Saba | Capital

August 14, 2020

Mr. Paul G. Cellupica, Esq.
Deputy Director and Chief Counsel
Division of Investment Management
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

RE: Control Share Acquisition Statutes

Dear Mr. Cellupica:

Saba Capital Management, L.P.[1] is an investment management firm that is registered with the Securities and Exchange Commission (the "Commission") as an investment adviser under the Investment Advisers Act of 1940, as amended. We serve as an investment adviser or sub-investment advisor to (i) certain private funds that are exempt from registration under the Investment Company Act of 1940, as amended (the "1940 Act"), (ii) an open-end investment company that is registered under the 1940 Act and operates as an exchange-traded fund, and (iii) certain separately managed accounts. We, through the various vehicles that we manage, often invest in the shares of various publicly-traded closed-end management investment companies that are either registered as investment companies under the 1940 Act, or have elected to be regulated as business development companies thereunder, which we refer to collectively in this comment letter as "regulated funds".

We are writing in response to the statement recently issued by the staff of the Division of Investment Management (the "Staff") with respect to state control share acquisition statutes.[2] Notably, the Staff Statement, among other things, specifically withdrew the Staff's prior

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[1] References in this comment letter to "we", "us" or "our" refer to Saba Capital Management, L.P.
[2] See *Staff Statement of the Division of Investment Management Regarding Control Share Acquisition Statutes* (May 27, 2020), *available at https://www.sec.gov/investment/control-share-acquisition-statutes* (the "Staff Statement").

position that such control share acquisition statutes violated Section 18(i) under the 1940 Act.[3] For the reasons enumerated below, we believe that *Boulder* should not have been withdrawn, as it continues to provide an accurate statement with respect to the problems control share acquisition statures, such as the Maryland Control Share Acquisition Act[4] referenced in *Boulder*, pose to shareholder rights expressly granted under the 1940 Act. In addition, we believe that the withdrawal of *Boulder* will have widespread and negative implications for shareholder rights throughout the regulated fund space, as we expect managers of regulated funds to seek ever more creative ways to avail themselves of the type of management entrenchment tools provided under control share acquisition statutes such as the MCSAA. We also believe that the brevity of the Staff Statement, particularly as compared to the detail provided in *Boulder*, provides room for managers of regulated funds to take ever more aggressive positions, and we encourage the Staff to provide interpretive guidance to provide clarity and stem potential abuses moving forward.

I. We Believe that the Withdrawal of *Boulder* was Incorrect and Ignores Relevant Legislative History and Well-Understood and Long Held Staff Positions

In issuing *Boulder*, the Staff provided an extremely detailed and well-reasoned discussion of both the legislative history of Section 18(i), along with prior Staff statements that touched on similar issues posed by the conflict between control share acquisition statutes such as the MCSAA and various provisions under the 1940 Act. For example, the Staff noted in *Boulder* that "Congress adopted Section 18(i) to address the use of 'various devices of control' by investment company insiders that were intended to effectively deny public shareholders "any real participation in the management of their companies."[5] The Staff also referenced the findings set forth in the Securities and Exchange Commission's Report to Congress on Investment Trusts and Investment Companies (the "Trust Study"), upon which Congress heavily relied in crafting the 1940 Act.[6] Among other things, the Trust Study discussed practices employed by managers to ensure continued control over funds through voting securities with superior voting rights, including through the issuance of special classes of stock with differential voting rights or through the issuance to fund managers of unpaid options as compensation for management services.[7] The Staff noted in *Boulder* that Congress had expressed particular concern with respect to such arrangements, in that:

> … control of such funds offers manifold opportunities for exploitation by the unscrupulous management of some companies. These assets can and have been easily misappropriated

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[3] *See Boulder Total Return Fund, Inc.*, SEC No-Action Letter (November 15, 2010), *available at https://www.sec.gov/divisions/investment/noaction/2010/bouldertotalreturn111510.htm* ("Boulder").
[4] *See* Md. Code Ann., Corps. & Ass'ns §§ 3-701 to -710 (2020) (the "MCSAA").
[5] *Boulder*, citing S. Rep. No. 76-1775, at 7 (1940) ("Senate Report").
[6] *See* Securities and Exchange Commission, Report on Investment Trusts and Investment Companies, pt. 3, ch.4, H.R. Doc. No. 136, 77th Cong., lst Sess. (1940).
[7] *See* id at 1895.

