



## **D&O/E&O INSURANCE COVERAGE FOR SHAREHOLDER DATA BREACH EVENTS**

### FREQUENTLY ASKED QUESTIONS

*ICI Mutual has introduced a new “Shareholder Data Breach Event Endorsement” under its Directors and Officers/Errors and Omissions Liability Insurance Policy (“ICI Mutual Policy”). The endorsement is designed to specify the scope of coverage available under the ICI Mutual Policy for losses that may be incurred by insureds in connection with data breaches involving the unauthorized disclosure, acquisition or dissemination of confidential information regarding fund shareholders.*

*The new endorsement will be available in two versions: standard and supplemental. The standard version of the endorsement will be provided to insureds at no additional premium. The supplemental version of the endorsement—which will afford certain additional coverage beyond what is afforded under the standard version—will be available to qualifying insureds upon request, subject to their payment of additional premium. Both versions will be subject to insureds’ satisfactory responses to separate underwriting questions. This guide is designed to respond to frequently asked questions regarding this new ICI Mutual endorsement.<sup>1</sup>*

#### **1. Why is ICI Mutual introducing its new Shareholder Data Breach Event Endorsement?**

A number of events—including a number of highly-publicized customer data breaches outside the fund industry—have fueled increased attention by regulators, fund boards and fund advisers to cyber risks within the fund industry, and to programs in place at fund groups to manage these risks. For the fund industry, one key cyber risk is the Shareholder Data Breach Event, the industry’s analogue to a customer data breach.<sup>2</sup> Not surprisingly, many fund groups (1) have been seeking guidance as to how their directors and officers/errors and omissions (D&O/E&O) liability insurance policies and other “traditional” business insurance policies may respond to Shareholder Data Breach Events (as well as to other types of cyber risks), and (2) have been evaluating whether to buttress their cyber risk management programs through the purchase of “specialty” cyber insurance products.

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<sup>1</sup> These Frequently Asked Questions (FAQs) provide an overview of the new endorsement and a general discussion of the coverage available thereunder. In any particular situation, the terms, conditions and limitations of the endorsement itself (as well as any other applicable terms, conditions and limitations of the ICI Mutual Policy) will govern any coverage questions that may arise.

<sup>2</sup> The capitalized terms used in these FAQs are defined either in the endorsement itself or in Section III of the ICI Mutual Policy. The term “Shareholder Data Breach Event,” which is also defined in the endorsement, can be generally viewed as an incident in which the security or confidentiality of data is compromised, so as to result in the unauthorized disclosure, acquisition or dissemination of confidential information regarding Fund shareholders (e.g., shareholder names, account numbers, Social Security or tax identification numbers, or similar information).

As discussed in Question 2 below, the scope of coverage provided for losses associated with Shareholder Data Breach Events remains uncertain under the D&O/E&O policies now generally available to fund groups. ICI Mutual has developed its new endorsement to provide more certainty for its insured fund groups in this regard, and to reduce the potential for future misunderstandings or conflicting expectations as to the scope of coverage available under the ICI Mutual Policy for this type of cyber risk.

## **2. Are losses resulting from Shareholder Data Breach Events covered under current D&O/E&O policies?**

The D&O/E&O policies now generally available to fund groups—whether issued by commercial insurers or by ICI Mutual—were originally developed prior to the emergence of cyber risk as a key area of concern for fund groups. At present, these D&O/E&O policies typically do *not* directly address the scope of insurance coverage available for financial exposures in claims arising from Shareholder Data Breach Events. Moreover, many of these D&O/E&O policies expressly *include* certain provisions which, by their terms, could potentially exclude or limit coverage for such exposures.<sup>3</sup> Accordingly, the scope of coverage currently afforded under D&O/E&O policies for losses resulting from Shareholder Data Breach Events remains uncertain.

