

MEMO# 32502

June 2, 2020

SEC Staff Provides No-Action Relief for Closed-End Fund to Exclude Shareholder Proposals that Proponents' Shares Cannot Vote On

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June 2, 2020 TO: ICI Members

Investment Company Directors SUBJECTS: Closed-End Funds RE: SEC Staff Provides No-Action Relief for Closed-End Fund to Exclude Shareholder Proposals that Proponents' Shares Cannot Vote On

The Securities and Exchange Commission's Division of Investment Management earlier this spring issued two no-action letters permitting a registered closed-end fund to exclude shareholder proposals from proxy materials for the fund's annual meeting when the proponent of a proposal does not hold securities "entitled to be voted" on the proposal.[\[1\]](#) The staff's determinations appear to permit funds to exclude a shareholder proposal when state law and a fund's governing documents restrict a proponent's shares to voting on certain matters but not the subject of the proposal.

Under Rule 14a-8(b)(1) under the Securities Exchange Act of 1934, a shareholder must have held at least \$2,000 in market value, or 1 percent, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date such shareholder submits his or her proposal. Under Delaware law, which governs the subject closed-end fund, beneficial owners of a statutory trust (such as the fund) are only entitled to vote on those matters specified in the statutory trust's governing instruments. The fund's Declaration of Trust states that the fund's shareholders are permitted to vote only on specific matters enumerated in the fund's Declaration of Trust. Because the fund's Declaration of Trust did not specifically confer shareholders with the ability to vote their shares on the subject of either of the two shareholder proposals,[\[2\]](#) the staff concluded that the closed-end fund appears to have a basis for its view that the proponent's shares are not "entitled to be voted" on the proposals and the proposals may be excluded from the proxy materials.

In issuing its responses, the SEC staff included the Division of Investment Management's procedures that state that the staff's determinations do not and cannot purport to "adjudicate" the merits of an investment company's position with respect to the

proposal.^[3] It clarifies that only a court can decide whether an investment company is obligated to include shareholder proposals in its proxy materials. Thus, the staff's action does not preclude a proponent or any fund shareholder from pursuing any rights he or she may have against the fund in court should a fund omit the proposal from its proxy materials.

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endnotes

[1] See Omission of Shareholder Proposal Submitted by Alison Pampinella (pub. avail. Apr. 10, 2020) ("Pampinella Proposal"), *available at* <https://www.sec.gov/investment/dividend-income-fund-041020-14a8>; Omission of Shareholder Proposal Submitted by Matisse Discounted Closed-End Fund Strategy (pub. avail. Apr. 10, 2020) ("Matisse Proposal"), *available at* <https://www.sec.gov/investment/dividend-income-fund-041020-14a8-2>.

[2] The Pampinella Proposal provides:

RESOLVED: The Fund's rigged election bylaw should be replaced with the following one: "The nominees that receive the most votes cast at a meeting at which a quorum is present shall be elected as Trustees."

The Matisse Proposal provides:

BE IT RESOLVED, that the shareholders of Dividend and Income Fund (the "Fund"), request that the Board of Trustees (the "Board") consider authorizing a self-tender offer for all outstanding shares of the Fund at or close to net asset value ("NAV"). If more than 50% of the Fund's outstanding shares are submitted for tender, the tender offer should be cancelled and the Fund should be liquidated or converted into an open-end mutual fund.

[3] See SEC Division of Investment Management, Informal Procedures Regarding Shareholder Proposals (modified May 14, 2018), *available at* <https://www.sec.gov/divisions/investment/informal-procedures-regarding-shareholder-proposals.htm>.

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