Claims Trends

A Review of Claims Activity in the Mutual Fund Industry (January 2021–March 2022)

ICIMutual

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Abbreviations used in this *Claims Trends*:

'33 Act	Securities Act of 1933
'34 Act	Securities Exchange Act of 1934
CFTC	U.S. Commodity Futures Trading Commission
DOJ	U.S. Department of Justice
DOL	U.S. Department of Labor
ERISA	Employee Retirement Income Security Act of 1974
EXAMS	Division of Examinations of the SEC (formerly OCIE)
FINRA	Financial Industry Regulatory Authority
IAA	Investment Advisers Act of 1940
ICA	Investment Company Act of 1940
OCIE	Office of Compliance Inspections and Examinations of the SEC (now EXAMS)
PROMESA	Puerto Rico Oversight, Management, and Economic Stability Act of 2016
SEC	U.S. Securities and Exchange Commission

In addition, U.S. Courts of Appeals are referred to by their circuit number (e.g., First Circuit, Second Circuit).

Introduction

ICI Mutual's annual *Claims Trends* reports on significant civil lawsuits, regulatory enforcement proceedings, and operational errors involving fund advisers and their affiliates, registered investment companies, and fund directors and officers. The publication is designed to assist ICI Mutual's insureds to better assess and manage the risks associated with such matters, thereby reducing the potential for associated losses and reputational damage.

ICI Mutual measures claims activity by both *frequency* and *severity*. Despite a modest year-over-year decrease in 2021 in the overall number of claims submitted by ICI Mutual's insured fund groups under their directors and officers/errors and omissions (D&O/E&O) policies, the frequency of claims reported to ICI Mutual remained within historical norms. Over the five-year period 2017–2021, nearly 40% of ICI Mutual's insured fund groups submitted at least one claim notice. These figures suggest that, in the current environment, claims frequency remains an issue for the fund industry.

Unlike frequency, the *severity* of new claims can be more difficult to assess, particularly for civil lawsuits and regulatory proceedings, where it may take years to establish the magnitude of losses (in the form of defense costs, settlements, and judgments). Historically, higher severity claims submitted to ICI Mutual have involved civil lawsuits or, in some cases, regulatory proceedings. Since the mid-2010s, however, in a marked break from past experience, ICI Mutual has also seen multiple high severity costs of correction claims.

For fund groups faced with civil litigation and/or regulatory investigations and proceedings, legal defense costs remain substantial. ICI Mutual's claims experience indicates that defense costs can quickly reach seven figures for affected fund groups and, in significant shareholder litigation, can in some cases climb into eight figures.

Note

This *Claims Trends* is current through March 31, 2022. For more recent information on the matters discussed herein, please refer to ICI Mutual's online *Litigation Notebook* (available at http://www.icimutual.com/litigation/notebook.php). The *Litigation Notebook* provides basic public information about recent lawsuits and regulatory proceedings involving funds, fund directors and officers, and fund advisers; free access to significant documents filed in those matters; and, to the extent applicable and available, additional public information about the matters, including procedural histories and links to relevant federal or state docket sheets or to the relevant regulators' websites.

Fees

Over the past twelve years, the fund industry has defended against a wave of lawsuits initiated by the plaintiffs' bar challenging fees paid by funds to investment advisers and other service providers, with many of these lawsuits having alleged violations of section 36(b) of the ICA.

Section 36(b) Lawsuits

Section 36(b) imposes a fiduciary duty on investment advisers with respect to the compensation they receive for providing advisory services to registered investment companies, and it provides fund shareholders with an express private right of action to enforce this duty.[1]

In 2010, the U.S. Supreme Court, in *Jones v. Harris Associates L.P.*, affirmed the use of the "*Gartenberg* standard" for assessing the liability of fund advisers in excessive fee cases brought under section 36(b).[2] While providing greater clarity to section 36(b) jurisprudence, the *Jones* decision did not discourage the plaintiffs' bar from initiating new section 36(b) lawsuits.

Indeed, over the years following the Supreme Court's decision, the plaintiffs' bar initiated 29 new section 36(b) lawsuits, involving a total of 26 fund groups.[3] In 2021, this wave of excessive fee lawsuits at long last came to an end, with a final resolution of the last pending lawsuit.[4] (A complete list of the lawsuits in this wave and their resolutions is provided on the next page.)

As discussed in past *Claims Trends,* the post-*Jones* section 36(b) lawsuits can largely be divided into two basic categories, both of which focused on disparities between fees of advisers and subadvisers. The first category, often referred to as "**manager-of-managers**" lawsuits, focused on the alleged disparities between fees charged by advisers and fees paid to unaffiliated subadvisers. The second category, often referred to as "**subadvisory**" lawsuits, focused on the alleged disparities between fees charged by advisers for managing their *affiliated* funds and the lesser fees charged by those advisers in their roles as subadvisers to *unaffiliated* funds. A small number of lawsuits relied on different theories.

In the last pending lawsuit in this post-*Jones* wave, a district court ruled in favor of the defendants in August 2020 following a bench trial and dismissed the plaintiffs' claims. In July 2021, the Tenth Circuit affirmed the dismissal, holding that the plaintiffs failed to prove a breach of fiduciary duty under section 36(b).[5]

On an overall basis, the results for the fund industry in this long-running wave of litigation were positive, with plaintiffs failing to secure any judgments in their favor and with defendant advisers prevailing on summary judgments or following trial in a number of cases.

These positive results came at a substantial cost, both in terms of external legal and other costs incurred by fund groups in the defense of these lawsuits, and in the time and other internal resources expended by fund groups in their defense efforts. ICI Mutual estimates that, on an industry-wide basis, defense costs incurred by fund groups in this wave of section 36(b) lawsuits totaled several hundred million dollars.

Other Developments in Fee Litigation

Fees in the fund industry have also been challenged, directly or indirectly, under ERISA (see "Other Litigation Developments – ERISA" section below). In addition, as discussed in past *Claims Trends,* the fund industry has also seen fee challenges in derivative claims brought under state law for breach of fiduciary duty.

Post-*Jones v. Harris* Section 36(b) Lawsuits

2010	• **Santomenno v. John Hancock Life Ins. Co.**, No. 10-cv-1655 (D.N.J. filed Mar. 31, 2010), *dismissed*, 2011 U.S. Dist. LEXIS 55317 (D.N.J. May 23, 2011), *aff'd*, 677 F.3d 178 (3d Cir. Apr. 16, 2012) & 2013 U.S. Dist. LEXIS 103404 (D.N.J. July 24, 2013), *aff'd*, 768 F.3d 284 (3d Cir. Sept. 26, 2014), *reh'g denied*, No. 13-3467 (Nov. 24, 2014), *cert. denied*, 135 S. Ct. 1860 (2015) • **Southworth v. Hartford Inv. Fin. Serv., LLC**, No. 10-cv-878 (D. Del. filed Oct. 14, 2010), *closed per stipulation* (Nov. 7, 2011)
2011	• **Kasilag v. Hartford Inv. Fin. Serv., LLC**, No. 11-cv-1083 (D.N.J. filed Feb. 25, 2011), *dismissed*, 2017 U.S. Dist. LEXIS 28280 (D.N.J. Feb. 28, 2017), *aff'd*, 745 Fed. Appx. 452 (3d Cir. Aug. 15, 2018) • **Reso v. Artisan Partners Ltd. P'ship**, No. 11-cv-3137 (N.D. Cal. filed June 24, 2011), *closed per stipulation* (Aug. 23, 2012) • **Sivolella v. AXA Equitable Life Ins. Co.**, No. 11-cv-4194 (D.N.J. filed July 21, 2011), *dismissed*, 2016 U.S. Dist. LEXIS 113822 (D.N.J. Aug. 25, 2016), *aff'd,* 742 Fed. Appx. 604 (3d Cir. July 10, 2018)
2013	• **Laborers' Local 265 Pension Fund v. iShares Trust**, No. 13-cv-46 (M.D. Tenn. filed Jan. 18, 2013), *dismissed*, 2013 U.S. Dist. LEXIS 122613 (M.D. Tenn. Aug. 28, 2013), *aff'd*, 769 F.3d 399 (6th Cir. 2014), *cert. denied*, 135 S. Ct. 1500 (2015) • **Am. Chem. & Equip. Inc. 401(k) Ret. Plan v. Principal Mgmt. Corp.**, No. 13-cv-1601 (N.D. Ala. filed Aug. 28, 2013), *dismissed*, No. 14-cv-44 (S.D. Iowa Feb. 8, 2016), *aff'd,* 864 F.3d 859 (8th Cir. 2017) • **In re Voya Glob. Real Estate Fund S'holder Litig.**, No. 13-cv-1521 (D. Del. filed Aug. 30, 2013), *closed per stipulation* (Oct. 19, 2017) • **In re Russell Inv. Co. S'holder Litig.**, No. 13-cv-12631 (D. Mass. filed Oct. 17, 2013), *closed per order of closure* (Feb. 28, 2017) • **Curd v. SEI Invs. Mgmt. Corp.**, No. 13-cv-7219 (E.D. Pa. filed Dec. 11, 2013), *closed per stipulation* (Nov. 21, 2016)
2014	• **Zehrer v. Harbor Cap. Advisors, Inc.**, No. 14-cv-789 (N.D. Ill. filed Feb. 4, 2014), *dismissed*, 2018 U.S. Dist. LEXIS 40718 (N.D. Ill. Mar. 13, 2018) • **In re BlackRock Mut. Funds Advisory Fee Litig.**, No. 14-cv-1165 (D.N.J. filed Feb. 21, 2014), *dismissed*, 2019 U.S. Dist. LEXIS 63547 (D.N.J. Feb. 8, 2019), *aff'd*, 816 Fed. Appx. 637 (3d Cir. May 28, 2020) • **Goodman v. J.P. Morgan Inv. Mgmt., Inc.**, No. 14-cv-414 (S.D. Ohio filed May 5, 2014), *dismissed*, 2018 U.S. Dist. LEXIS 39209 (S.D. Ohio Mar. 9, 2018), *aff'd*, 2020 U.S. App. LEXIS 9868 (6th Cir. Mar. 30, 2020) • **Kennis v. First Eagle Inv. Mgmt., LLC**, No. 14-cv-585 (D. Del. filed May 7, 2014), *closed per stipulation* (Aug. 8, 2017) • **In re Davis N.Y. Venture Fund Fee Litig.**, No. 14-cv-4318 (S.D.N.Y. filed Jun. 16, 2014), *dismissed*, 2019 U.S. Dist. LEXIS 111521 (S.D.N.Y. Jul. 2, 2019), *aff'd*, 805 Fed. Appx. 79 (2d Cir. May 22, 2020) • **Redus-Tarchis v. N.Y. Life Inv. Mgmt.**, No. 14-cv-7991 (D.N.J. filed Dec. 23, 2014), *dismissed*, 2018 U.S. Dist. LEXIS 175309 (D.N.J. Oct. 10, 2018) • **Kenny v. PIMCO**, No. 14-cv-1987 (W.D. Wash. filed Dec. 31, 2014), *closed per stipulation* (Aug. 9, 2018)
2015	• **Chill v. Calamos Advisors, LLC**, No. 15-cv-1014 (S.D.N.Y. filed Feb. 11, 2015), *dismissed*, 2019 U.S. Dist. LEXIS 175641 (S.D.N.Y. Sep. 27, 2019) • **Ingenhutt v. State Farm Inv. Mgmt. Corp.**, No. 15-cv-1303 (C.D. Ill. filed July 22, 2015), *closed per stipulation* (Nov. 21, 2018) • **Wayne Cty. Emps.' Ret. System v. Fiduciary Mgmt. Inc.**, No. 15-cv-1170 (E.D. Wis. filed Sept. 30, 2015), *closed per stipulation* (Jan. 4, 2016) • **Kennis v. Metropolitan West Asset Mgmt., LLC**, No. 15-cv-8162 (C.D. Cal. filed Oct. 16, 2015), *dismissed*, 2019 U.S. Dist. LEXIS 162598 (C.D. Cal. Aug. 5, 2019), *aff'd,* No. 19-55934, 2020 U.S. App. LEXIS 29662 (9th Cir. Sept. 17, 2020) • **North Valley GI Med. Grp. v. Prudential Invs. LLC**, No. 15-cv-3268 (D. Md. filed Oct. 30, 2015), *closed per stipulation* (Feb. 2, 2017) • **Ventura v. Principal Mgmt. Corp.**, No. 15-cv-481 (S.D. Iowa filed Dec. 30, 2015), *closed per stipulation* (Oct. 17, 2017)
2016	• **Obeslo v. Great-West Cap. Mgmt., LLC**, No. 16-cv-230 (D. Colo. filed Jan. 29, 2016), *dismissed*, 2020 U.S. Dist. LEXIS 141198, *aff'd,* 2021 U.S. App. LEXIS 22435 (10th Cir. July 26, 2021) • **Paskowitz v. Prospect Cap. Mgmt., L.P.**, No. 16-cv-2990 (S.D.N.Y. filed Apr. 21, 2016), *dismissed*, 232 F. Supp. 3d 498 (S.D.N.Y. 2017), *appeal docketed*, No. 17-510 (2d Cir. filed Feb. 21, 2017), *closed per stipulation* (May 5, 2017) • **Zoidis v. T. Rowe Price Assocs., Inc.**, No. 16-cv-2289 (N.D. Cal. filed Apr. 27, 2016), *closed per stipulation* (Jan. 4, 2021) • **Karp v. Harris Assocs., L.P.**, No. 16-cv-8216 (N.D. Ill. filed Aug. 19, 2016), *closed per stipulation* (Nov. 28, 2016)
2017	• **Pirundini v. J.P. Morgan Inv. Mgmt. Inc.,** No. 17-cv-3070 (S.D.N.Y. filed Apr. 27, 2017), *dismissed*, 2018 U.S. Dist. LEXIS 25315 (S.D.N.Y. Feb. 14, 2018), *aff'd*, 2019 U.S. App. LEXIS 8300 (2d Cir. Mar. 18, 2019)
2018	• **Winston v. Western Asset Mgmt. Co.,** No. 18-cv-3523 (C.D. Cal. filed Apr. 26, 2018), *dismissed as to Western Asset defendants* (C.D. Cal. Jan. 28, 2019), *closed per stipulation* (May 7, 2019)