ICI Mutual’s new endorsement is designed to address this uncertainty. By specifically describing the scope of coverage available on a prospective basis under the ICI Mutual Policy for Claims arising from Shareholder Data Breach Events, the new endorsement provides certainty and guidance for fund groups. The new endorsement also thereby reduces the potential for

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<sup>3</sup> Thus, for example, a Shareholder Data Breach Event might potentially implicate exclusions found in many D&O/E&O policies for “invasion of privacy” and/or for “loss of or damage to tangible property.” See, e.g., Heidi Lawson and Daniel Harary, *Cyber Risks for the Boardroom Part 2: Why Corporate Directors Should be Concerned About Data Security Breaches*, (“[M]any D&O policies contain a standard privacy exclusion . . . , which may reduce or eliminate coverage for a cyber breach”) (May 6, 2014); David L. Barres and Dominic J. Picca, *Director Liability for Cybersecurity Risks*, Corporate Counsel (Aug. 6, 2014) (“Many D&O policies contain, in sections that an untrained eye might overlook, exclusions to liability resulting from a privacy breach. . . . The phrase ‘right of privacy’ arguably could trigger the exclusion after a data breach”); Res. Bank v. Progressive Cas. Ins. Co., 503 F. Supp. 2d 789, 792 (E.D. Va. 2007) (accepting insurer’s argument that “invasion of privacy” as used in an exclusion in a professional liability policy applies to violations of a particular statute dealing with consumer privacy claims [i.e., the Telephone Consumer Protection Act]); Roberta D. Anderson, *Viruses, Trojans and Spyware, Oh My! The Yellow Brick Road to Coverage in the Land of Internet Oz – Part II*, FC&S Legal, The Insurance Coverage Law Report (February 2014) (discussing decisions under commercial general liability policies that “support an argument that data is tangible property” as well as decisions to the contrary, and noting that “[a] leading insurance law authority notes that the issue as to whether ‘computerized information is tangible property’ has ‘not been satisfactorily resolved’”); Computer Corner, Inc. v. Fireman’s Fund Ins. Co., 46 P.3d 1264, 1267 (N.M. Ct. App. 2002) (in case involving a commercial liability insurance policy, underlying court concluded that “computer data is tangible property”).

Separate and apart from D&O/E&O policy exclusions, there may also be issues under any given D&O/E&O policy as to whether particular claims resulting from a Shareholder Data Breach Event fall within the overall grant of coverage afforded by the policy. See generally Laura E. Bange & Amy Lock, *Insurability of HIPAA Claims Arising from Health Information Data Breaches Under Traditional E&O and D&O*, PLUS Journal (July 2014) (noting that under E&O policies, “whether an alleged . . . breach arises in the course of an insured’s performance of ‘professional services’ will be carefully examined”); Latham & Watkins, *Cyber Insurance: A Last Line of Defense When Technology Fails* (April 15, 2014) (“E&O coverage for a cyber incident requires that the insured be able to show some sort of nexus between the cyber issue and the professional services in which the insured is engaged.”).

misunderstandings or conflicting expectations between ICI Mutual and its insureds as to how the ICI Mutual Policy may respond to such Claims.

### **3. Is ICI Mutual’s new endorsement a substitute for “specialty” cyber insurance coverage?**

Numerous “specialty” cyber insurance products are now available for purchase in the commercial insurance market. These specialty cyber insurance products are often expressly designed to respond to an array of cyber-related exposures, including certain data breach-related exposures, that are outside the traditional scope of D&O/E&O insurance. Neither the standard version nor the supplemental version of ICI Mutual’s new endorsement is designed or priced to serve as a substitute for such specialty products.<sup>4</sup> In particular, neither version of the endorsement will respond to certain data breach-related exposures for which coverage may be afforded under specialty cyber insurance products (e.g., First Party Costs, assorted fines and penalties).

In ICI Mutual’s view, decisions on whether to purchase specialty cyber insurance products involve business judgments on which different fund groups may come to different determinations, depending upon their particular circumstances. This being said, ICI Mutual expects that over time, many fund groups will choose to purchase specialty cyber insurance products, although some may not.

### **4. What is the basic design of ICI Mutual’s new endorsement?**

Broadly stated, the types of Claims that might be initiated in the aftermath of a Shareholder Data Breach Event can be divided into two categories:

- (1) ***Traditional Claims (a/k/a “Securities Claims”)***: The first category comprises those types of Claims which have been relatively common in the fund industry over the years, and to which fund industry D&O/E&O insurance has traditionally been specifically designed and actuarially priced to respond (e.g., shareholder lawsuits alleging violations of federal or state securities laws, shareholder derivative lawsuits alleging breaches of fiduciary duty, investigations or regulatory actions by the U.S. Securities and Exchange Commission (“SEC”));
- (2) ***Non-Traditional Claims***: The second category comprises those types of Claims which have been relatively rare in the fund industry over the years, and to which fund industry D&O/E&O insurance has traditionally been neither specifically designed nor actuarially priced to respond (e.g., shareholder lawsuits or state attorney general actions alleging violations of shareholder notification statutes, privacy statutes, consumer protection statutes, etc.).

