



Letter from the Investment Company Institute

October 10, 2025

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

Re: *Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Exempt Closed-End Management Investment Companies Registered Under the Investment Company Act of 1940 That Are Listed as of or After May 20, 2025 From the Annual Meeting of Shareholders Requirement Set Forth in Exchange Rule 14.10(f) (Release No. 34-103824; **File No. SR-CboeBZX-2025-072**)*

Dear Ms. Countryman:

The Investment Company Institute¹ is writing in response to issues raised by the Securities and Exchange Commission (SEC) in its order instituting proceedings issued on September 2, 2025,² and to provide further information in support of Cboe BZX Exchange, Inc.'s (Cboe) proposed amendments to exempt newly listed closed end funds (CEFs) registered under the Investment Company Act of 1940 ("1940 Act") from the annual meeting requirement of shareholders set forth in Cboe Exchange Rule 14.10(f).³

¹ The [Investment Company Institute](https://www.ici.org) (ICI) is the leading association representing the asset management industry in service of individual investors. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage \$41.5 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 120 million investors. Members manage an additional \$9.7 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London.

² Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Exempt Closed-End Management Investment Companies Registered Under the Investment Company Act of 1940 that are Listed as of or after May 20, 2025 from the Annual Meeting of Shareholders Requirement Set Forth in Exchange Rule 14.10(f), Exchange Act Release No. 103824 (Sept. 2, 2025), *available at* www.sec.gov/files/rules/sro/cboebzx/2025/34-103824.pdf ("Order").

³ Notice of Filing of a Proposed Rule Change to Exempt Closed-End Management Investment Companies Registered Under the Investment Company Act of 1940 that are listed as of or after May 20, 2025 from the Annual

At the outset though, ICI would like to emphasize how approving the exchange's proposal will advance the directives laid out in the Presidential Executive Order (EO), *Democratizing Access to Alternative Assets for 401(k) Investors*.⁴ The quickest and most direct way to foster access in 401(k) plans to retail funds providing private market access is to approve and promote policies that encourage capital formation in listed CEFs. The closed-end structure of a listed CEF does not need to provide for daily investor redemptions, nor does it have to maintain a sleeve for portfolio liquidity to facilitate periodic redemptions. This allows listed CEFs to fully invest in their underlying investment strategies, even if those investment strategies focus on less liquid investments such as private assets. Further, listed CEFs can be purchased through self-directed brokerage accounts (also known as brokerage windows) available in many 401(k) plans.⁵ Thus, policies that encourage capital formation in listed CEFs will directly facilitate retail investor access to private assets in 401(k) plans.

The exchange's proposal before the SEC will promote the directives in the EO by reducing the ability of predatory activists to wage attacks on listed CEFs and encourage listed CEF sponsors to step back into the IPO market. Predatory activist campaigns, which exploit mandatory annual meeting requirements to undermine funds and their shareholders, have all but frozen the IPO market for listed CEFs. Just three listed CEFs have launched since the start of 2023.⁶ Meanwhile, over the same period, approximately 2,000 ETFs and more than 140 interval funds, tender offer funds, and unlisted business development companies (BDCs) have launched. A fundamental reason for the contrast between the IPO activity in these funds (specifically interval funds, tender offer funds, and unlisted BDCs) and the dormant IPO market for listed CEFs is the absence in the former of any annual meeting requirement, as this is the mechanism that predatory activists utilize to attack listed CEFs.

Under current market practices, CEFs launch with a full portfolio, meaning that a sponsor spends millions of dollars launching the product and does not expect to see a return on investment for a minimum of five years, on average. Sponsors are going to proceed cautiously before launching a listed CEF if an activist can use the annual meeting requirement as a pretext to attack a fund during a market downturn, with associated market-wide volatility and

Meeting of Shareholders Requirement Set Forth in Exchange Rule 14.10(f), Exchange Act Release No. 103166, 90 Fed. Reg. 24172 (June 6, 2025), available at www.govinfo.gov/content/pkg/FR-2025-06-06/pdf/2025-10283.pdf.

⁴ Executive Order, *Democratizing Access to Alternative Assets for 401(K) Investors* (Aug. 7, 2025), available at www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/.

⁵ Plan Sponsor Council of America, 67TH ANNUAL SURVEY OF PROFIT SHARING AND 401(K) PLANS, at Table 76 (2024) (reporting that 26.1 percent of all plans in its survey, and 45.2 percent of the largest plans, offered a self-directed brokerage window in 2023).

⁶ And the capital raised in 2024 was only approximately \$136 million.

price dislocations, and take control of the listed CEF.⁷ The ever present risk that an activist can come in and take over a fund whenever a high volatility market event occurs means that a sponsor is going to proceed cautiously with regard to putting millions of dollars of capital at risk of loss, as no one can predict when such an event will occur. This is not a hypothetical—it is exactly what happened in 2020 during the COVID-19 crisis,⁸ and again in 2022 when the Fed sharply raised interest rates to combat inflation.⁹ More recently, an activist appears to be in the process of taking over another listed CEF, the ASA Gold and Precious Metals Limited Fund, seizing on discounts present in late 2022 and 2023 that reflected the volatility in the gold market during that time.¹⁰

The desire for retail access to private markets in a 1940 Act regulated product, and the apt nature of the closed-end structure to provide that access, can be seen from the substantial growth over the past four years in other regulated CEFs, such as interval funds, tender offer funds, and BDCs. Assets of these funds have more than tripled over the past four years from \$140 billion at year-end 2020 to \$444 billion as of March 2025, and the number of these funds has increased from 241 to 410 over the same period. Listed CEFs provide a solution for two of the most common hurdles related to launching an unlisted product, namely distribution and ability of a model portfolio or target date fund to change allocation exposure, because listed CEF's exchange-listed nature allows easy investor access and secondary market liquidity. Yet,

⁷ Listed CEFs tend to trade at discounts (i.e., the market price of the fund is lower than its net asset value), which have persisted over time. Discounts tend to widen out during crisis periods and activists often purchase shares during these periods. The lower-than-average discounts during these periods are then often used by the activist to implement its own investment strategy for its benefit, often in conflict with the listed CEF's investment strategy. For more information, see ICI, *Closed-End Fund Activism* (2025), available at www.ici.org/system/files/2024-05/cef-activism.pdf.

⁸ See *infra* Section III.B, Figures 7-9 (discussing the takeover of the former Voya Prime Rate Trust by an activist between 2020 and 2021).

⁹ See *infra* Section III.B, Figures 10-12 (discussing the takeover of the former Templeton Global Income by an activist between 2021 and 2023).

¹⁰ Over one- and three-year annualized returns, as of July 31, 2025, the ASA Gold and Precious Metals Limited Fund (ASA) has returned 82.2% and 27.2% based on share price returns, which exceeds the S&P 500 on similar timelines. However, the fund has had a discount, currently at 9.51% as of September 24, 2025. What is the point of "fixing" management for a fund beating the S&P 500? Yet, a major activist owns nearly 24% of the fund, see ASA, Schedule 13D available at www.sec.gov/Archives/edgar/data/1230869/000106299325015640/xslSCHEДУLE_13D_X01/primary_doc.xml, and has replaced the entire board with its slate of directors, see ASA, Form 8-K (Aug. 6, 2025), available at www.sec.gov/ix?doc=/Archives/edgar/data/0001230869/00012390025072821/ea024411301-8k_asagold.htm. While it is unknown what the next steps are for ASA, if it liquidates, the activist may receive its discount premium, but existing shareholders will no longer have access to the returns they were receiving as the fund will not exist if liquidated. Further, these actions highlight the prevailing issue: What sponsor is going to want to launch a listed CEF if even a listed CEF returning 82.2% in a year can be attacked and taken over? And without a robust listed CEF market, that will make it all the more harder to accomplish the Presidential directives in the EO. This issue could be remedied today, and first steps to accomplishing the EO's directives, by approving the exchange's proposal.

almost no listed CEFs have launched during this same period and AUM has been generally stagnant. This is because activism has effectively foreclosed the IPO market for listed CEFs. The exchange proposal before the SEC would allow that market to reopen by giving fund sponsors an option to launch funds without the mechanism that activists exploit to enact their agenda to the detriment of both retail shareholders and market-wide capital formation opportunities.

Further, we note Chairman Atkins's goals to "make IPOs great again"¹¹ and end the "weaponization of corporate governance" by "shareholder activists."¹² The exchange proposal before the SEC would advance those goals for listed CEFs. Predatory activism creates increased complexity and added costs in facilitation of the activist agenda. Proxy contests require significant mailings and direct contact with financial advisors and their end clients to increase voter participation. The increase in activism has created an undue burden on financial advisors that has impacted the decision to recommend a listed CEF. The exchange's proposal will help align financial advisors' third-party costs of listed CEFs with those of other available registered investment companies, and accomplish the goals that Chair Atkins has laid out in public statements.

ICI's members are ready to step into the IPO market with products that will provide private market access to retail investors—and available in their 401(k)s—to accomplish the directives and goals laid out by the President. However, first the SEC needs to take steps to encourage capital formation in these products. Approving the exchange's proposal will accomplish the directives laid out in the EO and be a step in the right direction to "make IPOs great again" in line with statements from Chairman Atkins, while still providing all of the investor protections and voting rights laid out in the 1940 Act. As ICI has stated across its many letters on this issue, Congress debated requiring an annual meeting after analyzing a fact pattern that is very similar to those occurring today, and Congress did not include a requirement for an annual meeting in the final text of the 1940 Act. Approving the exchange's proposal would simply realign shareholder protections with those delineated by Congress when it adopted the 1940 Act.

In addition to explaining how ICI, its members, and the SEC can best accomplish the directives in the EO, ICI would also like to address how the proposal is consistent with Section 6(b)(5) of the Exchange Act and its requirement, among others, that the rules of a national securities exchange be designed to protect investors and the public interest. In particular, ICI will address

¹¹ Paul S. Atkins, Chairman, SEC, *Open Meeting Statement on Policy Statement Concerning Mandatory Arbitration and Amendments to Rule 431 of the Commission's Rules of Practice* (Sept. 17, 2025), available at www.sec.gov/newsroom/speeches-statements/atkins-091725-open-meeting-statement-policy-statement-concerning-mandatory-arbitration-amendments-rule-431.

¹² Paul S. Atkins, Chairman, SEC, CNBC Squakbox (Sept. 19, 2025), available at <https://www.cnbc.com/video/2025/09/19/watch-cnbc-full-interview-with-sec-chairman-paul-atkins.html>.

the issues raised in the SEC's Order: (i) investor protection concerns for listed CEF shareholders with respect to eliminating the right to an annual shareholder meeting that may not be present for shareholders of other exchange-traded investment products, such as ETFs; and (ii) whether the exchange proposal could allow for the elimination of the rights of existing CEF shareholders to engage management at an annual shareholder meeting. Further, ICI will reiterate the harms that predatory activism causes currently, both to the market as a whole and to existing retail shareholders of listed CEFs that are attacked, that would end if the exchange proposal were approved. Finally, ICI will reiterate the protections provided in the 1940 Act and how approving the exchange proposal will re-align shareholder protections with those delineated by Congress when it passed the 1940 Act.

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I. Focusing On Redemption at NAV Negates Analyzing Whether Removing the Annual Meeting for New Listed CEFs Will Benefit Future Listed CEF Shareholders

Listed CEFs are not ETFs. ETFs offer creations and redemptions at net asset value (NAV) to authorized participants as an “arbitrage mechanism” so that the trading of the ETF shares on the exchange will occur at close to NAV. The underlying basket of securities has to be fairly liquid in an ETF, in compliance with Rule 22e-4, in order for this “arbitrage mechanism” to function as intended.

Listed CEFs do not provide the opportunity to redeem at NAV given their potentially less liquid portfolio holdings and/or use of leverage, nor are they marketed as such. Requiring redemption at NAV undercuts the ability of sponsors of listed CEFs to offer strategies that provide access to less liquid strategies. Operationally, redemption at NAV is not something the listed CEF is designed to provide.

There is no legal or policy basis for the SEC to prioritize the ability to redeem shares at NAV over other features that a CEF investor may weigh more highly. As shown by ICI survey results cited throughout this letter,¹³ when a listed CEF trades a discount, 80 percent of CEF-owning households are glad they can reinvest their dividends, likely because it allows not only for increased yield but the ability for capital gains if the discount narrows over time. As long as such features are adequately disclosed to retail investors, the SEC should not be substituting its opinions for those of investor choice.

In this section, we discuss (i) operational features of listed CEFs; (ii) data demonstrating how retail investors utilize those features, and an accompanying lack of utilization of the annual meeting; (iii) draw a parallel between other trading standards that do not utilize an annual meeting to demonstrate existing support for the exchange’s proposal; and (iv) emphasize how promotion of capital formation policies for listed CEFs supports the policy directives in the Presidential EO. The SEC must weigh investor protection concerns—and without removal of the annual meeting the listed CEF market will remain closed and the associated market and retail harms will continue to occur.

¹³ ICI conducts the Annual Mutual Fund Shareholder Tracking Survey each year to gather information on the demographic and financial characteristics of households in the United States. The most recent survey including CEF questions was conducted from May to June 2024 and was fielded on the KnowledgePanel®, a probability based online panel designed to be representative of the US population. The KnowledgePanel® is designed and administered by Ipsos. The Annual Mutual Fund Shareholder Tracking Survey sample for 2024 included 9,011 US households drawn from the KnowledgePanel®. Of the households contacted, 2.7 percent owned CEFs. For more information, see ICI, *What US Households Consider When They Select Closed-End Funds* (2025), available at www.ici.org/system/files/2025-02/25-ppr-cef-household-considerations.pdf.

