# 22-407

**In the United States Court of Appeals**
**for the Second Circuit**

SABA CAPITAL CEF OPPORTUNITIES 1, LTD., SABA CAPITAL MANAGEMENT, L.P.,

*Plaintiffs-Appellees*,

v.

NUVEEN FLOATING RATE INCOME FUND, NUVEEN FLOATING RATE INCOME OPPORTUNITY FUND, NUVEEN SHORT DURATION CREDIT OPPORTUNITIES FUND, NUVEEN GLOBAL HIGH INCOME FUND, AND NUVEEN SENIOR INCOME FUND; AND TERENCE J. TOTH, JACK B. EVANS, WILLIAM C. HUNTER, ALBIN F. MOSCHNER, JOHN K. NELSON, JUDITH M. STOCKDALE, CAROLE E. STONE, MARGARET L. WOLFF, ROBERT L. YOUNG, AND MATTHEW THORNTON, III, IN THEIR CAPACITY AS TRUSTEES OF THE NUVEEN TRUSTS,

*Defendants-Appellants*.

On Appeal from the United States District Court
for the Southern District of New York, Case No. 21-cv-327,
Hon. J. Paul Oetken, *United States District Judge*

## BRIEF OF INVESTMENT COMPANY INSTITUTE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

Susan Olson
Dorothy Donohue
Kenneth Fang
THE INVESTMENT COMPANY INSTITUTE
1401 H Street, NW
Washington, DC 20005

Steven A. Engel
David A. Kotler
Michael H. McGinley
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10006
(212) 698-3512
steven.engel@dechert.com

*Counsel for Amicus Curiae the Investment Company Institute*

# TABLE OF CONTENTS

**PAGE**

# TABLE OF AUTHORITIES

**CASES** **PAGE(S)**



**STATUTES**

**OTHER AUTHORITIES**

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Investment Company Institute ("ICI") certifies that it has no parent corporation and no publicly owned corporation owns ten percent (10%) or more of its stock.

Amicus curiae ICI respectfully submits this brief in support of Defendants-Appellants (collectively, "Nuveen").

## STATEMENT OF INTEREST[1]

ICI is the leading association representing regulated investment funds. Its mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI's members include mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts in the United States, in addition to UCITS and similar funds offered to investors in Europe, Asia, and other jurisdictions. Its members manage total assets of $29.7 trillion in the United States, serving more than 100 million investors, and an additional $9.3 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through ICI Global.

Since its founding in 1940, ICI has worked to protect and advance the interests of investment company shareholders through advocacy and research directed at ensuring a sound legal and regulatory framework. ICI's legislative, regulatory, and

[1] No party's counsel has authored this brief in whole or in part, and no person other than amicus or its counsel contributed money intended to fund the preparation or submission of this brief. All parties to this appeal have consented to the filing of ICI's amicus brief.

other initiatives focus on increasing government and public awareness of issues affecting investment companies and their shareholders.

ICI conducts extensive research on the investment industry and regularly produces reports of that research, including a recent study submitted to the Securities and Exchange Commission ("SEC") analyzing the impact that the arbitrage efforts of activist shareholders may have on the interests of other closed-end fund shareholders. *See* ICI, *Recommendations Regarding the Availability of Closed-End Fund Takeover Defenses* (Mar. 2020) ("ICI Closed-End Fund Report"), *available at* https://ici.org/pdf/20_ltr_cef.pdf. ICI also regularly submits amicus briefs in cases of relevance to its members to ensure that the courts may appreciate the impact particular decisions may have on investment company shareholders.

## INTRODUCTION

In the Investment Company Act of 1940 (the "ICA"), Congress charged the disinterested directors of investment companies with the primary responsibility for looking after the interests of funds and their shareholders. The ICA's statement of purpose requires that investment companies not be "organized, operated, [and] managed" in the interests of "affiliated persons" (including substantial shareholders), 15 U.S.C. § 80a-1(b)(2), but instead be managed "in the interest of all classes of such companies' security holders," *id.* Consistent with that purpose, both

courts and the SEC historically have interpreted the statute to strengthen directors' ability to protect the general interests of the fund.

The district court's decision stands the ICA on its head by mistakenly reading one shareholder protection to deprive the directors of their traditional authority to adopt reasonable anti-takeover provisions. 15 U.S.C. § 80a-18(i) requires that all company stock be voting stock with equal voting rights and thereby protects against one form of manipulation—the issuance of complex capital structures that deprive small shareholders of their voting rights. But a tiered capital structure is not the only way that insiders, including concentrated shareholders, may take advantage of small shareholders.