Disclosure

"Prospectus liability" lawsuits—i.e., shareholder class action lawsuits brought under the '33 Act that allege misrepresentations or omissions in fund offering documents—have long been a source of significant potential liability for funds and their directors, officers, advisers, and principal underwriters.[6] As discussed below, 2021 and early 2022 saw new prospectus liability lawsuits, as well as developments in various lawsuits filed in recent years against fund industry defendants.

From time to time, plaintiffs have also challenged fund disclosure under the '34 Act (as opposed to under the '33 Act) or under state law. As discussed below, plaintiffs have historically had limited success in bringing these types of lawsuits against fund industry defendants.

As discussed in "Regulatory Developments" below, disclosure issues are also an area of interest for regulators and can and do lead to regulatory action.

Prospectus Liability Lawsuits

The fund industry's historical claims experience evidences that prospectus liability lawsuits are often initiated in the wake of disruptions affecting certain industry sectors or the broader market, but also sometimes arise from discrete issues affecting individual fund groups. The currently active prospectus liability lawsuits are of the latter type.

2021 and early 2022 witnessed the filing of new prospectus liability lawsuits as well as developments in earlier prospectus liability lawsuits.

- *Alleged Misrepresentations of Valuation Procedures:* In February 2021, two prospectus liability lawsuits alleging '33 Act violations were filed in New York state court. These lawsuits allege that a mutual fund, its adviser, its trustees (including independent trustees) and certain officers, and distributor, among others, misrepresented, in the fund's registration statement, how the fund valued swap contracts for purposes of calculating the fund's net asset value.[7] The lawsuits were consolidated in April 2021.[8] The defendants filed a motion to dismiss in June 2021, which remains pending.[9]

  Another lawsuit against many of the same defendants, alleging both '33 Act and '34 Act violations, was filed in federal court in June 2021, and remains in its early stages.[10]

  In addition, two class action lawsuits against many of the same defendants, alleging '34 Act violations, were filed in federal courts in February and April 2021.[11] The first lawsuit remains in its early stages, and the second lawsuit was voluntarily dismissed in May 2021.[12]

  In February 2022, yet another class action lawsuit involving the same fund was filed in federal court. This lawsuit alleges both '33 Act and '34 Act violations by the fund (and two unregistered funds), its adviser, its trustees (including independent trustees), and its distributor, administrator, and auditor.[13] This lawsuit is in the early stages of litigation. As noted in "Regulatory Developments" below, at the same time this lawsuit was initiated, separate actions were brought by the SEC, the CFTC, and the DOJ.[14]

- *Alleged Misrepresentation of Investment Strategy:* In August 2021, a class action lawsuit was filed against a registered fund (and certain non-registered funds) and its investment adviser, alleging a failure by the fund to follow the investment strategy set forth in its registration statement.[15] Defendants filed a motion to dismiss the complaint in November 2021, which remains pending.[16]

- *Alleged Closet Indexing:* In November 2021, a class action lawsuit was filed in federal court alleging that an open-end mutual fund, its distributor and investment adviser, and a fund officer and the fund's directors (including independent directors) misrepresented the fund as being actively managed, when, the complaint alleged, the fund was being managed in accordance with a "closet indexing" strategy.[17] The plaintiff voluntarily dismissed this lawsuit in January 2022.[18]

Other Disclosure-Based Litigation

Previous *Claims Trends* have reported on fund shareholders' challenges to disclosure in class action "securities fraud" lawsuits brought under the '34 Act. Because these lawsuits typically are subject to legal requirements that can be difficult for plaintiffs to satisfy in the mutual fund context,[24] plaintiffs have historically had limited success in pursuing these lawsuits against fund industry defendants.[25]

As noted above, '34 Act violations were alleged against a mutual fund, its adviser, and its trustees (including independent trustees) and certain officers in class action lawsuits filed in February 2021, April 2021, and February 2022 in connection with the valuation of swap contracts.[26]

Recent Disclosure-Based Litigation Against Non-ICA Registered ETFs

Investment vehicles not registered as investment companies under the ICA may also be involved in disclosure-based litigation that is substantially similar to disclosure-based litigation involving registered investment companies. For example:

- In June 2020, plaintiffs filed a class action lawsuit in federal court against the sponsor of an ETF that tracks crude oil prices, a commodity pool operator, certain officers, and various underwriters of the ETF's securities, challenging disclosures in the ETF's offering documents and alleging violations of the '33 Act and '34 Act.[19] In September 2020, this lawsuit was consolidated with additional lawsuits with similar allegations that were filed in July and August 2020.[20] A motion to dismiss, filed in April 2021, remains pending.[21]

- A similar complaint, alleging '34 Act violations only, was filed in federal court in July 2020 with respect to another ETF that tracks crude oil prices.[22] This lawsuit alleged that the ETF, its adviser, and certain officers misled investors by failing to disclose material facts regarding the oil markets. This lawsuit was dismissed voluntarily by the parties in February 2021.[23]

Litigation under State Law

Lawsuits against fund groups have sometimes taken the form of (1) state or common law–based derivative actions—i.e., lawsuits purporting to be filed on behalf of funds themselves, that allege violations of state or common law by fund advisers and/or fund directors and officers, or (2) state or common law–based class actions—i.e., lawsuits purporting to be filed on behalf of groups (or "classes") of fund shareholders, that allege violations of state or common law by fund advisers, funds themselves, and/or fund directors and officers. This section describes recent developments in such actions and in similar state or common law–based lawsuits brought directly (as opposed to derivatively or as purported class actions) by shareholders.

In March 2022, plaintiffs initiated a direct lawsuit in federal court against a fund's adviser, fund trustees (including independent trustees), and the fund itself, alleging breach of fiduciary duty with respect to a reduction in fees of certain share classes.[27] The lawsuit remains in its early stages.

Separately, an appeal remains pending of a district court's May 2020 dismissal of a lawsuit filed in federal district court in September 2018 alleging that a mutual fund's investment adviser and trustees (including independent trustees), along with the fund as a nominal defendant, violated their fiduciary duties and contractual obligations under state and common law by permitting the fund to invest in and "prop up" another fund within the same trust.[32]

Closed-End Fund Litigation: Litigation against fund groups under state or common law has often involved activist shareholders of closed-end funds (see box, below). Although these challenges have typically involved state law issues, a recent lawsuit raises a federal law issue.

More specifically, in January 2021, a shareholder filed a direct lawsuit in federal court in New York against several closed-end funds and their trustees (including independent trustees).[33] The lawsuit alleged that the "control share acquisition" bylaw amendments adopted by the funds violate the ICA.[34] The lawsuit sought rescission of those amendments, citing a 2019 Second Circuit decision holding that section 47(b) of the ICA provides an implied private right of action for rescission of contracts that violate the ICA.[35] Defendants filed a motion to dismiss the lawsuit in March 2021.[36] The plaintiffs responded by filing a motion for summary judgment in April 2021,[37] which the district court granted in February 2022.[38] An appeal of the district court's decision was filed in February 2022 and remains pending.[39]

Closed-End Fund Activism

In recent years, activist shareholders have sought to influence the management of closed-end funds (which funds have often been trading at a significant discount to their NAVs) in an effort to achieve a variety of goals, including to obtain tender offers for fund shares, to liquidate or open-end funds (including conversion of closed-end funds to ETFs), to terminate existing investment advisory agreements, to approve new investment advisory agreements, and/or to elect new board members.[28] As activist shareholders have increased their efforts, a number of fund boards appear to have enhanced their funds' defenses (e.g., by implementing staggered or classified boards, or by imposing super-majority voting requirements).[29]

Increased shareholder activism and enhancement of defenses by closed-end funds have led in recent years to a rise in threatened and/or actual litigation against closed-end funds and their boards.[30] Of note, in addition to the lawsuit described in the text, one activist shareholder has also challenged governance practices of several other closed-end funds offered by other fund groups, as discussed in last year's *Claims Trends*.[31]

In January 2022, a different shareholder filed a direct lawsuit against a different closed-end fund, its adviser, its distributor, and the fund's trustees (including independent trustees), alleging that the adviser and trustee defendants breached their fiduciary duties and the distributor made misrepresentations with respect to the authorization of the redemption of certain auction preferred shares ("APS").[40] The shareholder also alleges that the defendants redeemed the APS of other shareholders, but not those held by the plaintiff. The lawsuit is in its early stages.

