STRADLEY RONON

Stradley Ronon Stevens & Young, LLP
2005 Market Street, Suite 2600
Philadelphia, PA 19103
Telephone 215.564.8000
Fax 215.564.8120
www.stradley.com

July 30, 2024

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

Re: **File No. SR-NYSE-2024-35**
Notice of Filing of Proposed Rule Change Proposes to Amend Section 302.00 of the NYSE Listed Company Manual to Exempt Closed-End Funds from the Requirement to Hold Annual Shareholder Meeting (Release No. 34-100460)

Dear Ms. Countryman:

Stradley Ronon appreciates the opportunity to comment on the New York Stock Exchange's (NYSE) proposed amendments to Section 302.00 of the NYSE Listed Company Manual that would exempt closed-end funds listed on the NYSE from holding an annual meeting.[1] Our firm represents many closed-end funds and closed-end fund independent directors. We are writing to support the proposed amendments to eliminate the NYSE's annual meeting requirement for listed closed-end funds because it is unnecessary to protect closed-end fund investors, costs our clients millions of dollars in expenses and has been abused by certain shareholder activists to harm long-term closed-end fund investors.

As demonstrated by the data contained in the Investment Company Institute's letter in the comment file for SR-NYSE-2024-35 (the "ICI letter"), the annual meeting requirement is creating an end-run around the very protections the Investment Company Act of 1940 ("1940

Act") is intended to provide and allowing the very harms that Congress and the Securities and Exchange Commission (SEC) analyzed when formulating the 1940 Act. In particular, we note the Voya Prime Rate Trust case study outlined in the ICI letter, which clearly demonstrates that activist investors are engaging in the very abuses the 1940 Act was designed to prevent. Our

[1] Notice of Filing of Proposed Rule Change Amending Section 302.00 of the NYSE Listed Company Manual to Exempt Closed-End Funds Registered Under the Investment Company Act of 1940 From the Requirement to Hold Annual Shareholder Meetings, Exchange Act Release No. 100460, 89 Fed. Reg. 56447 (July 9, 2024), *available at* https://www.govinfo.gov/content/pkg/FR-2024-07-09/pdf/2024-15037.pdf.

clients have faced similar abuses by activist investors who, for example, have sought to place nominally "independent" trustees on closed-end fund boards that are interested persons of the activist investor (e.g., the principal portfolio manager of the activist investor) and whose service on the board reflects a significant conflict of interest between the fiduciary duties of the portfolio manager to the activist and the fiduciary duty of the director to the closed-end fund. Among other conflicts, activist investor trustees may obtain material non-public information or other confidential information from the closed-end fund that they can't "unhear." These conflicts can chill discussion and otherwise reduce the effectiveness of the board.

We echo the concern raised in the ICI letter that this abusive activism is rendering unsustainable the listed closed-end fund market, with no new listed closed-end funds launching last year at a time when the unlisted closed-end fund market is booming and exchange-traded funds (ETFs) show no sign of slowing down.[2] This development is to the detriment of long-term retail closed-end fund shareholders, many of whom are retirees, small business owners and others seeking long-term capital appreciation and a reliable income stream. For such investors, shareholder activist strategies represent a clear harm, and the limits in the listed closed-end fund market represent a risk that such investors will be unable to have their investing needs addressed.

Among all investment companies registered with the SEC under the 1940 Act, which includes mutual funds, ETFs, unlisted closed-end funds, unit investment trusts, and money market funds, only listed closed-end funds are required to hold an annual meeting. This annual meeting requirement is not derived from federal or state law, but rather is a vestige of exchange listing standards that predates the 1940 Act and reflects the bygone thinking that investment companies—which were then in their infancy and not well understood—should be treated as generally akin to operating companies.[3] Since then, Congress passed the 1940 Act, which explicitly enumerates the instances in which voting is required in lieu of imposing annual

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[2] While the number of ETFs launched between 2022 and 2023 increased from 2,847 to 3,108 and the number of non-traditional closed-end funds, inclusive of unlisted closed-end funds and business development companies, launched between 2022 and 2023 increased from 293 to 322, the number of listed closed-end funds decreased between 2022 and 2023 from 427 to 402 with no new listed closed-end funds launching in 2023. *See* ICI, 2024 Investment Company Fact Book at 66, 70-71 & 76 (64th Ed, 2024), *available at* https://www.icifactbook.org/pdf/2024-factbook.pdf.