For each of these two categories of Claims, the new endorsement sets forth the extent of coverage available under the ICI Mutual Policy (a) for *fund independent directors*, (b) for

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<sup>4</sup> “Specialty” cyber insurance products may also frequently be designed to respond to other types of cyber risks outside the typical scope of D&O/E&O policies and other traditional business insurance products.

*insured funds themselves* (and their “inside” directors and officers), and (c) for *insured advisers and other insured service providers* (and their directors and officers). More detailed information as to the nature and extent of coverage available under the endorsement for each subset of insureds, for each category of Claims, is provided in Questions 5 through 8 below.

In summary form, however, the coverage afforded under the standard version of the endorsement can be diagrammed as follows:

<b>Shareholder Data Breach Event Claims</b>		
<b>Availability of Coverage under <u>Standard</u> Version of New ICI Mutual Endorsement <sup>(1)</sup></b>		
	<b>Coverage For Traditional (a/k/a “Securities”) Claims</b> (Defense Costs, Settlements, Judgments)	<b>Coverage for Non-Traditional Claims</b> (Defense Costs, Settlements, Judgments)
<b>Fund Independent Directors</b>	<b>Yes</b>	<b>Yes</b>
<b>Insured Funds</b> (And Their “Inside” Directors and Officers)	<b>Yes</b>	<b>Yes</b> (Subject to Sublimit on Settlements) <sup>(2)</sup>  (Sublimit for settlements may be increased or removed under supplemental version)
<b>Insured Advisers/Insured Service Providers</b> (And Their Directors and Officers)	<b>Yes</b>	<b>No</b> <sup>(3)</sup>  (Coverage for defense costs, insurable settlements and insurable judgments available under supplemental version)

(1) This diagram is provided for general guidance only. The terms, conditions and limitations of the endorsement itself (as well as any other applicable terms, conditions and limitations of the ICI Mutual Policy) will govern any coverage questions that may arise in any particular situation.

(2) Under the standard version of the endorsement, coverage for Funds is subject to a per-Policy sublimit for payments made in settlements of Non-Traditional Claims. (Note that this sublimit does *not* apply to defense costs or insurable judgments paid by Funds.) Under the supplemental version of the endorsement, this per-Policy sublimit for settlement payments may be increased or removed. See Question 6.

(3) Under the standard version of the endorsement, no coverage is available for defense costs, settlements or judgments incurred by insured advisers or other insured service providers (and/or their directors and officers) in Non-Traditional Claims. Under the supplemental version of the endorsement, this coverage may be provided. See Question 7.

The ICI Mutual Policy is a third-party liability insurance product. As such, the ICI Mutual Policy, like D&O/E&O policies generally, is neither designed nor priced to cover “breach response costs” or other First Party Costs arising from a Shareholder Data Breach Event (e.g., post-breach shareholder notifications, forensic investigations, public relations initiatives, business interruption, etc.). The new endorsement underscores that no coverage is available under the ICI Mutual Policy, directly or indirectly, for such First Party Costs, subject to certain limited exceptions.<sup>5</sup>

## **5. What coverage is available under the new endorsement for Fund Independent Directors?**

**Traditional (a/k/a “Securities”) Claims:** Independent Directors may be at risk of being named as defendants or respondents in Traditional Claims arising from Shareholder Data Breach Events (e.g., derivative lawsuits alleging breach of fiduciary duty in oversight of cyber risk, regulatory investigations by the SEC, etc.). Coverage is available under the standard version of the endorsement both for Costs of Defense and for other covered Loss that Independent Directors may incur in connection with such Traditional Claims.

**Non-Traditional Claims:** In contrast to Traditional Claims, Independent Directors are likely to be at lesser risk of being named as defendants or respondents in Non-Traditional Claims (e.g., lawsuits or state attorney general actions alleging violation of state privacy statutes, state consumer protection regulatory actions, etc.).<sup>6</sup> Even so, coverage is available under the endorsement both for Costs of Defense and for other covered Loss that Independent Directors may incur in connection with such Non-Traditional Claims.

