Panelists discuss recent developments in corporate governance and activism in closed-end funds during AICA Summer Summit.

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Phil Goldstein from Bull Dog Investers, Brian Schaffer from Prosek, Tom DeCapo from Skadden, Arps and Peter Kimball of ISS Corporate Solutions were panelists at the AICA Summer Summit held on August 13. The moderator of the panel was Chuck Jaffe, syndicated financial host and host of *Money Life with Chuck Jaffe* as well as host of AICA's *The NAVigator* podcast. Read the transcript from the discussion below to hear the insight from the panelists.

Chuck Jaffe

Phil Goldstein

Brian Schaffer

Tom DeCapo

Peter Kimball

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Chuck Jaffe: Good afternoon everybody, welcome to your first panel discussion at the AICA Summer Summit. My name is Chuck Jaffe, I'm a syndicated financial host and I am the host of *Money Life with Chuck Jaffe*, and perhaps most importantly to you, I'm also the host of *The NAVigator* podcast, which is the AICA's weekly sponsored talk about everything that's happening in closed-end funds. You can find the podcast at the AIC Alliance's website every Friday, and I hope you're going to check it out.

Now today we are here to talk about recent developments in corporate governance and activism in closed-end funds, which is a long way of saying the impact the changing rules are having on closed-end funds. And while that subject may sound or seem a little bit boring, I'm going to try to make this anything but boring. I have a distinguished panel of experts here to help me keep this lively, and to that end I'm going to introduce each of them a bit more fully as I bring them into the conversation.

But what's important is that we have an activist shareholder in Phil Goldstein, a corporate PR specialist in Brian Schaffer, a lawyer in Thomas DeCapo, and a governance expert in Peter Kimball, so we can attack what's happening from all sides. Now to help you understand a bit how activism works and how it is reacting to changes in the rules, we're going to put our panel through a hypothetical situation that simulates something that very much could happen in real life.

I'm going to point out that while my panel is prepared for this, they don't know the exact conditions I'm going to describe here, and they still haven't played this one. So we're going to play this game out in front of you for real and we're going to keep it as organic as possible. So for the purposes of this discussion, I'd like to introduce you to the Moderator Fund. It's not a real fund, but as moderator I get to make up my own fund and I get to be involved in all aspects of how it runs.

Now here's what you need to know about Moderator, it invests in fixed-income and currently has a market value of just north of $550 million dollars. It holds plain vanilla bond funds, corporate bonds, and for good measure, a few convertible securities. It's trading currently for about $25 a share, it has a total distribution rate of 8.75% of the share price, a leverage ratio of roughly 25%, and a three-year discount of 2%. But the current actual discount courtesy of market conditions is more than seven times higher, it now stands above 14% and unfortunately it shows little sign of narrowing dramatically even as the market has gone through its big rebound since the March lows.

One of my key shareholders in the Moderate Fund is one of our panelists today. Now Phil Goldstein may be the one person in the closed end fund space who really doesn't need an introduction. He is a founder and principal portfolio manager at Bull Dog Investors, and he's a leading activist shareholder. There was an old joke in the news business that you knew it was a bad day if *60 Minutes* crews showed up on your doorstep with their cameras running. Well that's kind of how some closed-end management companies feel about Phil, as he's going to keep them on their toes.

So Phil, we're going to bring you in first, thank you for joining us, and now let's talk about your position in my Moderator Fund. My discount has grown substantially, it is not shown signs of getting better, and I suspect you're going to be getting ready to do your thing to get the most out of my fund. But you've also told me that it's hard to be an activist these days amid all the rules changes, so talk to us about the next steps. What do you do? How do you get involved? And highlight any areas where the rule changes might change your approach.

Phil Goldstein: That's a lot to chew on. Given the information that you provided, it certainly would be interesting to start-- obviously the first step is to assess whether you want to take a position. I'm assuming that we have no position in the fund to begin with, so at a 14% discount what we would do-- you gave a lot of information, one of the things we would do would be take a look at the shareholder base right up front. Because you're given us a discount, I assume it's been at that discount for several months, and if the shareholder base does not show any institutional ownerships, we might just do nothing and just wait and see if other institutions take positions. Or we might start to nibble at it.