> and diverted by such types of managements, and have been employed to foster their personal interests rather than the interests of public security holders.[8]

As the Staff described in *Boulder,* "Section 18(i) addresses these concerns by ensuring that each investment company shareholder has a vote proportionate to his or her stock holdings 'like a mutual savings bank — one class of stock, no conflicts, [and] everybody has a pari passu share in the voice of the management.'"[9] In short, Section 18(i) helps to prevent manager entrenchment by ensuing all shareholders have equal voting rights. Importantly, the Staff in *Boulder* also specifically referenced Section 1(b) under the 1940 Act, which "requires that the provisions of the Act be interpreted 'to mitigate and, so far as is feasible, to eliminate' certain enumerated abuses."[10] As relevant to Section 18(i), such list of abuses include when an investment company is organized, operated or managed in the interests of investment advisers or affiliated persons, rather than in the interest of all classes of its security holders[11], issues securities containing inequitable or discriminatory provisions, or "fails to protect the preferences and privileges of the holders of [it's] outstanding securities."[12]

Importantly, the Staff's position in *Boulder* was applied on an informal basis for a number of years in advance of its release in no-action letter form. In particular, new regulated funds routinely received Staff comments requesting confirmation of the Staff's position that opting into the MCSAA violated Section 18(i) well before the release of *Boulder*.[13] As a result, the Staff Statement not only withdraws *Boulder*, but overturns well-established Staff positions that preceded *Boulder* and guided much of the current disclosure included by regulated funds with respect to control share acquisition statutes such as the MCSAA.

II. The Withdrawal of *Boulder* was the Result of False and Misleading Information Provided by a Pro Manager Lobbyist Group.

Crucially, the Staff only cites "market developments" from the Investment Company Fact Book (the "ICI Fact Book"), allegedly showing that the number of closed-end funds has declined by more than 20% from 2011 through 2018, as the sole basis for its decision.[14] To be abundantly clear, this is an intentionally misleading data point from the Investment Company Institute, a lobbying group supporting regulated fund managers (the "ICI"). The reason for this

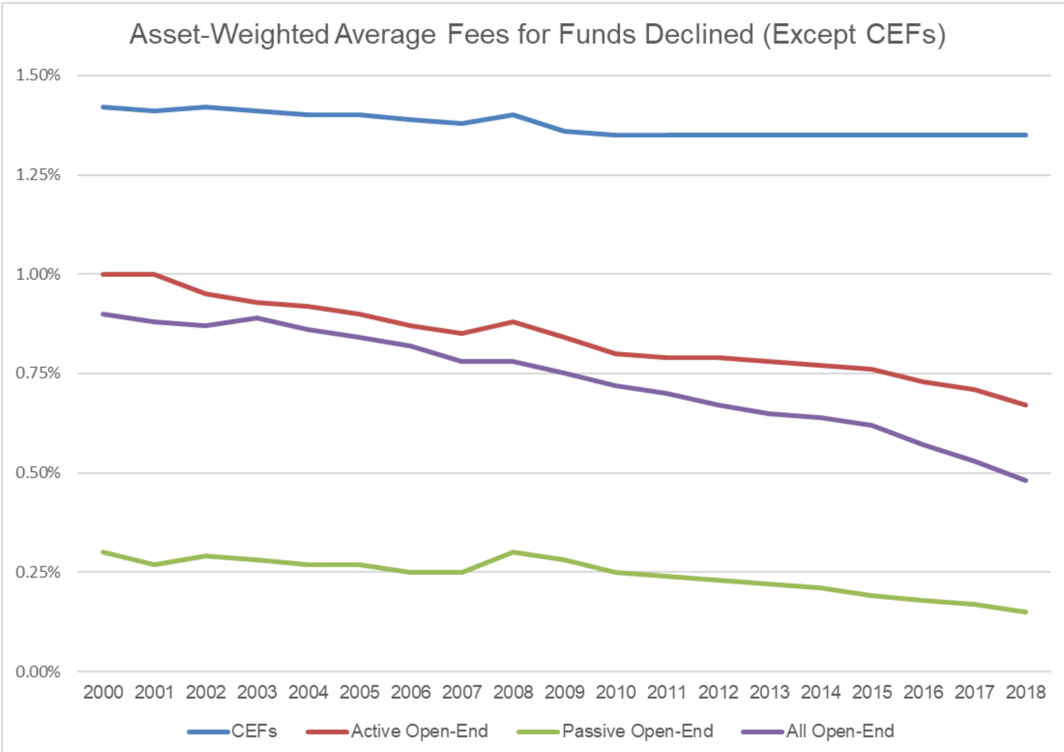
[8] *Boulder*, citing Senate Report at 6.
[9] *Boulder*, citing *Investment Trusts and Investment Companies; Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 76th Cong., 3d Sess. 271 (1940) (statement of Mr. David Schenker, Chief Counsel of the Commission's Investment Trust Study).
[10] *Boulder*, citing 1940 Act Section 1(b).
[11] *See* 1940 Act Section 1(b)(2).
[12] 1940 Act Section 1(b)(3).
[13] *See Boulder*, at footnote 4 (describing comments provided by the Office of Disclosure and Review of the Division of Investment Management to regulated funds addressing the Staff's view that opting into the MCSAA was inconsistent with Section 18(i)).
[14] https://www.sec.gov/news/public-statement/clayton-control-share-statutes-2020-05-27

