Debevoise & Plimpton

Debevoise In Depth

The Supreme Court Clarifies the Scope of Section 47(b): What's Next for Listed Funds

June 24, 2026

Two recent distinct developments—the Supreme Court's decision in *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.*, No. 24-345 (June 11, 2026), and the Security and Exchange Commission's (the "Commission" or the "SEC") proposed rulemaking packages released on May 19, 2026—underscore the continued relevance of the listed registered closed-end funds ("CEFs") and business development companies ("BDCs") framework and provide an opportunity to consider the next phase of its modernization. While the Supreme Court's decision largely reaffirmed the view that the Investment Company Act of 1940, as amended (the "1940 Act"), does not broadly authorize private enforcement through Section 47(b) of the 1940 Act, the SEC's proposals reflect a continued effort to modernize the regulatory framework governing listed funds. Together, these developments provide a constructive backdrop for considering additional innovations to the listed fund structure, particularly those designed to improve liquidity, price discovery and retail access to private market investment strategies.

The Supreme Court Rejects a New Avenue for Private Enforcement Under the 1940 Act

Background

Saba Capital pursues, in relevant part, an arbitrage strategy of buying shares of CEFs trading at a discount to their net asset value ("NAV") and then seeks to influence fund management to take actions intended to reduce or eliminate those discounts. Such actions could include repurchase offers, mergers, liquidations, conversions to open-end funds, or other transactions designed to realize portfolio value. Under the facts at hand, in order to guard against activist takeover attempts, the petitioner funds (the "Funds") adopted resolutions opting into Maryland's Control Share Acquisition Act (the "MCSAA"), which is intended to protect Maryland corporations from takeover efforts by limiting the voting rights associated with shares acquired above specified ownership thresholds unless those voting rights are approved by other shareholders.

Saba challenged the Funds' use of the MCSAA, arguing that the statute conflicted with Section 18(i) of the 1940 Act, which generally requires that every share of stock issued by a registered management investment company be voting stock and have equal voting rights with other outstanding voting stock. Saba further argued that Section 47(b) of the 1940 Act authorized it to seek relief because that provision permits a court to grant rescission or other remedies with respect to contracts that violate the 1940 Act, and provides that such relief may be sought by a party to the contract.[1] In particular, Saba contended that board resolutions and related corporate actions opting the Funds into the MCSAA constituted contracts or instruments whose enforcement could be challenged under Section 47(b) because they allegedly violated Section 18(i).

The Holding

In a 6-3 decision, the Supreme Court held that Section 47(b) of the 1940 Act does not impliedly empower private parties to sue for rescission of contracts that allegedly violate the 1940 Act.

The Court's reasoning focused on the statute's text and structure. As a textual matter, the Court held that Section 47(b)'s language stating that "a court may not deny rescission" of a contract that violates the 1940 Act "at the instance of any party" does not create an implied private right of action, because Section 47(b) is a "mandate directed to…courts" not to individuals. The Court held that the phrase "at the instance of either party" directs a court's remedial power when a party properly before it urges recission but "says nothing about conferring a right to sue in the first place."

Turning to the broader statutory structure, the Court reasoned that "Congress's decision to create a comprehensive agency enforcement scheme" in which the SEC bears "primary responsibility for ensuring compliance" with the 1940 Act did not support implying a private right of action into Section 47(b) where none was explicitly granted. In support of that conclusion, the Court noted that the 1940 Act twice expressly authorized private rights of action elsewhere but that Congress did not use that same explicit formulation in Section 47(b).

In so holding, the Court rejected Saba's reliance on the Supreme Court's 1979 decision in *Transamerica Mortgage Advisors, Inc. v. Lewis* —which found an implied private right of action in the language of Section 215 of the Investment Advisers Act of 1940 (the "IAA"). Saba argued that because Section 47(b) under the 1940 Act and Section 215 under the IAA originally contained similar voidability provisions, the Court should interpret Section 47(b) consistently with *Transamerica* and recognize a private right of action under the 1940 Act. The Court rejected that argument, noting that Congress

---

[1] Section 47(b) applies to BDCs through Section 59 of the 1940 Act.

amended the 1940 Act in 1980 and entirely reworked Section 47(b), including the specific voidability language originally included therein that was relied upon by *Transamerica*. The Court reasoned that since Congress had changed the 1940 Act's language so much since its enactment, the original similarities with the IAA were not persuasive. As a result, similarities that may have existed between the IAA and the 1940 Act when *Transamerica* was decided no longer carried the same interpretive significance. The Court therefore concluded that *Transamerica* did not support implying a private right of action under the current version of Section 47(b).

Significance for Listed CEFs and BDCs

The Supreme Court's decision resolves a circuit split and rejects a litigation theory that, if accepted, could have expanded the ability of activist investors to challenge listed funds governance measures under the 1940 Act. By foreclosing implied private rights of action under Section 47(b), the Court limits the avenues through which activists can mount collateral attacks on fund structures—including control-share-acquisition statutes, defensive bylaws and other protective governance mechanisms. The ruling should provide comfort to fund boards and sponsors seeking to promote long-term shareholder interests.

