

The Honorable Jay Clayton
Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: *Request for Commission Action to Protect Closed-End Fund Shareholders*

Dear Chairman Clayton:

On behalf of the members of the Investment Company Institute,¹ I am writing to urge the Commission to take prompt action to protect the interests of closed-end funds and their shareholders. Certain aspects of the current regulatory regime for these funds have become simply untenable. The Commission staff issued a letter ten years ago that clearly empowered, and emboldened, a small group of activist investors to act in a manner that harms closed-end funds. Activist investors do so by taking steps intended ultimately to extract short-term profits at the expense of closed-end funds' long-term shareholders.²

The activists target a closed-end fund with shares trading at a discount to the fund's net asset value and then use their concentrated voting power to force the fund to take actions to allow the activists to sell their shares at or near NAV, thereby capturing an arbitrage profit. Unlike the fund's long-term investors, the activists are not investing to gain exposure to the assets, strategies and total return opportunity of the closed-end fund. Their tactics cause serious harm and impel fundamental changes to the targeted funds that are contrary to the expectations and interests of other shareholders. In fact,

¹ The Investment Company Institute ("ICI") is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US\$25.2 trillion in the United States, serving more than 100 million US shareholders, and US\$7.0 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

² *Boulder Total Return Fund, Inc.* (Nov. 15, 2010) ("Boulder"). Prior to the issuance of Boulder, ICI met with Commission staff to advocate against the staff prohibiting independent directors from employing the takeover defense at issue in the letter.

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an academic study documented that the Commission staff's actions negatively impacted the price of closed-end funds' shares.³

Enabled by the staff's no-action position, activism of this kind has become more pronounced and frankly threatens the continued viability of closed-end funds as a valuable and important form of registered investment company. This would be a particularly regrettable outcome for Main Street investors and the capital markets -- all the more so because closed-end funds are a structure uniquely qualified to help accomplish the Commission's policy goal of increasing retail shareholder access to private investments.⁴ Ironically, proxy advisory firms' policies substantially assist activist takeover efforts targeting closed-end funds. Yet the Commission's recent proxy proposal, by its terms, would make it more difficult for closed-end funds to educate their shareholders about the merits of the firms' recommendations.⁵

I respectfully ask for an opportunity to meet with you in the near future to discuss:

- why the staff no-action letter is misguided and should be withdrawn; and

³ The 2016 empirical study demonstrated positive effects on closed-end fund share prices from certain Maryland district court decisions in 2004 and 2007 approving the use of certain defensive actions by a closed-end fund under the Investment Company Act of 1940 ("Investment Company Act" or "Act") and negative effects on closed-end fund share prices as a result of a 2009 Commission staff speech and the 2010 Boulder letter. Martin Cremers, Robert J. Jackson and John Morley, *The Value of Takeover Defenses: Evidence from Exogenous Shocks to Closed-End Mutual Funds* (2016).

⁴ See SEC Release No.10649, Concept Release on Harmonization of Securities Offerings Exemptions (June 18, 2019) and Letter from Susan Olson, General Counsel, Investment Company Institute, to Vanessa Countryman, Secretary, US Securities and Exchange Commission, dated September 24, 2019 (recommending that the Commission encourage investor protection by increasing retail investors' access to private markets through regulated funds). See also Paul Schott Stevens, President and CEO, Investment Company Institute, 2020 Academic and Practitioner Symposium on Mutual Funds and ETFs, University of Virginia Darden School of Business (Feb. 21, 2020) (stating that we can enable retail investors to obtain a stake in private offerings and still retain the regulatory safeguards by letting them invest in private markets through regulated funds).

⁵ See SEC Release No. 34-87457, Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (November 5, 2019) and Letter from Paul Schott Stevens, President and CEO, Investment Company Institute, to Vanessa Countryman, Secretary, US Securities and Exchange Commission, dated February 3, 2020 (recommending that any final rule allow for companies and investors to concurrently review proxy advisory firm recommendations to, among other things, allow closed-end funds adequate time to engage in dialogue with investors to rebut negative proxy advisory firm recommendations).

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- why the Commission should issue new guidance clarifying the ability of closed-end the funds' independent directors to protect long-term shareholders' interests against activist investors' predatory tactics.

We are submitting to you today a comprehensive analysis to support our request. Our analysis demonstrates that the staff letter is incorrect as a legal matter and explains how it undermines – rather than furthers -- the policies underlying the Investment Company Act. The legislative history and specific provisions of the Act evidence a clear intent to protect funds and their shareholders against the self-interest of investors who become affiliated persons.

It is vital that the Commission act to support independent closed-end fund directors using legitimate defenses against activists with concentrated holdings to prevent shareholder harm when they determine that an activist's agenda is not in the fund's best interests. Doing so will serve to protect the expectations of the overwhelming majority of closed-end fund shareholders that the fund will serve as a vehicle to advance their own long-term investment objectives and not be hijacked by opportunists seeking short-term profits at their expense.

Our submission reflects ICI data and information we collected from our closed-end fund members through a detailed survey. Among other things, it describes the decline in the number of closed-end funds, the stagnation of closed-end fund assets, the increase in activist activity by a small group of actors, and the range of strategies that they employ.

In short, there is an urgent and compelling case for the Commission to move expeditiously to withdraw the staff letter and issue Commission guidance that confirms the ability of closed-end fund independent directors to avail themselves of takeover defenses permitted by courts and state law.

I will contact your office to request a meeting time. In the meantime, if you or your staff have any questions, please do not hesitate to contact me at (202) 326-5901, Susan Olson, General Counsel at 202-326-5813, or Dorothy Donohue, Deputy General Counsel, Securities Regulation, at 202 218-3563.

With thanks for your consideration, and very best regards.

Sincerely,

/s/Paul Schott Stevens

Paul Schott Stevens
President and CEO
Investment Company Institute