Recent experience demonstrates why many closed-end funds require these protections. Activists, such as Plaintiffs-Appellees ("Saba"), increasingly have adopted arbitrage strategies aimed at seizing interests in closed-end funds to extract short-term profits. Such investors attempt to interfere with the business judgment of the directors of those funds for short-term gain then exit, leaving many long-term investors worse off. Activists may demand that a fund make a tender offer, which can force the fund to shrink its assets and liquidate long-term positions on unfavorable terms. Activists also have pressed for fundamental changes to the fund's structure, such as turning a closed-end fund into an open-end fund, which is a much different investment vehicle. These actions limit the universe of closed-end

funds generally, and increase the costs borne by closed-end fund shareholders who remain in the funds after activists have exited, including many retirees who invest in closed-end funds in reliance on a predictable dividend stream.[2]

If a closed-end fund's board of directors concludes that an activist's goals are not in the best interests of the fund, then it may consider reasonable takeover defenses. Directors who seek to prevent activists from using control shares to interfere with a fund's management seek to stop the very type of harm Congress sought to address in the ICA: the use of concentrated voting power by holders of a significant percentage of shares to control a fund to the detriment of other shareholders.

Indeed, many jurisdictions have adopted statutes authorizing restrictions on the use of control shares ("Control Share Amendments") that allow boards of directors to protect funds against such abuse by a concentrated, yet still minority, interest. These measures provide that, before a shareholder who acquires a controlling bloc may vote such a position, the disinterested shareholders must affirmatively approve it. State courts in Delaware and elsewhere have recognized that these reasonable protections serve the interests of the companies involved and

---

[2] *See The Closed-End Fund Market, 2021*, ICI Research Perspective, Vol. 28, No. 5, May 2022, at 19, *available at* https://www.ici.org/system/files/2022-05/per28-05.pdf.

do not threaten state equal-voting requirements. There is nothing in the text of Section 18(i) of the ICA that requires a different result, and the structure and policies underlying the statute demand precisely the opposite of the result reached by the district court.

The district court's decision would reduce these available defenses, leaving closed-end funds exposed to manipulation, and thereby inviting the kind of rent-seeking opportunities that diminish the value of closed-end funds to their long-term shareholders. ICI has been studying the closed-end fund market for some time, and the market data demonstrates that activist attacks predominantly benefit the concentrated shareholders, not other holders of closed-end funds. *See* ICI Closed-End Fund Report at 51-70. Because the ICA was adopted to protect small investors from such exploitation, the district court's decision should be reversed.

## BACKGROUND

Closed-end funds are unique investment products. Unlike open-end mutual funds, closed-end funds do not continuously issue shares, and investors may not continuously purchase new shares from the fund at net asset value ("NAV"). Instead, a closed-end fund typically issues a fixed number of shares that are listed and traded on an exchange. Investors usually buy shares in the fund at market prices set by supply and demand in the marketplace. Closed-end funds thus may trade at a premium or at a discount to the fund's NAV.

Several features of closed-end funds make them attractive to long-term investors. Those features include the distribution of earnings in the form of regular dividends, the ability to utilize greater leverage than open-end funds, and the option to fully invest the fund's assets or invest in less-liquid instruments, because the fund does not need to keep cash on hand to meet redemption requests. And, recognizing the unique benefits that closed-end funds offer, investors continue to demand them. In 2021, for example, net issuance (*i.e.*, issuance of new shares taking into account redemptions or buy-backs) of closed-end fund shares was over $16 billion. *See The Closed-End Fund Market, 2021*, *supra* n.2, at 1.

But these same features also can render closed-end funds vulnerable to activist attacks. Activists seek to exploit closed-end funds whose share prices are trading below their NAV by buying large blocks of shares, and then demanding that the fund liquidate, make a tender offer, or convert to an open-end fund—which would enable the activists to realize all or some of the difference between the trading discount and the shares' NAV. Sometimes activists take other actions—such as replacing an existing investment adviser with an affiliate of the activist, restructuring the fund's board, or stocking the board with affiliates or allies of the activist—to seek additional rents or to facilitate a future liquidation of the fund.

Although these arbitrage opportunities may fulfill activists' goal of realizing short-term returns, they can harm the fund's long-term investors. A closed-end fund

that makes a tender offer or liquidates must sell assets quickly. *Infra* at 17-18. And, if the fund is highly levered or holds illiquid positions, then those forced sales may occur at inopportune times. *Id.* Liquidation also may force long-term investors out of their investments and cause them to pay significant capital-gains taxes or incur other negative tax penalties that they might otherwise avoid. *Id.* Other activist strategies, like converting closed-end funds to open-end funds, impose on investors a product they did not buy and deprive them of the benefits of closed-end funds they sought out. *Id.* at 19-20. And activists' rent-seeking behavior, like appointing affiliates to replace existing investment advisers, may cause changes to a fund's investment strategies and enrich activists at the expense of retail investors. *Id*. at 20.