Also in January 2022, yet another shareholder filed a derivative and class action lawsuit against a closed-end fund's adviser, sub-adviser, and trustees (including independent trustees), alleging breaches of fiduciary duties and breach of contract with respect to the management of the fund during market volatility in 2020.[41] The lawsuit is in its early stages.

Regulatory Developments

The SEC pursued an active overall enforcement agenda in fiscal year 2021, bringing over 400 stand-alone enforcement actions (i.e., proceedings other than follow-on proceedings or deregistration proceedings). In 2021, the SEC continued to focus on, among other things, protecting retail investors and holding entities and individuals accountable for their misconduct.[42]

With the change in the presidential administration, there has been new leadership at the SEC at both the Commission and staff levels (see box, below). With this new leadership have come shifts in SEC priorities in a number of areas, including environmental, social and governance ("ESG") issues and cybersecurity matters, which could have implications for SEC enforcement activity. (See boxes on the following pages with regard to ESG, cybersecurity, and other developments that may affect the SEC's enforcement agenda.)

SEC Enforcement Actions

In fiscal year 2021, over a quarter of the stand-alone actions brought by the SEC's Division of Enforcement involved investment advisers and/or investment companies (including unregistered investment companies).[43] As in prior years, enforcement actions against entities outside the registered investment company space (e.g., unregistered funds and their advisers) outnumbered those within the registered fund space.

Administrative proceedings initiated and/or resolved by the SEC in 2021 and early 2022 against advisers (and/or their affiliates) of registered funds involved various issues, including an adviser's undisclosed conflicts of interest with respect to its clients' investments in proprietary mutual funds,[44] fund investments inconsistent with a fund's classification and fundamental policy,[45] miscalculation of a fund's NAV,[46] a fund officer's role in assisting others in fraudulent conduct,[47] and breach of fiduciary duty by a robo-adviser with respect to investing client assets in proprietary ETFs without full disclosure.[48]

In 2021 and early 2022, the SEC also initiated litigation against advisers (and/or their affiliates) of registered funds. In May 2021, the SEC filed a complaint against two investment advisers and their portfolio managers, alleging the parties fraudulently misled investors and the funds' board of directors regarding risk management practices of a registered fund and similarly managed private funds, as well as misrepresenting the level of the risk taken on by the funds.[49] A parallel lawsuit was filed against the same parties on the same day by the CFTC.[50] These lawsuits remain in the early stages of litigation.

In September 2021, the SEC brought a lawsuit against an employee of an adviser to a registered fund, alleging that the employee had engaged in front-running of trades for the benefit of personal and family accounts.[51] This lawsuit remains in the early stage of litigation.

New Leadership at the SEC

In April 2021, Gary Gensler, former chair of the CFTC, was confirmed as the SEC's chair, taking over from acting chair Allison Herren Lee. 2021 also saw new leadership in the Divisions of Investment Management (William Birdthistle), Examinations (Richard Best), Corporate Finance (Renee Jones), Trading and Markets (Haoxiang Zhu), and Enforcement (Gurbir Grewal), as well as a new General Counsel (Dan Berkovitz).

Commissioner Elad Roisman left the Commission in January 2022, and Commissioner Lee has announced her intention to leave the Commission when her term expires in June 2022. The Commission is currently composed of three Democratic commissioners and one Republican commissioner.

In another lawsuit, filed in February 2022, the SEC alleged that an officer of a registered fund perpetrated a fraudulent valuation scheme to mask the fund's performance.[52] In a parallel action, the CFTC initiated a lawsuit against the same defendant alleging improper valuation of swaps in registered commodity pools.[53] In addition, the DOJ brought a criminal action against the same defendant for his fraudulent actions.[54] The SEC and CFTC lawsuits have both been stayed pending the outcome of the DOJ's action. As discussed above, at the same time, a shareholder class action lawsuit relating to the same matter was filed.[55]

Expansion of SEC "Disgorgement" Authority

Historically, the SEC has frequently sought "disgorgement" in enforcement actions. In recent years, U.S. Supreme Court decisions have upheld, but limited, the SEC's ability to seek this remedy. More specifically, a 2017 decision by the Court held that disgorgement is subject to a five-year statute of limitations and a 2020 decision by the Court broadly affirmed the power of federal courts to order disgorgement as an equitable relief in certain cases, but noted potential limits on its use.

Enacted in January 2021, the National Defense Authorization Act (1) gives the SEC the statutory ability to seek disgorgement in federal court in lawsuits involving federal securities laws, and (2) establishes a ten-year statute of limitations within which the SEC may seek disgorgement in cases involving scienter, effectively doubling the amount of time within which the SEC may bring such actions.

SEC Examination Priorities

The SEC communicates its examination priorities (which may indicate areas of future enforcement activity) in a variety of publications, speeches, and public statements from the chair, commissioners, and staff.

The SEC annually publishes the examination priorities of the SEC's Division of Examinations, or EXAMS (formerly called the Office of Compliance Inspections and Examinations, or OCIE).

For the SEC's current fiscal year, EXAMS has indicated that, with respect to registered investment advisers, it will focus on ESG issues (including disclosure of ESG investment approaches, portfolio management processes and practices, proxy voting policies, and legal and compliance issues), fiduciary duties to clients, revenue sharing, information security and operational resiliency, and crypto-assets (including issues relating to custody, liquidity, and operational controls around portfolio management of crypto-assets).[59] EXAMS has also noted a continued focus on

Cybersecurity Developments

In recent years, the SEC has increasingly focused on cybersecurity issues and is approaching the issue on multiple fronts, including with respect to potential examinations, enforcement, and regulation.

- **Examinations:** The Division of Examinations (EXAMS) has, for many years, included cybersecurity as an examination priority and has issued risk alerts on the subject.[56] As noted above, EXAMS' 2022 examination priorities continue to include cybersecurity.
- **Enforcement:** In actions involving firms outside the fund industry, the SEC settled administrative proceedings in August 2021 with several broker dealers and/or investment advisory firms for deficiencies in their cybersecurity policies and procedures that led to takeovers of their cloud-based email accounts and resulted in the exposure of personally identifying information of customers and clients.[57] To date, the SEC does not appear to have brought any cyber-related enforcement actions directly involving registered funds or advisers to registered funds. Notably, however, the Division of Enforcement initiated voluntary information requests to public companies and SEC registrants (including a number of asset managers) seeking information relating to the SolarWinds cyberattack in December 2020.
- **Regulation:** The SEC has undertaken various rulemaking projects in the area of cybersecurity. Of particular relevance to the fund industry, in February 2022, the SEC proposed new rules focusing on cybersecurity risk management for investment advisers, registered investment companies, and business development companies. The proposed new rules would require registered investment advisers and registered investment companies to implement cybersecurity risk management programs and new incident notification regimes. The proposed new rules also would require advisers and funds to make disclosures related to significant cybersecurity risks and cybersecurity incidents to their clients and shareholders and would impose new recordkeeping requirements.[58]

advisers' disclosures and other issues related to fees and expenses.[60]

With respect to registered investment companies, EXAMS has indicated an ongoing focus on compliance programs, disclosures, accuracy of reporting to the SEC, and compliance with new rules and exemptive orders. EXAMS has also indicated a focus on funds' liquidity risk management programs, fund investments in private funds, advisory fee waivers, and trading activities designed to inflate fund performance, as well as on money market fund compliance with stress testing (and other requirements) and on business development companies' valuation practices, marketing activities, and conflicts of interest.[61]

Throughout the year, EXAMS also issues risk alerts that provide information about its examination findings and priorities. In 2021, EXAMS issued alerts on a range of topics, including: digital assets,[69] ESG investing,[70] observations regarding fixed income principal and cross trades by investment advisers,[71] observations from the registered investment company initiatives,[72] observations from examinations of advisers that provide electronic advice,[73] and investment advisers' fee calculations.[74]

EXAMS has noted that, in 2021, it examined more than 2,200 investment advisers and 125 investment companies.[75] Overall, EXAMS completed over 3,000 exams and issued 2,100 deficiency letters, while making 190 referrals to the Division of Enforcement.[76]

ESG-Related Regulatory Developments

Recent years have seen an increased political and societal attention to environmental, social, and governance (ESG) issues. The SEC and other regulators have similarly increased their focus on these issues.[62] As with cybersecurity, the SEC is approaching ESG matters with respect to potential regulation, examinations, and enforcement.

- **Regulation:** In March 2022, the SEC proposed rules to enhance disclosures by operating companies regarding climate-related risks and opportunities.[63] Other ESG-related rule proposals on the SEC's agenda include potential enhancements to disclosures by operating companies regarding corporate board diversity and human capital management. The SEC chair has also indicated that the so-called "names rule" could be modified to address fund names that suggest an ESG-related investment strategy.[64] In addition, the SEC's proposed cybersecurity rules for operating companies would require such companies to disclose whether any member of a company's board has cybersecurity expertise, as well as how the board is overseeing the company's overall cybersecurity program (thereby dovetailing with the "governance" prong of ESG investing).[65]
- **Examinations:** As noted above, EXAMS issued a risk alert on ESG investing in April 2021.[66] EXAMS has also included ESG investing as an examination priority in recent years and has continued to do so in its 2022 examination priorities.
- **Enforcement:** In March 2021, the SEC announced the formation of a new Climate and ESG Task Force in the Division of Enforcement that will seek to identify misconduct in connection with climate and ESG-related disclosures and investments. Of particular relevance to the asset management industry, the task force will "analyze disclosure and compliance issues relating to investment advisers' and funds' ESG strategies."[67]

Other regulators are also focusing on ESG issues. Of particular relevance to the asset management industry, the DOL's position on the ability of ERISA plan fiduciaries to consider ESG factors in selecting plan investments has evolved with the change of the presidential administration. In March 2021, the DOL announced that it would not enforce constraints adopted under the previous administration on the consideration of ESG factors in selecting plan investments. In October 2021, DOL published a new proposed rule that, if adopted, would permit a plan fiduciary, in selecting investment options for a plan, to include "an evaluation of the economic effects of climate change and other ESG factors on the particular investment or investment course of action."[68] To date, final rules have not been adopted.

Other Regulators

The SEC is generally viewed as the primary regulator of the investment management industry. However, other regulators (including FINRA, the CFTC, the DOL, state securities regulators, and foreign regulators) may also institute enforcement actions that may involve and/or impact registered funds and/or their affiliated service providers.