The activism part that this panel is talking about is really an option. We've been in situations like you've described Chuck, where we might start buying the stock at a 14% discount and maybe wind up with 1 or 2% of the stock. And then in six or eight weeks it starts to narrow and it moves down to let's just say a 9% discount, it kind of puts us into no man's land and we might just decide to sell. So there's a lot of parameters, and really everything's in a state of flux, before you go hot an heavy on the activism.

Chuck Jaffe: Well let's make an assumption here, because what I did say is that we haven't been able thus far to narrow our discount. And I also actually did say that you were one of our shareholders, so you've nibbled at us already, at least a little bit. So you've got a small position, you could have a bigger position, and me or my company or my fund is not showing signs of not being able to necessarily narrow the discount by doing business as usual. So where do you step in from there?

Phil Goldstein: Again, there's issues of how liquid is the-- you said it's a $500 million fund, I assume there's reasonably good liquidity, so yeah, we probably would go to increase our position. But it would be on a gradual basis, monitoring, sometimes other investors will reach out to us and say, "Hey, why don't you take a look at Chuck's fund, the Moderate Fund seems to be at a wide discount." So yeah, it could be an attractive target and at a certain point there's no fixed point, but probably not until we were to get to 5%, which in your case would be a $25 million investment.

Typically in a case like this, here's probably what we would do. We would get to just under 5% and then we would try to reach out to management and say, "Look, we'd like you to consider doing something to narrow the discount, let's see what kind of options there are. If you don't want to do anything, we're probably going to go over five and make a filing, but let's try to see if we can do something without having to make a 13D filing. So I think that's probably the answer to the first part of the question. The second part having to do with rules changes and so forth, I think we should hold off on that.

But certainly one of the things we would look at in assessing whether we want to get to that 5%, $25 million is a pretty big investment, certainly for us. But one of the things we'd want to look at is what kind of anti-takeover provisions the fund has and whether we thought any of them were of dubious legality. So was it a staggered board? Some of the other types of things that we can talk about further later when we get further down the road assuming that management doesn't want to negotiate.

Chuck Jaffe: Okay, so now we know the tactics that you can take and we need to decide what the fund is going to do about it. And that means I'm going to turn to my PR counsel, and that's Brian Schaffer of Prosek, who spent the last two decades plus giving strategic communications counsel to senior management teams and fund directors. And I should point out he's played both offense and defense in activist shareholder cases in the closed-end fund business and the business-development company space. So Brian, we've now been aware that Phil is looking at us, he's had communication, he's saying he may wind up getting above 5%. Help me coordinate the Moderator Fund's response from the PR perspective.

Brian Schaffer: Well hopefully I've been contacted early on initially after Phil's made his outreach to the company just to get a sense as to what direction Phil may go. Is he going to push hard on governance matters? Is he going to push hard on performance matters? And the first thing I'm going to ask is, "How willing are you to engage with Phil?" Because looking ahead if we're two months down the road and we go in front of ISS and they ask the first question, "Were you willing to speak? Were you willing to engage?" and they say, "Well, no." Your game is half run at that point. And so what I'm going to try and make sure is that we can demonstrate a willingness to engage with a top shareholder, whether he's 4%, 5% or if he's built a position to 15%, I want to make sure that the team has given Phil the opportunity to be heard. It doesn't necessarily mean we have to agree with him, but I want the opportunity to at least be heard.

And then we're going to pour over what we think his angle might be. He's not going to show his full set of cards, and so he may suggest that, "Hey, I'm going to be looking to put on three nominees if you don't do something to mitigate the discount." And if that's the case, I've got to start thinking ahead as to, "Well, if he's really going to try to liquidate the fund, is that his ultimate goal rather than get a couple nominees on the board?" And so I'd try to play a couple steps ahead as to ultimately what he's going to try to do.