Many states have sought to protect the interests of small shareholders from such manipulation. To that end, those states have adopted statutes authorizing Control Share Amendments, which allow directors to adopt reasonable anti-takeover measures to limit temporarily the voting power of activist blocs, absent approval by a large majority of shareholders. Rather than creating unequal voting rights, those measures help directors to protect funds against detrimental and manipulative conduct by activists.

## ARGUMENT

### I. The District Court Misread Section 18(i) Of The ICA.

The district court based its decision on the text of Section 18(i) of the ICA, which states that "every share of [fund] stock . . . shall be a voting stock and have equal voting rights with every other outstanding voting stock." 15 U.S.C. § 80a-18(i). The district court concluded that this "equal voting" requirement deprived a board of the authority to limit the rights of particular shareholders—namely, those holding more than ten percent (10%) of shares—to exercise their voting rights without the consent of other shareholders. In so holding, it relied almost entirely on the word "presently" used in the definition of "voting security" in Section 2(a)(42). *See* Nuveen Br. at 58.

But that overly simplistic reading of Section 18(i) is not dictated by the statutory text, and it is fundamentally inconsistent with the history and purpose of the statute. The text of Section 18(i) does not prohibit Control Share Amendments because there is a long-recognized distinction between the voting rights of shares and the limits that may apply to particular shareholders. *See id.* at 45-51. And the district court's crabbed view of the statute actually undermines the structure and policy objectives underlying the ICA. As many states have recognized, there is nothing in equal-voting provisions that precludes a board of directors from adopting

measures that temporarily limit the voting rights of particular shareholders in order to preserve the general interests of the fund.

### A. The District Court's Reading Of Section 18(i) Conflicts With The Text And Purpose Of The Act.

By empowering activist shareholders to cause an investment company to act in their own narrow interests, rather than the fund's general interests, the district court's ruling upends the objectives of the Act. Under the ICA, an investment company's independent directors have primary responsibility for looking after the best interests of the fund, not specific classes of shareholders. As the Supreme Court has recognized, the "structure and purpose of the ICA indicate that Congress entrusted to the independent directors of investment companies, exercising the authority granted to them by state law, the primary responsibility for looking after the interests of the funds' shareholders." *Burks v. Lasker*, 441 U.S. 471, 484-485 (1979); *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 107 (1991).

This responsibility to protect the interests of the fund—not just a concentrated group of shareholders—is reflected in the text of the ICA. Section 1(b) of the ICA "declare[s] that the national public interest and the interest of investors are adversely affected" when "investment companies are organized, operated, managed, or their portfolio securities are selected, in the interest of . . . affiliated persons" of the investment companies, "rather than in the interest of *all* classes of such companies' security holders." 15 U.S.C. § 80a-1(b)(2) (emphasis added). And the ICA makes

clear that an "affiliated person" includes "*any* person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person." *Id.* § 80a-2(a)(3) (emphasis added). In adopting the ICA, Congress thus was keenly attuned to the threat that concentrated shareholders, like Saba, could pose to the general interests of the fund—and Congress charged the independent directors with protecting those interests.

By constraining a board's ability to take steps to protect the fund from potentially damaging attacks by concentrated shareholders, the district court's interpretation of Section 18(i) does not further, but directly conflicts with, the ICA's statutory text and stated purpose. The district court decision reduces a fund's defenses and permits a closed-end fund to be managed and controlled in the interests of activist blocs that are directly contrary to shareholders' long-term interests.

The district court's decision also conflicts with Congress's direction that the statute be read to protect retail investors from self-interested behavior. Section 1 expressly says that the policies enumerated in Section 1 are based on the "record and reports of the Securities and Exchange Commission," thus incorporating those reports by reference, and then declares that the Act "shall be interpreted . . . to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors." 15 U.S.C. § 80a-1.

Before adopting the ICA, Congress directed the SEC to study "the influence exerted by interests affiliated with the management of [investment] trusts and companies upon their investment policies." *See* Act of Aug. 26, 1935, ch. 687, title I, § 30, 49 Stat. 837. Following this directive, the SEC submitted a report (the "SEC Report") to Congress along with a draft bill, S. 3580, which was a precursor to the ICA, that reflects that both Congress and the SEC were focused on protecting retail investors and preventing self-interested activist behavior. *See* U.S. Sec. & Exch. Comm'n, *Report on Investment Trusts and Investment Companies*, H.R. Doc. No. 76-279 (1939-40).

The SEC Report expressed concern about the imbalance of power between people affiliated with investment companies and the general investing public. The SEC Report cited the concern that fund affiliates could become "the arbiter[s] of the affairs of the company" and exercise "power . . . to [their] personal advantage." SEC Report at 1641. A later Senate report echoed these concerns, stating that "in the absence of regulatory legislation, individuals who lack integrity will continue to be attracted by the opportunities for personal profit available in the control of the liquid assets of investment companies." S. Rep. No. 76-1775, at 6 (1940). The final text of the ICA confirms that Congress wanted to protect retail investors from problematic behavior by "affiliated persons," which included those owning more

than five percent (5%) of the voting shares of a fund. *See* 15 U.S.C. § 80a-1(b)(2); 15 U.S.C. § 80a-2(a)(3) (defining affiliated persons).