In February 2022, FINRA, which conducts examinations of broker-dealers, published its annual Examination and Risk Monitoring Report, which reports on findings from recent exams and provides firms with a sense of where the regulator intends to focus its resources over the coming year. The report also discusses FINRA's priorities, which for the coming year include digital assets, liquidity management, anti-money laundering, communications with the public, cybersecurity, and technology governance.[77]

The CFTC, which regulates the trading of commodities (including many futures and derivatives), often discusses its annual priorities through speeches and other public statements. The CFTC's chair and other commissioners have recently discussed, among other priorities, regulation of digital assets,[78] harmonizing regulations for market participants subject to concurrent CFTC and SEC jurisdiction,[79] and ESG investing.[80]

The CFTC and the SEC have recently cooperated in their respective enforcement efforts, including through the initiation of parallel proceedings. As discussed in "Regulatory Developments – SEC Enforcement Actions" above, for example, the two agencies in May 2021 filed simultaneous complaints against two investment advisers and their portfolio managers with respect to the risk management practices of a registered fund and similarly managed private funds and the level of the risk taken on by the funds,[81] and in February 2022 filed simultaneous complaints against an officer of a registered fund and registered commodity pools with respect to valuation issues.[82]

As one of the regulators responsible for administering and enforcing ERISA, the DOL may also regulate asset management industry participants with respect to their provision of services to retirement plans. As discussed in the box on the previous page, the DOL has issued proposed rules regarding the consideration of ESG factors in selecting investment options in retirement plans. To date, final rules have not been adopted. In March 2022, the DOL issued a release addressing the use of crypto assets in retirement plans.[83]

Portfolio Management Errors

A significant portion of all claim amounts paid by ICI Mutual has been for "costs of correction" claims—i.e., insurance claims by advisers or their affiliates for payments made by them, outside the litigation context, to remedy operational errors that have resulted in losses to funds or private accounts. Generally, costs of correction insurance coverage permits an insured entity to seek insurance reimbursement for certain costs incurred to correct an operational error, provided that the insured entity has actual legal liability for the resulting loss.[84]

A number of factors—including the size of fund groups, the scale of their operations, the magnitude of trades being executed on behalf of funds and other clients, the volatility of the securities markets, and operational challenges—may create the potential for operational errors resulting in costs of correction claims.

Over the years, ICI Mutual has received claims associated with operational errors in a number of areas. Examples include claims associated with errors relating to trades of portfolio securities, compliance with investment restrictions, valuation, and portfolio composition.

When business operations are outsourced to affiliated or unaffiliated service providers, determining the extent to which costs of correction insurance coverage is available may be particularly challenging, especially in the context of certain types of events (e.g., cyberattacks),[85] where the actual legal liability of an insured fund service provider (as well as any measure of "damages" incurred) may be far from clear-cut.

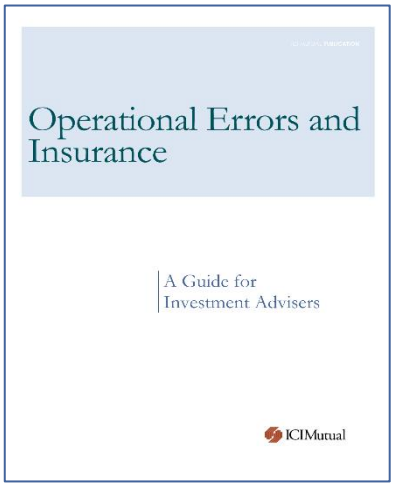
ICI Mutual's costs of correction claims history illustrates the continued importance to fund groups of close attention to policies, procedures, and the use of technology designed to prevent and detect operational mistakes and oversights.

Costs of Correction Severity Risk

"Costs of correction" insurance coverage, long a feature of ICI Mutual's D&O/E&O policies, is highly valued by insured advisers for its role in facilitating timely and efficient remediations of operational errors and other operational mishaps.

Over its history, ICI Mutual has received and paid scores of insurance claims under this coverage. The *frequency* of costs of correction insurance claims received by ICI Mutual has remained relatively stable over time. Until fairly recently, the *severity* of such claims had likewise remained relatively stable, with dollar amounts at issue in individual claims rarely exceeding the mid-seven figures. Since the mid-2010s, however, in a marked break from past experience, ICI Mutual has received multiple *high severity* costs of correction insurance claims—i.e., claims that have involved (or that have had the clear potential to involve) dollar amounts of eight figures or more. Of note, none of these recent high severity claims (with one possible exception) resulted from pandemic-related mishaps.

In light of this claims experience, in July 2021, ICI Mutual published a new risk management study entitled *Operational Errors and Insurance: A Guide for Investment Advisers*. The study (1) provides general information on the frequency, severity, and characteristics of larger operational errors in the fund industry, (2) outlines the various considerations that may come into play in assessing and resolving the issue of advisers' legal and financial responsibility for such errors, and (3) describes the role of costs of correction insurance in facilitating timely and efficient remediations by advisers of larger operational errors for which they bear legal responsibility. Intended primarily for risk managers, in-house counsel, and other advisory personnel at fund groups, the guide may also be of interest to outside counsel, insurance brokers, and other outside insurance consultants.



Other Litigation Developments

In addition to the fee, disclosure, and state law–based lawsuits already discussed, 2021 and early 2022 also saw other noteworthy litigation developments.

ERISA

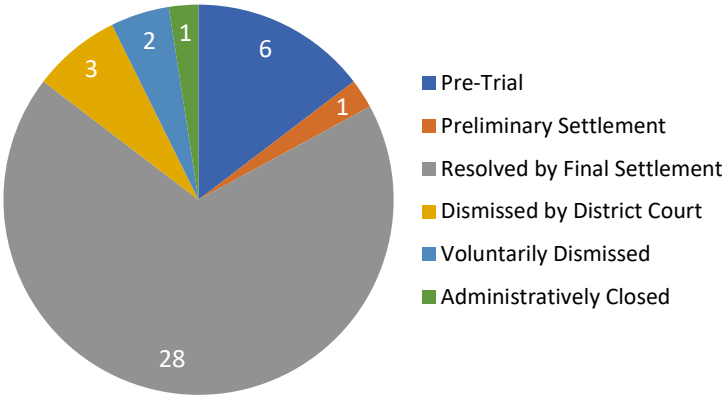
As reported in past *Claims Trends*, the plaintiffs' bar has used ERISA as a legal avenue to attack the fund industry.[86] 2021 and early 2022 saw the filing of new ERISA-based lawsuits, as well as developments in existing lawsuits, involving asset managers and/or their affiliates.

"PROPRIETARY FUNDS" LAWSUITS

Past *Claims Trends* have tracked ERISA-based lawsuits challenging the inclusion of "proprietary" mutual funds within the offerings of in-house 401(k) or similar employee benefit plans sponsored by asset managers and/or their affiliates.

Typically structured as class actions, these lawsuits frequently allege that the named defendants (which may include one or more entities, committees, and/or individuals) have breached their fiduciary duties under ERISA, and/or engaged in "prohibited transactions," by including in their in-house plans proprietary mutual funds that allegedly have charged excessive fees, and/or that have underperformed, relative to purportedly similar *non*-proprietary funds (i.e., funds offered by other asset managers). Such lawsuits may also include other allegations (e.g., that the defendants engaged in self-dealing, failed to include in their in-house plans the lowest-cost share classes of the proprietary funds at issue, and/or failed to adequately investigate providing non-mutual fund alternatives such as collective trusts).

Procedural Status of Proprietary Funds Lawsuits
Initiated 2011–2022 (as of March 31, 2022)



Since 2011, the plaintiffs' bar has initiated at least 41 such lawsuits involving 39 fund groups (with three of these lawsuits having been initiated since January 2021).[87] As discussed below, six of the lawsuits remain in the pre-trial stage of the litigation process, one has reached a preliminary settlement, and 34 have been fully resolved. Of these 34 lawsuits, 28 have been resolved through final monetary settlements, three have been dismissed by the courts (with one of these dismissals affirmed on appeal), two have been voluntarily dismissed by the parties, and one has been administratively closed by the court.

The preliminary and final monetary settlements reached to date in these "proprietary funds" lawsuits collectively total over $380 million.[88]

- *Lawsuits in the Pre-Trial Stage:* Six lawsuits remain in the pre-trial stage of the litigation process. Three of these six lawsuits are currently in their early phases, with one filed in December 2021,[89] another filed in January 2022,[90] and the third with a pending motion to dismiss.[91] In three other lawsuits, motions to dismiss

have been denied in whole or in part, with the most recent ruling occurring in December 2021.[92]

- *Lawsuit with a Preliminary Settlement:* A preliminary settlement has been reached in one of the seven active lawsuits. The court preliminarily approved a monetary settlement in January 2022.[93]

- *Lawsuits Resolved by Final Settlements:* Twenty-eight of the lawsuits have reached final monetary settlements. Five of these final monetary settlements were approved by district courts in 2021.[94]

- *Lawsuits Dismissed by the Courts:* Three of the lawsuits have been dismissed by the courts. In one, following a bench trial, the district court issued a judgment in favor of the defendants in January 2019.[95] No appeal was filed, and the lawsuit is now closed. A second lawsuit was concluded following a ruling granting defendants' motion to dismiss.[96] In the third lawsuit, in August 2018, the Eighth Circuit affirmed the district court's dismissal, thereby concluding the lawsuit.[97]

- *Lawsuits Voluntarily Dismissed by the Parties:* Two lawsuits closed in 2018 pursuant to voluntary dismissals.[98]

- *Lawsuit Administratively Closed by the Court:* In one lawsuit, the district court stayed the action, noting that the plaintiff's individual claims were subject to an enforceable arbitration provision, and administratively closed the case.[99]

In addition to the lawsuits described above challenging the inclusion of proprietary *registered* funds as investment options in in-house retirement plans, at least four lawsuits filed in 2020 and 2021 have challenged asset managers' inclusion of proprietary *non-registered* funds (typically, index funds and/or target date funds structured as collective investment trusts or separate accounts) as investment options in their in-house retirement plans.[100] In the first lawsuit, the parties filed a notice of settlement in January 2022, and a motion for preliminary approval of the settlement is scheduled to be filed in April 2022.[101] In the other three lawsuits, motions to dismiss remain pending.[102]

FEE-BASED LAWSUITS

The previous section described lawsuits challenging the inclusion of proprietary mutual funds as investment options in in-house plans sponsored by asset managers and/or their affiliates. As reported in previous *Claims Trends*, there have also been lawsuits challenging fees and compensation received directly or indirectly by asset managers and/or their affiliates as service providers to third-party plans. 2021 saw developments in certain of these lawsuits.