A. Operational Features of Listed CEFs

Listed CEFs allow retail investors to access less-liquid investments through a retail-focused wrapper that provides the protections inherent in the 1940 Act. Because listed CEFs trade at market price, there is often divergence between the market price and the underlying NAV. A listed CEF trading at a share price higher than its NAV is said to be trading at a “premium,” while a listed CEF trading at a share price lower than its NAV is said to be trading at a “discount.” Listed CEFs may trade at premiums or discounts for a number of potential reasons, such as market perceptions or investor sentiment.¹⁴ For example, some academics have argued that the discount is representative of neoclassical finance theories and may reflect, in addition to investor sentiment, the uncanceled expenses and time value that would be required to liquidate a less liquid portfolio and unwinding a leveraged position.¹⁵ As another example, a listed CEF trading at a discount may be due to investors having priced in any perceived tax liability resulting from large unrealized capital gains.

A majority of listed CEFs trade at a discount¹⁶—including those managed by activists¹⁷—and this discount should be viewed as a feature, not a flaw, of listed CEFs. In many cases, the

¹⁴ See, e.g., Charles Lee, Andrei Shleifer, and Richard Thaler, *Investor Sentiment and the Closed-End Fund Puzzle*, JOURNAL OF FINANCE, Vol. 46, No. 1 at 75-109 (March 1991); Martin Cherkas, Jacob Sagi, and Richard Stanton, *A Liquidity-Based Theory of Closed-End Funds*, THE REVIEW OF FINANCIAL STUDIES, Vol. 22, Issue 1 at 257-297 (Jan. 2009); and Martin Cherkas, *Closed-End Funds: A Survey*, ANNUAL REVIEW OF FINANCIAL ECONOMICS, Vol. 4 at 431-445 (2012).

¹⁵ See, cf., Cherkas, Sagi, and Stanton, at *supra* note 14, at 257-297 (“This paper develops a rational, liquidity-based model of closed-end funds (CEFs) that provides an economic motivation for the existence of this organizational form: They offer a means for investors to buy illiquid securities, without facing the potential costs associated with direct trading and without the externalities imposed by an open-end fund structure. Our theory predicts the . . . observed behavior of the CEF discount, which results from a tradeoff between the liquidity benefits of investing in the CEF and the fees charged by the fund’s managers.”). While the Cherkas, Sagi, and Stanton paper is focused on premiums appearing during a listed CEF’s IPO due to the capitalized costs of purchasing illiquid assets that an investor would not have to pay if investing indirectly in an illiquid pool of assets by purchasing shares of the CEF, the inverse would be true for listed CEFs further along in their lifecycle that are trading at a discount as they may be needing to allocate new capital or exit existing positions and such transactional costs have not yet occurred nor been capitalized.

¹⁶ See James Duvall, *The Closed-End Fund Market, 2024*, ICI RESEARCH PERSPECTIVE, Vol. 31, No. 4, at 3-4 (April 2025), available at www.ici.org/system/files/2025-04/per31-04.pdf (providing data demonstrating that, generally, the majority of listed CEFs trade at a discount and that discounts have persisted over time).

¹⁷ As of October 6, 2025, the website (which changes daily due to market changes) for Saba Capital Income and Opportunities Fund and Saba Capital Income and Opportunities Fund II showed discounts of 11.8% and 9.9%, respectively. See Saba Capital, www.sabacef.com/. For a longer-term comparison, see *infra* Figures 9 and 12. Predatory activists have inaccurately asserted that any discount is solely reflective of management and have used this false narrative in the press to contend they are unlocking shareholder value when targeting listed CEFs. If their assertions were true, then their time would be better spent criticizing their own funds. However, the fact that their listed CEFs have comparatively large discounts better supports academic assertions, for example, that the discount may reflect the price of liquidity for illiquid assets, given the underlying holdings in those funds.

discount can represent a buying opportunity as investors are able to buy listed CEF shares or reinvest dividends at a discount to net asset value (NAV), which in turn boosts their dividend yield and allows for the potential of an enhanced total return.¹⁸ Beyond the potential increased yield opportunity that listed CEFs can offer long-term shareholders—via dividend reinvestments or other reinvestment opportunities—there are many structural advantages that listed CEFs offer to retail investors. Listed CEFs often utilize leverage to enhance income distributions to retail shareholders to an extent not available in mutual funds or ETFs.¹⁹ Additionally, and importantly for long-term retail investors, is the long-term strategy conviction that a listed CEF wrapper allows a portfolio manager to maintain during volatile market periods, particularly for yield-based strategies.²⁰ Listed CEFs also allow for full investment in their designated investment strategy as compared to many other registered products because, as listed CEFs do not face daily redemptions, there is little need to maintain cash reserves.

B. Retail Investors Value Discount Investment Opportunities But Do Not Materially Engage in Annual Shareholder Meetings

The argument that retail investors seek to exit their investment at NAV pre-supposes that they purchased shares with that expectation. Because many investors purchase on the secondary market when listed CEF shares are trading at a discount, investor activity undercuts that assumption and ignores the operational aspects of listed CEFs. In many cases, the discount represents a buying opportunity as investors can acquire listed CEF shares or reinvest dividends at a discount to NAV.²¹ This, in turn, boosts their dividend yield and allows for a potential enhanced total return. Indeed, among an estimated 3.6 million households owning listed CEFs in 2024, eight out of 10 were glad they reinvest dividends when a listed CEF they own is trading at a discount, and seven out of 10 households consider buying more shares.²²

The fact that these households buy listed CEF shares trading at a discount and then reinvest dividends when shares continue to trade at a discount underscores that many shareholders

¹⁸ See, e.g., Stuart Kirk, *What I learnt from your open-ended wisdom on closed-end funds*, FINANCIAL TIMES, June 14, 2024 (arguing that discounts, in particular large discounts, represent a buying opportunity).

¹⁹ See Duvall, *supra* note 16, at 10 (noting that 60 percent of traditional listed CEFs use leverage).

²⁰ For example, because listed CEFs do not face daily redemptions or subscriptions, unlike open-end funds, a listed CEF does not need to buy and sell underlying portfolio holdings to meet subscriptions and redemptions, respectively. This means that a listed CEF portfolio manager does not have to sell or buy assets under unfavorable market conditions to meet redemptions and subscriptions, thus allowing the listed CEF portfolio manager to maintain the strategy's investment conviction during market cycles, providing the potential for a steadier yield, particularly for credit strategies, during market volatility.

²¹ See, e.g., Catherine Gillis, *Are Discounts Really a Problem?*, MORNINGSTAR CLOSED-END FUNDS (Mar. 13, 1992) ("The funds' inclination to trade at premiums and more often than not, at discounts to their net asset values, has yielded many profit opportunities to astute investors[.]").

²² Results from the Annual Mutual Fund Shareholder Tracking Survey, *supra* note 13.

buy and hold shares for the yield and distribution listed CEFs offer as opposed to any future opportunity to exit at NAV. Further, the listed CEF wrapper allows the possibility to trade at a premium to NAV, thus allowing for an exit above NAV. The listed CEF wrapper is advertised and operated with these potential outcomes in mind.

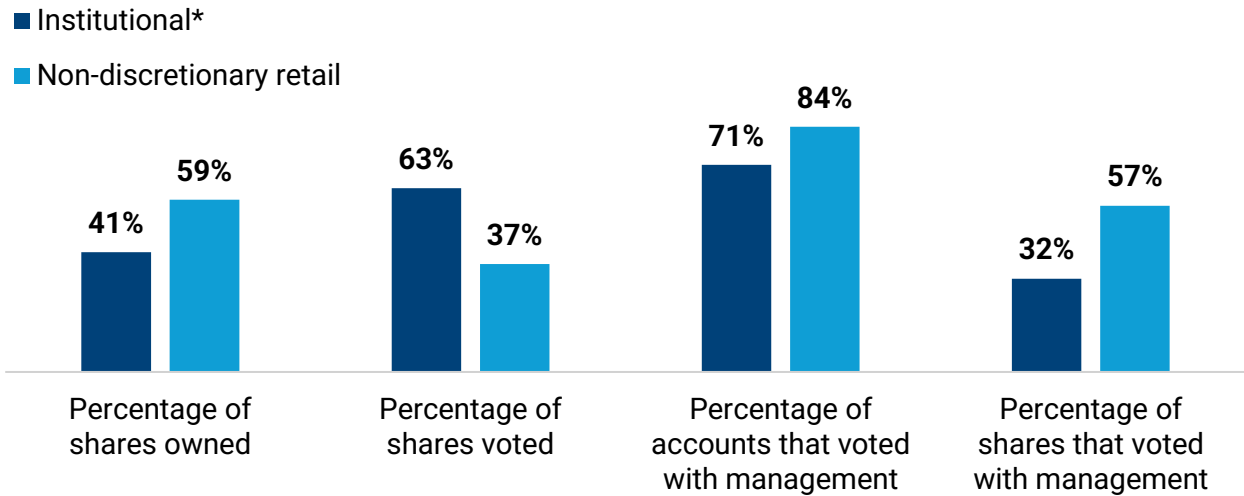
In contrast to data underlying retail investing decisions, retail voting data has historically demonstrated that engagement at listed CEF annual meetings is limited.²³ Based on recent survey data, about half of listed CEF-owning households indicated that they “rarely” or “never” voted their CEF proxy in 2024.²⁴ Recent data on proxy voting in contested elections also show that retail investors who direct their own vote and do not have an adviser or broker vote for them (*i.e.*, “non-discretionary retail”) often participate in the proxy process at lower rates. While these investors held 59 percent of the listed CEF shares involved in these elections, they accounted for only 37 percent of the votes cast (Figure 1). Additionally, when non-discretionary retail shareholders did vote in these contests, they leaned heavily toward supporting management—84 percent of non-discretionary retail accounts voted in favor of management with 57 percent of the total non-discretionary retail ballots being cast in favor of management.

²³ See, e.g., INVESTMENT TRUSTS AND INVESTMENT COMPANIES – REPORT OF THE SEC PURSUANT TO SECTION 30 OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935: PART THREE, CHAPTERS III, IV, AND V, ABUSES AND DEFICIENCIES IN THE ORGANIZATION AND OPERATION OF INVESTMENT TRUSTS AND INVESTMENT COMPANIES at 1875 (1940) (“As a rule less than two-thirds of the outstanding voting shares have been represented, either in person or by proxy, at annual stockholders’ meetings. It is thus apparent that 30% stock ownership would constitute a degree of control which would ordinarily be invulnerable to attack by any outside group. In many cases, as little as 10% stock ownership constituted working or practical control.”).

²⁴ Results from the Annual Mutual Fund Shareholder Tracking Survey, *supra* note 13. Data exclude respondents that selected their financial adviser votes on their behalf.

Figure 1
Predatory Activists Are Able to Exploit the Fact that Retail Participation in Listed CEF Proxy Contests Is Limited

But retail investors that do vote their shares tend to align with fund management



**Institutional* includes discretionary retail accounts where an adviser or broker votes for the beneficial retail owner.

Note: Data from an analysis of 94 CEF proxy contests from July 2019 to June 2024.

Source: Broadridge

These data highlight an important point—retail shareholders have limited engagement in annual meetings. Further, the minority who do take the time to review the proxy materials overwhelmingly vote *against* activist plans and *with* existing management. As such, the data demonstrate that there would be no material disadvantage to retail shareholders to remove the annual meeting requirement as they have limited engagement, and when they do engage, it is to support the existing fund investment strategy, investment manager, and board.

Retail investors buy shares for a fund’s investment strategy, distributions, and total returns—not because they want to immerse themselves in a fund’s corporate governance matters. As a court found recently following an extensive trial in a case involving an activist attack on a listed CEF, “most retail shareholders and non-activist investors likely invest in CEFs with investment objectives that align with the CEFs’ investment goals. [The] activist agenda . . . is contrary to and inconsistent with the stated investment objectives of the [CEFs]. [Shareholders] may not have voted for [these proposals] because [shareholders] are in

opposition to the [activist's] strategy.”²⁵ Retail investors—when unhappy—would likely just sell their shares rather than engage in proxy campaigns. Removing the annual meeting requirement would not materially disadvantage retail shareholders, but maintaining the annual meeting requirement actively undermines the reasons why most long-term investors purchase listed CEF shares in the first place, as it has allowed predatory activists to freeze the market, foreclose new entrants, reduce investor choices, and actively harm existing retail shareholders, as discussed *infra* Section III of this letter.

C. There is Existing Precedent for Secondary Market Trading Without an Annual Meeting Requirement

The Order's apparent binary view that shareholders either need to be able to redeem at NAV or have an annual meeting vote seems unfounded legally and from a policy standpoint, as there are several existing precedents for investors to transact in products that do not trade at NAV nor provide annual meetings. In the United States, the OTCID Basic Market allows shares of companies, including pooled investment vehicles like CEFs that do not necessarily trade at NAV, to trade among the investing public.²⁶ The OTCID Basic Market rulebook does not have an annual meeting requirement.²⁷ Looking to Europe, tokenized stocks and ETFs trading on digital asset exchanges trade at discounts and premiums as compared to the underlying asset.²⁸ And these tokenized assets come with no annual meeting requirement,²⁹ let alone any of the voting requirements provided pursuant to the 1940 Act, as described *infra* Section IV.C.

More common, though, are secondary transactions of shares of private funds. Secondary transactions are often completed at a discount to NAV,³⁰ with limited partnership secondary transactions for all funds showing, on average, a 10% discount to NAV and venture funds, in particular, showing a 24% discount to NAV for 2025 through July.³¹ An investor in a private fund buys shares knowing that if they were to exit prior to liquidation, they would likely need to

²⁵ Eaton Vance Senior Income Trust v. Saba Capital Master Fund, Ltd., Case No. 2084-CV-01533, at 47 (Mass. Super. Ct. Oct. 21, 2024).

²⁶ Bexil Investment Trust (ticker: BXSX) and Foxby Corp. (ticker: FXBY) are examples of two CEFs that trade via OTCID.

²⁷ See OTCID Rules, available at www.otcmkt.com/files/OTCIDRules.pdf.

²⁸ See Alexander Osipovich and Vicky Ge Huang, *Want to Trade Amazon on Crypto Exchange? The Price Might Be Off by 300%*, WSJ (July 15, 2025), available at www.wsj.com/finance/stocks/tokenized-stocks-prices-crypto-exchanges-856ea114?mod=Searchresults&pos=3&page=1.