Even after the ICA's adoption, Congress continued to express concern about the threat that activist shareholders presented to retail investors. In 1966, the SEC prepared another report for Congress on the risks of "fund holding companies," which are funds that invest in other funds. The SEC emphasized that "fund holding companies . . . pose a real potential for the exercise of undue influence or control over the activities of portfolio funds." Sec. & Exch. Comm'n, *Public Policy Implications of Investment Company Growth*, H.R. Rep. No. 89-2337, at 315 (1966). It cautioned that, if fund holding companies gained a large enough stake in funds, they could "induce deviations from the investment program or policy of registered companies subject to [their] influence" using the "threat of redemption." *Id.* at 316.

The SEC specifically expressed concern about closed-end funds, warning that "the power to vote a significant block of stock of a closed-end company may represent potential for exercise of control." *Id.* at 324. It recommended that the ICA be amended to "prevent the creation and operation of fund holding companies" given these risks. *Id.* at 323. And, in 1970, Congress amended the ICA to address these concerns. *See* Pub. L. 91-547, § 7, 84 Stat. 1417 (1970); *see also* S. Rep. No. 90-1351, at 29 (1969) (explaining that Section 12(d)(1)(C), which places restrictions on holding companies' closed-end fund position size, was added because it is "much

more difficult for a buyer or a seller to know how much of a closed-end company's stock was owned by" investment holding companies, making Section 12(d)(1)(C)'s limits "appropriate."). The risks posed by fund holding companies are similar to those posed by activists. They, too, can and do acquire large positions in closed-end funds and use threats of tender offers, conversions, or liquidations to meaningfully change funds' operations in ways that benefit activists but harm retail investors.

Thus, at its heart, the ICA seeks to protect investment company shareholders from all forms of self-interested behavior by insiders, including concentrated shareholders. There simply is no way that the ICA can, or should, be interpreted to prevent a fund's independent directors from exercising their business judgment to adopt anti-takeover provisions when appropriate to protect small, long-term shareholders from activists.

### B. State Courts Have Interpreted Parallel Provisions To Recognize The Distinction Between Voting Rights Of *Stockholders* And Voting Rights Of *Stock*.

The district court read Section 18(i) to preempt the Control Share Amendment, yet the ICA's equal voting provision is not unusual. While many states use similar language to ensure parity among shareholders, those states have not read their equal-voting statutes to preclude boards of directors from adopting reasonable anti-takeover measures.

Most notably, Delaware law recognizes that restrictions on a *shareholder's* right to vote do not violate the equal voting rights of similar classes of *shares*. Similar to the ICA's equal voting provision, Section 212 of the Delaware Code provides that "[u]nless otherwise provided in the certificate of incorporation and subject to § 213 of this title, each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder." 8 Del. C. § 212(a). Nevertheless, the Delaware Supreme Court long has recognized a distinction between the equal voting rights among shares and the limits on particular shareholders' ability to exercise those rights.

In *Providence & Worcester Co. v. Baker*, 378 A.2d 121 (Del. 1977), the corporate charter provided that each shareholder would receive one vote for every 50 shares owned, one vote for each additional 20 shares, and that no shareholder could vote more than a quarter of all outstanding stock. *Id.* at 121 n.2. The Delaware Supreme Court squarely held that such a provision was consistent with Section 212(a), since "these restrictions are limitations upon the voting rights of the stockholder, not variations in the voting powers of the stock per se." *Id.* at 123. "The voting power of the stock in the hands of a large stockholder is not differentiated from all others in its class; it is the personal right of the stockholder to exercise that power that is altered by the size of his holding." *Id.*

Likewise, in *Williams v. Geier*, No. CIV.A. 8456, 1987 WL 11285 (Del. Ch. May 20, 1987), the Court of Chancery relied on *Providence*'s distinction between shareholders' ability to exercise rights and the rights themselves when it allowed "tenure voting," where voting power is tied to a stockholder's length of ownership of shares. *Id.* at *3-*4.