"decline" is simply because of the **merger of small closed-end funds** with similar mandates and **not activism**. We have made this fact clear to the Staff on multiple occasions, including through the provision of ample supporting data. Again, since 2013 there have been 30 liquidations (excluding term trusts), 136 mergers and 71 initial public offerings. During that same time frame, there were $5.6 billion of tenders/liquidations, compared to $28.5 billion in new capital raised through initial public offerings within the closed-end fund space. The universe has grown – not decreased. There is simply no debate with respect to that fact. And it certainly raises eye-brows that such an important decision can be based on this data "sleight of hand" promoted by the ICI in the ICI Fact Book.

The motives of the ICI are transparent – to influence SEC Staff rulemaking to protect high fee funds from the rigors of the market place. According to the Morningstar 2018 Annual Fund Fee Study, mutual fund and exchange-traded fund ("ETF") investors pay roughly 50% less in fees than they did in 2000, 40% less than they did a decade ago and about 26% less than they did just five years ago.[15] Closed-end fund investors, though, have not benefited from this industry-wide fee compression. In particular, purportedly "independent" boards have nearly universally refused to push for lower fees, arguably putting the profits of the investment manager ahead of the shareholders. Closed-end fund board members are often paid nearly half a million dollars a year to sit on all the fund boards in a manager's fund complex. There is no doubt they are more aligned with the investment advisor than an individual fund's shareholders. The withdrawal of *Boulder* is tantamount to the SEC placing its thumb on the scale in favor of fund managers to ensure fees remain high for retail investors – exactly the group the SEC should be focused on protecting. Without the threat of an organized shareholder action, there will never be any real catalyst for investor fees to be lowered; and closed-end fund investors will never have the benefits of competition that investors in open-end products appreciate.

Below is a chart showing the downward fee trend of open-end funds and EFTs versus the near constant fee trend of similar situated closed-end funds.

[15] https://newsroom.morningstar.com/newsroom/news-archive/press-release-details/2020/Morningstars-Annual-Fund-Fee-Study-Finds-Investors-Saved-Nearly-6-Billion-in-Fund-Fees-in-2019/default.aspx



To put the impact of these fees in context, closed-end fund investors by last count **pay $2.8 billion** in advisor fees and expenses per year. If instead they were able to switch to actively managed open-end funds, they would **save $1.2 billion per year**. As the dominant investor base in closed-end funds are retail investors, this battle comes down to giant asset managers taking over $1 billion dollars in excess fees per year out of the accounts of retail investors.