²⁹ See Kraken, *xStocks Risk Disclosure* (visited Sept. 29, 2025), available at www.kraken.com/legal/xstocks (“Holders of xStocks have no voting rights[.]”).

³⁰ See Hamilton Lane, *The Truth About Secondaries: Separating Myth from Market Opportunity* (July 16, 2025), available at www.hamiltonlane.com/en-us/insight/the-truth-about-secondaries.

³¹ Jeffries, *Global Secondary Market Review* (July 2025).

sell at a discount into the market. If this feature is acceptable for investors in private funds (who are generally qualified purchasers), there is no principled basis for denying similar investment opportunities and options to retail investors, as long as the risks are appropriately disclosed.

D. Failing to Promote Policies Encouraging Capital Formation in Listed CEFs Will Continue to Freeze IPOs in the Listed CEF Market, Which is Inconsistent With the Directives in the President's EO

Taking predatory activists' arguments to their logical end will result in continued stasis and the eventual extinction of the listed CEF market, which is a result adverse to the directives laid out in the President's EO. The predatory activists argue, as laid out in one of the academic letters filed during the prior proposal process,³² that they must have free rein to attack listed CEFs in order to ensure efficient capital markets. The putative chain of logic is that: (i) listed CEF discounts are inconsistent with a frictionless market; and (ii) the discount cannot be arbitrated away because shareholders cannot redeem at NAV; therefore (iii) shareholders (*i.e.*, activists) must be free to attempt to force the listed CEF to liquidate or open-end itself; otherwise (iv) listed CEFs will not trade in an efficient market.

This chain of logic breaks apart upon analysis, however. First, listed CEFs, like hedge funds, tend to have portfolio holdings that are less liquid and hence have high liquidity costs. High liquidity cost is a market friction. Even if a predatory activist successfully attacks and open-ends a listed CEF, the CEF's underlying holdings, once disposed of, will still be illiquid. Thus, the attack does not and cannot remove the frictions that characterize listed CEFs' underlying holdings. As ICI's data shows *infra* Figure 5, after an activist finishes its attack and exits its position, the discount tends to revert to where it was, thus underscoring the lack of logic underlying activists' arguments. Despite recent record activist campaigns shown *infra* Figure 6, discounts persist due to the frictions inherent in the listed CEFs' underlying holdings and those frictions cannot be removed by an activist attack. However, activists' continued attacks on listed CEFs will eventually make the listed CEF market frictionless, but only because the market itself will ultimately end. If fund advisers and boards lose confidence that listed CEFs' can carry out their stated long-term strategies, the listed CEF market will disappear over time. With that, listed CEF discounts, by definition, would be eliminated, as there are no more listed CEFs. This result is what concerns ICI the most, as it will foreclose one of the best access points for investment diversification in private market assets available to retail investors.

Further, the activists' chain of logic has not been adopted in the context of any other financial product. For example, hedge funds, like listed CEFs, may often hold illiquid assets with minimal

³² See Letter from Working Group on Market Efficiency and Investor Protection in Closed-End Funds to Vanessa Countryman, Secretary, SEC (July 30, 2024), available at www.sec.gov/comments/sr-cboebzx-2024-055/srcboebzx2024055-498555-1461502.pdf.

liquidity and pursue complex strategies utilizing leverage that is inappropriate for, or impossible to operate in, an open-end framework. Recent academic evidence and data suggests that hedge funds, like listed CEFs, can embody sizable discounts of market prices to NAV.³³ Hedge funds, like listed CEFs, often use defense-like measures to lock up investor capital (e.g., lock-up periods).³⁴ Adopting such frictions is necessary if hedge funds are to provide much needed long-term capital to achieve their investment mandates. But, by the logic of predatory activists', hedge funds' use of defense-like frictions thwarts efficient capital markets, which might suggest the SEC should consider requiring predatory activists, which manage hedge funds themselves, to open-end themselves. Such a policy action would of course be absurd, given the important role that hedge funds play in capital markets.

We urge the SEC to look beyond the activist's surface-level arguments and apply them in other contexts to see how such arguments easily fall apart. Applying their assumptions to any other fund product would result in the market for that product terminating, which would be bad for investor choice and capital formation. The result is no different for listed CEFs, and we urge the SEC to adopt the exchange's proposal to encourage capital formation in retail products that promote the goals of the President's EO.

II. Existing Listed CEFs Will Not Be Able to Merge or Reorganize Into Newly Listed CEFs Unless Shareholders Vote to Approve the Corporate Transaction

Under normal corporate law, an existing fund can merge or reorganize into a new fund. Thus, an existing listed CEF, subject to an annual meeting requirement, can reorganize into a newly listed CEF, which does not have an annual meeting requirement. However, this merger or reorganization **will** require a shareholder vote, contrary to the unsupported claims of the predatory activists. While it is true that Rule 17a-8 would not require a shareholder vote, and state statutory trust law is generally silent on the issue, **every** organizational document ICI has reviewed would require a shareholder vote if the annual meeting requirement was removed. Further, this shareholder requirement was generally stated in a listed CEF's declaration of trust or similar document, which cannot be readily amended by the board like bylaws generally can.

We find it extremely telling that no activist could name a single listed CEF that would be able to implement this purported transaction without a shareholder vote. We are not aware of any either. Further, there are a number of practical reasons why this proposed transaction could never occur without a shareholder vote. Activists are often significant shareholders in listed CEFs, as they need to build up a sizable number of shares to enact their agendas. If a listed

³³ See Tarun Ramadorai, *The Secondary Market for Hedge Funds and the Closed Hedge Fund Premium*, JOURNAL OF FINANCE, Vol. 62, No. 2 at 479-512 (April 2012). See also the [online appendix](#) to that paper. For recent data, see Jeffries, *supra* note 31, and accompanying text.

³⁴ See SEC – Office of Investor Education and Advocacy, *Investor Bulletin: Hedge Funds* (Oct. 2012), available at https://www.sec.gov/files/ib_hedgefunds.pdf.

CEF, with an annual meeting requirement, were to try to reorganize into a newly listed CEF without an annual meeting requirement, the activist would sue the listed CEF and its adviser to stall the transaction, likely under the corporate theory of “dissenters’ appraisal rights,” essentially claiming that shares of the newly listed CEF are not reflective of the shares’ true value.³⁵ As activists are aware, litigation can take years and such steps would forestall any merger or reorganization attempt. The possibility that a merger or reorganization would ever occur without shareholder approval, and in turn without the approval of any predatory activist holding shares in the fund being merged or reorganized, is merely a hypothetical smokescreen.

Corporate transactions need to be allowed to occur, but they would occur with the approval of shareholders if an existing listed CEF with an annual meeting requirement sought to merge or reorganize into a newly listed CEF without an annual meeting requirement. For example, a sponsor may seek to consolidate multiple state-specific municipal listed CEFs, which may never have gained scale, into a large national municipal listed CEF. That transaction should be allowed to occur, and if the newly listed CEF does not require an annual meeting, shareholders would be required to approve the transaction. ICI finds it somewhat hypocritical that the entities pushing this false narrative are the same entities that have forced corporate transactions that remove annual meeting requirements. For example, when an activist forces a listed CEF to convert into another investment product—whether an ETF, mutual fund, or unlisted CEF—or otherwise liquidate, there is no longer an annual meeting requirement.³⁶ Activists know that an adviser could not engage in a merger or reorganization that would remove the annual meeting requirement without shareholders approving the transaction, as no entities have gone down this process more so than them.

However, to address any lingering concerns about the possibility of a listed CEF that is subject to annual meetings merging into one that is not, ICI supports an amendment to the exchange

³⁵ As the exchange proposal is structured to only apply to new funds that do not yet exist and do not have shareholders, there is no existing “right” that would be removed as a result of SEC approval. Arguably, predatory activists would not even have standing to challenge the amendment, if approved, because the proposed amendment does not affect any current holdings or investments of predatory activists. The proposed amendment only applies prospectively to new funds that have not yet launched and do not yet have shareholders. If a listed CEF were to try to merge or reorganize, and the activist did not support that action, the activist would have to sue the listed CEF and its adviser.

³⁶ See, e.g., Amey Stone, [Pioneer Looks to Liquidate Closed-End Funds. Could it Be a Trend?](#), BARRON’S (May 15, 2025) (reporting on Pioneer Investments shuttering its entire listed CEF product line after an activist refused to approve a new investment management agreement required as part of a merger); Daniel Gil, [First Trust to Convert Closed-End Fund into ETF](#), IGNITES (Dec. 2, 2024) (reporting on the planned and prior listed CEF to ETF conversions from this sponsor and how the listed CEF to ETF conversion process is often in response to campaigns from activists, which often take stakes in listed CEFs to force concessions); Joe Morris, [Tortoise Retreats from Closed-End Funds Via ETF Conversion](#), IGNITES (Aug. 8, 2024) (reporting on the sponsor merging half of its listed CEF lineup into an ETF). Tortoise’s listed CEFs had previously been the subject of litigation and activist attacks. See *Saba Capital Master Fund, Ltd. et al. v. BlackRock ESG Capital Allocation Trust et al.*, No. 23-8104 (2d Cir. June 26, 2024).

proposal clarifying that if an existing listed CEF with an annual meeting requirement were to merge or reorganize into a newly listed CEF without an annual meeting requirement, a shareholder vote approving such transaction would be required.³⁷ As explained above, we believe such a shareholder vote would already be required by the CEF's governance documents. Alternatively, we would also support a statement of the Division of Investment Management staff or the SEC itself that an annual meeting is akin to a "fundamental policy" and would require a "1940 Act Majority Vote"³⁸ if a merger or reorganization is occurring into a new fund without an annual meeting, in line with what is required under Rule 17a-8 when changing fundamental policies in a merger or reorganization.

III. Listed CEF Market and Retail Shareholder-Specific Harms Caused by Predatory Activists

A. Data Visualizing Predatory Activist Harms to Listed CEF Market

The annual meeting listing standard is a requirement that draws limited participation among retail shareholders yet saddles them with millions of dollars in expenses. Further, the types of proposals submitted by predatory activists often help facilitate activists' agenda for large liquidity events and takeovers that are in opposition to the listed CEF's investment strategy and the interest of shareholders that bought their CEF for that strategy.³⁹ In particular, forced tender offers primarily benefit predatory activist shareholders (and other discount-arbitraging institutional investors) while leaving long-term shareholders (primarily retail shareholders) in a listed CEF with reduced economies of scale and fewer assets available to carry out the investment strategy. Once predatory activists crystalize their profit, they typically exit the listed CEF within a year and the discounts they claim to improve tend to widen back out. Long-term retail shareholders are left to shoulder the additional costs (e.g., tender offer costs, proxy

³⁷ Regarding the exchange's proposal covering any listed CEF launching after May 20 but before this rule amendment may be declared effective, ICI's understanding is that no listed CEF has listed on the exchange yet, thus rendering it a moot point. To the extent a listed CEF were to list during this timeframe on the exchange, there would likely be ample disclosure required to inform prospective shareholders, thus putting shareholders on notice.

³⁸ A 1940 Act Majority Vote 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." Section 2(a)(42) of the 1940 Act.

³⁹ See, e.g., *Eaton Vance Senior Income Trust v. Saba Capital Master Fund, Ltd.*, Case No. 2084-CV-01533, at 47 (Mass. Super. Ct. Oct. 21, 2024) (making a finding of fact that the activist at issue had objectives that were generally inconsistent with the investment objectives of the funds under attack and that the "goal of monetizing the discount to NAV differs from the goal of managing a stable pool of assets for a steady income stream over a long period of time"). Further, if predatory activist investors lose a proxy campaign one year, our members have told us that the predatory activist often returns the next year with the same proposals and/or director nominees. Predatory activists need a significant liquidity event to further their investment objective, which as the *Eaton Vance* court noted can be at odds with the investment objective of the listed CEF.

costs, reduced economies of scale) resulting from the actions of well-funded predatory activists, who mostly avoid bearing any such costs because they have sold their position. Further, predatory activist activity has chilled the IPO market for listed CEFs, which has historically provided unique opportunities (e.g., access to private and less-liquid markets as well as leverage opportunities) to retail investors.⁴⁰ As the tactics of predatory activist investors have become significantly more aggressive and more well-resourced in recent years, the annual meeting requirement for listed CEFs has come to facilitate harm to the market as a whole with no discernible tangible benefit for long-term retail shareholders. Each of these points are visualized with data and research shown below.

a. Significant Costs Are Being Borne by Retail Shareholders to Facilitate the Agendas of Predatory Activists

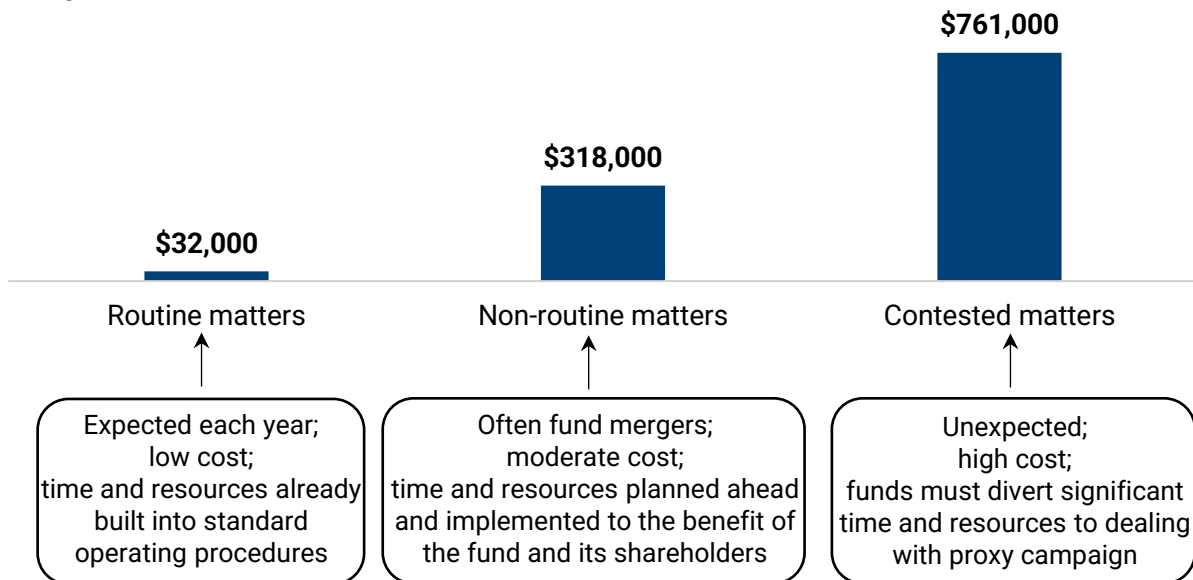
While prior data in this letter confirmed the limited engagement from retail shareholders in annual meetings, it is important to also discuss the costs retail shareholders incur from this requirement. Most annual meetings involve routine matters, but when predatory activists contest matters this strains a fund's resources and costs investors a significant amount of money. Contested matters cost retail shareholders in a listed CEF an average of \$761,000 annually (Figure 2). Not only must the listed CEF incur additional legal, solicitation, and engagement costs, but contested matters divert employees of the listed CEF's investment adviser from the roles and functions where they add the most value for investors (e.g., such as researching, selecting, and monitoring investments). It is unfair to saddle retail shareholders with these costs for something that primarily benefits well-funded predatory activists.