Delaware courts have issued many similar rulings in the corporate context.[3] As the Delaware Supreme Court has stated, "[i]t is well established in our jurisprudence that stockholders need not always be treated equally for all purposes." *Nixon v. Blackwell*, 626 A.2d 1366, 1376 (Del. 1993).[4] The district court's reading of Section 18(i) thus is inconsistent with the way equal-voting provisions have been

---

[3] Although Delaware does not currently have a control share statute, on May 5, 2022, Senate Bill 284 was introduced in the Delaware General Assembly, which if adopted, would implement a control share statute for registered closed-end funds and business development companies. S.B. 284, 151st Gen. Assemb. (Del. 2022), *available at* https://legis.delaware.gov/BillDetail/109453. The bill was voted out of committee on June 14, 2022. Even without a formal statute, the Delaware Supreme Court has recognized the ability of boards of directors to adopt reasonable anti-takeover measures, such as poison pills, consistent with their fiduciary duties. *See, e.g.*, *Moran v. Household International, Inc.*, 500 A.2d 1346, 1348 (Del. 1985).

[4] *See also Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 956 (Del. 1985) (permitting a corporation to make a defensive tender offer for its own stock to every shareholder except the shareholder attempting a hostile takeover); *Sagusa, Inc. v. Magellan Petroleum Corp.*, No. CIV A 12,977, 1993 WL 512487, at *2 (Del. Ch. Dec. 1, 1993), *aff'd*, 650 A.2d 1306 (Del. 1994) (allowing a bylaw provision requiring both a majority of shares and shareholders to approve a transaction, thereby giving more power to smaller shareholders of identical stock).

interpreted by courts in analogous circumstances.[5] There is nothing in the text of Section 18(i) or the policies underlying the ICA that could justify such a result.

## II. The District Court's Decision Empowers Activists To Harm Closed-End Funds And Their Long-Term Shareholders.

If upheld by this Court, the district court's decision could cause tremendous harm to closed-end funds and their long-term shareholders. As a representative of the interests of the investment company industry, and the investors in those companies, ICI has studied the impact of activists on closed-end funds for some time. In March 2020, ICI expressed its concerns with the rent-seeking behavior of Saba and similar activists by submitting a lengthy report to the SEC. *See* ICI Closed-End Fund Report. ICI's Report explains in great detail the harm that activists often inflict on closed-end funds and their long-term shareholders. Indeed, Saba itself has caused such harm through its past actions with respect to a number of closed-end funds.

---

[5] In a now-retracted no-action letter, the SEC staff opined that the ICA sought to prevent "the organization, operation, and management of investment companies in the interest of insiders" and therefore, did not include activists. *Boulder Total Return Fund, Inc*., 2010 WL 4630835, at *6 (S.E.C. No-Action Letter Nov. 15, 2010) (citing 15 U.S.C. § 80a(1)(b)(2)). Yet that conclusion directly conflicts with the text of the ICA, which defined "affiliated persons" to include anyone who owns five percent (5%) or more of the outstanding voting securities of such other person. The SEC staff withdrew the *Boulder* letter on May 27, 2020. *See* Sec. & Exch. Comm'n, *Control Share Acquisition Statutes*, Staff Statement, Division of Investment Management (May 27, 2020), *available at* https://www.sec.gov/investment/control-share-acquisition-statutes.

### A. Activist Strategies Harm Long-Term Closed-End Fund Investors.

Although the unique features of closed-end funds have made them attractive to certain long-term investors, activists use those features as a mechanism for exploitation. Activists look for closed-end funds trading at a discount to NAV to make a short-term profit. They try to take advantage of what they view as arbitrage opportunities. Activists may try to liquidate the entire fund so that shareholders receive a cash distribution equal to the fund's NAV. They may try to force a tender offer, resulting in a repurchase of some of the funds' shares at or near NAV. They may try to convert the fund to an open-end structure, so that they can redeem their shares at NAV. They may try to change the composition or structure of the fund's board to make it easier to eventually turn shares into cash. Or they may install themselves or an affiliated entity as the fund's investment adviser to profit from advisory fees. All of these activities can harm long-term closed-end fund investors.

Most obviously, the liquidation of a fund forces the realization of the investment and renders it entirely unavailable to investors. Investors choose funds based on many factors, including their own investment objectives and appetite for risk, the fund's investment strategy and expense ratio, and the manager's experience and track record. Liquidation kicks investors out of the investment vehicle they took time and effort to choose. Worse, to raise the cash necessary to repurchase shares, investment advisers must liquidate all of the fund's portfolio. Levered funds will

need to unwind complex positions, and advisers may need to sell illiquid assets quickly and prematurely. These transactions could result in less value to investors and could force the recognition of capital gains. Even though they receive cash, investors would need to spend time and resources to find an alternate option to redeploy their capital. And, given how activists have been targeting closed-end funds for liquidation, a similar fund offering the same benefits may not even exist.[6]

Tender offers are similarly disruptive. As with a liquidation, the fund will have to raise cash quickly and may be required to sell its assets at inopportune times. Although long-term investors who do not tender may remain in the fund after participants tender their shares, the fund's reduced asset base will mean that they may shoulder higher expense ratios and have less collateral to obtain leverage. On average, closed-end funds with tender offers in 2017 saw their expense ratios increase by forty-five percent (45%).[7] According to ICI research and analysis, for