In a lawsuit filed in September 2017, plaintiffs alleged that a third-party provider of recordkeeping and other services to third-party 401(k) plans breached its fiduciary duties by charging "unreasonable" fees for its services.[103] Defendants filed a motion to dismiss in February 2018, which the district court granted in part and denied in part in February 2020.[104] In July 2021, by

Insurance Considerations for ERISA Litigation Involving In-House Plans

Broadly stated, "fiduciary liability" insurance insures against liabilities arising out of third-party claims brought against company-sponsored employee benefit plans, the sponsoring companies themselves, and/or certain other persons or entities associated with such plans, by reason of their breach of fiduciary duties under ERISA (and/or common and other statutory law) in providing services to "in-house" retirement plans. Historically, fiduciary liability coverage has been viewed by insurance markets as separate and distinct from other types of liability coverages, including both "directors and officers" (D&O) coverage and "errors and omissions" (E&O) coverage. Indeed, fiduciary liability coverage is generally offered as a separate, stand-alone insurance product.

stipulation of the plaintiff, the court dismissed the lawsuit with prejudice.[105]

In four lawsuits filed in early and mid-2019 and consolidated in August 2019, plaintiffs participating in third-party plans alleged that a plan service provider that operated a mutual fund platform (or "supermarket") charged an undisclosed "infrastructure" fee to funds distributed through the platform.[106] In February 2020, the district court granted the defendants' motion to dismiss the consolidated lawsuit, on the grounds that the defendants did not owe a fiduciary duty under ERISA with respect to the fees at stake.[107] In March 2021, the First Circuit affirmed the district court's dismissal of the lawsuit.[108] The lawsuit is now closed.

MISMANAGEMENT LAWSUITS

The federal securities laws do not, in general, permit direct lawsuits against advisers for alleged mismanagement of assets. ERISA, however, provides an express right of action against plan "fiduciaries" for mismanagement of plan assets under their control—i.e., for failure to adhere to their duty of "prudent management."

In a "proprietary funds"–like class action lawsuit filed in June 2021, plaintiffs participating in their employers' retirement plans alleged that certain plan fiduciaries mismanaged participants' assets (and breached their fiduciary duties) through the selection and retention of mutual funds affiliated with the plan's investment adviser as underlying investments for plan assets.[109] These affiliated mutual funds, according to the plaintiffs, had higher fees and lower performance than the fees and performance of similar funds. The lawsuit is in its early stages.

Bankruptcy Claims Involving Issuers of Portfolio Securities

Mutual funds have sometimes been ensnared in proceedings arising from bankruptcies, typically for no reason other than the funds' status as passive holders or former holders of securities of the bankrupt issuers. In these "clawback" proceedings, bankrupt issuers and/or their creditors often seek a return of pre-bankruptcy payments made to security holders or other creditors, including funds. While these bankruptcy proceedings—including those involving the Tribune Company, Nine West Holdings, and Sears Holdings—have typically involved corporate issuers, there has also been a bankruptcy-like proceeding involving the Commonwealth of Puerto Rico, an American territory.[110]

***Tribune* Bankruptcy:** The *Tribune* proceeding, on which *Claims Trends* has been providing updates since 2010, was finally resolved in February 2022, when the U.S. Supreme Court denied a petition for a writ of certiorari in the litigation, filed in January 2022.[111] The *Tribune* proceeding involved "constructive fraudulent conveyance" and "intentional fraudulent conveyance" claims under state and federal law. In December 2019, the Second Circuit affirmed the district court's dismissal of the *state* law *constructive* fraudulent conveyance claims. A petition for a writ of certiorari on these claims, filed in July 2020, was denied by the Supreme Court in April 2021.[112] In August 2021, the Second Circuit affirmed district court decisions that dismissed *federal* law fraudulent conveyance claims. The Supreme Court declined to review these decisions, finally ending the litigation.

***Nine West Holdings* Bankruptcy:** The *Nine West Holdings* proceeding involves actual and constructive fraudulent conveyance claims under state law.[113] In August 2020, the district court issued an order dismissing certain claims as barred by a "safe harbor" provision of the federal bankruptcy laws.[114] An appeal of the dismissal of the "safe harbor" claims was filed in November 2020 and remains pending. Oral argument before the Second Circuit proceeded in March 2022.[115]

***Sears Holdings* Bankruptcy:** The *Sears Holdings* proceeding involves actual and constructive fraudulent conveyance claims under state and/or federal law.[116] This adversary proceeding was filed in October 2020 and consolidated with another adversary proceeding in March 2021.[117] A motion to dismiss, filed in January 2021, remains pending in the bankruptcy court.[118]

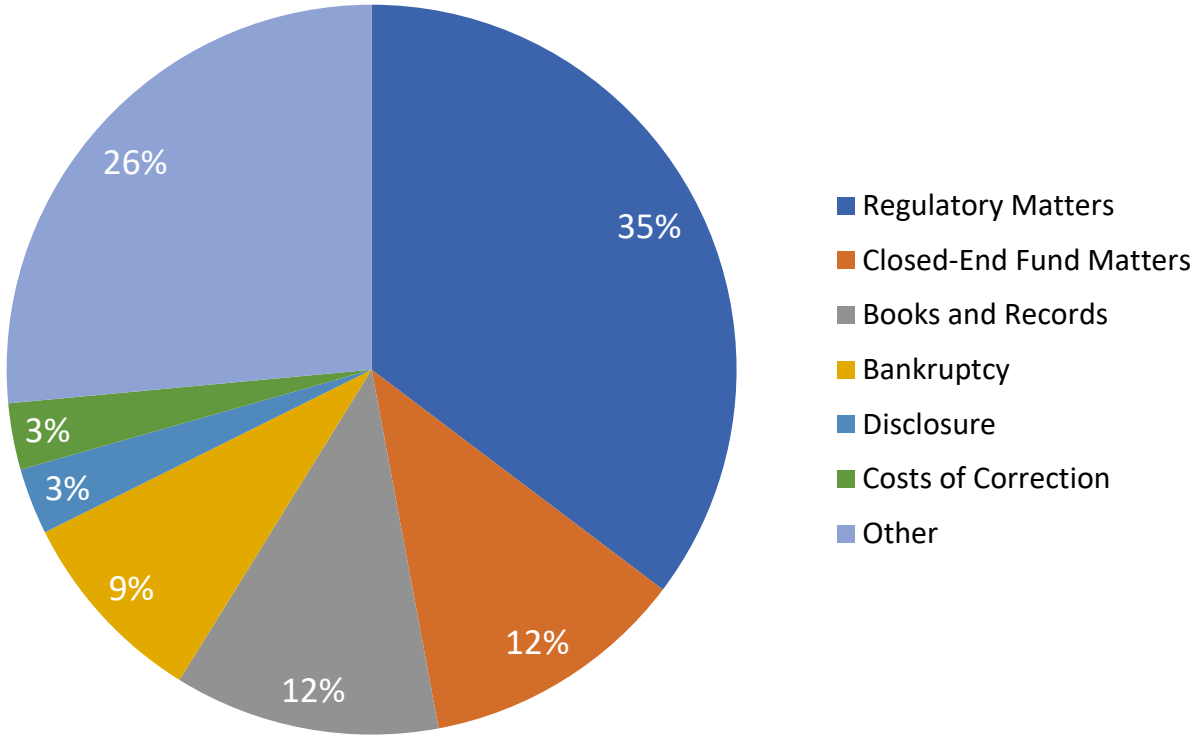
***Puerto Rico* Adversary Proceedings:** The *Puerto Rico* proceedings arise from Puerto Rico's difficulties in meeting its bond debt and unfunded pension obligations. Following the enactment of PROMESA in 2016, which allowed Puerto Rico to avail itself of federal bankruptcy-like proceedings, Puerto Rico filed to restructure its debt in 2017.[119]

Various entities (including mutual funds) held municipal debt issued by Puerto Rico, and a number of funds and/or fund advisers appear to have been named in related adversary proceedings.[120] In March 2021, Puerto Rico's federal oversight board filed an amended bankruptcy plan.[121] In January 2022, the district court confirmed the plan, which became effective in March 2022.[122] The adversary proceedings were voluntarily dismissed in March 2022.[123]

D&O/E&O Claims Data

D&O/E&O Notices by Subject (2021)

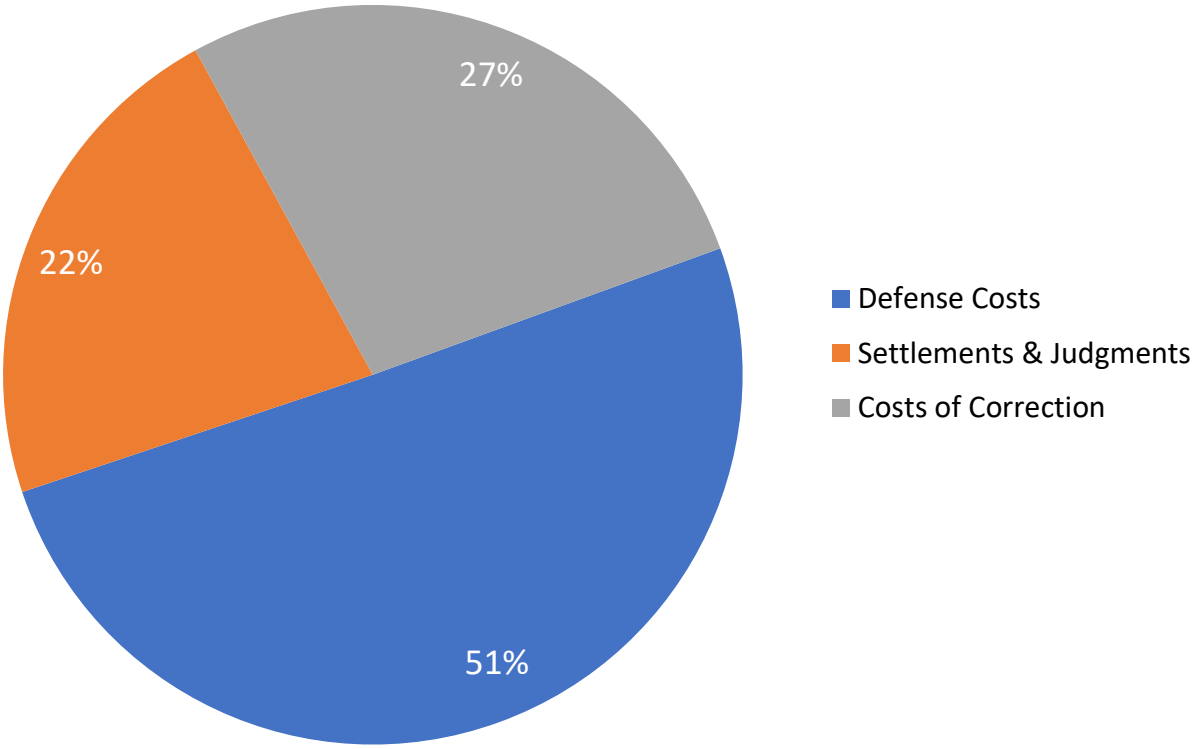
Regulatory matters, closed-end fund matters, and fund shareholder demands for inspection of books and records constituted the most common subjects of claims notices submitted under ICI Mutual D&O/E&O policies in 2021. As shown in the chart below, a substantial percentage of notices received (the "Other" category) do not fall neatly into a broader category.