⁴⁰ Retail investors value listed CEFs' access to less-liquid investments and use of leverage to enhance income distributions. Before purchasing their most recent CEFs, seven out of 10 CEF-owning households thought the ability to enhance performance by using leverage was important and six out of 10 thought the ability to hold less-liquid assets was important. See Results from the Annual Mutual Fund Shareholder Tracking Survey, *supra* note 13.

Figure 2

Contested Proxies Burden Retail Shareholders with Substantial Costs

Average annual fund-level cost in dollars, 2019–2023



Note: Data are based on responses to a survey distributed to ICI CEF members in May 2024. Survey participation represented 62 percent of CEF assets and 50 percent of the total number of CEFs.

Source: Investment Company Institute

b. Forced Tender Offer Data Demonstrate That Predatory Activists Are Strictly Self-Serving

One common predatory activist tactic is to use its outsized position in a listed CEF—an average of 16 percent of a listed CEF’s outstanding shares—to force the fund to hold a tender offer. Predatory activist shareholders have historically claimed that they try to force tender offers in listed CEFs to benefit long-term retail shareholders—but the data show otherwise.⁴¹

⁴¹ One activist argument that they claim “benefits” long-term shareholders is that tender offers (even those forced on the fund by predatory activists) are value accretive to NAV. See Letter from Boaz Weinstein to Hester M. Peirce, Commissioner, SEC (Dec. 5, 2024), available at www.sec.gov/comments/sr-nyse-2024-35/srnyse202435-1562522.htm. This is true to a point, but, despite activist claims, there is no “free lunch” in a tender offer that was forced by an activist.

The activist provides an example of a \$100 million fund that conducts a 35% tender offer at 98% of NAV. By their calculations, \$700,000 (\$35 million x 0.02) is relinquished by the tendering shareholders to the listed CEF, and this \$700,000 offsets potential future increases to CEF operating costs. But the example ignores important costs related to forced tender offers that a fund may incur to meet the repurchase amount or engage with an activist.

Predatory activists tend to abandon the listed CEF shortly after it holds a tender offer (Figure 3) while receiving the bulk of tender offer proceeds (Figure 4). The annual meeting is creating a scenario where predatory activists can wield the power of their holdings to elect their own directors and/or force actions that benefit themselves while leaving long-term retail shareholders shouldering the costs the fund is forced to bear.⁴²

First, the activist example ignores potential transaction costs. Repurchasing \$35 million of shareholders' equity at an unexpected time—which is likely to be the case for the vast majority of listed CEFs that are forced into tender offers at the behest of predatory activists—will most likely incur substantial broker and other transactional costs for the fund. One of the reasons forced tender offers are below NAV is to help the fund offset these transaction costs to mitigate dilution. Depending on the circumstances, the benefit to the fund and its remaining shareholders of the repurchase below NAV may be outweighed by the costs the fund could incur for having to liquidate assets at a potentially inopportune time. Indeed, as a recent court's findings of fact about tender offers noted, "tenders that result from activist pressure can lead to CEFs liquidating portfolio assets to raise sufficient cash to purchase the tendered shares at inopportune times which can...potentially necessitate a sale of assets at prices either below the asset's intrinsic value or at prices lower than what the asset could command at a different time." See *Eaton Vance Senior Income Trust v. Saba Capital Master Fund, Ltd.*, Case No. 2084-CV-01533, at 47 (Mass. Super. Ct. Oct. 21, 2024).

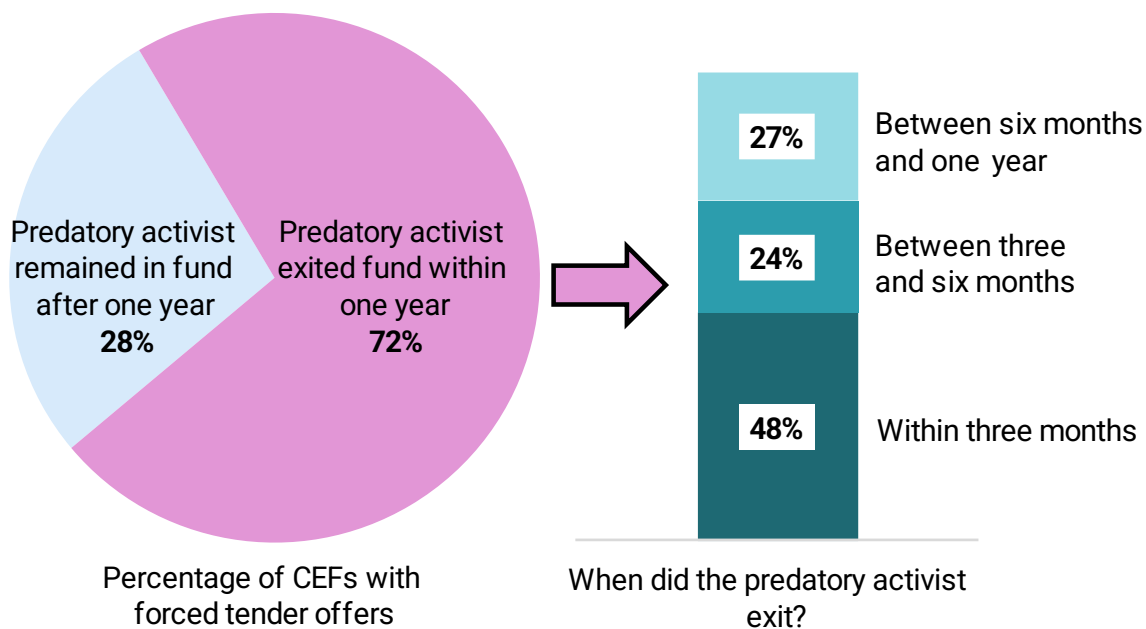
Second, the activist example ignores costs to engage with an activist. As shown in Figure 2, *supra*, contested proxy campaigns cost listed CEFs an average of \$761,000, with the final amount potentially being smaller or larger depending on the campaign and the size of the fund. These engagement costs would offset some or even potentially all of the accretive benefits from the repurchase of fund securities from investors at a tender price below NAV.

Additionally, the activist example also mentions that the increased share price from a narrowing of the listed CEF's discount further offsets potential increases to fund operating costs from reduced assets. ICI does not understand the reasoning behind this statement because any short-term benefits to a narrower discount is only realized if an investor sells their shares during this time. And as we show *infra* Figure 5, excess discounts following forced tender offers tend to widen to close to their pre-tender offer level in the year following the date of the tender offer. Long-term investors in the listed CEF that do not tender do not benefit, but they do bear the heightened expenses and reduced economies of scale that the predatory activist has forced on the listed CEF.

⁴² One key benefit of listed CEFs is that they can be fully invested in their strategies—since they do not need to meet daily redemptions and maintain cash reserves—allowing them to manage a long-term investment strategy view during volatile market periods, particularly for yield-based strategies. Indeed, nearly nine out of 10 US households owning CEFs consider them to be medium- or long-term investments. See Results from the Annual Mutual Fund Shareholder Tracking Survey, *supra* note 13. However, as predatory activists continue to abuse listed CEFs, they inhibit a CEF's ability to properly execute its strategy.

Figure 3
Predatory Activists That Successfully Force Tender Offers Typically Exit the Fund Within a Year

And nearly half of those exited the fund within three months



Note: Data include 58 forced tender offers between January 2015 and July 2025. For CEFs with multiple tender offers, the activist's position after the final tender offer is used. Three CEFs are counted twice because separate activists made distinct Schedule 13D filings.

Source: ICI calculations of Refinitiv data

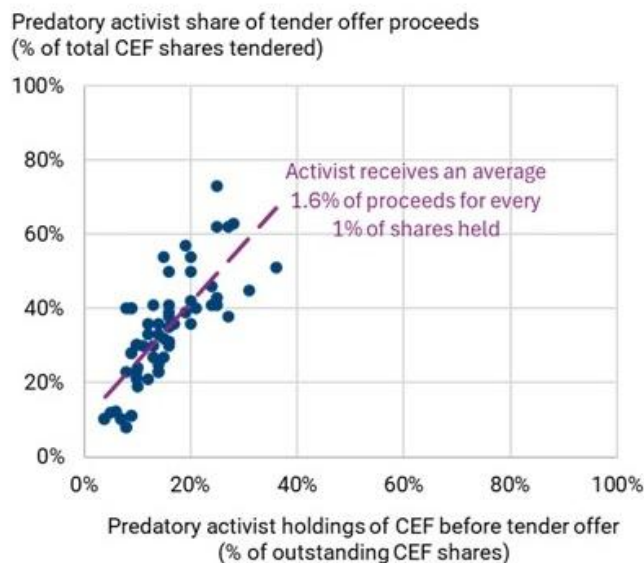
Figure 4

Predatory Activists Receive the Bulk of Tender Offer Proceeds

And they get by with a little help from their friends—many of the top holders of targeted listed CEFs are discount-arbitraging hedge funds or other well-known institutional activists

Predatory activist investors typically receive the bulk of the proceeds from a tender offer¹...

...and on average, predatory activists (and their friends) take more than 60 percent of tender offer proceeds.²



¹Data include 56 forced tender offers between 2015 and July 2025. Data for one fund include the holdings of two predatory activists because two 13D filings were made on the same day. Data include funds targeted more than once if tender offers were more than 3 years apart.

²Data include 50 forced tender offers between 2015 and June 2025. Data for one fund include the holdings of two predatory activists because two 13D filings were made on the same day. Data include funds targeted more than once if tender offers were more than 3 years apart, but data exclude tender offers of less than 10 percent of the fund's outstanding shares, tender offers completed after June 2025, and follow-on tender offers that occurred because of a discount-managing policy.

Note: Non-primary activist and discount-arbitraging institutional investors primarily include hedge funds among the top 10 institutional holders of a fund. "Other institutional investors" tend to be institutions that act on behalf of retail clients. Data exclude tender offers with missing data. Data for non-primary activist (and discount-arbitraging institutional) investors only include those with a decrease in the number of shares held—in line with the size of the prorated distribution of tender offer proceeds—in the quarters before and after the tender offer. Data assume all shares are tendered, which is consistent with observed changes in the number of shares held by institutional investors.

Source: ICI calculations of SEC EDGAR (13D filings) and Refinitiv (13F filings) data

c. Predatory Activism Does Not Benefit Governance or the Discount in the Long-Term

Predatory activist shareholders have historically claimed that their actions benefit all listed CEF shareholders, including long-term shareholders, and will lead to improvements in the discount. These improvements, however, tend to be short-lived. After examining listed CEFs that held an activist-induced tender offer between 2015 and August 2024, the data show that, on average, these funds' excess discounts (*i.e.* a fund's discount relative to the discount of other listed CEFs in the same asset class) narrowed in the window between the initial predatory activist public filing and the completion of the tender offer (Figure 5).⁴³ However, predatory activist involvement did not appear to improve listed CEF discounts in the long-term. Average excess discounts widened back out within the first year after listed CEFs held an activist-induced tender offer.⁴⁴

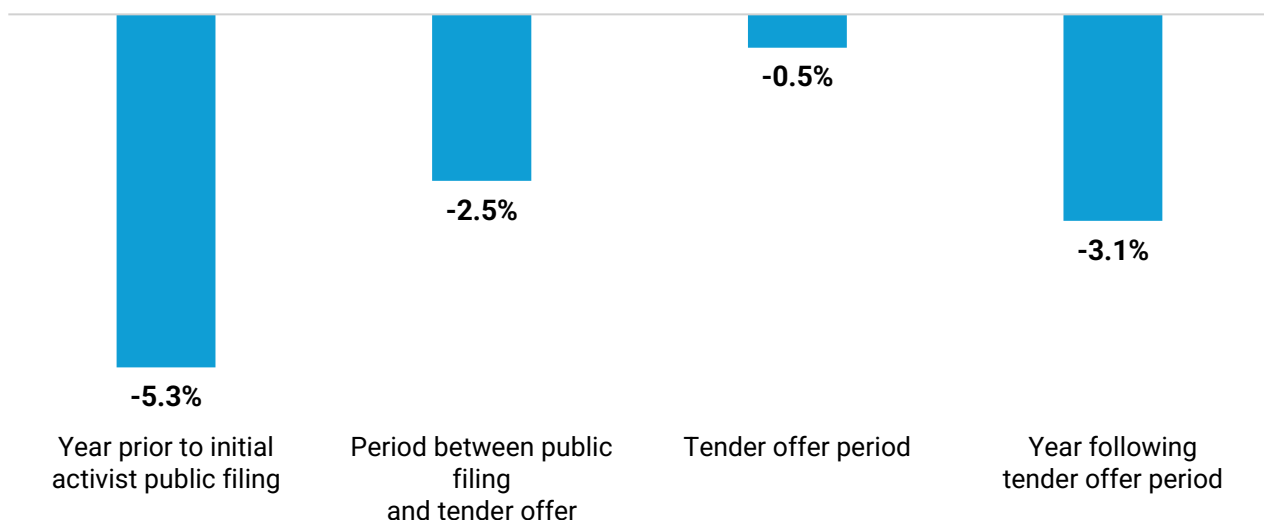
⁴³ The narrower discount is likely related to the tender offer event because the listed CEF will be buying back some percentage of shares at or close to NAV. All else equal, one should see the listed CEF's market price move closer to its NAV.