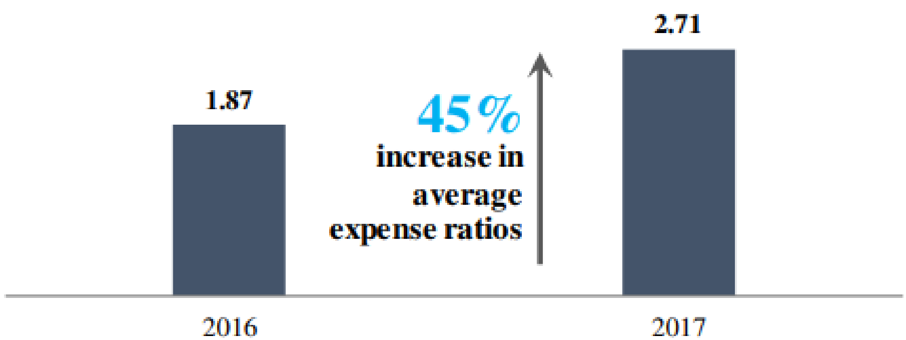
Furthermore, given the suspicious timing between the withdrawal of *Boulder* and the submission by the ICI of its purported white-paper entitled "Recommendations Regarding the Availability of Closed-End Fund Takeover Defenses" (the "ICI White Paper")[16], we felt it necessary to address the ICI White Paper's veracity. In particular, the ICI White Paper is a clear and obvious attempt to mislead the SEC and the Staff through specious data and half-truths. Almost every piece of information in the ICI White Paper is a deliberate attempt to misrepresent data to serve the ICI's primary purpose of protecting the high fees for investment managers. For example, a very important section discusses how activism "burdens long-term shareholders with higher

[16] https://www.ici.org/pdf/20_ltr_cef.pdf

expense ratios."[17] If that allegation were true, which it is not, it would obviously be a very concerning consideration for the Staff.

Below is a chart from The ICI Fact Book put forth to show the effects of activism on CEF fees:

Figure C.6
Simple Average Expense Ratio for CEFs with Activist-Induced Tender Offers Rose 45 Percent in 2017
Closed-end funds with tender offers in 2017*



*Data include 10 closed-end funds targeted by activists in 2017—three of which merged in 2018.
Source: Investment Company Institute tabulations of Morningstar Direct data

Reaching that conclusion, though, requires some creative interpretation of data on the part of the ICI. Specifically, the ICI used the "total expense ratio" of each of the subject funds in calculating the average expense ratio included in the table above. What they failed to disclose, however, is that the total expense ratio calculation includes both operating expenses **AND** cost of leverage. The increase in the 12-month LIBOR from 0.63% in 2015 to 2.1% in 2018 represents the bulk of the change in expense ratios for the subject funds over that period. This is a shameful and clear attempt to deceive both the SEC and the Staff, in that the ICI could have easily shown a comparison of "operating expenses" during this same period, but that comparison would not have provided the necessary "support" for its argument. So, instead ICI tried to trick readers, including the Staff, into thinking that an increase in total costs, as a result of higher interest rates, is actually caused by the presence of activist in these funds. Below is a table showing the change in expense ratios for AVK (Advent Convertible and Income Fund), one of the ten funds used by ICI to try to mislead the Staff that expenses have sky-rocketed. You can clearly see that, yes, the total expense

[17] https://www.ici.org/pdf/20_ltr_cef.pdf

ratio increased 30%, but no, this had absolutely nothing to do with shareholder activism – in fact, operating expenses never changed.

	Period Ended April 30, 2018 (Unaudited) (g)	Year Ended October 31, 2017	Year Ended October 31, 2016	Year Enc October 2(
Ratio to average net assets of:				
Net investment income, prior to the effect of dividend to preferred shares, including interest expense	3.17% (g)	4.04%	4.66%	3
Net investment income, after the effect of dividends to preferred shares, including interest expense	3.17% (g)	4.04%	4.66%	3
Total expenses (d)(e)	3.56% (g)	2.72%	2.92%	2
[illegible]	[illegible]	[illegible]	98%	[illegible]
Senior Indebtedness				
Borrowings - committed facility agreement (in thousands)	$ 130,000	$ 150,000	$ 170,000	$ 170,(
Asset Coverage per $1,000 of borrowings (f)	$ 4,346	$ 3,869	$ 3,797	$ 3,(
Reverse Repurchase Agreements (in thousands) (h)	$ 97,310	$ 77,000	$ 92,000	$ 92,(
Total Borrowings and reverse repurchase agreements outstanding (in thousands)	$ 227,310	$ 227,000	$ 262,000	$ 262,(
Asset Coverage per $1,000 of indebtedness (i)	$ 2,485	$ 2,557	$ 2,464	$ 2,(