In the meantime, I'm going to be putting together my first statement, which is going to go out publicly and it's going to say something along the lines that, "We appreciate the outreach from Phil, and as with all shareholders, we appreciate the feedback and we wish to have ongoing dialogue." Hopefully though, Phil as well as the board, can have this discussion behind the scenes before it becomes public. It's in everybody's best interests and hopefully there's a resolution. But assuming there's not a resolution, I've got my statement ready and I'm already thinking ahead as to what my fight letters are going to look like to defend myself.

Chuck Jaffe: Okay, well let's make an assumption here. That although I like Phil, I'm not going to agree to anything right now, we're not going to have resolution. And although PR, well that's one side of where my team is going to respond, we're going to have some legal decisions to make, and that's why I now turn to Thomas DeCapo of Skadden, Arps. Tom is widely recognized as one of the nation's top experts in mutual fund law, he's got a long career history advising closed-end funds, and interval funds and more through governance matters, and shareholder challenges, and the full menu of legal rules around closed-end funds. Tom, you've heard what we've got and you've heard me say we do not have an easy resolution, so where do you take us next?

Tom DeCapo: Well Chuck, as you know since I've been serving as council to you, you regularly look at the fund's trading, and you regularly look at the fund's discount, and you regularly evaluate whether there are steps to take consistent with all of your investment policies and your mandate to close that discount. So this board is on top of the situation and has been following the discount throughout.

Similarly because I'm your council, you at least annually take a look at your defensive posture. And so your board has evaluated what all the options are in the marketplace and it made its own determination about which corporate governance positions they are comfortable with and would like to have, and so you're well situated to meet Phil's demands if they come.

So first step is to decide that whether in light of the facts that you've laid out, a near-term discount, even though you've been trading at only a 3% discount over an extended period of time, the board thinks it should be doing something different than it has historically been doing. And if so, it should do so. And part of that might be having a dialogue with Phil and figuring out what it is that the board think is appropriate in light of what's in the best interest of all shareholders that might also be of interest to Phil.

On the other hand, given the facts that you lay out, a near-term issue on the discount with an historic trading not so bad. In the event that the fund's mandate is to pursue investment in fixed-income securities and it's not to monitor discounts, the board might very well decide that what's in the best interest of shareholders is to simply stay the course, keep doing what its mandate tells it to do. And so that's the first decision tree.

Chuck Jaffe: Well I can tell you that if you listen to my weekday podcast, we're always talking with folks that say, "Hey, you don't change what you do in the middle of unusual circumstances necessarily." So no, we're not going to change, we're long-term, we've had that discount. Yep, we're doing what we do, we've got the expanded discount, we're going to fight this one. I know you're not surprised, so where does that leave us next?

Tom DeCapo: Well that leaves us next, if you've got a staggered board and we have this new position of the SEC staff that they will no longer take the position that opting into a control statute, it violates the Investment Company Act. A good first step, I think, in reinforcing closed-end funds. And so I think the board would have to sit down and look at the defensive measures that it has in place, and consider whether it wants to possibly either opt in to a control share statute if we are in Maryland. You might want to remind me what state you're in. If you're not in Maryland, then you'd have to build one through your bylaws or through your declaration of trust consistent with what you can do without a shareholder vote, to be prepared in the event that Bull Dog decides to continue buying, go beyond 5%, and try and influence control and management of the fund.

Chuck Jaffe: So that has given me my options. Now that brings us to Peter Kimball, who is head of advisory solutions at ISS Corporate Solutions, where he leads the team of governance compensation and sustainability experts working with closed-end funds. And Peter, talk about advisory solutions, I need your advice on a solution for the Moderator Fund. You've heard where we are heading, how are you helping us get there and what do you think we're heading to?

Peter Kimball: So as Brian mentioned previously, you've got to get your advisory team in place early in the process. The earlier you can get the advisory team in place, the more research you can do on the shareholder, on the nominees that are being contemplated to be nominated by the shareholder. And the more time you have to asses your own governance provisions, your own readiness to engage, whether it's amicably or defensively. So that's number one.

Number two is understanding where you stand relative to the market and your peers. I think that's an important element of the discussion in any activist situation. Sure, you may be 14% below NAV, but where is everybody else that is like you? Where is everyone in your industry? We've certainly seen some topsy turvy activity in that regard in the last few months, and so understanding how you can use your relative position to your advantage or where that relative position leads to vulnerabilities in your activism defence is equally important.