**First Party Costs:** As noted above, the ICI Mutual Policy, like D&O/E&O policies generally, is a third-party liability insurance product. As such, it is neither designed nor priced to provide coverage, directly or indirectly, for First Party Costs. Because First Party Costs are typically an exposure for entities rather than for individuals, it appears unlikely that Independent Directors could themselves be held responsible for them. Even so, the endorsement extends special protection to Independent Directors in this regard. It does so by making coverage available for Independent Directors in the event that lawsuits (or other Claims) are brought against them seeking recovery of First Party Costs.

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<sup>5</sup> These limited exceptions are described in the endorsement and in Questions 5 and 6 below.

<sup>6</sup> In this regard, it is instructive that in claims arising out of large-scale data breaches impacting retailers and other businesses outside the fund industry, *traditional* claims (e.g., derivative lawsuits) have been directed at directors or officers, but non-traditional claims have to date generally been directed only at the *entities* involved in the data breaches and *not* at the individual directors (or officers) of these entities. *See, e.g., Palkan v. Homes*, 14-cv-1234, 2014 WL 5341880 (D.N.J. Oct. 20, 2014) (shareholders derivative suit brought against board of directors of Wyndham hotel operating company following data breach at Wyndham); *In re Target Corp. Customer Data Security Breach Litigation*, MDL No. 2522 (D. Minn.) (consolidated cases following data breach at Target Corp. naming Target board of directors as defendants in only shareholder derivative suits and not with respect to other causes of action).

## 6. What coverage is available under the new endorsement for Insured Funds?

**Traditional (a/k/a “Securities”) Claims:** Although Funds do not themselves actually hold or safeguard Confidential Shareholder Information, they may nevertheless be at risk of being named as defendants (or respondents) in Traditional Claims arising from Shareholder Data Breach Events (e.g., disclosure-based class action lawsuits alleging violations of federal securities laws). Coverage is available under the endorsement for Costs of Defense and for other covered Loss incurred by Insured Funds in such Traditional Claims. This same scope of coverage is likewise available for “inside” directors and officers of Insured Funds.

**Non-Traditional Claims:** In a rational world, one would expect that Non-Traditional Claims should be primarily directed at the service providers that actually hold and safeguard Confidential Shareholder Information, rather than at Funds themselves. The endorsement nevertheless recognizes the potential for Funds, as entities, to be included as defendants (or respondents) in Non-Traditional Claims. In this regard, coverage is available under the endorsement for Costs of Defense that Insured Funds may incur in the defense of such Claims, as well as for insurable judgments that might be entered against them.<sup>7</sup>