D&O/E&O Claims Data

D&O/E&O Insurance Payments by Category (2000–2021)

The chart below shows the breakdown of payments (i.e., defense costs, settlements and judgments, and costs of correction) made by ICI Mutual on claims submitted under ICI Mutual D&O/E&O policies over the period January 1, 2000 through December 31, 2021.



Endnotes

1 15 U.S.C. § 80a-35(b) (2007).

2 Jones v. Harris Assocs. L.P., 559 U.S. 335 (2010). This standard was first articulated by a federal appellate court in *Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*, 694 F.2d 923 (2d Cir. 1982). The court set forth six factors—the "*Gartenberg* factors"—which are generally viewed to include: (1) the nature and quality of services provided to the fund and its shareholders; (2) the profitability of the fund to the adviser-manager; (3) "fall-out benefits" accruing to the adviser-manager or its affiliates; (4) "economies of scale" realized by the adviser-manager (and the extent to which they are shared); (5) comparative fee structure; and (6) the independence, expertise, care, and conscientiousness of the fund's board in evaluating adviser compensation. *Id.* at 928–32.

3 The count of post-*Jones* lawsuits herein does not include cases that were consolidated into other cases.

4 Obeslo v. Great-West Cap. Mgmt., LLC, 2021 U.S. App. LEXIS 22435 (10th Cir. July 26, 2021).

5 *Id.*

6 *See generally* ICI Mutual's 2010 Risk Management Study, MUTUAL FUND PROSPECTUS LIABILITY: UNDERSTANDING AND MANAGING THE RISK, https://www.icimutual.com.

7 Hunter v. Infinity Q Diversified Alpha Fund, No. 651295-2021 (N.Y. Sup. Ct. filed Feb. 24, 2021); Rosenstein v. Tr. for Advised Portfolios, No. 651302-2021 (N.Y. Sup. Ct. filed Feb. 25, 2021).

8 In re Infinity Q Diversified Alpha Fund Secs. Litig., No. 651295-2021 (N.Y. Sup. Ct. Apr. 15, 2021) (order consolidating *Hunter* and *Rosenstein*).

9 In re Infinity Q Diversified Alpha Fund Secs. Litig., No. 651295-2021 (N.Y. Sup. Ct. June 30, 2021) (filing of motion to dismiss consolidated complaint).

10 Oak Fin. Grp., Inc. v. Infinity Q Diversified Alpha Fund, No. 21-cv-3249 (E.D.N.Y. filed June 8, 2021) (filing of complaint).

11 Yang v. Tr. for Advised Portfolios, No. 21-cv-1047 (E.D.N.Y. filed Feb. 26, 2021); Sokolow v. Tr. for Advised Portfolios, No. 21-cv-2317 (E.D.N.Y. filed Apr. 27, 2021) (filing of complaints).

12 Sokolow v. Tr. for Advised Portfolios, No. 21-cv-2317 (E.D.N.Y. filed May 10, 2021) (notice of voluntary dismissal).

13 Schiavi + Dattani v. Tr. for Advised Portfolios, No. 22-cv-896 (E.D.N.Y. filed Feb. 17, 2022) (filing of complaint).

14 SEC v. Velissaris, No. 22-cv-1346 (S.D.N.Y. filed Feb. 17, 2022) (filing of complaint alleging a fund's chief investment officer fraudulently manipulated valuations of fund-held securities to mask the funds' poor performance); CFTC v. Velissaris, No. 22-cv-1347 (S.D.N.Y. filed Feb. 17, 2022) (filing of complaint alleging that the same officer improperly valued swaps in registered commodity pools); USA v. Velissaris, No. 22-cr-105 (S.D.N.Y. filed Feb. 16, 2022) (filing of indictment against same officer).

15 Jackson v. Allianz Glob. Invs. US LLC, No. 651233-2021 (NY Sup. Ct. filed Feb. 22, 2021) (filing of complaint).

16 Jackson v. Allianz Glob. Invs. US LLC, No. 651233-2021 (NY Sup. Ct. Nov. 4, 2021) (filing of motion to dismiss).

17 Hays v. Am. Cent. Cap. Portfolios, No. 21-cv-8625 (N.D. Cal. Nov. 5, 2021) (filing of amended complaint) (registered fund not named as a defendant in original complaint filed on Feb. 22, 2021).

18 Hays v. Am. Cent. Cap. Portfolios, No. 21-cv-8625 (N.D. Cal. Jan. 31, 2022) (filing of notice of voluntary dismissal).

19 Lucas v. U.S. Oil Fund, LP, No. 20-cv-4740 (S.D.N.Y. filed June 19, 2020) (filing of complaint). In November 2021, the SEC settled administrative proceedings relating to the same ETF's disclosures. In re U.S. Commodity Fund LLC & U.S. Oil Fund, LP, Rel. No. 3-20648 (SEC Nov. 8, 2021), https://www.sec.gov/litigation/admin/2021/33-11006.pdf (finding that a commodity pool ETF and the commodity pool operator failed to disclose material information regarding limitation imposed on the ETF by its sole futures commission merchant).

[20] In re U.S. Oil Fund, LP Secs. Litig., No. 20-cv-4740 (S.D.N.Y. Sept. 16, 2020) (order consolidating *Lucas* with Ephrati v. U.S. Oil Fund, LP, No. 20-cv-6010 (S.D.N.Y. filed July 31, 2020) & Palacios v. U.S. Oil Fund, LP, No. 20-cv-6442 (S.D.N.Y. filed Aug. 13, 2020)).

[21] In re U.S. Oil Fund, LP Secs. Litig., No. 20-cv-4740 (S.D.N.Y. Apr. 29, 2021) (filing of motion to dismiss).

[22] Di Scala v. ProShares Ultra Bloomberg Crude Oil, No. 20-cv-5865 (S.D.N.Y. filed July 28, 2020) (filing of complaint).

[23] Di Scala v. ProShares Ultra Bloomberg Crude Oil, No. 20-cv-5865 (S.D.N.Y. Feb. 22, 2021) (filing of stipulation of voluntary dismissal).

[24] Under section 10(b) of the '34 Act and rule 10b-5 thereunder, one such requirement is that a plaintiff demonstrate that defendants engaged in intentional or reckless misconduct (i.e., "scienter"). *See generally* ICI Mutual's 2010 Risk Management Study, MUTUAL FUND PROSPECTUS LIABILITY: UNDERSTANDING AND MANAGING THE RISK, https://www.icimutual.com (at pp. 6–7, discussing legal requirements applicable to "securities fraud" class action lawsuits brought under section 10(b) of the '34 Act and rule 10b-5 thereunder).

[25] As reported in prior *Claims Trends*, a noteworthy development in the rule 10b-5 area came in 2011 with the U.S. Supreme Court's decision in *Janus Cap. Grp. v. First Derivative Traders*, 131 S. Ct. 2296 (2011). In considering whether an investment adviser to mutual funds (and the adviser's parent company) could be held liable for allegedly deceptive statements included in mutual fund prospectuses, the Court in *Janus* held that the adviser did not itself "make" any of the alleged prospectus misstatements at issue, and therefore could not be liable as a "primary" violator in shareholder litigation brought under rule 10b-5.

[26] Yang v. Tr. for Advised Portfolios, No. 21-cv-1047 (E.D.N.Y. filed Feb. 26, 2021) (filing of complaint); Sokolow v. Tr. for Advised Portfolios, No. 21-cv-2317 (E.D.N.Y. filed Apr. 27, 2021) (filing of complaint); Schiavi + Dattani v. Tr. for Advised Portfolios, No. 22-cv-896 (E.D.N.Y. filed Feb. 17, 2022) (filing of complaint).

[27] Verduce v. Vanguard Chester Funds, No. 22-cv-955 (E.D. Pa. filed Mar. 14, 2022) (filing of complaint).

[28] *See, e.g.*, Saba Cap. CEF Opportunities 1 Ltd v. Voya Prime Rate Tr., No. CV2020-5293 (Ariz. Sup. Ct. Maricopa Cty. filed May 1, 2020) (challenging bylaw provisions establishing voting standards for board elections), Saba Cap. CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund, No. 21-cv-327 (S.D.N.Y. Feb. 17, 2022) (district court granted plaintiff summary judgment, finding changes implemented to fund bylaws imposed unequal voting rights among shareholders, thus violating the ICA). *See also* Naimish Keswani, *Saba Goes After Franklin Templeton CEF in Latest Activist Campaign*, FUND DIRECTIONS (Apr. 1, 2021), https://funddirections.com/news/77706/saba-goes-after-franklin-templeton-cef-in-latest-activist-campaign/; Tim LeeMaster, *Saba Director Slate Takes Over Voya CEF Board*, FUND DIRECTIONS (Aug. 27, 2020), https://funddirections.com/news/77507/saba-director-slate-takes-over-voya-cef-board/; Tim LeeMaster, *Bulldog Investors Targeting CEF Complexes at Larger Firms for Activism*, FUND DIRECTIONS (Aug. 20, 2020), https://funddirections.com/analysis/77521/bulldog-targeting-cef-complexes-at-larger-firms-for-activism/; Tim LeeMaster, *The Funds and Firms Pursuing Closed-End Fund Activism*, FUND DIRECTIONS (Feb. 13, 2020), https://funddirections.com/news/76965/the-funds-and-firms-pursuing-closed-end-fund-activism-2/.

[29] *See* Investment Company Institute, *Recommendations Regarding the Availability of Closed-End Fund Takeover Defenses* 15–16 (March 2020), https://www.ici.org/system/files/attachments/20_ltr_cef.pdf (discussing takeover defenses available to closed-end fund boards).

Under laws of certain states, a company may be permitted to prevent or restrict changes in control of the company by restricting the voting power of certain voting shares, unless a majority of the company's disinterested shareholders vote to permit the person to vote the shares. A 2020 SEC staff statement indicated that the staff would not recommend enforcement action against a closed-end fund that availed itself of an applicable control share statute, subject to certain conditions. *See Control Share Acquisition Statutes*, SEC Staff Statement, Div. of Inv. Mgmt. (May 27, 2020), https://www.sec.gov/investment/control-share-acquisition-statutes. The staff's statement withdrew a 2010 no-action letter in which the staff articulated its view that it would be inconsistent with section 18(i) of the ICA if a closed-end fund availed itself of Maryland's control share statute. *See* Boulder Total Return Fund, SEC No-Action Letter (Nov. 15, 2010), https://www.sec.gov/divisions/investment/noaction/2010/bouldertotalreturn111510.htm.

[30] Closed-end fund matters often involve a so-called "demand" made on the fund's board of directors. In the demand, the shareholder typically requests that the fund board itself authorize and pursue litigation on behalf of the fund. The

fund board, in order to make an informed decision as to how to respond to the demand—i.e., whether (1) to take over and assert the claims at issue (thereby displacing the shareholder), (2) to pursue an alternative remedy, or (3) to reject the shareholder's demand—will often appoint a special committee to conduct a shareholder derivative demand investigation (which is often conducted by an outside law firm retained by the special committee).