[3] The NYSE first began requiring annual meetings for operating companies in 1909, as a provision of individually negotiated listing agreements. *See* Special Study Group of the Committee on Federal Regulation of Securities, ABA Section of Business Law, *Special Study on Market Structure, Listing Standards and Corporate Governance*, 57 Bus. Law. 1487, 1497 (2002). The NYSE began listing investment companies in 1929, only after adopting special listing requirements that included annual financial reporting requirements for those investment companies. *See New York Stock Exchange to List Securities of Investment Trusts—Tentative Requirements Announced,* The Commercial & Financial Chronicle, Vol. 128, No. 3337, 3764-65 (June 8, 1929); *The Regulation of Management Investment Trusts for the Protection of Investors*, 46 Yale L. J. 1211, 1218 (1937). The special listing requirements assumed that an investment company would have an annual meeting, as financial reporting and annual meetings had become inextricably intertwined under the NYSE's governance requirements. *See* Douglas C. Michael, *Untenable Status of Corporate Governance Listing Standards Under the Securities Exchange Act*, 47 Bus. Law. 1461, 1467-68 (1992). Given that the NYSE requirement first was applied to closed-end funds before the enactment of the 1940 Act, the necessity of the continued application of the annual meeting requirement to closed-end funds must be re-evaluated in light of the 1940 Act's protections.

meetings, and every major state where investment companies incorporate or organize has removed the annual meeting requirement.[4] We support eliminating the NYSE's annual meeting requirement for listed closed-end funds because it is superfluous to the requirements in the 1940 Act,[5] unnecessarily saddles closed-end fund shareholders with millions of dollars in expenses,[6] and has been misused to facilitate the very harms the 1940 Act sought to prevent. Accordingly, to protect long-term shareholder interests in a manner consistent with Congressional intent, we urge the SEC to adopt the NYSE's proposed rule change to end the annual meeting requirement for listed closed-end funds.

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Thank you for considering our comments. If you have any questions, please contact the below signatories:

- Bruce Leto at 215,654.8115 – bleto@stradley.com
- Sara Crovitz at 202.507.6164 – scrovitz@stradley.com

Very truly yours,

/s/ Stradley Ronon Stevens & Young, LLP

Stradley Ronon Stevens & Young, LLP

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[4] The vast majority of closed-end funds are organized under Delaware, Maryland or Massachusetts law, which do not require that registered investment companies, including closed-end funds, hold annual meetings. Some states, such as Maryland, required registered investment companies to hold annual shareholder meetings until the 1980s, when these requirements were eliminated. Currently, Maryland law permits investment companies registered under the 1940 Act to adopt charter and bylaw provisions that eliminate annual meetings, except in years that the 1940 Act requires an election of directors. *See* Section 2-501 of Maryland General Corporation Law. Massachusetts and Delaware law do not require annual shareholder meetings, as the statutes defer to an entity's organizational documents. This is indicated by the lack of an affirmative requirement under Chapter 182 of the Massachusetts General Laws and the Delaware Statutory Trust Act.

[5] As discussed further in ICI's comment letter in the comment file for SR-NYSE-2024-35, Congress debated including an annual meeting requirement in the 1940 Act, but decided that the harm that a controlling shareholder could cause by electing different trustees, who in turn would change the investment management contract or the fund's investment policies, was thought to be too great to retail shareholders, who generally invested based on a fund's investment strategy, relied on continuity of the fund's management, and who were statistically less likely to participate in annual meetings. *See* 76th Congress, 3rd Session, Hearings Before a Subcommittee of the Committee on Banking and Currency on S. 3580 – A Bill to Provide for the Registration and Regulation of Investment Companies and Investment Advisers, and For Other Purposes, Statement of Merrill Griswold, Chairman, Massachusetts Investors Trust of Boston at 504 (April 17, 1940). Instead, Congress enshrined specified governance protections in the 1940 Act that render an annual meeting and director elections superfluous, such as specified instances of shareholder election of directors, director independence requirements, and a "vote of a majority of the outstanding voting securities" (as defined in the 1940 Act) for specified governance and policy changes.

[6] *See* ICI, Analysis of Fund Proxy Campaigns: 2012-2019 at 2 (Dec. 2019), *available at* https://www.ici.org/system/files/attachments/19_ltr_proxyanalysis.pdf (finding that cost estimates across 145 proxy campaigns totaled $373 million in accrued costs).