⁴⁴ The data show that discounts for some listed CEFs do not widen out in the year following the tender offer. In most of these cases, however, the listed CEF had in place measures, adopted either before or during the predatory activist attack, that have been shown to have an impact on a fund's market price depending on the market conditions. For example, some listed CEFs implement managed distribution plans (MDPs) to ensure that investors received stable levels of income for some pre-defined period. MDPs have been shown to have an elongated impact on discounts, unlike the temporary effect associated with predatory activist attacks more generally. For more information, see Martin Cherkes, Jacob S. Sagi, and Z. Jay Wang, *Managed Distribution Policies in Closed-End Funds and Shareholder Activism*, JOURNAL OF FINANCIAL AND QUANTITATIVE ANALYSIS, Vol. 49, Nos. 5/6 at 1311-37 (Oct./Dec. 2014).

Figure 5

Generally, Predatory Activism Does Not Improve Discounts Over the Long-Term

On average, excess discounts* on listed CEFs widen back out after predatory activist involvement



**Excess discount* is the simple average discount of the given listed CEF over the specified period minus the simple average discount of all funds in the same investment objective over the specified period.

Note: Sample includes 41 funds with forced tender offers between 2015 and August 2024.

Sources: Investment Company Institute and Morningstar

It is worth noting that certain activist-managed listed CEFs have discounts well below their category average, thus underscoring again the insincerity of any activist argument about improving governance or discounts.⁴⁵ If the predatory activists believed their own arguments, they would be attacking their own funds. But they do not, thus underscoring that they seek attacks merely if it is beneficial for their own bottom line regardless of impact on long-term retail listed CEF shareholders.

d. Rise in Predatory Activist Activity Has Contributed to a Nearly Frozen Listed CEF IPO Market

Activism in listed CEFs has been present for decades, as certain investors have sometimes identified arbitraging discounts as a viable profit-making opportunity. Over the past decade, however, activism has become both much more predatory and successful for a number of

⁴⁵ See *supra* note 17 (noting that on October 6, 2025, Saba Capital Income and Opportunities Fund and Saba Capital Income and Opportunities Fund II had discounts of 11.8% and 9.9%, respectively). However, those are point in time examples and change daily. For better comparison, see *infra* Figures 9 and 12, respectively.

reasons, including the following:

- Predatory activists have more capital invested in listed CEF discount-arbitraging strategies than they ever have previously (Figure 6);
- Data are more readily available via EDGAR and other platforms (e.g., Bloomberg, Refinitiv, Factset) that provide a clear picture of other institutional investors in listed CEFs and how many shares they hold;⁴⁶ and
- Predatory activists often receive favorable support from proxy advisory services and certain institutional investors rely strongly on the recommendations of these services.⁴⁷

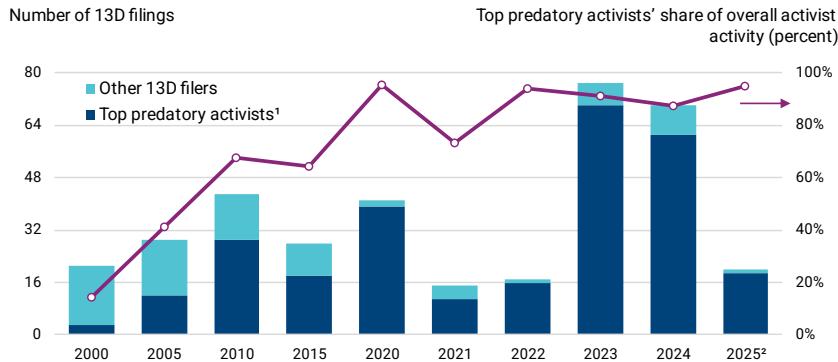
The substantial success that predatory activists have experienced in recent years has contributed to a chilling of the listed CEF IPO market. While there are always a number of factors that influence the IPO market, the heightened threat that predatory activists have come to pose has undeniably discouraged entry into the listed CEF market.

⁴⁶ See *supra* Figure 4, which shows the percentage of tender offer proceeds that go to non-primary activist (and discount-arbitraging institutional) investors. All data are viewable via publicly available SEC Form 13F data.

⁴⁷ See Kenneth Fang and James Duvall, *Proxy Advisory Firms—Killing Closed-End Funds Softly with Their Policies*, ICI (Oct. 25, 2023), available at www.ici.org/viewpoints/23-view-cef-proxy-advisory-services.

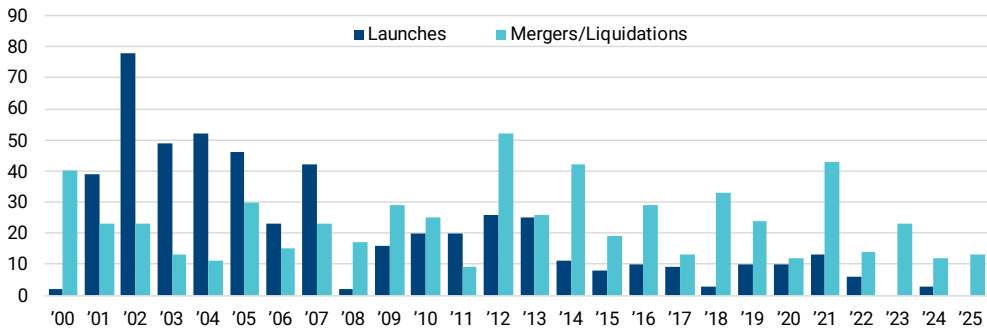
Figure 6
Predatory Activist Presence is Detrimental to Listed CEF Market

Predatory activism has softened somewhat in 2025 following the extraordinary amount of activism in 2023 and 2024.



Nearly 40 percent of all CEFs have been targeted by the three most engaged predatory activist shareholders since 2015, and as of June 2025, they held shares in close to half of the 382 listed CEFs.

The number of listed CEF mergers and liquidations has outpaced the number of launches in nearly every year since the 2007–2009 financial crisis as predatory activist presence discourages new CEF entry into the market.



This has contributed to a 42 percent drop in the number of listed CEFs from 2007.

¹Top predatory activists are the three most engaged activists since 2015 as measured by the number of Schedule 13D and contested preliminary proxy (PREC 14A) filings.

²Data are through mid-September 2025.

Note: Data prior to 2018 for number of funds and launches/mergers/liquidations may include a small number of tender offer funds.

Sources: Investment Company Institute, Refinitiv, and calculations of publicly available SEC filings

B. Specific Case Studies of Predatory Activist Campaigns and Resulting Retail Shareholder Harm

While the market-wide harms and lack of any clear benefit are discussed above, it is also important to analyze the detrimental impact of predatory activist campaigns on individual shareholders, as such activity has led to the very types of harms that the 1940 Act sought to

prevent. To illustrate these harms, we provide a case study of the effect of predatory activism on the former Voya Prime Rate Trust ("Trust").

The Trust was established in 1987.⁴⁸ The Trust was a diversified listed CEF with an investment objective "to provide investors with as high a level of current income as is consistent with the preservation of capital."⁴⁹ The Trust accomplished this objective by "investing, under normal market conditions, at least 80% of its net assets (plus borrowings for investment purposes) in US dollar-denominated floating rate secured senior loans."⁵⁰

A predatory activist began buying shares of the Trust in 2019 and by April 2020 held 24.6% of the Trust's outstanding shares.⁵¹ The activist instituted a proxy battle by filing its own slate of nominees to change all eight of the Trust's board members, terminate the current adviser to the Trust, and conduct a tender offer.⁵² While the activist could not satisfy the 1940 Act voting threshold to terminate the advisory agreement, the activist was able to get its board nominees elected.⁵³ Of approximately 147 million shares outstanding, 39% voted for the activist's board slate, 25% voted for the existing board members, and 34% (presumably retail investors) did not vote.⁵⁴

The activist could not satisfy the vote of the majority of outstanding voting securities standard that Congress intended when there is a change of investment adviser and instead leveraged the exchange annual meeting requirement, and its lower vote threshold, to elect its director slate and end-run the 1940 Act's protections. Given that the activist owned nearly 25% of the Trust's outstanding voting securities, the activist was able to enact its agenda with only 14% of

⁴⁸ Voya Prime Rate Trust, Registration Statement (Form N-2) at 1 (filed June 26, 2020), *available at* www.sec.gov/Archives/edgar/data/826020/000168386320011390/f6225d1.htm.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Compare Voya Prime Rate Trust, Schedule 13G filed by Saba Capital Management, L.P. (filed Jan. 18, 2019), *available at* www.sec.gov/Archives/edgar/data/826020/000106299319000277/schedule13g.htm (reporting 5.16% of the Trust's voting securities held) with Voya Prime Rate Trust, Schedule 13D filed by Saba Capital Management, L.P. (filed April 30, 2020), *available at* www.sec.gov/Archives/edgar/data/826020/000121465920003912/p20-0994sc13da.htm (reporting 24.6% of the Trust's voting securities held).

⁵² Voya Prime Rate Trust, Proxy Statement of Saba Capital Management, L.P. (Schedule 14A) at 1-2 (filed May 8, 2020), *available at* www.sec.gov/Archives/edgar/data/826020/000121465920004168/p20-1033defc14a.htm.

⁵³ Voya Prime Rate Trust, Semi-Annual Report for Period Ending August 31, 2020 (Form N-CSR) at 52 (filed Nov. 6, 2020), *available at* www.sec.gov/Archives/edgar/data/826020/000110465920122351/tm2031566-11_ncsrs.htm.

⁵⁴ See Voya Prime Rate Trust, Supplement to the Trust's Prospectus (Form 497) (filed Aug. 11, 2020), *available at* www.sec.gov/Archives/edgar/data/826020/000168386320012471/f6646d1.htm (noting that as of June 5, 2020, the Trust had 147,130,780.50 shares outstanding); Voya Prime Rate Trust, Form N-CSR, *supra* note 53, at 52 (listing the shares voted in favor or against various proposals). The numbers do not add up to 100% because some investors voted against the activist's or management's board slate as opposed to voting *for* one of the slates.

unaffiliated outstanding shares in support of its board slate. Once the activist's board members were seated, the board replaced the existing adviser and the board appointed the activist as manager.⁵⁵ During that time period, the Trust engaged in two tender offers, which the activist participated in to secure a profit.⁵⁶ Additionally, the activist changed the investment restrictions of the Trust, including changing the Trust's sub-classification under the 1940 Act from "diversified" to "non-diversified" and removing the Trust's fundamental investment restriction relating to investing in other investment companies.⁵⁷ Further, the activist

⁵⁵ See Voya Prime Rate Trust, Annual Report for the Period Ending February 28, 2021 (Form N-CSR) at 26 (filed May 6, 2021), *available at* www.sec.gov/Archives/edgar/data/826020/000110465921062317/tm219046d11_ncsr.htm (noting that the board determined to replace the former adviser and sub-adviser with Saba Capital Management, L.P. on March 22, 2021, and approved such agreement on April 1, 2021). While under the 1940 Act an investment adviser can be appointed as a temporary adviser for 150 days under certain circumstances, see Rule 15a-4 under the 1940 Act, shareholders approved the management agreement between the Trust and Saba Capital Management, L.P. on May 21, 2021, with the prior adviser and sub-adviser officially resigning on June 4, 2021, with Saba Capital Management, L.P. taking over on such date. See Saba Capital Income & Opportunities Fund (formerly Voya Prime Rate Trust), Semi-Annual Report for the Period Ending August 31, 2021 (Form N-CSR) at 27 (filed Nov. 5, 2021), *available at* www.sec.gov/Archives/edgar/data/826020/000139834421020990/fp0069915_ncsrs.htm. While the activist did obtain the necessary shareholder vote, because the option was either approve the advisory agreement or the Trust would have no adviser, shareholders generally vote for approval over no management at all.

⁵⁶ See Saba Capital Income & Opportunities Fund, Schedule TO (June 21, 2021), *available at* www.sec.gov/Archives/edgar/data/826020/000139834421013205/fp0066366_sctoi.htm (tender offer for 30% of outstanding shares); Voya Prime Rate Trust, Schedule TO (Dec. 3, 2020), *available at* www.sec.gov/Archives/edgar/data/826020/000119312520309656/d18387dsctoi.htm (tender offer for 15% of outstanding shares). According to Form 13Fs, the activist sold its holdings of the Trust during both tender offers. Compare Saba Capital Management, L.P., Form 13F for the Period Ending September 30, 2021 (filed Nov. 15, 2021), *available at* www.sec.gov/Archives/edgar/data/1510281/000106299321010900/xslForm13F_X01/form13fInfoTable.xml (showing 11,009,359 of the Trust's shares held) with Saba Capital Management, L.P., Form 13F for the Period Ending June 30, 2021 (filed Aug. 16, 2021), *available at* www.sec.gov/Archives/edgar/data/1510281/000106299321007571/xslForm13F_X01/form13fInfoTable.xml (showing 26,099,9964 of the Trust's shares held); compare Saba Capital Management, L.P., Form 13F for the Period Ending March 31, 2021 (filed May 17, 2021), *available at* www.sec.gov/Archives/edgar/data/1510281/000106299321004752/xslForm13F_X01/form13fInfoTable.xml (showing 27,457,299 of the Trust's shares held) with Saba Capital Management, L.P., Form 13F for the Period Ending December 31, 2020 (filed Feb. 16, 2021), *available at* www.sec.gov/Archives/edgar/data/1510281/000106299321001543/xslForm13F_X01/form13fInfoTable.xml (showing 36,320,674 of the Trust's shares held).