[31] *See* Saba Cap. CEF Opportunities 1 Ltd. (order granting dismissal with prejudice); Saba Cap. Master Fund, Ltd. v. BlackRock Muni N.Y. Intermediate Duration Fund, Inc., Case No. 2068-2019 (Md. Ct. Spec. Apps. Feb. 27, 2020) (notice of voluntary dismissal).

[32] Lanotte v. Highland Cap. Mgmt. Fund Advisors, L.P., No. 18-cv-2360 (N.D. Tex. May 26, 2020) (order granting motion to dismiss), *appeal docketed*, No. 20-10649 (5th Cir. June 25, 2020); Lanotte v. Highland Cap. Mgmt. Fund Advisors, L.P., No. 18-cv-2360 (N.D. Tex. Mar. 25, 2019) (filing of motion to dismiss).

[33] Saba Cap. CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund, No. 21-cv-327 (S.D.N.Y. filed Jan. 14, 2021) (filing of complaint).

[34] *See* discussion of control share acquisition statutes at note 29 *supra*. The permissibility of "control share acquisition" bylaw amendments under the ICA is also at issue in counterclaims filed by the same activist shareholder in another lawsuit. *See* Eaton Vance Sr. Income Tr. v. Saba Cap. Master Fund, Ltd., No. 2084-cv-1533 (Mass. Suffolk Cty. Sup. Ct. Aug. 31, 2020) (filing of counterclaims by defendant). On March 31, 2021, the court granted in part and denied in part the plaintiff's motion to dismiss the defendant's counterclaims in that lawsuit, thereby permitting the defendant's counterclaim relating to the alleged ICA violation to proceed. Eaton Vance Sr. Income Tr. v. Saba Cap. Master Fund, Ltd., No. 2084-cv-1533 (Mass. Suffolk Cty. Sup. Ct. Mar. 31, 2021) (order granting in part and denying in part plaintiff's motion to dismiss defendant's counterclaims). The litigation remains pending.

[35] *See* Oxford Univ. Bank v. Lansuppe Feeder, Inc., 933 F.3d 99 (2d Cir. Aug. 5, 2019) (holding that section 47(b) of the ICA provides an implied private right of action for rescission of contracts that violate the ICA). Prior to the Second Circuit's decision, a number of courts had declined to find an implied private right of action under section 47(b), and courts had generally found that the only private right of action under the ICA was expressly set forth in section 36(b).

[36] Saba Cap. CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund, No. 21-cv-327 (S.D.N.Y. Mar. 30, 2021) (filing of joint motion to dismiss).

[37] Saba Cap. CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund, No. 21-cv-327 (S.D.N.Y. Jan 14, 2021) (filing of motion for summary judgment).

[38] Saba Cap. CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund, No. 21-cv-327 (S.D.N.Y. Feb. 17, 2022) (opinion and order).

[39] Saba Cap. CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund, No. 22-407 (2d. Cir. filed Feb. 25, 2022) (filing of appeal).

[40] Leader Cap. Fund v. Eaton Vance Sr. Floating Rate Tr., 22-cv-5009 (W.D. Wash. filed Jan. 7, 2022) (filing of complaint).

[41] Blaugrund v. Guggenheim Fund Inv. Advisors, LLC, No. 2021-1094 (Del. Ch. Ct. filed Jan 24, 2022) (filing of complaint).

[42] *See* SEC, Press Rel., SEC Announces Enforcement Results for FY 2021 (Nov. 18, 2021), https://www.sec.gov/news/press-release/2021-238.

[43] SEC, Press Rel., SEC Announces Enforcement Results for FY 2021 (Nov. 18, 2021), https://www.sec.gov/news/press-release/2021-238 at addendum (indicating that 87, or approximately 28%, of its stand-alone actions in fiscal year 2021 were against investment companies/investment advisers).

[44] In re City Nat'l Rochdale, LLC, No. 3-20789 (SEC Mar. 3, 2022), https://www.sec.gov/litigation/admin/2022/34-94352.pdf (finding that an investment adviser failed to disclose to its clients that they could invest in the adviser's proprietary mutual funds at lower cost, and failed to discuss related conflicts of interest).

[45] In re Upright Fin. Corp. & David Yow Shang Chiueh, No. 3-20664 (SEC Nov. 24, 2021), https://www.sec.gov/litigation/admin/2021/33-11010.pdf (finding that a mutual fund's investment adviser and portfolio manager made

investments that were inconsistent with the fund's classification as a diversified investment company and with the fund's fundamental policy with respect to industry concentration).

[46] *Id.* (finding that a mutual fund's investment adviser had, at various times, overstated or understated the fund's NAV by over 15%).

[47] In re Abbate, Rel. No. 3-20688 (SEC Dec. 21, 2021), https://www.sec.gov/litigation/admin/2021/33-11019.pdf (finding that a registered investment adviser made material misstatements concerning his responsibilities for two funds, including one mutual fund, under his management, and for aiding the fund sponsor's fraudulent course of business with respect to fund assets).

[48] In re SOFI Wealth, LLC., Rel. No. 3-20466 (SEC Aug. 19, 2021), https://www.sec.gov/litigation/admin/2021/ia-5826.pdf (finding that a robo-adviser invested client assets in proprietary ETFs while failing to provide its clients with full and fair disclosure of its conflicts of interest relating to the transactions).

[49] SEC v. LJM Funds Mgmt., Ltd., No. 21-cv-2859 (N.D. Ill. filed May 27, 2021) (filing of complaint).

[50] CFTC v. LJM Funds Mgmt., Ltd., No. 21-cv-2863 (N.D. Ill. filed May 27, 2021) (filing of complaint).

[51] SEC v. Polevikov, No. 21-cv-7925 (S.D.N.Y. filed Sept. 23, 2021) (complaint) (alleging that an analyst for an adviser to a registered fund improperly used inside information to front-run trades in personal and family accounts).

[52] SEC v. Velissaris, No. 22-cv-1346 (S.D.N.Y. filed Feb. 17, 2022) (complaint) (alleging that a fund's chief investment officer fraudulently manipulated valuations of fund-held securities to mask the fund's poor performance) (lawsuit stayed by the district court on March 30, 2022, pending the outcome of the criminal trial (*see infra* note 54)).

[53] CFTC v. Velissaris, No. 22-cv-1347 (S.D.N.Y. filed Feb. 17, 2022) (filing of complaint) (lawsuit stayed by the district court on March 28, 2022, pending the outcome of the criminal trial (*see infra* note 54)).

[54] USA v. Velissaris, No. 22-cr-105 (S.D.N.Y. filed Feb. 16, 2022) (filing of indictment).

[55] Schiavi + Dattani v. Tr. for Advised Portfolios, No. 22-cv-896 (E.D.N.Y. filed Feb. 17, 2022) (filing of complaint).

[56] *See, e.g.*, SEC, EXAMS, Nat'l Exam Program Risk Alert, Cybersecurity: Safeguarding Client Accounts against Credential Compromise (Sept. 15, 2020), https://www.sec.gov/files/Risk%20Alert%20-%20Credential%20Compromise.pdf; SEC, EXAMS, Nat'l Exam Program Risk Alert, Cybersecurity: Ransomware Alert (July 10, 2020), https://www.sec.gov/files/Risk%20Alert%20-%20Ransomware.pdf.

[57] SEC, Press Rel., SEC Announces Three Actions Charging Deficient Cybersecurity Procedures (Aug. 30, 2021), https://www.sec.gov/news/press-release/2021-169.

[58] SEC, Proposed Rule, Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies, 87 Fed. Reg. 13524 (Feb. 9, 2022), https://www.sec.gov/rules/proposed/2022/33-11028.pdf.

[59] SEC, EXAMS, 2022 Nat'l Exam Program Examination Priorities, 3–18 (Mar. 29, 2022), https://www.sec.gov/files/2022-EXAMS-Priorities-Report_FINAL_508.pdf.

[60] *Id.* at 17.

[61] *Id.* at 18.

[62] *See, e.g.*, *SEC Sharpens Focus on ESG*, Client Alert, Willkie Farr & Gallagher LLP (Mar. 17, 2021), https://www.willkie.com/-/media/files/publications/2021/03/sec_sharpens_focus_on_esg.pdf; SEC Focuses on ESG and Climate Disclosure, Client Alert, White & Case LLP (Mar. 18, 2021), https://www.whitecase.com/publications/alert/sec-focuses-esg-and-climate-disclosure.

[63] SEC, Proposed Rule, The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (Mar. 21, 2022), https://www.sec.gov/rules/proposed/2022/33-11042.pdf.

[64] *See, e.g.*, *Gensler: Update Names Rule to Include ESG*, IGNITES (July 8, 2021), https://www.ignites.com/c/3240534/409504; SEC Chair Gensler, Prepared remarks at London City Week (June 23, 2021), https://www.sec.gov/news/speech/gensler-speech-london-city-week-062321).

[65] SEC, Proposed Rule, Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, 87 Fed. Reg. 16590 (Mar. 9, 2022), https://www.sec.gov/rules/proposed/2022/33-11038.pdf. *See* David Isenberg, *SEC Proposal May Add Cybersecurity to the ESG Mix*, IGNITES (Mar. 10, 2022), https://www.ignites.com/c/3530844/451564 (noting the view of some observes that the proposal rules "would add cybersecurity to the commission's environmental, social and governance investing disclosure requirements" and "could force portfolio managers to examine cybersecurity protocols when picking investments for ESG funds").

[66] SEC, EXAMS, Risk Alert: The Division of Examinations' Review of ESG Investing (Apr. 9, 2021), https://www.sec.gov/files/esg-risk-alert.pdf.

[67] *See* SEC, Press Rel., SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42.

In August 2021, it was publicly reported that the SEC and DOJ were investigating allegations by a former employee of an investment adviser with respect to ESG investing. *See DWS's ESG Claims Draw Civil, Criminal Probes: Reports*, IGNITES (Aug. 26, 2021), https://www.ignites.com/c/3301134/417124.

[68] DOL, U.S. Department of Labor Statement Regarding Enforcement of Its Final Rules on ESG Investments and Proxy Voting by Employee Benefit Plan (Mar. 10, 2021), https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/erisa/statement-on-enforcement-of-final-rules-on-esg-investments-and-proxy-voting.pdf; DOL Proposed Rule, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 85 Fed. Reg. 57,272, 57,276 (Oct. 14, 2021), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/notice-of-proposed-rulemaking-on-prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights.pdf. The proposal notes that "this provision is intended to counteract negative perceptions of the use of climate change and other ESG factors in investment decisions caused by the [rules promulgated in 2020]." *Id.* Under the 2020 rules, a fiduciary was permitted to use a non-pecuniary factor as a tiebreaker "in circumstances where the fiduciary could not distinguish such investment option from an alternative on the basis of pecuniary factors alone," but did not permit a fiduciary to make a selection "solely on the basis of a fiduciary's personal policy preferences." Financial Factors in Selecting Plan Investments, Final Rule, DOL, 85 Fed. Reg. 72846, 72862–63 (Nov. 13, 2020), https://www.federalregister.gov/documents/2020/11/13/2020-24515/financial-factors-in-selecting-plan-investments.