Chuck Jaffe: Well, I should point out we are vulnerable there because in the scenario that we've got, Moderator, where everybody else has seen their discounts widen, we have widened to a factor of more than seven times our norm and everybody else is somewhere around three times their norm. So we're distinctly wider than everybody else is, even as they react to pandemic. That would be why we'd be attractive to an activist shareholder.

Peter Kimball: So that does of course lead to I think real questions not only from the shareholder but also at the level of the sponsor and directors about what the right course of action to address that is. Tom mentioned that the board has of course been taking a look at its options for reducing that discount and otherwise, but especially when presented with a challenge from a significant activist, you do need to take a hard look again at whether going to open-ended or whether converting to a different form is something that should be on the table. And only after you decide that it's not do you then enter into the defensive stance and start working on fight letters.

So our goal is to just try and help leverage the database that ISS collects. And of course I should mention that at ISS Corporate Solutions, we are separated by a firewall from the ISS proxy advisory research division that provides proxy analysis and recommendations to institutional investor clients. So my work is on the defense side in these kinds of situations, and so what I'm doing is leveraging our database to help get some of these answers in front of the board and management team as quickly as possible when something arises. And the appropriate course of action will often be informed by some of that early information and those early discussions.

Chuck Jaffe: Okay, so now we're going to bring this back to Phil. Phil, I don't know yet if you're drooling at being able to make a play on the Moderator Fund, but I am surprised you haven't brought out a napkin to wipe away something because I think we've got a pretty juicy situation for you here. And I know you were also waiting to hear things like staggered board like Tom talked about, and some other things. So we've talked both a little bit here but also you've been on *The NAVigator* podcast talking about how activism is tougher now. We've made what should be a juicy opportunity for you here. Where are you going? And now where is it that you think you can make a play or maybe you can't make a play because of the changing rules?

Phil Goldstein: I'm assuming that as you said, you're not willing to negotiate at this point?

Chuck Jaffe: I am wholly intractable as many people know that tends to be my way on a lot of things.

Phil Goldstein: Yeah, well I think what we have to do is assess. We don't really have a lot of options. If you're looking at the potential anti-takeover measures, as Tom mentioned, the SEC has taken kind of a hands-off approach on the control share issue. Which for the viewers, effectively limits the ability to vote shares above a certain amount. Usually in Maryland, 10%. So if you're fund is a Maryland fund and you were to consider opting into that statute, we would have to assess what we're going to do about that. We could just give up and move onto greener pastures and say it's too tough, or we could think about a legal challenge to that.

Chuck Jaffe: But giving up, if I were to leave my hat behind as a fund operator and go to my hat as a journalist, I would say that giving up in a situation that looks juicy is the exact case that says activism is not working the way it has in the past. So if you're that much more easily discouraged, doesn't that then say that as a closed-end fund investor, where I might have looked at a juicy discount situation before and said, "I'd love to ride along on Phil Goldstein's coattails," again, I'm talking about the individual investor in our audience, that right now your coattails are shorter because of this?

Phil Goldstein: Yes, and if you recall at the last in-person conference, I suggested that it was going to be tougher for activists. That doesn't mean there's not going to be any activism, but it is tougher and you can't just assume that activists are going to bail you out. Also, there's always a possibility, although we've been offered it but you've got to be careful as an individual investor that the activist - I hate to use this word but I don't have a real good substitute - we've been offered greenmail occasionally. Where a third party, possibly the advisor would buy our shares to make us go away. That leaves the public investor high and dry. We don't do that because it would hurt our reputation going forward, but it's tougher.

Again, a lot of it depends on the attitude of management. Is your fund, the Moderator Fund, is it part of a large complex like a BlackRock or a Nuveen? Or is it a standalone fund where it's the primary source of your income? How hard are you going to fight? We've been in one, I'm not going to mention a name, but one fight where we went into litigation and I think in the end if we would have pursued it we had a good chance to prevail. But the management and the board apparently showed that they were willing to spend virtually unlimited amounts on litigation. I think they spent 5% of the NAV on litigation, so we gave up because while I believe in principals, we're investing client money. And if they're going to take a scorched earth approach it just doesn't pay, because if you win, it's going to be what we would call a Pyrrhic victory.