⁵⁷ See Saba Capital Income & Opportunities Fund, Form N-CSR, *supra* note 55, at 27 (disclosing that, in addition to changing the investment adviser, Saba Capital Management, L.P. recommended, and was approved by shareholder vote, (i) removal of the Trust's fundamental investment restriction relating to investing in warrants; (ii) removal of the Trust's fundamental investment restriction relating to purchasing or selling equity securities, engaging in short-selling and the use of certain option arrangements; (iii) removal of the Trust's fundamental investment restriction relating to investing in other investment companies; (iv) change of the Trust's sub-classification under the 1940 Act from "diversified" to "non-diversified"; (v) change of the Trust's investment objective; and (vi) make the Trust's investment objective non-fundamental).

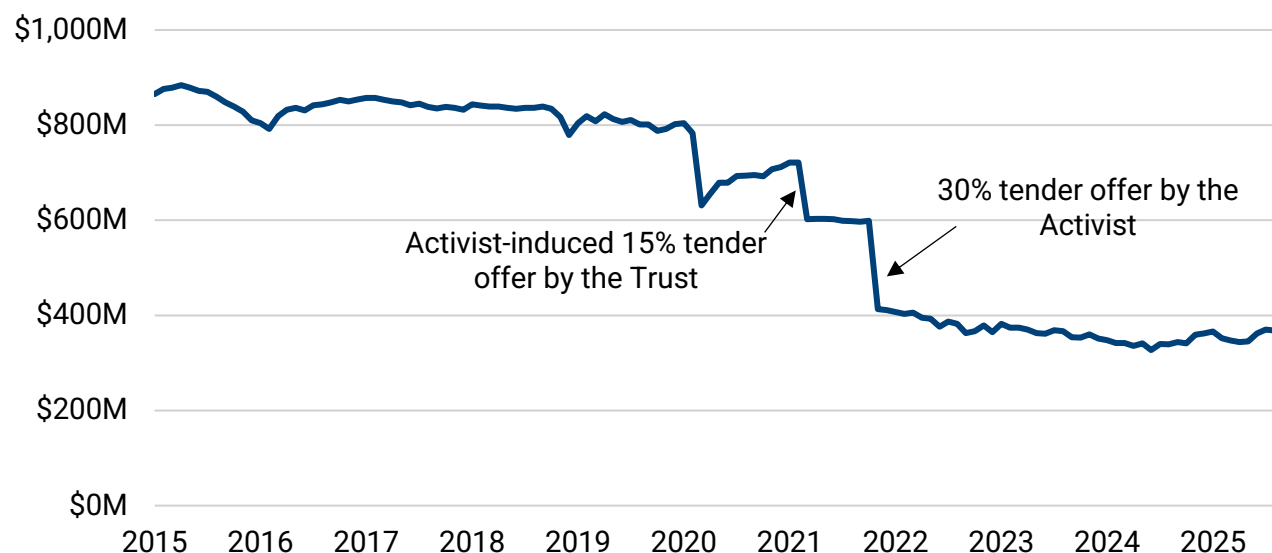
drastically changed the Trust's portfolio holdings: Whereas previously the Trust held approximately 96% of its assets in senior loans, after the takeover by the activist, the fund's portfolio was shifted to be approximately 23% in other CEFs, 8% in foreign investment trusts (including foreign crypto trusts), 11% in private funds, 5% in crypto trusts, 5% in SPACs, 6% in common stocks, 10% in corporate bonds, and only 10% remaining in senior loans, with significant short sale exposure occurring in the portfolio.⁵⁸

These substantive changes are visualized in the figures that follow:

Figure 7

Activist Takeover of the Voya Prime Rate Trust Halved its Net Assets

Total net assets are currently less than half of what they were prior to activist involvement⁵⁹



Note: Data are through September 30, 2025.

Source: ICI calculations of Refinitiv data

⁵⁸ Compare Voya Prime Rate Trust, Form N-CSR, *supra* note 55, at 28-53 (Portfolio of Investments) with Saba Capital Income & Opportunities Fund, Annual Report for the Period Ending October 31, 2023 (Form N-CSR) at 19-42 (filed Jan. 5, 2024), available at www.sec.gov/Archives/edgar/data/826020/000139834424000237/fp0085976-1_ncsr.htm (Consolidated Schedule of Investments).

⁵⁹ An academic letter submitted during the prior proposal process argues that this visualization is mistaken as it does not show total return—which would also include return of capital distributions as part of total return calculations. See Letter from Professor Robert J. Jackson, Jr. to Vanessa Countryman, Secretary, SEC (Nov. 14, 2024), available at www.sec.gov/comments/sr-cboebzx-2024-055/sr-cboebzx2024055-540555-1547742.pdf. This argument misunderstands the point of the chart, which visualizes the decline in the Trust's assets and how a lower base of assets on which to manage a fund, all else equal, leads to lower economies of scale and increased

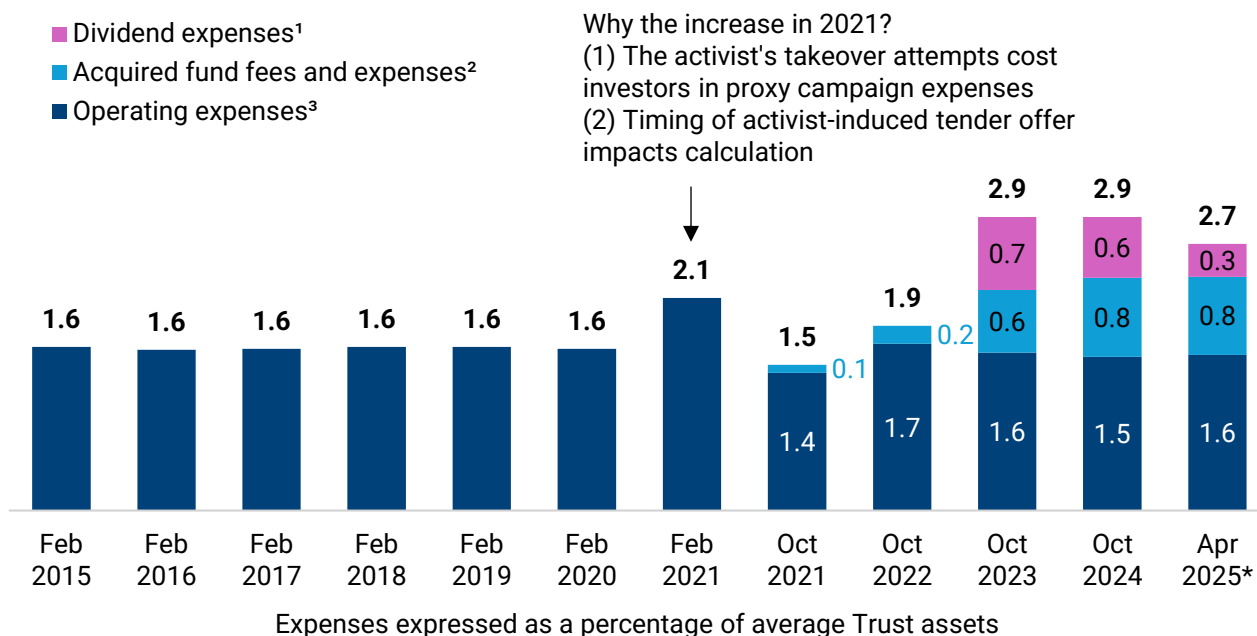
fund operating expenses. Assets under management directly affect the fees and expenses charged to a fund, which can directly affect long-term investors' welfare. While these increases may be small and/or may take a couple of years to show up in fund annual reports, economies of scale are nevertheless an important driver of fund expense ratios. There is a reason why directors analyze economies of scale when approving advisory agreements. See *Jones v. Harris Associates L.P.*, 559 U.S. 335 (2010) (upholding the *Gartenberg* standard, which requires review of economies of scale as one of the factors, that must be weighed with respect to compensation).

Regardless, ICI does want to address return of capital as it relates to total return. Return of capital—whether generated naturally through ordinary business operations, or, more specific to the Trust, a managed distribution plan (MDP)—is a more complex type of distribution requiring a holistic understanding. Many fund managers have very detailed documents outlining how return of capital affects their investors. For some examples, see [“Return of Capital Distributions Demystified,”](#) [“Return of Capital: Part 1,”](#) and [“Understanding Return of Capital in Closed-End Funds.”](#) Academic research has demonstrated that MDPs in funds can serve as a transfer of wealth from the manager to the shareholders of the fund, and they have also been shown to be a useful discount-managing tool and a way to deter predatory activist involvement. For more information, see Cherkes, Sagi, Wang, *supra* note 44, at 1311–37; also Shane Johnson, Ji-Chai Lin, and Kyojik Song, *Dividend Policy, Signaling, and Discounts on Closed-End Funds*, JOURNAL OF FINANCIAL ECONOMICS, Vol. 81, No. 3 (2006). MDPs also provide investors with stable cash flows, which can be useful for investors trying to optimally manage their annual income (albeit, at the cost of reducing the fund's assets). For more information, see Duvall, *supra* note 16, at 13.

Given the nuances regarding return of capital, we find including it in a total return calculation without additional context potentially confusing and inappropriate in the case of the Trust. By the SEC's definition, return of capital is considered a distribution, and distributions are included in a fund's calculation of total return. *However, the SEC's total return definition assumes distributions are reinvested.* If return of capital is as simple as taking capital out of the hands of underperforming managers and returning it to investors, as some argued during the prior proposal process, then it would be more reasonable to assume that the fund's investors would not choose to reinvest the capital. Based on the assumption of not reinvesting return of capital distributions, any total return chart for the Trust would change drastically from SEC presentation requirements. There are many reasons a CEF will generate return of capital, and doing so carries many nuanced considerations, none of which relates to the purposes of this chart demonstrating reduced economies of scale and, all other things equal, increased expenses.

Figure 8**The Activist's Strategy Change Sharply Increased the Expenses Investors Are Paying**

These expenses mean investors now pay 70 percent more to invest in the fund compared with before the activist takeover



¹Dividend expenses are the dividends paid out by an investment that the short seller must cover. While there are valid reasons for a fund to incur dividend expenses, and listed CEFs or other funds engaging in a short strategy do incur this, this chart is to show that long-term retail shareholders that bought and held the Trust are incurring *new* expenses after the activist took over the Trust and changed its investment strategy to something different than originally purchased by the long-term retail investors.

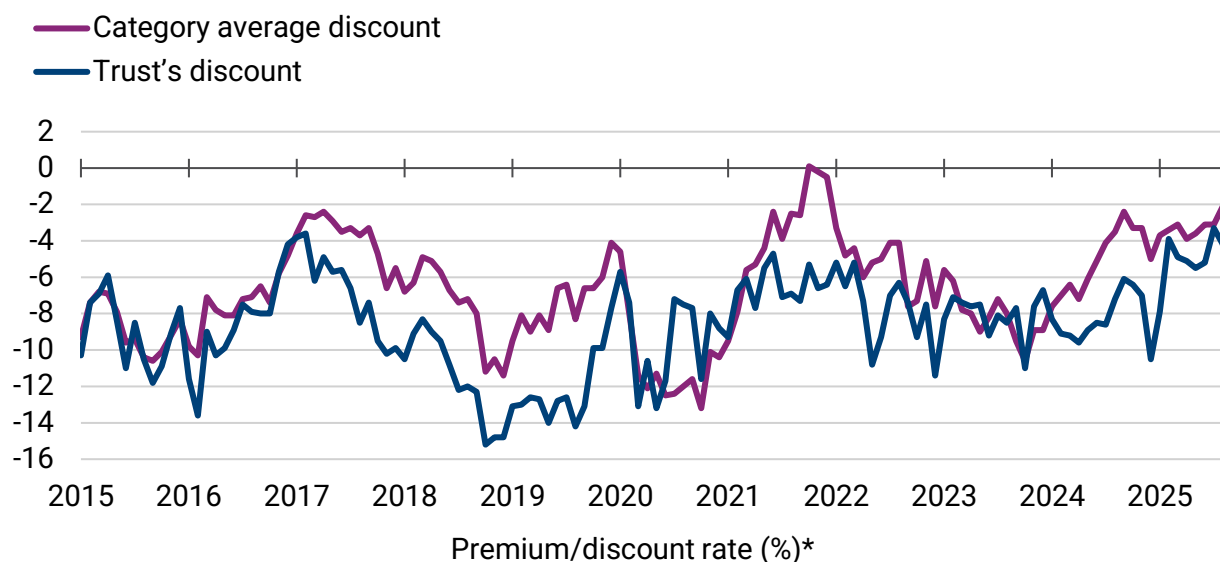
²Acquired fund fees and expenses are not reported in the annual report. ICI estimates this expense by applying general averages (e.g., 1.2 percent for CEFs, 2.0 percent for private funds) to average total net assets and the average share held at mid-year and year-end. Similar to dividend expenses, while there are valid reasons for a fund to incur acquired fund fees and expenses, and listed CEFs or other funds engaging in a "fund of funds" strategy do incur this, this chart is to show that long-term retail shareholders that bought and held the Trust are incurring *new* expenses after the activist took over the Trust and changed its investment strategy to something different than originally purchased by the long-term retail investors.

³The operating expense ratio is the management fee plus other fixed costs related to running the fund.

Note: Data for October 2021 and April 2025 are annualized. The data in this chart is intended to demonstrate the change in investment strategy and the associated costs that existing Trust shareholders now incur. Data exclude interest expenses.

Source: ICI calculations of SEC EDGAR data

Figure 9
Despite the Takeover, Strategy Change, and Managed Distribution Plan, the Trust Still Trades at a Discount
 Percent, as of Month-End



*The premium/discount rate is the simple average of the percent difference between the share price and net asset value at month-end.

Note: The categories used in "category average" are bank loan (between January 2015 and October 2021) and all bond (between November 2021 and September 2025). This split accounts for Saba taking over the fund and changing its fundamental strategy.