(a) Based on average shares outstanding.
(b) Total return is calculated assuming a purchase of a common share at the beginning of the period and a sale on the last day of the value ("NAV") or market price per share. Dividends and distributions are assumed to be reinvested at NAV for NAV returns or the Dividend Reinvestment Plan for market value returns. Total return does not reflect brokerage commissions.
(c) Included in the total return at NAV is the impact of the tender and repurchase by the Fund of a portion of its Auction Market Prefer AMPS' per share liquidation preference. Had this transaction not occurred, the total return at net asset value would have been lc
(d) Expense ratio does not reflect the fees and expenses incurred directly by the Fund as a result of its investment in shares of busin fees were included in the expense ratio, the increase to the expense ratio would be approximately 0.00%, 0.00%, 0.01%, 0.01% ended April 30, 2018 and the years ended October 31, 2017, 2016, 2015, 2014 and 2013.
(e) Excluding interest expense, the operating expense ratio for the period ended April 30 and the years ended October 31, would be:

April 30, 2018	2017	2016	2015
1.50%	1.49%	1.52%	1.42%

The ICI Fact Book, not surprisingly, also takes the position that any of the potential methods for reducing the discount and/or improving liquidity at regulated funds – including liquidations, tender offers or conversions to an open-end structure – are detrimental to investors[18]. To set the record straight we felt it important to address each individually. First, when a closed-end fund liquidates, the assets are typically sold over weeks or months if necessary to maximize shareholder value. The investors who were formerly trapped in a fund at a persistent discount can then switch to one of the thousands of lower-cost, better performing investment options, or another closed-end fund if they choose. Second, when a regulated fund conducts a tender offer, the purchase is nearly always priced at a discount to NAV (normally 2%), so that the tender offer is accretive to all remaining investors. The increase in NAV to remaining shareholders is often 10 to 20 times greater than the two-cent increase in fixed costs that result from managing a smaller fund. But even without considering the gains to remaining and exiting shareholders, it would seem easy for a manager to lower their well-acknowledged bloated advisory fees to reflect any minor increase in fixed costs if they were actually thinking of the best interests of their shareholders.

[18] https://www.ici.org/pdf/20_ltr_cef.pdf

Third, open-ending a closed-end fund structure immediately allows existing investors to capture the difference between the fund's prior market price and its then current NAV. While that may not be an attractive option for regulated funds that invest primarily in less liquid instruments, it remains an extremely shareholder-friendly alternative for closed-end funds that hold primarily liquid assets, yet trade at a persistent and wide discount to NAV. In short, regulated fund activism benefits *all* investors. Those who want to exit are finally given that opportunity to do so at a fair price. Investors who wish to remain can do so in a fund that has a higher NAV and trades at a smaller discount to that NAV, as the oversupply of shares has been reduced. In individual examples of traditional corporate activism, there can be a reasonable debate about the benefit to shareholders as the activist's plans can either add or reduce value, depending on the circumstances involved and can benefit solely the activist. By contrast, in regulated fund activism, the solution to the persistent discount is certain – the data from more than fifty cases over the past few years shows that a conversion to an open-end structure, a liquidation, or a tender, has resulted in a gain to all shareholders. Moreover, in regulated fund activism, all shareholder have the right to participate in a tender and all shareholder receive the benefit of an open ending or liquidation. With regard to tenders, a common contention from closed-end fund managers is that "tenders don't work" because some closed-end funds remain at a discount after a tender. The only plausible rationale for a persistent discount post a tender is that the tender was not large enough to reduce all the excess supply of shares and that there are less "long term shareholders" who want to remain in the fund than the manager has represented. If this is the case, the manager should consider some combination of a second tender, reducing the fees and expenses, changing the portfolio management team and/or the mandate in an effort to make the fund more appealing. This would be consistent with the actions those same managers take regarding their open-end funds.

Notwithstanding the foregoing, the ICI Fact Book confusingly states that "closed-end fund trading at a discount to its NAV is inherent to, and a feature of, the product", and at the same time that small investors need closed-end funds and because the number of funds is declining, activists are therefore depriving individuals of an irreplaceable investment.[19] You may wonder how an investment vehicle can be so valuable and sought after by investors, yet, for nearly every closed-end fund, no one is willing to pay the full value to invest in them. The market clearly disagrees with the claims made by the investment managers and the ICI, and the persistent discounts are evidence of the supply-demand imbalance.