The ruling should not, however, be read as a blanket endorsement of all defensive measures adopted by listed funds. The Court did not decide whether any particular control-share measure complies with Section 18(i) of the 1940 Act, and the SEC remains the primary federal enforcer of the 1940 Act. State-law claims, fiduciary-duty claims, express statutory private rights and SEC enforcement remain available in appropriate circumstances. The SEC staff's 2020 statement withdrew the 2010 Boulder Total Return no-action letter and stated that staff would not recommend enforcement action against a CEF for opting into and triggering a control-share statute if the board acted with reasonable care and consistent with its duties. That statement, however, expressly is not a rule, regulation or Commission statement and has no legal force or effect. Boards considering control-share protections, rights plans or other defensive measures should continue to build a careful record demonstrating that each measure was adopted with reasonable care, in compliance with applicable law, and in the interests of the fund and its shareholders.

The SEC's Modernization Proposals

On May 19, 2026, the SEC proposed two rulemaking packages: the Registered Offering Reform proposal (the "Registered Offering Reform Proposal"), which would expand registered offering and shelf registration flexibility for certain BDCs and registered CEFs, and the Enhancement of Emerging Growth Company Accommodations and

Simplification of Filer Status for Reporting Companies proposal (the “Filer Status Proposal”), which would simplify filer status under the Securities Exchange Act of 1934 (the “1934 Act”) and provide scaled disclosure accommodations for many reporting companies, including BDCs.[2]

The Registered Offering Reform Proposal would create two new categories: Eligible Listed Issuers ("ELIs"), which satisfy certain requirements and have at least one class of common equity listed on a national securities exchange, and Seasoned Eligible Listed Issuers ("SELIs"), which are ELIs with a 12-month reporting history. SELI status would unlock automatic shelf registration on Form N-2ASR—a benefit currently reserved for WKSI-affected funds—making Form N-2ASR potentially available to listed BDCs and CEFs below the current WKSI float threshold.

For listed CEFs, the most significant change is expanded access to Short-Form N-2 without satisfying the current $75 million public float test. The Registered Offering Reform Proposal also would eliminate the one-year 1940 Act registration history requirement for baseline Short-Form N-2 eligibility. The Proposal would extend many WKSI-style benefits to ELI- or SELI-affected funds but would not provide complete operating-company parity—affected funds would continue to rely on Rule 482 for advertising and sales materials.

The Broader Market Context Supports Further Modernization

The broader market context underscores why further modernization of the listed fund framework remains important. According to ICI data, the number of traditional CEFs continued to fall from 393 at year-end 2024 to 364 at year-end 2025, continuing a 14-year decline that has left the number of traditional funds down 43% from year-end 2011.[3] At the same time, activist pressure remains concentrated and intense: in 2025, three activist shareholders accounted for 80 percent of total CEF activism.[4] Notably, ICI's 2025 market report found little evidence that activist involvement produced sustained improvements in CEF discounts, with excess discounts tending to widen toward pre-activist levels within the first year after activist-induced tender offers.[5] These trends suggest that a healthy and competitive listed fund market requires more than periodic activist interventions. Rather, it depends on a regulatory framework that both permits boards to adopt appropriate governance protections and provides fund

---

[2] *See* https://www.debevoise.com/insights/publications/2026/05/sec-proposals-would-modernize-offering-and-report.

[3] *See* https://www.ici.org/system/files/2026-04/per-32-03.pdf.

[4] *Id.*

[5] *Id.*

sponsors with modern capital formation tools capable of supporting innovation, growth and long-term shareholder value creation.

Further Enhancements Are Still Necessary

While the developments discussed herein should collectively strengthen the listed CEF and BDC framework, additional reforms would help advance modernization of the listed fund regime.

Fund-Specific Proxy Reform

According to ICI's 2026 proxy report, total costs associated with fund proxy campaigns since 2020 ranged from $675 million to $1.14 billion and reported that special and contested CEF proxy campaigns have become harder and more expensive.[6] In response, ICI recommended a series of reforms designed to modernize fund governance and reduce unnecessary proxy costs, including revised quorum and shareholder approval requirements, expanded alternatives to shareholder votes for selected matters, enhanced retail voting programs, more effective direct shareholder communications, streamlined proxy disclosure, and reconsideration of exchange-imposed annual meeting requirements.[7] Recent developments outside the fund industry, including the SEC staff's willingness to permit exclusion of certain recurring shareholder proposals after substantial shareholder consideration, may signal a broader regulatory interest in reducing unnecessary proxy-related costs and procedural burdens. For example, the SEC staff no-action position[8] permitting the exclusion of certain recurring shareholder proposals after substantial shareholder consideration reflects a broader recognition that repetitive voting processes can impose significant costs without necessarily producing corresponding benefits. If a similar approach, with appropriate guardrails, was extended to listed CEFs and BDCs, we believe it would reduce proxy-related costs for such funds and would complement the SEC's capital formation proposals by addressing another significant source of friction in the listed market: the high cost and complexity of obtaining shareholder participation in fund proxy campaigns. Taken together, these considerations suggest that modernization of the listed fund framework should extend beyond capital formation reforms and also include targeted updates to proxy, voting and

---

[6] *See* https://www.ici.org/system/files/2026-03/26-confronting-growing-burden-fund-proxy-campaigns.pdf#:~:text=Survey%20respondents%20strongly%20indicated%20that%20special%20and%20contested%20CEF%20proxy%20campaigns%20have%0A%0Agotten%20harder%20and%20more%20expensive%E2%80%94many%20saying%20significantly%20so%E2%80%94since%202020.