But that typically doesn't happen with a fund complex, with a Nuveen, with a Franklin, with a BlackRock. They have a reputation and they don't want to be painted as taking a scorched earth approach that's going to hurt all shareholders. So there's a lot of judgement necessary from our standpoint on who are we talking to? Are we talking to somebody that actually cares about their reputation, or is it somebody who's willing to burn half the house down to the save the other half?

Chuck Jaffe: Okay, well you've only ever heard of one Moderator Fund, I'm a standalone complex. But I'm reasonably certain that the greenmail option is off the table because Tom DeCapo's probably not going to let me do that. But Tom, I want to turn to you for a moment because let's go back and look at this idea of, Phil has tools at his disposal, but I as the guy running the fund, I could have seen trouble coming. I watched my discount get this big.

It's not like I was sitting there going, "Hey, if we can't narrow this, nobody's going to be interested." So when we talk about the legal challenges, and the law changes, and the rules changes, and the control shares issue, etcetera. If we want to avoid or try to make it as hard as possible on Phil before Phil ever gets interested, are we taking steps maybe as a matter of course or maybe when the discount gets as wide as it has, to just say, "Hey, let's protect ourselves, because this could get ugly down the line"?

Tom DeCapo: Well yes, but the question is who is ourselves? So I'll relay to the group, as you know Chuck, a dialogue that we had with your board, where your board was inquiring what their duties were and who they owed those duties to. And some of the discussion here has presumed that the shareholder base at large, including retail shareholders, are interested in doing something to change the fund to address this immediate discount issue.

And as we discussed with your board, your retail shareholders bought this fund because it offered them something, presumably it offered them, as you mentioned you're 25% leveraged, an opportunity to participate in a leveraged investment program that they can only get through a closed-end fund, they can't get with open-end funds. And presumably if they bought in the IPO, they read the disclosure that's been in every closed-end fund offering for the past almost three decades. That the fund might trade at a discount and they bought anyway. And presumably if they bought in the secondary market, they bought at a discount, so the discount is kind of irrelevant to them in the sense that market prices goes up and down.

And so your board's going to look at the duty that it has to its shareholder base at large and decide what's in the best interest of the entire shareholder base. And if what they decide is that they think those shareholders bought this fund on purpose, knew what they were buying, and want the investment thesis that you're delivering, then they are going to defend it. And I wouldn't view that as a scorched earth approach, I would view it as discharging their duties to your shareholders at large.

In part as we discussed with your board, and the proof in the pudding for that is, often the resolution to these issues is a tender offer that is agreed to by the fund to satiate the demands of the institutional shareholders in it. But what you find in those tender offers is that the retail investors have a much smaller participation rate than the activists do, which suggests that many of your retail investors want to stay in the fund.

And so your board would be looking at the whole host of defensive options that they have, many of them they would have already put in place, some they might revisit anew in light of the challenge and in light of their assessment of what the shareholder base at large wants. And you might very well decide to go ahead and put in some type of share ownership limitation of the control share statute type or some other type, and the time to do that would be before Bull Dog came to a 5% position and declared an intention to try and influence management, on a clear day, as we call it.

Chuck Jaffe: Thank you Tom. Brian, let's turn back to you for a moment here. So now you know we're going to fight this fight. You know that we're going to try to say, "Well hey, you bought our fund for what we do and we want to survive it, etcetera." How do we make this work from a PR perspective and not make it look like we're somehow callous or missing the opportunity that is so apparent to Phil and anybody who's activist on this one, that there's money to be made in narrowing the discount?

Brian Schaffer: I'm going to take two tracks here. The first is I'm going to stress the fact that the fund is in fact meeting or living up to its investment objective over a longer time horizon, rather than a short-term approach. Which leads me to be able to go after Phil and suggest that he's an opportunist, he's in it for the short-term, he's not really looking out for the best interest of all shareholders. As Tom pointed out, they understand the fact that there may be a discount, at certain times it's going to narrow and at times it's going to widen. So I'm going to point all of that out.