In addition, neither the ICI Fact Book nor the ICI White Paper even address the rise in the scope and number of ETFs since *Boulder*, particularly in view of the greater latitude afforded to actively-managed ETFs since *Boulder* was released, that have had a fundamental impact on the rate of growth of closed-end funds during such time.[20] For example, ETFs generally have far

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[19] https://www.ici.org/pdf/20_ltr_cef.pdf
[20] Moreover, nowhere in the ICI papers or their website is an honest reflection about the product and those that manage the product. No time is spent discussing how managers can make the product better for investors, cheaper,

lower fees than registered closed-end funds, and by their nature trade at or near net asset value ("NAV"), as compared to registered closed-end funds that frequently trade at a discount to NAV, particularly if they have an equity focus. In addition, registered closed-end funds offer managers "permanent capital," without fear of redemptions regardless of performance, as opposed to ETFs, which face the risk of redemptions if performance suffers. As a result, we believe that new registered closed-end fund launches in recent years have been more focused on illiquid asset classes, with correspondingly fewer launches, while ETFs – which necessarily focus exclusively on liquid investments – have seen a significant uptick in new launches during the same period. In short, the decrease in the number of registered closed-end funds since *Boulder* is arguably far more attributable to market forces and the increasing prominence of the ETF model, rather than the concerns relating to state control share acquisition statutes like the MCSAA.

III. The Withdrawal of *Boulder* is the Result of Improper Rule Making by the Staff

We also believe that the actual operation of Section 18(i), as evidenced by legislative history and detailed in *Boulder*, was fundamentally modified by the issuance of the Staff Statement, in a manner arguably akin to a rule-making requiring both Commission action as well as the following of specific procedures as specified under the Administrative Procedures Act.[21] In particular, while the Staff may provide its views on interpretive issues, it does not have the authority to modify existing regulatory provisions – let alone statutory provisions. For example, even exemptive orders issued under the 1940 Act require formal Commission action, including appropriate notice. Notably, a formal rule-making process would have provided an opportunity for all concerned parties to be informed about and provide comments in advance of implementation. Instead of pursuing a proper rule making process, Boulder was withdrawn in the cloak of darkness. No opportunity was afforded to market participants in connection with the issuance of the Staff Statement and the changes to Section 18(i) that came as a result.

IV. The Withdrawal of *Boulder* Will Have Wide Ranging Negative Implications for All Shareholders of Regulated Funds

The withdrawal of *Boulder*, and the ability of regulated funds to opt into the MCSAA and similar state control share acquisition statutes, will have wide-ranging negative implications for all regulated fund shareholders and the regulated fund space generally. In particular, given the heavy usage by regulated fund managers of proxy advisory firms[22], such as Institutional Shareholder Services and Glass Lewis & Co., there is little incentive for such advisory firms to "punish" regulated funds for opting into state control share acquisition statutes such as the MCSAA, even though in other instances such advisory firms tend to disfavor anti-takeover measures generally. As a result, we fully expect nearly all regulated funds structured as Maryland

creating value, etc. Instead, the systemic problems of the industry are characterized as "discounts are normal" and "high expense ratios are common".

[21] 5 U.S.C. §§ 551-559.

[22] https://www.sec.gov/rules/final/2020/34-89372.pdf

corporations to opt in to the MCSAA. This will mean shareholders with more than 10% of a regulated fund's outstanding shares could be blocked from voting.[23] In addition, the definition of "control shares" included in the MCSAA references both direct or indirect voting control, suggesting that the MCSAA may permit aggregation of shares held by unaffiliated shareholders acting together as a group, in a manner similar to the group aggregation rules applied under Rule 13d-5 under the Securities Exchange Act of 1934, as amended (the "Exchange Act").[24] As a result, any shareholders forming a group that, collectively, held more than 10% of a regulated fund's outstanding shares could potentially face the loss of their voting rights under the MCSAA, severally limiting the ability of shareholders to collectively advocate for change.

While this will have a chilling effect on activism within the regulated fund space, it will also serve to further entrench existing managers – without fear of reprisals or consequences from poor performance – and we believe further diminish the viability of the regulated fund space generally. For example, long-standing discounts to NAV will likely become even more crystalized at chronically underperforming regulated funds. In addition, institutional investors will likely abandon the regulated fund space, to the extent they have not already done so, in favor of the cheaper fees and lack of trading discounts to NAV within the ETF space. As a result, retail investors will remain "stuck" indefinitely in poorly managed regulated funds, with no hope of independent market forces pushing for positive change to improve performance.

