

Investment Management Alert

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Thomas A. DeCapo

Partner / Boston
617.573.4814
thomas.decapo@skadden.com

Kenneth E. Burdon

Counsel / Boston
617.573.4836
kenneth.burdon@skadden.com

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Four Times Square
New York, NY 10036
212.735.3000

500 Boston Street
Boston, Massachusetts 02116
617.573.4800

Class Action Proxy Litigation Highlights Need for Corporate Defense Strategies in Closed-End Funds

On June 4, 2019, a hedge fund managed by Saba Capital Management L.P. filed lawsuits in Delaware Chancery Court and in Maryland Circuit Court against three BlackRock-managed registered closed-end funds, the trustees/directors of the funds and their investment adviser. These lawsuits arise from a proxy contest that Saba initiated against the funds. Both lawsuits seek class action certification.

These actions by Saba, in particular the use of class action litigation, represent a significant escalation in closed-end fund activist tactics. The activists' objective is to coerce targeted closed-end funds into liquidating, converting into open-end funds or shrinking the fund through at-or-near-NAV "liquidity events," so that the hedge fund can make a short-term profit based on the fund's market price discount from NAV at the expense of the fund's long-term retail investors. In direct conflict with the policy objectives of the current presidential administration,¹ these tactics have served to reduce important investment options and product structures available to retail investors, a trend which these aggressive lawsuits seek to accelerate.

Closed-end funds' ability to fend off these abusive tactics has been hamstrung by historical SEC staff positions² regarding the use of defensive measures that may be available in the world of ordinary operating companies, such as shareholder rights plans and state law control share statutes.

In light of this escalation, now may be an opportune time for closed-end fund boards to reevaluate these and other corporate defense strategies in order to preserve retail clients' ongoing access to the investment strategies that closed-end funds are designed to offer, as it is beneficial to implement such strategies on a "clear day." We also believe that the current SEC staff is more receptive to protecting closed-end funds than has been the case for over a decade.

We would be happy to discuss our views as to the legal basis and process for considering and implementing defensive strategies including shareholder rights plans and state law control share statutes in closed-end funds.

¹ See Exec. Order No. 13772, 82 Fed. Reg. 9965, "Presidential Executive Order on Core Principles for Regulating the United States Financial System" (Feb. 3, 2017), available at <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-core-principles-regulating-united-states-financial-system/>; Presidential Memorandum on Fiduciary Rule (Feb. 3, 2017), 82 Fed. Reg. 9675, available at <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-fiduciary-duty-rule/>.

² See Boulder Total Return Fund, Inc., SEC Staff No-Action Letter (Nov. 15, 2010); Andrew J. Donohue, Director, SEC Division of Investment Management, Keynote Address at the Independent Directors Council Investment Company Directors Conference (Nov. 12, 2009), available at https://www.sec.gov/news/speech/2009/spch11209ajd.htm#P50_18496.