Source: ICI calculations of Morningstar data

At this point, several years after the takeover, the Trust is not an isolated example—it is a playbook activists continue to use. The same predatory activist similarly eventually became the adviser to the Templeton Global Income Fund over a two- to three-year period ending in 2023,⁶⁰ and they appear to be following the same pattern, so far, with regard to their attack of the ASA Gold and Precious Metals Limited Fund.⁶¹ The changes made to the Templeton Global Income Fund, are visualized as follows to help clarify the tangible effects remaining shareholders are experiencing due to the annual meeting requirement.

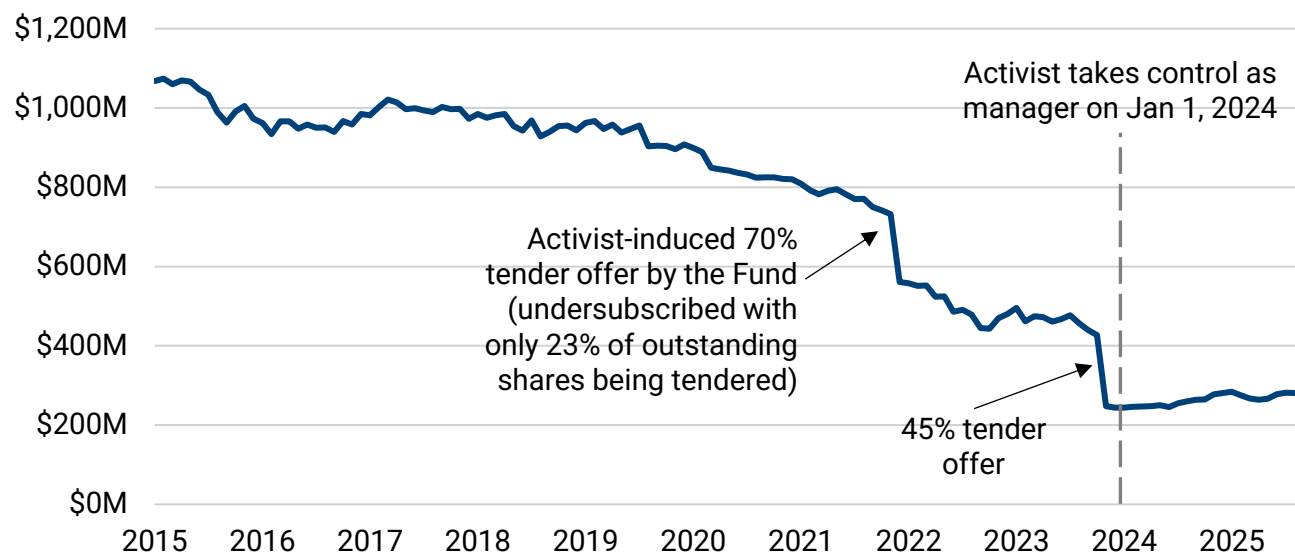
⁶⁰ The activist was again not able to obtain the requisite vote to terminate the advisory agreement, but enacted the playbook through the lower vote threshold needed to get its director slate elected by utilizing its over 30% of the fund's outstanding shares ownership stake. Annual Report for the Period Ending December 31, 2022 (Form N-CRS) at 39-40 (filed Feb. 28, 2023), available at www.sec.gov/Archives/edgar/data/828803/000186842023000025/primary-document.htm; see also Schedule 14A (filed Sept. 26, 2023), available at www.sec.gov/Archives/edgar/data/828803/000090266423004929/p23-2478def14a.htm (noting that the activist, via funds it managed, owned approximately 30.68% of the outstanding shares of the fund, with discretionary voting authority over 27.26%). According to a press release, over 90% of the

voted shares were voted in favor of the management's nominees, other than those owned by the activist or those subject to private agreements with the activist. See Form 8-K, Exhibit 99.1 (filed Feb. 15, 2023), *available at* www.sec.gov/ix?doc=/Archives/edgar/data/828803/000093041323000400/c105650_8k-ixbrl.htm. Once the activist had its director slate seated, and subject to shareholder approval, it replaced the existing adviser with that of the activist, made the fund's investment objective non-fundamental, and removed a fundamental investment policy. Annual Report for the Period Ending October 31, 2023 (Form N-CSR) at 38 (filed Feb. 28, 2023), *available at* www.sec.gov/Archives/edgar/data/828803/000186842023000209/primary-document.htm. Additionally, the board directed that the fund's portfolio begin being liquidated to cash and cash equivalents prior to the activist starting as adviser. *Id.* at 28. Further, a tender offer, announced on October 10, 2023, and expiring on November 9, 2023, for 45% of issued and outstanding shares was conducted, which the activist used to exit a significant portion of its more than 30% holdings of the fund's shares. *Id.* at 27; *compare* Form 13F for the Period Ending June 30, 2023 (filed Aug. 14, 2023), *available at* www.sec.gov/Archives/edgar/data/1510281/000106299323016431/xslForm13F_X02/form13fInfoTable.xml (showing 38,597,813 shares held) *with* Form 13F for the Period Ending December 31, 2023 (filed Feb. 14, 2024), *available at* www.sec.gov/Archives/edgar/data/1510281/000106299324003153/xslForm13F_X02/form13fInfoTable.xml (showing 8,792,605 shares held).

⁶¹ See *supra* note 10 and accompanying text for an explanation of the current situation regarding the ASA Gold and Precious Metals Limited Fund.

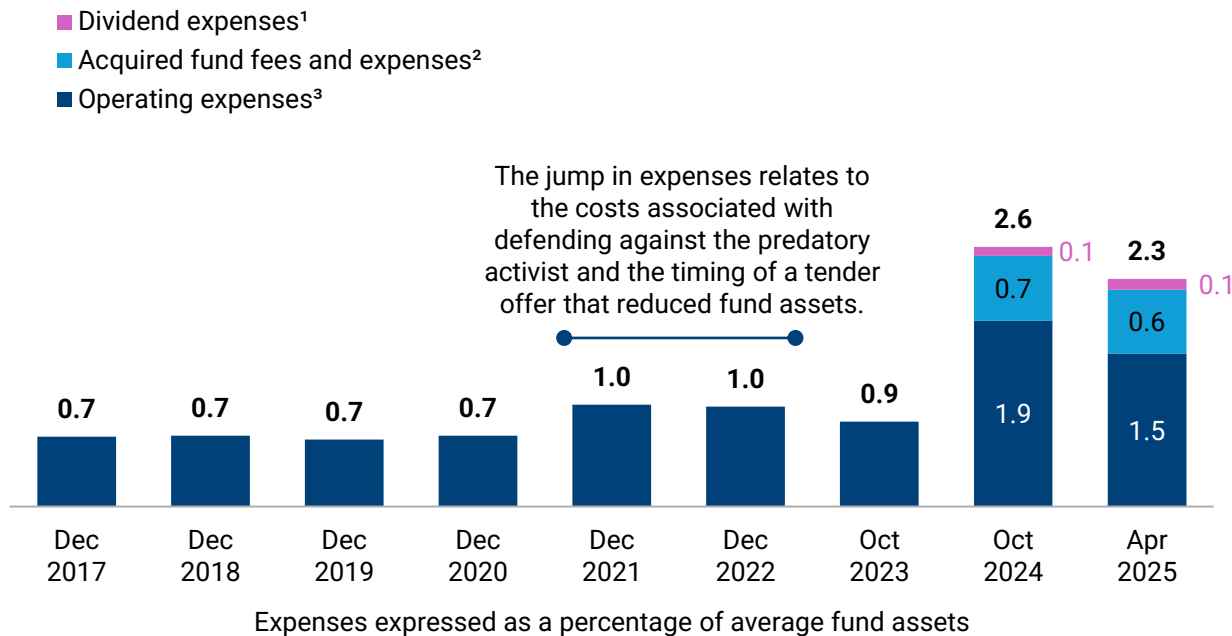
Figure 10

Activist Takeover of the Templeton Global Income Fund Sharply Reduced its Net Assets



Source: ICI calculations of Refinitiv data

Figure 11
The Activist Takeover Effectively Tripled the Expenses Shareholders Pay to Invest in the Fund



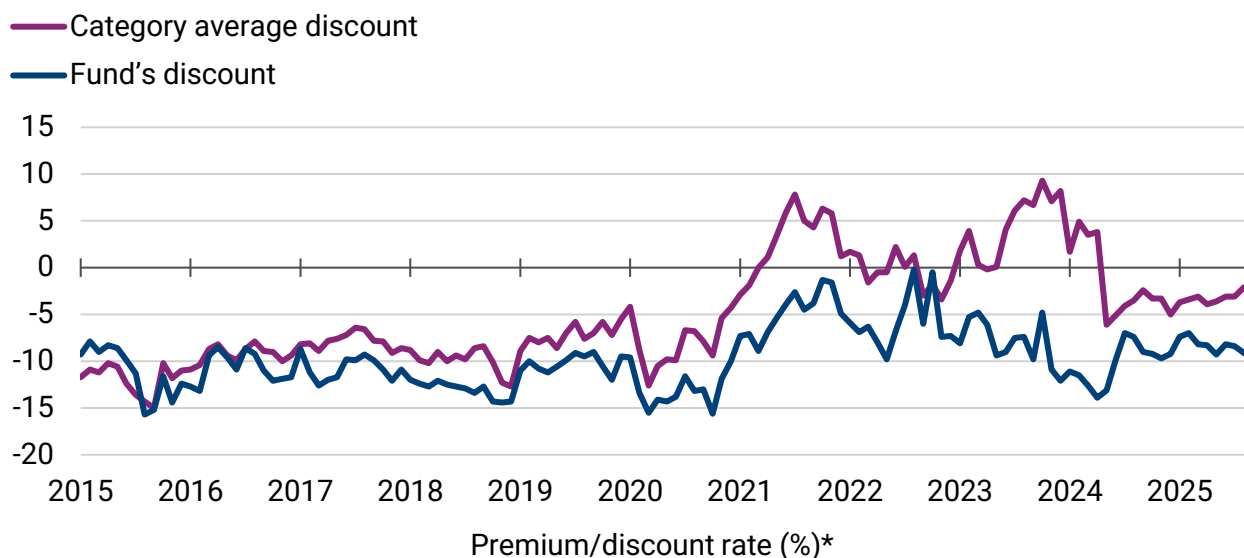
¹Dividend expenses are the dividends paid out by an investment that the short seller must cover. While there are valid reasons for a fund to incur dividend expenses, and listed CEFs or other funds engaging in a short strategy do incur this, this chart is to show that long-term retail shareholders that bought and held the CEF are incurring new expenses after the activist took over the CEF and changed its investment strategy to something different than originally purchased by the long-term retail investors.

²Acquired fund fees and expenses are not reported in the annual report. ICI estimates this expense by applying general average expense ratios to underlying funds (e.g., 1.2 percent for CEFs, 2.0 percent for private funds) to average total net assets and the average share held in the underlying funds at mid-year and year-end. Similar to dividend expenses, while there are valid reasons for a fund to incur acquired fund fees and expenses, and listed CEFs or other funds engaging in a “fund of funds” strategy do incur this, this chart is to show that long-term retail shareholders that bought and held the CEF are incurring new expenses after the activist took over the CEF and changed its investment strategy to something different than originally purchased by the long-term retail investors.

³The operating expense ratio is the management fee plus other fixed costs related to running the fund.
Note: Data for October 2023 and April 2025 are annualized. The fund did hold an underlying money market fund in the years before the activist’s takeover, but the underlying expenses related to those holdings were waived by the fund manager at the time. The data in this chart is intended to demonstrate the change in investment strategy and the associated costs that existing fund shareholders now incur. Data exclude interest expenses.

Source: ICI calculations of SEC EDGAR data

Figure 12
The Fund Still Trades at a Discount Despite the Change in Management
 Percent, as of Month-End



*The premium/discount rate is the simple average of the percent difference between the share price and net asset value at month-end.

Note: The categories used in "category average" are global bond (between January 2015 and April 2024) and all bond (between May 2024 and September 2025). This split accounts for the activist taking over the fund and changing its fundamental strategy.

Source: ICI calculations of Morningstar data

In conclusion, the annual meeting requirement, coupled with the lowered thresholds required for electing directors, have allowed activists to legally end-run the 1940 Act's protections designed for retail investors, which are elaborated *infra* Section IV. It is significant that Congress intentionally did not include an annual meeting requirement in the 1940 Act consistent with the view that such a requirement would not enhance investor protection and in fact would be susceptible of being abused.⁶² Accordingly, ICI urges the SEC to approve the exchange proposal to re-align listing standards for CEFs with the Congressionally designed protections for retail investors under the 1940 Act.

IV. Removing the Annual Meeting Requirement Removes the Outlet for Predatory Activists to Harm the Market and Retail Shareholders While Aligning Shareholder Protections with Those Delineated by Congress in the 1940 Act

When a listed CEF trades at a wider discount after a period of significant market volatility, such as in reaction to COVID or the Federal Reserve raising interest rates, an activist need only establish a minority position and utilize their outsized influence to enact its agenda and the associated harms to long-term retail investors like those discussed *supra* Section III. This fact

pattern and strategy is very similar to the facts and strategies analyzed by the SEC from the Great Depression as part of the “1935 Investment Company Study,” in particular that of Atlas Corporation.⁶³ As stated in the 1935 Investment Company Study:

Although the majority of amalgamations of investment companies occurred in an era of depressed securities prices, the methods and techniques for acquiring control of investment companies are equally workable at any time.⁶⁴

And it was these fact patterns and opportunist investment strategies, which could be enacted without regard for the harms of long-term retail investors, that formed the principles underlying the 1940 Act, which does not include an annual meeting requirement. During Congressional hearings on the 1940 Act, Congress actively debated whether an annual meeting should be required. After debate, Congress did not include any such requirement. As stated in the Congressional Record, 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 participated in annual meetings at a much lower rate.⁶⁵

As stated in the Congressional Record,

⁶² Based on voting patterns analyzed in the 1935 Investment Company Study, less than two-thirds of outstanding voting shares were represented at investment company shareholder meetings. INVESTMENT TRUSTS AND INVESTMENT COMPANIES, *supra* note 23, at 1875. As shown by the voting results for the Trust, all the technology of the last nearly 100 years has not changed that inertia as only two-thirds of outstanding voting shares, with the activist owning nearly 25% of the outstanding total, participated in the contested proxy for the Trust. See *supra* notes 51 & 54 and accompanying text.