In addition, we expect the Staff Statement to drive a movement of existing regulated funds to reincorporate in Maryland, to take advantage of the anti-takeover protections afforded by the MCSAA that are unavailable currently in states like Delaware. For example, we have already seen at least one large registered closed-end fund manager, BlackRock Advisors, LLC, push for the merger of multiple registered closed-end funds into a single registered closed-end fund structured as a Maryland corporation.[25] Certain counsel within the regulated fund space have also discussed adopting MCSAA-style protections as part of trust indentures for regulated funds that utilize the statutory trust model in states such as Massachusetts or Delaware, which has become the most common alternative structure to a Maryland corporation for new regulated fund launches.[26] Notably, if allowed to do so, regulated funds structured as trusts could include even more restrictive provisions than the MCSAA – for example, lowering the trigger threshold to 5% of outstanding shares – in order to even more tightly restrict the ability of shareholders to accumulate any meaningful voting position.

[23] *See* Md. Code Ann., Corps. & Ass'ns § 3-701(e)(1).
[24] *See* Md. Code Ann., Corps. & Ass'ns § 3-701(e)(2).
[25] *See* Press Release issued by BlackRock Advisors, LLC on June 22, 2020, *available at* *https://www.businesswire.com/news/home/20200622005376/en/BlackRock-Announces-Closing-Municipal-Closed-End-Fund-Merger*.
[26] *See Ropes & Gray Alert – Asset Management*, "SEC Staff Takes No-Action Position Regarding Closed-End Funds' Use of State Control Share Statutes" (June 2, 2020), *available at* *https://www.ropesgray.com/en/newsroom/alerts/2020/06/SEC-Staff-Takes-No-Action-Position-Regarding-Closed-End-Funds-Use-of-State-Control-Share-Statutes*.

V. We Believe that the Ambiguity Caused by the Withdrawal of *Boulder* Raises Interpretive Issues Under Several Additional 1940 Act Provisions

We believe that the withdrawal of *Boulder*, and the corresponding ambiguity it raises with respect to what constitutes a "voting security" in the context of Section 18(i), poses challenges with respect to interpretive issues under a number of additional 1940 Act provisions. First, allowing state control share acquisition statutes such as the MCSAA to restrict voting rights with respect to regulated funds in any meaningful way raises questions regarding the definition of "voting security" generally under the 1940 Act. In particular, "voting security" is defined in Section 2(a)(42) under the 1940 Act as any security entitling its owner to vote for the election of directors. To the extent a regulated fund has opted into the MCSAA, however, certain of its shares of common stock could be prevented from voting with respect to any election of directors to the extent they qualify as "control shares" under the MCSAA, and would therefore no longer qualify as "voting securities" under Section 2(a)(42). Such an outcome would clearly conflict with the position set forth in the Staff Statement that such "control shares" in fact remain "voting securities" even if they can no longer vote for the election of directors, and therefore the application of the MCSAA to those shares does not violate Section 18(i).

Second, even if shareholders have their votes blocked under a state control share acquisition statute such as the MCSAA with respect to voting matters governed by state law, they should clearly still be permitted to vote their shares with respect to matters governed primarily or exclusively by the 1940 Act – including where the required voting threshold is set forth in the 1940 Act.[27] The withdrawal of *Boulder*, though, raises the prospect that a state control share acquisition statute could effectively eclipse the 1940 Act, even with respect to matters where Congress clearly intended shareholders to have a modicum of control – such as with respect to the retention and dismissal of investment advisers. As a result, regulated funds that opt into the MCSAA or similar state control share acquisition statutes could effectively create just the type of risk of manager entrenchment that Congress wisely sought to prevent by providing shareholders with specific voting rights with respect to advisor agreements. Notably, the required voting threshold for approval or termination of an advisory agreement by shareholders is calculated under Section 2(a)(42) based upon a regulated fund's "voting securities". We believe that methodology requires that all shares – even "control shares" potentially subject to the MCSAA or similar state control share acquisition statute – must be permitted to vote on such matters in order to comply with the requirements of the 1940 Act.