If Phil has cherrypicked any of this data, I'm certainly going to know that as well. And if Phil goes a step further and decides to make any nominations, we're going to spend a lot of time and some resources digging into those folks. Finding out, are they actually qualified? Will they actually be complimentary to the other board members? And then counter to that, I'll also talk about the strengths of the existing board members and what they've been able to do. Not just with the fund but of course over the course of their careers.

But I want to make it very clear in particular to retail, we all know the difficultly in getting in front of retail and getting their attention. That the fact is the board is focused on trying to find a way to mitigate the discount. They are acting in their best interests, it's not a situation where they've taken their eye off the ball. And staying the current course over the long-term is in the best interest of all shareholders.

Chuck Jaffe: Peter, I'm going to get back to you now as well. So as we said, you've played on both sides of this equation here. So I've got Phil who's looking at us and he's looking at the provisions that are going to allow him to be an activist. I've got Tom who's helped me set up ways that I can be defensive. When you look at this situation now, let's go back to that initial premise, that the rules are changing and it is harder for activists to do what activists have traditionally done. So what we have here now is this impasse that is ultimately going to be resolved in one way or another. But as somebody who's been an observer of the closed-end fund space. Who wins in all of this? Who loses? And are we better off with where we've gotten to now with changes in the rules? Or were we better off a little while ago when it might have been a little more Wild West-y than it is now?

Peter Kimball: I think the answer to both of those questions is that it's in the eye of the beholder. If you are a shareholder, not just an activist shareholder but I think institutional shareholders would feel the same way. That the SEC's statement on control share provisions is anti-shareholder and that it weakens the framework of corporate governance for all companies and their shareholders. The corporate governance universe is a little bit weaker because of it.

Of course you feel differently about it if you're a company that is now either in Maryland or Massachusetts, your fund is able to take advantage of that and prevent or at least inhibit some of the power that an activist might have brought before. So certainly the rule changes give a little bit more power and leverage to the company, but if it still goes despite the rule changes to a fight, regardless of which side you're on. The activist and the company are really going to have to convince everyone else, and of course it's far easier to convince institutional investors than it is the retail investors. But if you're the fund or the activist, you need to convince your shareholders that the answer to two questions.

One is change warranted, and number two is my group, the best group to affect that change. That's really what it comes down in every fight. And the basis for so many early discussions between activists and funds comes down to some judgement about where each party stands with respect to being able to persuade shareholders on those two questions.

Chuck Jaffe: Okay. We're just about at the end of our time here and I know I have to keep us on time because everything else is going. So I quickly want to take a question we got from the audience, which I don't know that anybody knew this, but it works out.

Tom, I'm based in Massachusetts, so as much as we've talked about Maryland and Massachusetts, guess what? The Moderator Fund is a Massachusetts business trust. So aside from a staggered board, the question came from the audience, what's the most effective anti-takeover mechanism? And are your clients that are Massachusetts business trusts adopting control share acquisition provisions?

Tom DeCapo: I'll speak to it broadly because I can't speak to any particular client circumstance. And I'll also say at this juncture, these views are mine and not necessarily Skadden's, they're not necessarily those of any given client. We recently put something out that said we're not so sure actually that a Massachusetts busines trust can opt into the control share statute in Massachusetts. It applies to Massachusetts corporations, it doesn't apply to Massachusetts busines trusts. So as a Massachusetts business trust you would have to basically build a shareholder ownership limitation provision in your bylaws or deck of trust that mimic that that is available to corporations in Massachusetts. We think that is also defensive. We've always thought that was defensive even before the SEC took this position, but we have seen people in the marketplace considering that option.

Chuck Jaffe: Thank you, Tom. Quickly Phil again, because we're running out of time. You and I now have been at two AICA summits. We were at the one in New York together, we're in this one virtually. At the one in New York you spoke very pessimistically about the future of activism. That was before we had the SEC ruling that has been very much in the middle of this discussion. So are you worried that, with the continued success of AICA, that if we're doing this in a couple of years, that you'll be looking at it going, "There's really nothing I can do as an activist investor. I can't really be activist anymore"?