[7] *Id.*

[8] Exxon Mobil Corporation, SEC Staff No-Action Letter (Div. Corp. Fin. Sep. 15, 2025).

shareholder communication requirements that have become increasingly costly and burdensome in the modern fund marketplace.

Offering and Communications Parity

While the Registered Offering Reform Proposal would extend many WKSI-style benefits to ELI- and SELI-affected funds, listed CEFs and BDCs would continue to operate under communications and offering restrictions that do not apply to similarly situated operating companies. A final rulemaking should consider whether the current Rule 482 framework remains the right home for transaction-related marketing by listed ELI and SELI funds whose 1934 Act and 1940 Act reporting is in all other respects on parity with operating companies, or whether a fund-tailored free writing prospectus regime should be considered alongside Rule 482 for those funds.

Discount Management and the Section 23(b) Constraint

Improved shelf registration mechanics alone do not fix the fundamental challenge facing secondary-market price formation. Section 23(b) of the 1940 Act generally bars a registered fund from selling common stock below the current NAV unless an exception or SEC exemptive relief is available, creating a structural constraint that improved shelf access cannot overcome. While this restriction serves important investor protection purposes, it can also limit a fund's ability to raise capital, support liquidity and respond efficiently to market opportunities when shares trade at persistent discounts or premiums to NAV.

A durable modernization agenda should therefore focus not only on capital formation but also on market structure. Traditional tools such as opportunistic share repurchases, calibrated tender offer programs, term or target-term features, and efficient follow-on offerings when shares trade at favorable levels should remain important components of a board-supervised discount management framework. At the same time, the SEC should consider whether the existing regulatory framework adequately accommodates innovative structures designed to improve price discovery and narrow the gap between reported NAV and realizable value.

Practical Implications

Sponsors of listed funds should view the Supreme Court's decision as an opportunity to revisit their governance arrangements. Boards should review organizational documents, state-law protections, rights-plan preparedness, control-share elections and shareholder engagement practices. Any defensive action should be supported by a robust record focused on the interests of the fund and shareholders.

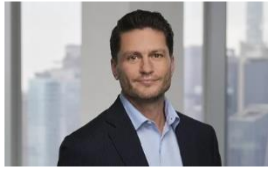
Sponsors should also begin preparing for the SEC offering reforms. Listed CEFs should assess whether they would qualify as ELIs or SELIs, how automatic shelf registration would change their financing strategy, and whether at-the-market programs or other shelf takedowns would become more useful. Sponsors should also consider whether the current regulatory environment creates opportunities to pursue innovative listed fund structures designed to improve capital formation, liquidity management and secondary-market price formation.

Conclusion

The Supreme Court's decision and the SEC's pending offering reforms are distinct developments, but together, they provide an important opportunity to reexamine the future of the listed fund structure. The Court's decision largely confirms what many CEF practitioners had long understood—that Section 47(b) does not create a broad implied private right of action under the 1940 Act—and resolves a circuit split that had created uncertainty regarding the scope of private enforcement. The SEC's recent proposals, by contrast, represent an affirmative effort to modernize the listed fund framework by expanding access to short-form registration and automatic shelf registration beyond the largest issuers. The next phase of advancement should build on that modernization effort. Areas for further consideration include greater clarity regarding fund governance tools, modernization of proxy and shareholder mechanics, expanded communication flexibility, reforms designed to improve secondary-market price formation and the practical effects of the Section 23(b) constraint, enhanced retail disclosure, and regulatory accommodations for innovative listed fund structures that seek to improve liquidity, price discovery and investor access. The objective should be to ensure that listed funds remain competitive, scalable and capable of evolving to meet the changing needs of investors and asset managers alike.

* * *

Please do not hesitate to contact us with any questions.



Vadim Avdeychik
Partner, New York
+1 212 909 6867
vavdeychik@debevoise.com

Zachary H. Saltzman
Partner, New York
+1 212 909 6690
zhsaltzman@debevoise.com

Andrew Friedman
Associate, New York
+1 212 909 6857
amfriedman@debevoise.com

Laura Hallas
Associate, New York
+1 212 909 6513
lahallas@debevoise.com

Samuel Scarritt-Selman
Associate, New York
+1 212 909 6931
shscarrittselman@debevoise.com

This publication is for general information purposes only. It is not intended to provide, nor is it to be used as, a substitute for legal advice. In some jurisdictions it may be considered attorney advertising.