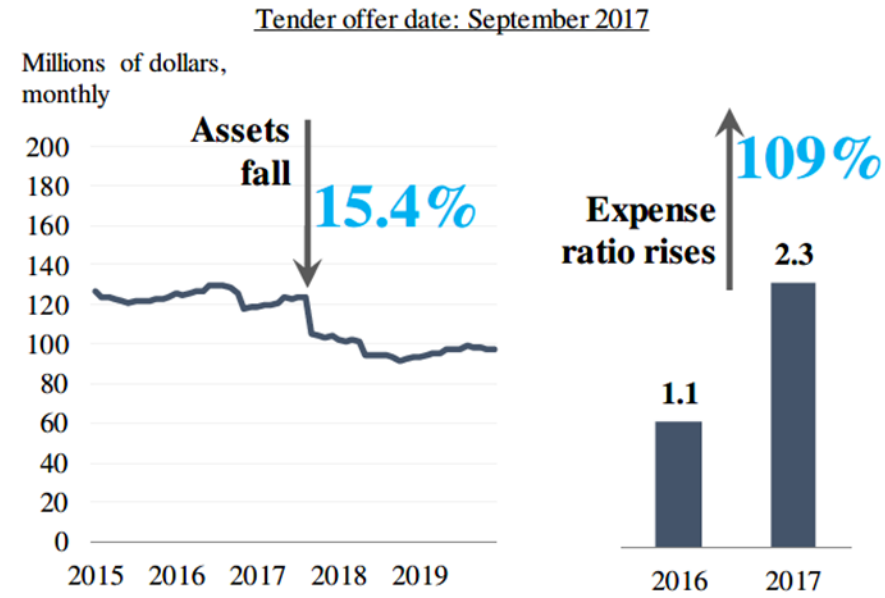
---

[6] Indeed, although investors continue to demand closed-end funds, the number of available closed-end funds has fallen considerably from a peak in 2007. *See* ICI Closed-End Fund Report at 33 ("However, after the number of closed-end funds reached its peak of 658 at year-end 2007, it had steadily fallen to 494 by year-end 2019"). Since 2019, the number of closed-end funds has continued to decline to 461 at year-end 2021. *See The Closed-End Fund Market, 2021*, *supra* n.2, at 7.

[7] *See* ICI Closed-End Fund Report at 57; *see also* ICI, *Letter to SEC on Responses to Staff Questions on Control Share Acquisition Statutes and Retail Investor Exposure to Private Offerings* (Dec. 16, 2020) at 7-8 (explaining that, even after accounting for interest expense arising from leverage, closed-end funds with tender offers have an expense ratio that is 11 percentage points higher than other funds with

example, one activist-induced tender offer in September 2017 caused fund assets to fall by fifteen and four-tenths percent (15.4%) and the fund's expense ratio to double.[8]

**Tactic: Activist-Induced Tender Offer—A Short-Term Profit Opportunity That Burdens Long-Term Shareholders with Higher Expense Ratios**




Sources: Morningstar Direct and EDGAR

Converting a closed-end fund to an open-end fund also forces long-term investors into a product they did not buy. An open-end fund must keep cash reserves on hand for redemptions and is more restricted in its use of leverage. Moreover,

---

similar leverage and no tender offers), *available at* https://www.sec.gov/divisions/investment/control-share-statutes/investment-company-institute-121620.pdf.

[8] *See* ICI Closed-End Fund Report at 56 fig. C.5.

open-ending the fund can impose adverse tax consequences. For these reasons, a forced conversion leaves long-term investors in the fund worse off.

Changing the fund's investment adviser can meaningfully change the fund's strategy or the manner in which that strategy is pursued. It also can create an opportunity for rent-seeking at the expense of long-term investors if the new adviser is affiliated with the activist. And using governance processes to effectuate a liquidation, tender offer, conversion, or the appointment of an affiliated adviser could interfere with the board's attention to the long-term operation of the fund for the benefit of its shareholders. Even if the activists' attack does not succeed, the fight itself is an expensive and time-consuming process, which can require a fund to incur significant expenses (*e.g.*, legal fees and increased fees for tax advisors), which are passed on to the funds' investors.

In addition, there is little evidence that activist tactics help long-term investors. Some activists have targeted closed-end funds that consistently have outperformed peer funds, undercutting the idea that activists are trying to replace inefficient managers or remedy poor performance.[9] Similarly, activists do not enable closed-end funds to trade closer to their NAVs over the long term, another one of their primary purported benefits. In a study of 15 closed-end funds with tender offers

---

[9] *See id.* at 60 & fig. C.8.

between 2016 and 2018, ICI found that after one year, more than half of the funds traded at *larger* discounts to their NAVs than they did before the tender offers. In addition, all but one of the funds with tender offers continued to trade at a discount to NAV.[10]

[10] *See id.* at 69 fig. C.13.