Phil Goldstein: Well anything's possible but look, I was pessimistic but I would like to just respond a little bit to what Tom said and talk about-- first of all, when you talk about the argument that I hear a lot of times from the management side is, "Well, the shareholders bought into this and they knew that a discount could develop, so you have no moral authority to come in and pressure management because they caveat emptor. You knew what you were getting into." I think shareholder bases change over time, and to say if the Moderator Fund has been around for 15 years, that the shareholders that bought into it at that time are the same shareholders today, that's just wrong.

And so ultimately, philosophically I believe the way to settle these things if we can't reach an agreement with management is through a shareholder vote. Because let's face it, you're talking about long-term shareholders, but every day some of your shareholders, your long-term shareholders may be selling at a 14% discount, and they might want to sell at a 2% discount or no discount. So everybody pretends to speak for the long-term shareholders, but nobody really knows what they want.

The only way to know for sure, and I don't think there's any way to distinguish. There's nothing certainly in the Investment Company Act that distinguishes between long, short, or any other shareholders. Every shareholder should get one vote. You have a vote. I mean, look we see what's going on in our political environment, people are very emotional about it but ultimately hopefully we're going to have an election in November and whoever wins, that's who wins. You can't go back and put the genie back in the bottle.

Chuck Jaffe: I'm not even going to go to the possibility Phil that somebody would say that we can't have a proxy vote by mail because we can't trust mail-in ballots. We're not going there, but I appreciate the suggestion.

Phil Goldstein: I don't want to get on a side issue, but the whole talk about voting political elections by mail, why don't they use what we use now? Which is basically do it online so at least you know that your vote gets counted, instead of throwing your absentee ballot in the mail and it gets lost in the mail. You have no idea if it gets voted, but that's a different issue.

Chuck Jaffe: That is. I want to get to one other issue as well. Peter, while we have been talking we got an audience question that basically says that on the issue of declassification, ISS makes no distinction between an operating company and an investment company, and ISS seems to always be in favor of declassification. Again, this question coming from our audience. The question then builds to, is this one size fits all potentially inappropriate for long-term investors?

Peter Kimball: It's a good question and I think a staggered board or a classified board has long been one of the classic bad corporate governance structures from the shareholder point of view. And although when evaluating an activism situation, ISS will not necessarily take a pro-shareholder view, they will look at the financials and the arguments being raised and make an objective determination on the facts in front of them.

As a general matter, ISS's proxy advisory unit is doing their work on behalf of institutional investors and institutional investors. Institutional investors, whether at an operating company or at a closed-end fund, have long felt that a staggered board is anathema to those who believe in best practices in corporate governance. So yes, I think it's fair to say that that's a one size fits all approach but it's not one that ISS is going to be backing down from anytime soon.

The other thing to note here is that there hasn't been quite as much direct pressure on companies to eliminate their staggered boards in the closed-end fund space as there has been in the corporate space. There has been some of course, but there hasn't been the wave of shareholder proposals and overwhelming attack on this structure to the same extent there has been in the operating company space we're now in. The S&P 500, you have hardly anybody using a classified board because of the intense shareholder pressure eon that. I think we're at a different point on that journey, if it is indeed a linear journey. But ISS' stance it what it is, and it's been that way for awhile and likely isn't going to change.

So as advisors to funds with a staggard board, we have to remind our clients to be mindful that in ordinary times, that you might take some hits because you're saving that structure in place in case it ever needs to be used to your advantage in an activist situation.

Chuck Jaffe: So in the limited time we have left here, let me throw out one question for all of you, you can sort of raise your hand and decide who's going to go at it first. But I'm a long-time financial journalist, and for ages, decades ago it was always everything for the shareholders, if it's going management's way, obviously somebody's taking it on the chin. Hard to be the consumer guy and not somehow feel that way.

These days, how much when we have a society where everybody, not just the voting stuff Phil was talking about but everybody's looking for, "Oh, there's deep state, there's whatever," all this other sort of stuff. When we've been talking about adversarial issues, do we expect there to be more or less adversarial issues in the close-end fund space going forward? It seems like this shouldn't be that hard for middle ground and common ground to be found, but for those of you who work both sides of it, do you wind up expecting that there's more or less of this kind of activity going forward? Brian, I think you're up.

