identical members, to meet on one day to select an independent accountant for all the Funds. Requiring the Funds to change the time of the selection of an independent accountant at this point would result in confusion and duplication of effort due to the extra meetings required because of varying fiscal year ends. So long as the constitution of each board complies with Section 10 of the Act, we feel that the intent of Section 32(a)(1) is satisfied, *i.e.*, that an independent accountant is selected by those members of the board of directors who are not interested persons.

Prior to any adverse response to this letter or, if you have any questions, please contact the undersigned at (312) 917-7947 or John E. McTavish, General Counsel, at (312) 917-7945.

Very truly yours,

JOHN NUVEEN & CO. INCORPORATED

Jane E. Edstrom

Associate Counsel

[STAFF REPLY LETTER]

Our Ref. No. 86-507-CC

John Nuveen & Co. Incorporated

File No. 801-4535

RESPONSE OF THE OFFICE OF Chief Counsel

DIVISION OF INVESTMENT MANAGEMENT

In your letter of October 6, 1986, you request that, with respect to funds of John Nuveen & Co. Incorporated ("Nuveen") which are incorporated in the State of Maryland ("Maryland funds"), the staff interpret Section 32(a)

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of the Investment Company Act of 1940 ("Act") to permit the Maryland funds to file with the Commission financial statements signed or certified by an independent accountant selected at a board of directors meeting held more than 30 days before the annual meeting of shareholders, as described in your letter. You argue that, although Section 32(a) is ambiguous, it should be interpreted to mean that the independent accountant must be selected within 30 days before or after the fiscal year-end or before (but not necessarily within 30 days of) the annual meeting. It is not clear from the statute or the legislative history whether the 30-day period described in Section 32(a)(1) applies only to a fund's fiscal year or to both a fund's fiscal year and its annual meeting. However, we would not recommend any enforcement action to the Commission against the Maryland funds under Section 32(a) of the Act if the Maryland funds proceed as described in your letter.

You also request that, with respect to Nuveen funds which are incorporated in the State of Minnesota and which will not hold annual shareholder meetings ("Minnesota funds"), the staff take a no-action position if the disinterested directors of each of the Minnesota funds continue to select an independent accountant at the regular board meeting in January of each year, rather than 30 days before or after the fiscal year-end. The language of Section 32(a)(1) explicitly calls for the disinterested directors of a fund to select the independent public accountant "at a meeting held within thirty days before or after the beginning of the fiscal year...." Accordingly, we are unable to assure you that we would not recommend any enforcement action to the Commission against the Minnesota funds under Section 32(a) of the Act if the disinterested directors of the Minnesota funds select an independent public accountant more than 30 days before or after the fiscal year-end, as described in your letter. Although we decline to take a no-action position with respect to the Minnesota funds, the arguments presented in your letter may support an application for an exemptive order under Section 6(c) of the Act. Of course, we express no view in this context as to whether the Division would support such an application. *See* Investment Company Act Rel. No. 14492 (Apr. 30, 1985).

Your letter also raises an issue regarding annual shareholders' meetings under the Act. You state that because Minnesota law does not require annual shareholders' meetings, the Minnesota funds will not hold such meetings. This statement indirectly raises the recurring question of whether Section 16(a) of the Act requires investment companies to hold shareholders' meetings to elect directors (or those persons holding equivalent positions) on an annual basis, irrespective of the requirements of applicable state law. While your letter does not request an interpretation on this issue, we would like to take this opportunity to state our views on this matter.