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<sup>7</sup> Plaintiffs in Non-Traditional Claims could face difficulties in demonstrating that they have sustained any cognizable injury that would merit an award of insurable damages, as has been the case in a number (but not all) of the non-traditional claims arising out of large-scale data breaches impacting retailers and other businesses outside the fund industry. See, e.g., *Lewert v. P.F. Chang’s China Bistro, Inc.*, No. 14-CV-4787, 2014 WL 7005097, at \*3 (N.D. Ill. Dec. 10, 2014) (“Speculation of future harm does not constitute actual injury. . . . Plaintiffs do not allege that identity theft has occurred; rather, they allege that identity theft may happen in the coming years. Plaintiffs have not alleged an injury in fact with respect to identity theft.”); *Remijas v. Neiman Marcus Grp.*, LLC, No. 14 C 1735, 2014 WL 4627893, at \*4 (N.D. Ill. Sept. 16, 2014) (“The complaint does not adequately allege standing on the basis of increased risk of future identity theft.”); *Galaria v. Nationwide Mut. Ins. Co.*, 998 F. Supp. 2d 646, 656 (S.D. Ohio 2014) (“[T]he mere increased risk of theft or fraud is [not] a sufficiently concrete injury-in-fact to confer standing.”); see also Nicholas Ranjan and Syed D. Ali, *Federal Courts in the Third Circuit are Following the National Trend and Dismissing Data Breach Cases for Lack of Standing*, K&L Gates Client Alert (April 24, 2015) (“[Data breach] incidents have spawned considerable litigation, including class action lawsuits brought by individuals whose personal information has been compromised. But many of these lawsuits have been dismissed at the outset on the basis of Article III standing . . . .”); John L. Jacobus and Benjamin B. Watson, *Clapper v. Amnesty International and Data Privacy Litigation: Is A Change to the Law “Certainly Impending”?*, 21 Rich. J.L. & Tech. 3, 4 (2014) (“Plaintiffs in [data breach class actions] . . . have frequently encountered a common hurdle: the requirement under Article III of the United States Constitution that a plaintiff have ‘standing’ to sue.”); 1 Data Sec. & Privacy Law § 8:27 (2014) (“Putative class action lawsuits for large scale data breaches are often dismissed during the initial stages of the litigation because the plaintiffs failed to allege an injury-in-fact and, therefore, lack standing to sue.”); Timothy H. Madden, *Data Breach Class Action Litigation - A Tough Road for Plaintiffs*, Bos. B.J., at 27, 29-30 (Fall 2011) (“Courts across the country . . . have not been receptive to data breach class actions absent the existence of actual, demonstrable economic harm to the plaintiff class. These cases have generally been dismissed . . . courts have generally held either that plaintiffs lack standing under Article III of the United States Constitution because with no harm there is no injury-in-fact and no case or controversy; or, that plaintiffs fail to make out the essential elements of their claims because they have suffered no recoverable damage.”); *but see* Kevin M. McGinty, *Consumer Claims Survive Motion to Dismiss in Target Data Breach Class Action*, N. L. Rev. (Dec. 29, 2014) (discussing court ruling that permitted most of the consumer claims in the Target data breach litigation to proceed past motion to dismiss); Allison Grande, *Target’s \$10M Breach Settlement Sets Affordable Standard*, Law360 (Mar. 19, 2015) (discussing \$10 million settlement reached in Target litigation following the court’s denial of Target’s motion to dismiss, and predicting that this \$10 million settlement “isn’t likely to be surpassed in the near future” in light of the size of the Target breach combined with the problems that plaintiffs have had recovering for suits in this context).

The standard version of the endorsement also provides specified coverage for amounts that Insured Funds may contribute towards insurable *settlements* of Non-Traditional Claims, subject to a per-Policy sublimit on such contributions. This per-Policy sublimit is designed to strike a balance between two competing interests: (1) the interest of Insured Funds in having some amount of insurance coverage available for them to contribute towards these settlements, so as to facilitate resolutions of Non-Traditional Claims in appropriate cases, and (2) the interest of Insured Funds (and of the fund industry more generally) in not having so much insurance coverage available for such settlements as to incentivize the plaintiffs’ bar (and other potential claimants) to view Funds as attractive “deep pocket” defendants in Non-Traditional Claims.<sup>8</sup>

Some fund groups, depending upon their particular circumstances, may be interested in securing additional coverage (beyond the per-Policy sublimit) for settlement amounts that their Funds, as entities, may pay in Non-Traditional Claims. Under the supplemental version of the endorsement, the per-Policy sublimit on settlement payments by Insured Funds in Non-Traditional Claims may be increased or removed, subject to satisfactory responses to separate underwriting questions and payment of additional premium.

***First Party Costs:*** As noted above, the ICI Mutual Policy—like D&O/E&O policies generally—is neither designed nor priced to provide coverage, directly or indirectly, for First Party Costs. Accordingly, coverage is generally *not* available, under either the standard or the supplemental version of the endorsement, for any First Party Costs that might be incurred or payable by Insured Funds.<sup>9</sup>

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<sup>8</sup> The standard version of the endorsement thus recognizes that there could be instances where (1) Insured Funds are named as defendants or respondents in Non-Traditional Claims seeking insurable damages, (2) the Non-Traditional Claims are not dismissed during the litigation process, and (3) the parties ultimately seek to pursue monetary settlements in lieu of litigating the Non-Traditional Claims to final judgment. In such instances, Funds might expect that the cost of the monetary settlements should be borne by the entities that actually held and safeguarded the Confidential Shareholder Information at issue, rather than by Funds themselves. Even so, the standard version of the endorsement provides specified coverage for amounts that Insured Funds may contribute towards insurable settlements of Non-Traditional Claims, subject to an overall per-Policy sublimit on such contributions. As noted in the text above, this per-Policy sublimit in the standard version of the endorsement is designed to strike a balance between (1) the interest of Insured Funds in having some amount of D&O/E&O insurance coverage available for them to contribute towards these settlements, and (2) the interest of Insured Funds (and of the fund industry more generally) in not having so much D&O/E&O coverage available for such settlements as to result in Funds being viewed as attractive “deep pocket” defendants in Non-Traditional Claims.