⁶³ See *generally* INVESTMENT TRUSTS AND INVESTMENT COMPANIES, *supra* note 23. For a summary of Atlas Corporation’s actions during the Great Depression, see Letter from Paul G. Cellupica, General Counsel, and Kevin Ercoline, Assistant General Counsel, ICI, to Vanessa Countryman, Secretary, SEC, at Section 1.2.1 (Aug. 2, 2024), available at www.sec.gov/comments/sr-cboebzx-2024-055/srcboebzx2024055-503595-1466622.pdf.

⁶⁴ INVESTMENT TRUSTS AND INVESTMENT COMPANIES, *supra* note 23, at 1023.

⁶⁵ See *Bill to Provide for the Registration and Regulation of Investment Companies and Investment Advisers, and For Other Purposes: Hearing on S. 3580 Before a Subcomm. of the Comm. on Banking and Currency, 76th Cong. 504 (1940)* (statement of Merrill Griswold, Chairman, Massachusetts Investors Trust of Boston) (“[A] change in management is a major matter vitally affecting the interests of those shareholders who bought into the trust in reliance on that kind of a management. A change in management under such circumstances should not be lightly treated, as it would be, for example, if only the majority of a quorum were necessary—which would only be 26 percent if a bare majority attending a meeting. Matters that are major in the case of corporations, such as the sale of all of the company’s assets, or a change in the general character of the business, or an increase or change in the capitalization, usually require the affirmative vote of a majority or of two-thirds of all of the outstanding shares, in order that the rights of minority shareholders, who went into the corporation on a certain basis, shall not be lightly overruled.”).

When an investor buys a share in the fund, whom does he want to control his money? . . . Does he want to have it possible for a group, alien to our management, by buying some shares to start a proxy fight and try to get control of his money, or does he want the assurance of continuity of management in those persons he has selected? Bear in mind, please, that this investor, himself, has the right to change the management, by redeeming his shares at any time[.]⁶⁶

Continuity of management was deemed paramount for investors, as even in the 1930s, investors made investment decisions on the basis of the fund's strategy and management and had less frequent participation in annual meetings.

[C]ontinuity of management is something for which an investor naturally looks when seeking to invest his money. . . . [T]o require annual approval of, or permit the change of, management by a percentage of stockholders may . . . be bringing about a contrary result, in leaving management the football of a proxy fight to be thrown out by some unscrupulous group having no responsibility to the shareholders in the original sales of the shares.⁶⁷

In lieu of an annual meeting, Congress enshrined specific governance protections in the 1940 Act as it relates to director elections, director independence requirements, and specified governance and policy changes requiring a 1940 Act Majority Vote.⁶⁸ These protections reflect an important distinction from operating companies, which are not subject to such requirements and whose shareholders do not have these rights. Such distinctions illustrate the differences between funds and traditional operating companies and exemplifies the 1940 Act's more tailored protections for fund shareholders, which in turn renders the annual meeting superfluous given the already robust and tailored protections fund shareholders have under the 1940 Act. Congress analyzed the potential for abuse that an annual meeting requirement could create and decided upon a number of specific substantive protections for retail shareholders. The exchange proposal before the SEC would re-align shareholder protections for investors in newly listed CEFs with the framework intended by Congress. Each of these protections—director elections, director independence requirements, and specified governance and policy changes requiring a shareholder vote—are described below.

A. Director Elections

The 1940 Act protects CEF shareholders by preserving their ability to elect directors, who have oversight responsibility for the management of a fund's affairs and are, among other things,

⁶⁶ 76th Cong., *supra* note 65, at 598 (statement of Charles F. Eaton, Jr., President, Eaton & Howard, Inc.).

⁶⁷ *Id.* at 599.

⁶⁸ See *supra* note 38 for definition of "1940 Act Majority Vote."

intended to monitor a fund's potential conflicts of interest. Specifically, the following three sections of the 1940 Act govern the election of directors by fund shareholders:

- Section 16(a) requires a fund to hold a shareholder meeting in two instances: (1) to elect the initial board of directors; and (2) to fill all existing vacancies on the board if shareholders have elected less than a majority of the board. Further, shareholders must fill any director vacancies if shareholders have elected less than two-thirds of the directors holding office.⁶⁹
- Section 18(a)(1)(C) requires a shareholder meeting for a CEF issuing senior securities that represent debt if on the last business day of each of twelve consecutive calendar months such debt shall have an asset coverage of less than 100%. The holders of such senior securities voting as a class are entitled to elect at least a majority of the members of the board of directors, with such voting right to continue until such debt shall have an asset coverage of 110% or more on the last business day of each of three consecutive calendar months.⁷⁰
- Section 18(a)(2)(C) requires a shareholder meeting for a CEF issuing senior securities that represent preferred stock if at any time dividends on such class of senior securities shall be unpaid in an amount equal to two full years' dividends. The holders of such securities can elect a majority of the directors.⁷¹

These provisions are designed to strengthen shareholders' control over management by preventing a board of directors from ceding control of an investment company to a new board without any shareholder notice or action. Further, these specified director election requirements provide a check over management and the fund's current directors, without enabling the abuses that may occur as a result of annual meetings. Section 16(a), in particular, provides balance between long-term safeguards regarding shareholders having a check over any significant change in director oversight without enabling the potential for a minority investor to exercise a controlling influence to extract short-term profits for itself.

B. Director Independence Requirements

A CEF's board is responsible for overseeing the fund's management and operations, and each director has a duty to act in the best interests of the fund. Congress intended for independent directors to be "independent watchdogs" whose role is to be an independent check on

⁶⁹ Section 16(a) of the 1940 Act.

⁷⁰ Section 18(a)(1)(C) of the 1940 Act.

⁷¹ Section 18(a)(2)(C) of the 1940 Act.

management and represent shareholder interests.⁷² For this reason, the 1940 Act requires that independent directors comprise at least 40 percent of an investment company's board, and relies on fund boards to represent investors and protect their interests.⁷³ In reality, the vast majority of CEF boards are comprised of more than a majority of independent directors, as many of the SEC exemptive rules upon which CEFs frequently rely have director independence requirements as well.⁷⁴ According to ICI research, on average CEF boards are 84 percent independent and 75 percent of CEF boards are at least 78 percent independent.⁷⁵

We recognize that the regulatory requirement for independent directors is not unique to the investment company industry. As further protection for shareholder interests, however, the 1940 Act requires that significant actions be approved by a majority of independent directors, especially those that involve a potential conflict of interest, such as approval of the investment advisory agreement between a fund and its investment adviser. Specifically, a majority of a fund's independent directors must approve:

- Initiation and renewal of the advisory agreement;⁷⁶
- Initiation and renewal of the underwriting agreement;⁷⁷
- Selection of independent public accountant;⁷⁸
- Acquisition of securities by a fund from an underwriting syndicate of which the fund's adviser or certain other affiliates are members;⁷⁹

⁷² See *Burks v. Lasker*, 441 U.S. 471, 484 (1979) (quoting *Tannenbaum v. Zeller*, 552 F.2d 402, 406 (2d Cir. 1979) and *Hearings on H.R. 10065 before a Subcomm. of the H. Comm. on Interstate and Foreign Commerce*, 76th Cong. 109 (1940) (statement of David Schenker, Chief Counsel, SEC)).

⁷³ See Section 10(a) of the 1940 Act. "Independent" means a person who is not "interested," as defined at Section 2(a)(19) of the 1940 Act. "Interested" persons of an investment company are primarily affiliated persons, family members of affiliated persons, affiliated persons of the investment company's investment adviser or principal underwriter, those with a specified financial interest, or specific professional affiliations. See Section 2(a)(19)(A) of the 1940 Act.

⁷⁴ See, e.g., Rule 10f-3; Rule 15a-4(b)(2); Rule 17a-7; Rule 17a-8; Rule 17d-1(d)(7); Rule 17e-1; Rule 17g-1(j); and Rule 23c-3 under the 1940 Act.

⁷⁵ ICI/IDC, *DIRECTORS PRACTICES STUDY* (2023).

⁷⁶ Section 15(a)(2) & (c) of the 1940 Act.

⁷⁷ Section 15(c) of the 1940 Act.

⁷⁸ Section 32(a)(1) of the 1940 Act.

⁷⁹ Rule 10f-3(c)(10) under the 1940 Act.

- The purchase or sale of securities between investment companies that have the same investment adviser;⁸⁰
- Mergers or asset acquisitions involving investment companies that have the same investment adviser;⁸¹
- Use of an affiliated broker-dealer to effect portfolio transactions on a national securities exchange;⁸² and
- Fidelity bond coverage for the fund.⁸³

As an example of the role independent directors play with regard to oversight for listed CEFs, several boards have pursued liquidations, discount management programs, and/or share buyback programs on their own volition in response to persistent discounts.⁸⁴ Congress intended for independent directors to be the primary oversight of fund management, rather than self-interested predatory activists that seek to gain benefits for themselves and not for shareholders as a whole. The SEC itself has observed that in many circumstances engaged oversight by independent directors can provide greater protection to shareholders than could an annual shareholder vote, such as when the SEC adopted Rule 32a-4 under the 1940 Act, which provides a limited exemption from the requirement to obtain ratification of the fund's independent public accountant at an annual meeting.⁸⁵

⁸⁰ Rule 17a-7(e) under the 1940 Act.

⁸¹ Rule 17a-8(a)(2) under the 1940 Act.

⁸² Rule 17e-1(b) under the 1940 Act.

⁸³ Rule 17g-1(d) under the 1940 Act.

⁸⁴ See Letter from Paul G. Cellupica, General Counsel, and Kevin Ercoline, Assistant General Counsel, ICI, to Vanessa Countryman, Secretary, SEC, at Section 4 & n.31 (Jan. 24, 2025), *available at* <https://www.sec.gov/comments/sr-cboebzx-2024-055/srcboebzx2024055-559995-1606982.pdf> (noting that boards for CEFs managed by Goldman Sachs Asset Management, Adams Funds, BlackRock, Deutsche, and numerous others have implemented these programs on their own volition).

⁸⁵ Role of Independent Directors of Investment Companies, Investment Company Act Release No. 24816, 66 Fed. Reg. 3734, 3747 (Jan. 16, 2001) ("Section 32(a)(2) of the Act requires that the selection of a fund's independent public accountant be submitted to shareholders for ratification or rejection. New rule 32a-4 exempts a fund from this requirement if the fund has an audit committee consisting entirely of independent directors to oversee the fund's auditor. The new rule could provide significant benefits to shareholders. Many believe shareholder ratification of a fund's independent auditor has become a perfunctory process, with votes that are rarely contested. As a consequence, we believe that the ongoing oversight provided by an independent audit committee can provide greater protection to shareholders than shareholder ratification of the choice of auditor.").

C. Vote of a Majority of the Outstanding Voting Securities for Specified Governance and Policy Changes

In addition to director election and director independence requirements, the 1940 Act explicitly requires registered investment companies to obtain shareholder approval for specified governance or policy changes. To obtain shareholder approval for these changes, registered investment companies must hold shareholder meetings. Matters that require shareholder approval include:

- A new investment management agreement or a material amendment to an investment management agreement;⁸⁶
- A change from closed-end to open-end status, or vice versa;⁸⁷
- A change from a diversified company to a non-diversified company;⁸⁸
- A change in a policy with respect to borrowing money, issuing senior securities, underwriting securities that other persons issue, purchasing or selling real estate or commodities or making loans to other persons, except in each case in accordance with the recitals of policy contained in its registration statement in respect thereto;⁸⁹
- A deviation from a policy in respect of concentration of investments in any particular industry or fundamental investment policy;⁹⁰ and
- A change in the nature of the investment company's business so as to cease to be an investment company.⁹¹

Shareholders of registered investment companies must approve these specified items by "vote of a majority of its outstanding voting securities" (*i.e.*, a 1940 Act Majority Vote), which is a standard that is more stringent than that used by most standard operating companies.⁹² In particular, a simple majority vote of shares present at a meeting could not approve a proposal unless the total shares voting in favor also represented a majority of all outstanding voting

⁸⁶ Section 15(a) of the 1940 Act.

⁸⁷ Section 13(a)(1) of the 1940 Act.

⁸⁸ Section 13(a)(1) of the 1940 Act.

⁸⁹ Section 13(a)(2) of the 1940 Act.

⁹⁰ Section 13(a)(3) of the 1940 Act.

⁹¹ Section 13(a)(4) of the 1940 Act.

⁹² See *supra* note 38 for definition of "1940 Act Majority Vote."

securities. Further, subject to that same voting threshold, the 1940 Act provides shareholders the ability to terminate an advisory agreement.⁹³ Through these requirements, the 1940 Act ensures that fund shareholders retain the direct ability to meet and determine important corporate governance decisions when, as Congress determined, they are appropriate.

V. Conclusion

We appreciate the opportunity to comment and urge the SEC to approve the exchange proposal. Not only will approving the exchange's proposal accomplish the directives laid out in the EO from the President by encouraging capital formation in products providing retail access to private markets, but will also be in line with recent SEC actions to make IPOs great again. ICI's members are ready to step into the IPO market with products that will provide private market access to retail investors—and available in their 401(k)s—to accomplish the directives and goals laid out in the EO by the President. If you have any questions, please contact Paul G. Cellupica, General Counsel, at paul.cellupica@ici.org, and Kevin Ercoline, Assistant General Counsel, at kevin.ercoline@ici.org.

Sincerely,

/s/ Paul G. Cellupica

Paul G. Cellupica
General Counsel

/s/ Kevin Ercoline

Kevin Ercoline
Assistant General Counsel

cc: The Honorable Paul S. Atkins, Chairman
The Honorable Mark T. Uyeda, Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
Brian Daly, Director, Division of Investment Management
Jamie Selway, Director, Division of Trading and Markets
Sarah Tadtman, Senior Counsel, CBOE

⁹³ Section 15(a)(3) of the 1940 Act.