The specific language of Section 16(a) of the Act makes clear that Congress intended the Act to require investment companies to hold an annual or special meeting to elect directors in two situations: (1) to elect the initial board of directors; and (2) to elect directors to fill existing vacancies on the board in the event that less than a majority of directors were elected by shareholders. [1] In either case, the Act requires that a shareholders' meeting must be held, irrespective of the requirements, or lack of requirements, of applicable state law. Absent either of these situations, however, the language of Section 16(a) is ambiguous regarding whether, as a matter of federal law, investment companies must hold shareholders' meetings annually to elect directors, [2] and the relevant legislative history is not dispositive on this question. [3] In light of this ambiguity, the interpretive issue presented is whether (1) Congress intended the Act to require investment companies to have annual shareholders' meetings to elect directors, notwithstanding that the specific language of the Act requires such meetings only in two situations, or (2) Congress intended applicable state law to govern the timing of shareholders' meetings to elect directors in situations other than the two set forth in the Act. In our opinion, the latter view is preferable because it is consistent with the regulatory structure intended by Congress whereby investment companies are incorporated and operate pursuant to state law subject to certain requirements imposed by the Act. [4] Accordingly, in situations other than the two addressed specifically in Section 16(a), we believe that applicable state law governs the timing of shareholders' meetings to elect investment company directors. [5]

As we agreed, this response will be made public immediately.

Thomas P. Lemke

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Nov 1, 2019 from Cheetah™

Chief Counsel

Footnotes

1 Section 16(c) excepts from these requirements certain common-law trusts existing in 1940, but includes other provisions to allow the beneficial owners of these trusts to remove the trustees.

2 Section 16(a) of the Act provides that directors of a registered investment company must be elected by shareholders "at *an* annual *or* a special meeting..." (emphasis added). The use of "an," instead of, for example, "the," and the use of the disjunctive "or," suggest that Congress did not intend the Act to impose an annual meeting requirement. On the other hand, the opposite intent might be inferred from the fact that Section 16(a) permits an investment company to have classes of directors subject to the requirement that no class have a term for more than five years and that at least one term expire each year.

A related provision of the Act, Section 32(a), is also ambiguous regarding whether Congress intended the Act to require investment companies to hold shareholders' meetings annually. Section 32(a)(2) states that the selection of an independent public accountant shall be submitted for ratification or rejection "at the next succeeding annual meeting of stockholders *if such meeting be held...*" (emphasis added). On the other hand, this section also makes provision for filling vacancies of accountants "occurring between annual meetings," suggesting that Congress assumed that all funds would hold shareholders' meetings annually.

3 At the Senate hearings on the bill that ultimately became the Act, David Schenker, Chief Counsel to the Investment Trust Study, stated that "if the board of directors which was elected by the stockholders is going to change substantially in complexion, then the stockholders ought to have something to say about who shall be the new directors." *Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 76th Cong., 3d Sess. 254 (1940). This suggests that, in enacting Section 16, Congress was concerned mainly with preventing changes in control of funds without shareholder approval, rather than ensuring the occurrence of periodic shareholders' meetings. In addition, the title of Section 16 -- "Changes in Board of Directors" -- also supports this interpretation. However, Mr. Schenker also stated that "Section 16 provides, in substance, that you cannot fill more than one-third of the board of directors between annual meetings," *id.* at 120, implying that shareholders' meetings would be held on an annual basis.

4 In *Burks* v. *Lasker*, 441 U.S. 471 (1979), Justice Brennan stated that federal regulation of investment companies and advisers is similar to federal regulation of corporate directors in that "congressional legislation is generally enacted against the background of existing state law." *Id.* at 478. In addition, in his concurring opinion, Justice Stewart stated that when the Act is silent on a question, "the inquiry... must turn to the relevant state law." *Id.* at 487.

5 In the past the staff has not objected when investment companies in corporate form changed to trust form and, in reliance on state law, did not hold annual meetings. *See, e.g.*, Lutheran Brotherhood Money Market Fund, Inc. (pub. avail. Apr. 11, 1983). However, while the staff has not held in the past that the Act clearly required annual shareholders' meetings, in a footnote to the 1966 Commission study of the mutual fund industry, it did state that the Commission has not objected in certain instances when a company's annual meeting was justifiably postponed, "despite the requirement of section 16(a) that directors of an investment company be elected annually." *Report of the Securities & Exchange Commission on the Public Policy Implications of Investment Company Growth* 335 n. 37 (1966).

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