<sup>9</sup> This being said, the ICI Mutual Policy does provide (through separate standard endorsements) a designated amount of insurance coverage for expenses incurred by Insured Funds in “Claim-Related Internal Corporate Investigations” and in “Shareholder Derivative Demand Investigations.” Under appropriate circumstances, these coverages could potentially be available to defray the costs of certain investigations that might be initiated by Insured Funds following a Shareholder Data Breach Event. For more information on these two ICI Mutual coverages, see the following documents, available at [www.icimutual.com](http://www.icimutual.com): (1) “D&O/E&O Insurance Coverage for Expenses of Claim-Related Internal Corporate Investigations – Frequently Asked Questions,” and (2) “D&O/E&O Insurance Coverage for Shareholder Derivative Demand Investigations – Frequently Asked Questions.”

## 7. What coverage is available under the new endorsement for Insured Advisers and Other Insured Service Providers?

**Traditional (a/k/a “Securities”) Claims:** Insured advisers or other insured service providers (and/or their directors and officers) may be at risk of being named as defendants (or respondents) in Traditional Claims arising from Shareholder Data Breach Events (e.g., disclosure-based class actions alleging violations of the federal securities laws, SEC regulatory investigations, etc.). Coverage is generally available under the standard version of the endorsement for Costs of Defense and for other covered Loss that insured advisers and other insured service providers (and/or their directors or officers) may incur in such Traditional Claims.

**Non-Traditional Claims:** Under the standard version of the endorsement, coverage is *not* available for Costs of Defense or for other Loss that insured advisers and other insured affiliated service providers (and/or their directors or officers) may incur in Non-Traditional Claims. Some fund groups, depending upon their particular circumstances, may be interested in securing such coverage. Under the supplemental version of the endorsement, coverage may be available for Costs of Defense and other covered Loss that insured advisers and other insured affiliated service providers (and/or their directors or officers) may incur in Non-Traditional Claims.

**First Party Costs:** As with Funds as entities (see Question 6 above), coverage is generally *not* available under either version of the endorsement for any First Party Costs that insured advisers or other insured service providers (or their directors or officers) may incur, directly or indirectly.<sup>10</sup>

## 8. What kinds of Claim-related exposures are not covered under the new endorsement?

Subject to its terms, conditions, and limitations, the ICI Mutual Policy is generally designed to respond to “Loss” resulting from a “Claim ... for a Wrongful Act” being made against an Insured. As with D&O/E&O policies generally, the ICI Mutual Policy places certain limitations on the types of Loss for which coverage may be available. More specifically, the ICI Mutual Policy, as here relevant, defines Loss to exclude “fines or penalties imposed by law, or matters which may be deemed uninsurable pursuant to which [the] policy may be construed ....”

ICI Mutual recognizes that insureds and D&O/E&O insurers may sometimes differ over whether particular payments should be viewed as constituting covered “loss” under a policy. ICI Mutual also recognizes that there may be a heightened risk for such differing views in Non-Traditional Claims arising from Shareholder Data Breach Events, given that (1) Non-Traditional Claims have been relatively uncommon to date (particularly in the fund industry), and (2) there has not yet developed a deep body of legal precedents to guide insurers and insureds in their interpretations of how D&O/E&O policy language might apply to such Claims. In order to

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<sup>10</sup> Thus, by way of example, coverage is not available under the endorsement for any amounts that an insured adviser or other insured service provider might pay in settlement or judgment of a derivative lawsuit brought against the adviser/service provider on behalf of a Fund (and/or a direct lawsuit brought against the adviser/service provider by the Fund itself) alleging that the adviser/service provider breached its fiduciary and/or contractual duties in failing to adequately protect Confidential Shareholder Information, thereby causing the Fund to sustain First Party Costs following a Shareholder Data Breach Event.



reduce the potential for misunderstandings or conflicting expectations in this regard, the new endorsement expressly addresses the scope of coverage potentially available in two areas that may be of particular relevance to Non-Traditional Claims—i.e., (a) coverage for “statutory damages,” and (b) coverage for “educational fund payments” and similar types of payments to state attorney generals.