Brian Schaffer: I think there'll absolutely be more. I think as activism more broadly has become an asset class unto itself, and I think a number of smaller funds out there have seen the success of people like Phil and others, their investors are asking for that increased and diversified exposure, we're going to see more people get into the game. That certainly doesn't mean they have any other better chance of being successful, but I think you're going to see more runs at fund complexes than even what we're seeing today. I don't think that abates any time soon barring, and I guess we're already seeing it, but really a pullback in the economy. But activism too hasn't really shown that pullback that we would typically see in a slowdown. So if we're not seeing it now, I don't see how we see it in the years ahead.

Chuck Jaffe: Peter, let's turn this over to you for a minute. Because again, we're talking about both sides of it. Are we going to see more or less of this going forward?

Peter Kimball: I think as long as there are underperforming companies or companies where an activist shareholder can make an argument that there's underperformance or a lack of long-term strategic vision for the fund, that you are going to see activism continue to be present. I don't think this makes it go away, I think it may change the nature of the discussions. Is it conceivable that you could see fewer fights, straight out proxy fights as a result of this? Perhaps, but I don't think it reduces the number of discussions opposite to management and engagements between funds and activists.

Chuck Jaffe: Tom, I'll turn the same question to you. Of course, your job is to potentially try to cut these things off at the pass if we can, but knowing how the rules are changing and that means different tools in your toolbox, more or less activism going forward?

Tom DeCapo: It's early and time will tell. I think to me at least it's clear that the fights that we do have will be more extreme fights. There'll be more hostile fights, the actions taken will be more aggressive because they will have to be because there'll be a larger hurdle to overcome just to be successful. I also agree with Peter that we may see fewer fights. As a result of more funds being better protected there'll be less low hanging fruit.

Chuck Jaffe: And Phil, like I said, I know you believe there's going to be less activism.

Phil Goldstein: Well no, I'm not sure of that but the one prediction I think I can make-- I hate making predications because when you're wrong somebody never forgets about it. And I think we've already seen it, but I think we're going to see more litigation. Because while you've talked about rules changing, the rules haven't changed. The SEC came out with what's effectively a no-action letter and sort of said, "We're just going to look the other way if you commit a crime." Tat's the way I see it. I see Tom shaking his head.

Chuck Jaffe: Tom's reaction, exactly.

Phil Goldstein: Ultimately look, people have asked me ever since I've been an activist, "Can a board do this? Can a board do that? Can they do that? Is that legal?" We've seen some pretty raw things and my answer is the board can do whatever it wants until a judge tells them they can't. I think Tom would agree with that pretty much. So I do foresee it.

And we've already seen some litigation, mostly from Saba, some they lost and some they won. They just actually took over an entire board of a Voya fund, and the fund fought like hell but they were able to prevail in court and then prevail in the proxy fight. So I think I can predict there's going to be litigation to challenge some of these positions just to say, "Well the board can opt in." But I think the question is what's the standard? Can they just disenfranchise shareholders just because they don't like what they're proposing? How far can they go with infringing on the shareholder franchise before it becomes a breach of duty?

Chuck Jaffe: Well gentlemen, this has been great. We have respected our time and I wish we had a little bit more, but hopefully I'll get a chance to chat with each of you on *The NAVigator* at some point, we'll carry out our discussion there. Thank you very much for all my panelists but also the attendees. A little reminder here, there is a post-event remote social, you've got your agenda, if you click on the links you'll be able to get there. And I think all of us you can find in the agenda how to reach us for question and follow-up if you need to. So thank you everybody for your time and your attention.

Gentlemen on the board, even the ones who aren't bearded here because we have mostly a beard thing going on, but not entirely, thank you so much, we appreciate it. The Moderator Fund is going to go back to being unknown but hopefully it has served its purpose. Thanks so much everybody, enjoy the rest of your time at the AICA Summer Summit.

Recorded on August 13, 2020.

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