We do not, however, believe that the temporary short-term restrictions on voting set forth in Rules 13d-1(e)(2)(i) or (f)(2)(i) under the Exchange Act raise the same type of concerns as those created by permitting the MCSAA to restrict voting rights for a much more significant

[27] *See, e.g.*, 1940 Act Section 2(a)(42) (defining "majority of the outstanding voting securities" for purposes of the 1940 Act), Section 15(a) (requiring the vote of a majority of a regulated fund's outstanding voting securities to approve a new advisory agreement) and Section 15(a)(3) (requiring that an advisory agreement be terminable by the vote of a majority of a regulated fund's outstanding voting securities).

period of time at a much lower ownership threshold. First, Regulation 13D under the Exchange Act is a provision of Federal law, and therefore does not raise the same Commerce Clause implications inherent in a conflict between Federal law and applicable state law provisions. Second, the voting restrictions under Regulation 13D referenced in the Staff Statement apply only *after* a shareholder crosses the 20% ownership threshold, and then only for a period of 10 days, meaning that an investor can manage its ownership percentage to ensure that the voting restriction does not prevent it from voting at any upcoming shareholder meeting. In contrast, the MCSAA kicks in at the 10% ownership threshold, and applies in perpetuity, absent approval by two-thirds of a regulated fund's other shareholders. Third, the purpose of the voting restrictions under Regulation 13D is to allow the market to receive and adequately digest sufficient information regarding the nature of an investor's significant equity position in the subject company – not to foster management and board entrenchment at the expense of ordinary investors.

VI. The Staff Must Provide Clear Guidance Addressing Interpretive Issues Posed by the Withdrawal of Boulder

Finally, we believe that there are other questions raised by the Staff Statement and withdrawal of *Boulder* that must be addressed by the Staff in advance of any formal rule-making process by the Commission. First, we feel the Staff should clarify that the MCSAA and similar state control share acquisition statutes will not limit the ability of shareholders to vote their shares with respect to matters governed primarily or exclusively by the 1940 Act, including the approval and termination of advisory agreements. Failing to do so will only encourage aggressive fund managers to push the limits of what types of votes such state control share statues can be used to restrict. In addition, restricting voting rights on 1940 Act matters also raises implications with respect to other rights specifically granted by Congress to shareholders under the 1940 Act, independent of the issue raised under Section 18(i) generally.

Second, we urge the Staff to clarify that regulated funds structured as statutory trusts may not adopt control share provisions that mirror state corporate control share acquisition statutes in the absence of applicable state law clearly detailing the parameters of such provisions. More aggressive managers – and their counsel – will seek to "push the envelope" in the absence of such guidance, to the detriment of a fund's shareholders. In addition, permitting regulated funds structured as trusts to create their own control share provisions would result in a chaotic environment, with each such regulated fund implementing slightly different terms reflecting each fund's respective shareholder base.

Third, we strongly encourage the Staff to clarify that regulated funds may not reincorporate in Maryland or another state with the intent of opting into that state's applicable control share acquisition statute in reliance on the carve-out from registration under the Securities Act of 1933, as amended (the "Securities Act"), set forth in Rule 145(a)(2) thereunder with respect to mergers where the sole purpose is to change an issuer's domicile. In particular, we believe the ability of a regulated fund to opt into a state control share acquisition statute, such as the MCSAA, would represent a material change to the rights of an investor in that regulated fund, and therefore involves an investment decision commensurate with the filing of a registration statement under the Securities Act. We believe such an outcome would be consistent with similar circumstances, where reincorporation from one state to another occurs as a means of, or in connection with, effecting material changes with respect to an issuer.

VII. Conclusion

We appreciate the attention you and the other members of the Staff have given to these and similar matters impacting shareholder rights in the regulated fund space generally. For the reasons detailed above, however, we believe that analysis and conclusion set forth in the Staff Statement is wrong, and that *Boulder* continues to reflect the correct analysis with respect to state control share acquisition statutes under the 1940 Act. We further believe that the withdrawal of *Boulder* will have a broad negative effect on the regulated fund space, and that the ambiguity it raises with respect to the concept of "voting security" under the 1940 Act will cause interpretive issues under other 1940 Act provisions beyond Section 18(i). Finally, we believe the Staff should promptly issue guidance on a number of interpretive matters raised as a result of the withdrawal of *Boulder*, to provide clear guidelines for regulated funds to follow.

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We would be pleased to respond to any inquiries you may have regarding the matters addressed in our letter. Please feel free to direct any inquiries to Michael D'Angelo at michaeldangelo@sabacapital.com or 212-542-4635.

Very truly yours,

SABA CAPITAL MANAGEMENT, L.P.