Separate and apart from the foregoing, and as discussed in the preceding questions, coverage is generally *not* available under either version of the endorsement for any First Party Costs that any insureds may incur, directly or indirectly. It is therefore unlikely that “Costs of Correction” coverage could be available, either in theory or in practice, to any insured service providers in connection with a Shareholder Data Breach Event.<sup>11</sup> In order to reduce the potential for misunderstandings or conflicting expectations in this regard, “Costs of Correction” coverage is deleted from the new endorsement.

#### **9. Should my fund group apply for the supplemental version of the new endorsement?**

The standard version of the new ICI Mutual endorsement will be provided to insureds at no additional premium. As discussed above, the *supplemental* version of the endorsement—which will provide certain additional coverage beyond what is afforded under the *standard* version—will be available upon request, subject to the insureds’ payment of additional premium. Both versions will be subject to insureds’ satisfactory responses to separate underwriting questions.

ICI Mutual anticipates that some fund groups will find the standard version of ICI Mutual’s new endorsement to be satisfactory for their needs, whereas others may look to purchase the supplemental version. In ICI Mutual’s view, selecting between the two versions of the new ICI Mutual endorsement will involve a business judgment, on which different fund groups may come to different determinations, depending upon their particular circumstances. In making this judgment, fund groups may wish to consider the following questions, among others:

- **What is our relative risk for Shareholder Data Breach Events?:** How much Confidential Shareholder Information do we hold directly, versus through omnibus arrangements? How susceptible do we believe our Confidential Shareholder Information may be to a data breach? What are the terms of our contractual agreements with service providers with regard to Shareholder Data Breach Events?

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<sup>11</sup> See generally Section II.B of the ICI Mutual Policy (describing “Costs of Correction” coverage available for insured entities). As in mutual fund D&O/E&O policies generally, “Costs of Correction” coverage under the ICI Mutual Policy is an “E&O” coverage, and is therefore potentially available only to insured *entities* (and not to insured individuals). Moreover, because operations-based losses in the fund industry are generally traceable back to the acts or omissions of advisers or other service providers (rather than to the acts or omissions of Funds themselves), “Costs of Correction” coverage is generally regarded as an *adviser/service provider* coverage (rather than as a *fund* coverage). Just as coverage is unavailable under the endorsement for any amounts payable by an insured adviser or other insured service provider in settlement or judgment of a Claim brought by or on behalf of a Fund seeking recovery for the Fund’s own First Party Costs (see note 10 above), coverage would likewise be unavailable for any amounts that an insured adviser or other insured service provider might seek to pay the Fund as “Costs of Correction” in such circumstances.

- **What is the nature and amount of our fund’s D&O/E&O insurance?:** What is the overall dollar limit of the existing D&O/E&O insurance coverage purchased by our Funds? How many Funds and Fund boards share this coverage? Do advisers or other affiliated service providers also share this coverage? Do we want to expose the dollar limit of our D&O/E&O insurance to the additional exposures that are covered by the supplemental version of the endorsement?
- **If we already have specialty cyber insurance coverage, should we pursue the supplemental endorsement?:** What is the dollar limit of our specialty cyber insurance policy and what scope of coverage does it afford to our Funds? To our Fund Independent Directors? To our Fund advisers and affiliated service providers? In light of the coverage afforded by our specialty cyber insurance policy and our view of our relative risk, should we incur the additional cost of the supplemental endorsement? Would we be better served by increasing the limit of our specialty cyber insurance policy, and/or using the money elsewhere?
- **If we do not purchase a specialty cyber insurance policy, should we pursue the supplemental endorsement?:** Do we want additional coverage (beyond the dollar amount of the sublimit in the standard endorsement) for settlement payments that our Funds might make in Non-Traditional Claims? Do we want any D&O/E&O coverage for Costs of Defense or other Loss that our affiliated service providers (and/or their directors or officers) might incur in Non-Traditional Claims? If the answer to either question is “yes,” would we be better served by purchasing a specialty cyber insurance policy than by purchasing the supplemental endorsement? Should we consider both?