**No Evidence That Tender Offers "Unlock Long-Term Value" for CEF Shareholders**
Excess discount over specified period[1]

| CEF | One year prior to initial 13D filing by activist | Period between initial 13D filing and tender offer | Tender offer period | One year after tender offer period |
|---|---|---|---|---|
| **Excess discount widened after tender offer** | | | | |
| FBT1[2] | -1.5% | -1.8% | -2.9% | -6.1% |
| F8T1 | -2.2% | -1.6% | -2.2% | -5.9% |
| FCT1[2] | -0.8% | -2.7% | 0.4% | -4.4% |
| F0T1[3] | -4.1% | -3.1% | -4.1% | -7.2% |
| F2T1 | -2.7% | -2.0% | -0.8% | -5.3% |
| FAT1[2] | -2.9% | -1.1% | 0.3% | -3.7% |
| FET1[3] | -3.8% | -4.2% | -2.7% | -4.5% |
| FDT1[2] | -0.7% | 1.1% | 6.9% | -1.4% |
| **Excess discount narrowed after tender offer** | | | | |
| F6T1[2] | -4.0% | -2.8% | -1.8% | -3.5% |
| F7T1[2] | -9.2% | -5.1% | -3.5% | -8.0% |
| F9T1 | -3.0% | -1.1% | -0.8% | -1.1% |
| F1T1[2,4] | -6.0% | -2.0% | 0.0% | -3.7% |
| F3T1[4] | -6.0% | 0.6% | 1.9% | -0.7% |
| F5T1[4] | -7.6% | -1.6% | 1.0% | -2.0% |
| F4T1[4] | -6.1% | -0.1% | 0.9% | 0.9% |

[1]*Excess discount* is the simple average discount of the given CEF over the specified period minus the simple average discount of all funds in the same investment objective over the specified period.
[2]Some funds liquidated or merged within one year following the tender offer. In these cases, the "one year after tender offer period" is the excess discount over the period in which the fund was active. Similarly, this same thing is done for any fund whose tender offer period was after September 30, 2018.
[3]One or more funds merged into these funds at some point during the overall period of the sample.
[4]In addition to a tender offer, the fund also implemented a managed distribution plan to last multiple years. Managed distribution plans are considered one method to reduce closed-end fund discounts. For more information, see Cherkes, Sagi, Wang 2014.
Note: Data include closed-end funds targeted by activists and held a tender offer between 2016 and 2018.
Sources: Investment Company Institute and Bloomberg

### B. Appellees' Own Actions Illustrate The Harm To Long-Term Closed-End Fund Investors Caused By Activist Strategies.

In recent years, Saba has used many of the above activities to enrich itself while harming long-term closed-end fund investors. From January 2016 through February 2020, Saba engaged in 33 attacks on closed-end funds.[11] For example, on June 14, 2019, Saba entered into three standstill agreements with an investment adviser and three of its closed-end funds.[12] These agreements arose from proxy contests Saba initiated to try to force the funds into liquidating, converting into open-end funds, or "liquidity events" redeeming shares at or near NAV. Those alternatives would allow Saba to make a short-term profit by recouping the difference between the funds' share prices (which traded at a discount) and NAV, at the expense of long-term retail investors.

In those standstill agreements, the funds settled, commencing tender offers to repurchase either fifteen percent (15%) (with respect to two funds) or twenty percent

---

[11] *See* ICI Closed-End Fund Report at 41-47.

[12] Schedule 13D/A, Invesco Senior Income Trust (June 17, 2019), *available at* https://www.sec.gov/Archives/edgar/data/1059386/000090266419002796/p19-1447sc13da.htm; Schedule 13D/A, Invesco High Income Trust II (June 17, 2019), *available at* https://www.sec.gov/Archives/edgar/data/846671/000090266419002797/p19-1448sc13da.htm; Schedule 13D/A, Invesco Dynamic Credit Opportunities Fund (June 17, 2019), *available at* https://www.sec.gov/Archives/edgar/data/1393662/000090266419002798/p19-1449sc13da.htm.

(20%) (with respect to the third) of the outstanding common shares, at a price equal to 98.5% of net asset value.[13] The boards concluded, in their business judgment, that such a settlement was preferable to the potential alternatives, given Saba's interference. The tender offers were fully subscribed, as is virtually certain when a high percentage of shares are held by the activist seeking the tender offers.[14] The standstill agreements—which forced the funds to liquidate and disburse some of their assets and likely left long-term investors who did not tender with a higher expense ratio—inure to the short-term benefit of Saba and to the detriment of the funds and long-term retail investors. Such "activism" is not about achieving any benefit for the funds, but rather a desire to wrest a one-time profit from the funds at the expense of their long-term viability.

In a more recent example, Saba forced the ouster of a closed-end fund's investment adviser, substituting itself in its place. In the summer of 2020, Saba won a proxy battle with another closed-end fund and succeeded in electing a new slate of

---

[13] Schedule 13D/A, Invesco Senior Income Trust, *supra* n.12 at Ex. 3 § 1; Schedule 13D/A, Invesco High Income Trust II, *supra* n.12 at Ex. 3 § 1; Schedule 13D/A, Invesco Dynamic Credit Opportunities Fund, *supra* n.12 at Ex. 3 § 1.

[14] Press Release, *Invesco Advisers Announces Expiration of Tender Offers for Invesco Dynamic Credit Opportunities Fund, Invesco High Income Trust II and Invesco Senior Income Trust* (Dec. 6, 2019), *available at* https://www.sec.gov/Archives/edgar/data/1059386/000113743919000503/ex99a5ii.htm.

Saba-nominated trustees, none of whom owned shares in the fund and two of whom were employees of Saba.[15] Those trustees selected Saba itself to serve as the fund's investment adviser, replacing the fund's incumbent adviser.[16] This is rent-seeking behavior at the expense of long-term investors: Saba used its minority stake to replace the existing adviser, modify the fund's investment strategy dramatically, and extract a management fee on all of the fund's assets.[17]

Finally, Saba's actions have led to the total liquidation of a closed-end fund. Saba disclosed in October 2020 that it had acquired nearly ten percent (10%) of yet

---

[15] Form 497, Voya Prime Rate Trust (July 29, 2020), *available at* https://www.sec.gov/Archives/edgar/data/826020/000168386320012234/f6582d1.htm.

[16] Form N-CSR at 26, Voya Prime Rate Trust (May 6, 2021), *available at* https://www.sec.gov/Archives/edgar/data/826020/000110465921062317/tm219046d11_ncsr.htm.

[17] *See* Press Release, *The Board of Trustees of Voya Prime Rate Trust Selects Saba Capital as New Investment Adviser*, BusinessWire (Mar. 25, 2021) ("Saba plans to transition a meaningful portion of the Fund's portfolio from leveraged loans into investments that Saba believes can provide more attractive risk-adjusted returns, including: bonds, special purpose acquisition companies (SPACs) and other registered closed-end funds."), *available at* https://www.businesswire.com/news/home/20210325005946/en/The-Board-of-Trustees-of-Voya-Prime-Rate-Trust-Selects-Saba-Capital-as-New-Investment-Adviser.

another closed-end fund.[18] A month later, it disclosed its intent to nominate two individuals, both of whom had connections to Saba, for election to the fund's board of trustees.[19] Then, in June 2021, the fund announced that its board had determined, in its business judgment, to liquidate the fund in response to Saba's actions, which had increased its holdings to 14% of the fund.[20] These are just a few examples of the harm that activist attacks can have on closed-end funds and their shareholders.

The district court's decision leaves funds exposed to these kinds of attacks. Yet Control Share Amendments sensibly avoid these issues by compelling concentrated shareholders either to win support from others or to bring any concerns to the board charged with acting in the fund's best interests. Section 18(i) thus should be read to preserve the discretion of boards to take actions to protect their funds, rather than forcing the funds into transactions resulting only in short-term

---

[18] Schedule 13D at 4, First Eagle Senior Loan Fund (Oct. 26, 2020), *available at* https://www.sec.gov/Archives/edgar/data/1510281/000106299320005151/formsc13d.htm.

[19] Schedule 13D/A at 5, First Eagle Senior Loan Fund (Nov. 13, 2020), *available at* https://www.sec.gov/Archives/edgar/data/1510281/000090266420003929/p20-1936sc13da.htm.

[20] *First Eagle Senior Loan Fund Announces Plan to Liquidate*, Globe Newswire (June 14, 2021), https://www.globenewswire.com/news-release/2021/06/14/2246768/0/en/First-Eagle-Senior-Loan-Fund-Announces-Plan-to-Liquidate.html; *Saba Forces Liquidation of FSLF*, Seeking Alpha (July 2, 2021), https://seekingalpha.com/article/4437644-saba-forces-liquidation-of-fslf.

gains for the activists. Such measures would address situations like those discussed above, and thereby safeguard the interests of all shareholders, consistent with the ICA.

## CONCLUSION

The decision below should be reversed.

Dated: June 17, 2022

Respectfully submitted,

*/s/ Steven A. Engel*
Steven A. Engel
David A. Kotler
Michael H. McGinley
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10006
(202) 261-3369
steven.engel@dechert.com

*Counsel for Amicus Curiae the Investment Company Institute*

Susan Olson
Dorothy Donohue
Kenneth Fang
THE INVESTMENT COMPANY INSTITUTE
1401 H Street, NW
Washington, DC 20005

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because the brief contains 5,603 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.