[69] SEC, EXAMS, Risk Alert: The Division of Examinations' Continued Focus on Digital Asset Securities (Feb. 26, 2021), https://www.sec.gov/files/digital-assets-risk-alert.pdf.

[70] SEC, EXAMS, Risk Alert: The Division of Examinations' Review of ESG Investing (Apr. 9, 2021), https://www.sec.gov/files/esg-risk-alert.pdf.

[71] SEC, EXAMS, Risk Alert: Observations Regarding Fixed Income Principal and Cross Trades by Investment Advisers from an Examination Initiative (July 21, 2021), https://www.sec.gov/files/fixed-income-principal-and-cross-trades-risk-alert.pdf.

[72] SEC, EXAMS, Risk Alert: Observations from Examinations in the Registered Investment Company Initiatives (Oct. 26, 2021), https://www.sec.gov/files/exams-registered-investment-company-risk-alert.pdf.

[73] SEC, EXAMS, Risk Alert: Observations from Examinations of Advisers that Provide Electronic Advice (Nov. 9, 2021), https://www.sec.gov/files/exams-eia-risk-alert.pdf.

[74] SEC, EXAMS, Risk Alert: Division of Examinations Observations: Investment Advisers' Fee Calculations (Nov. 10, 2021), https://www.sec.gov/files/exams-risk-alert-fee-calculations.pdf.

[75] *See* SEC, EXAMS, 2022 Nat'l Exam Program Examination Priorities, 3 (Mar. 29, 2022), https://www.sec.gov/files/2022-EXAMS-Priorities-Report_FINAL_508.pdf.

[76] *Id.*

[77] FINRA, 2022 Report on FINRA's Examination and Risk Monitoring Program (Feb. 9, 2022), https://www.finra.org/sites/default/files/2022-02/2022-report-finras-examination-risk-monitoring-program.pdf.

[78] *See, e.g.*, Remarks of CFTC Chairman Rostin Behnam Regarding "Examining Digital Assets: Risks, Regulation and Innovation" (Feb. 9, 2022), https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam20; *see also* Statement

of Commissioner Dawn D. Stump on the CFTC's Regulatory Authority Applicable to Digital Assets (Aug. 23, 2021), https://www.cftc.gov/PressRoom/SpeechesTestimony/stumpstatement082321.

[79] *See, e.g.*, Keynote Address of Chairman Rostin Behnam at the ABA Business Law Section Derivatives & Futures Law Committee Virtual Winter Meeting, CFTC (Jan. 27, 2022), https://www.cftc.gov/PressRoom/SpeechesTestimony/opabehnam19.

[80] *See, e.g.*, *id.*

[81] SEC v. LJM Funds Mgmt., Ltd., No. 21-cv-2859 (N.D. Ill. filed May 27, 2021) (filing of complaint); CFTC v. LJM Funds Mgmt., Ltd., No. 21-cv-2863 (N.D. Ill. filed May 27, 2021) (filing of complaint).

[82] SEC v. Velissaris, No. 22-cv-1346 (S.D.N.Y. filed Feb. 17, 2022) (filing of complaint); CFTC v. Velissaris, No. 22-cv-1347 (S.D.N.Y. filed Feb. 17, 2022) (filing of complaint). The DOJ also brought a criminal lawsuit against the same individual for his allegedly fraudulent manipulation of securities valuations. USA v. Velissaris, No. 22-cr-105 (S.D.N.Y. filed Feb. 16, 2022) (filing of indictment).

[83] DOL, 401(k) Plan Investments in "Cryptocurrencies," Compliance Assistance Rel. No. 2022-01 (Mar. 10, 2022), https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2022-01.

[84] The coverage also typically requires the insured to obtain the insurer's advance consent before incurring any costs for which the insured may seek reimbursement. *See generally* ICI Mutual's 2009 Risk Management Study, MUTUAL FUND D&O/E&O INSURANCE: A GUIDE FOR INSUREDS, at 35–36, https://www.icimutual.com (discussing insurance for the costs of correcting operations-based errors).

[85] *See, e.g.*, ICI MUTUAL, *D&O/E&O Insurance Coverage For Network Security Events: Frequently Asked Questions*, Question 8 (Jan. 2017), https://www.icimutual.com.

[86] *See generally* ICI Mutual's 2010 Risk Management Study, ERISA LIABILITY: A GUIDE FOR INVESTMENT ADVISERS AND THEIR AFFILIATES, https://www.icimutual.com & ICI Mutual's 2014 Expert Roundtable Report, TRENDS IN FEE LITIGATION: ACTIONS BROUGHT UNDER SECTION 36(B) AND ERISA, https://www.icimutual.com.

[87] The count of "proprietary funds" lawsuits set forth herein does not include cases that were consolidated into other cases.

[88] The preliminary settlement reached in early 2022 is as follows: Feinberg v. T. Rowe Price Grp., Inc., No. 17-cv-427 (D. Md. Jan. 18, 2022) (preliminary approval of $7 million settlement).

The 2021 final settlements are as follows: Karg v. Transam. Corp., No. 18-cv-134, 2019 U.S. Dist. LEXIS 140567 (N.D. Iowa Nov. 22, 2021) ($5.4 million); Baker v. John Hancock Life Ins. Co., No. 20-cv-10397 (D. Mass. Sept 30, 2021) ($14 million); Baird v. BlackRock Inst'l Tr. Co., N.A., No. 17-cv-1892 (N.D. Cal. Mar. 23, 2021) ($9.65 million); Karpik v. Huntington Bancshares Inc., No. 17-cv-1153 (S.D. Ohio Feb. 18, 2021) ($10.5 million); Moitoso v. Fidelity, No. 18-cv-12122 (D. Mass. Jan. 21, 2021) ($28.5 million).

The pre-2021 final settlements are as follows: Bekker v. Neuberger Berman Grp., LLC, No. 16-cv-6123 (S.D.N.Y. Dec. 1, 2020) ($17 million); Beach v. JPMorgan Chase Bank, N.A., No. 17-cv-563 (S.D.N.Y. Oct. 7, 2020) ($9 million); Brotherston v. Putnam Invs., LLC, No. 15-cv-13825 (D. Mass. Sept. 9, 2020) ($12.5 million); In re M&T Bank Corp. ERISA Litig., No. 16-cv-375 (W.D.N.Y. Sept. 3, 2020) ($20.85 million); Cervantes v. Invesco Holding Co. (U.S.), Inc., No. 18-cv-2551 (N.D. Ga. Aug. 13, 2020) ($3.47 million); In re SunTrust Banks, Inc. 401(k) Plan Affiliated Funds ERISA Litig., No. 11-cv-784 (N.D. Ga. filed Mar. 24, 2020) ($29 million); Stevens v. SEI Invs. Co., No. 18-cv-4205 (E.D. Pa. Feb. 28, 2020) ($6.8 million); Velazquez v. Mass. Fin. Servs. Co., No. 17-cv-1124 (D. Mass. Dec. 5, 2019) ($6.875); Cryer v. Franklin Res., Inc., No. 16-cv-4265 (N.D. Cal. Oct. 4, 2019) ($26.75 million); Price v. Eaton Vance Corp., No. 18-cv-12098 (D. Mass. Sept. 24, 2019) ($3.45 million); Bowers v. BB&T Corp., No. 15-cv-732 (M.D.N.C. May 10, 2019) ($24 million); Pease v. Jackson Nat'l Life Ins. Co., No. 17-cv-284 (W.D. Mich. Apr. 23, 2019) ($4.5 million); Schapker v. Waddell & Reed Fin., Inc., No. 17-cv-2365 (D. Kan. Apr. 8, 2019) ($4.875 million); Moreno v. Deutsche Bank Americas Holding Corp., No. 15-cv-9936 (S.D.N.Y. Mar. 1, 2019) ($21.9 million); Urakhchin v. Allianz Asset Mgmt. of Am., L.P., 2018 U.S. Dist. LEXIS 54681 (C.D. Cal. July. 30, 2018) ($12 million); Main v. Am. Airlines Inc., No. 16-cv-473 (N.D. Tex. Feb. 21, 2018) ($22 million); Richards-Donald v. TIAA-CREF, No. 15-cv-8040 (S.D.N.Y. Oct. 20, 2017) ($5 million); Andrus v. N.Y. Life Ins. Co., No. 16-cv-5698

(S.D.N.Y. June 15, 2017) ($3 million); Gordan v. Mass. Mut. Life Ins. Co., No. 13-cv-30184 (D. Mass. Nov. 3, 2016) ($30.9 million); Dennard v. Aegon USA LLC, No. 15-cv-30 (N.D. Iowa Oct. 28, 2016) ($3.8 million); Anderson v. Principal Life Ins. Co., No. 15-cv-119 (S.D. Iowa Nov. 13, 2015) ($3 million); Krueger v. Ameriprise Fin., Inc., 2015 U.S. Dist. LEXIS 91385 (D. Minn. July 13, 2015) ($27.5 million); Bilewicz v FMR LLC, 2014 U.S. Dist. LEXIS 183213 (D. Mass. Oct. 15, 2014) ($12 million).

[89] Ravarino v. Voya Fin., Inc., No. 21-cv-1658 (D. Conn. filed Dec. 14, 2021) (filing of complaint).

[90] Pecou v. Bessemer Tr. Co., No. 22-cv-377 (S.D.N.Y. filed Jan. 26, 2022) (filing of complaint).

[91] Cho v. Prudential Ins. Co. of Am., No. 19-cv-19886 (D.N.J. Dec. 20, 2021) (filing of motion to dismiss second amended complaint).

[92] Waldner v. Natixis Inv. Mgrs., N.P., No. 21-cv-10273 (D. Mass. Dec. 20, 2021) (order denying motion to dismiss); Falberg v. The Goldman Sachs Grp., Inc., No. 19-cv-9910 (S.D.N.Y. July 9, 2020) (order denying motion to dismiss); In re G.E. ERISA Litig., No. 17-cv-12123 (D. Mass. March 31, 2020) (order granting in part and denying in part motion to dismiss).

[93] *See* note 88, *supra*.

[94] *See id.*

[95] Wildman v. Am. Cent. Servs., LLC, No. 16-cv-737 (W.D. Mo. Nov. 8, 2017) (filing of motion for summary judgment) & 237 F. Supp. 3d 902 & 237 F. Supp. 3d 918 (W.D. Mo. Feb. 27, 2017) (orders denying motion to dismiss and granting in part and denying in part the defendants' motion for summary judgment); Wildman v. Am. Cent. Servs., LLC, 2019 U.S. Dist. LEXIS 10672 (W.D. Mo. Jan. 23, 2019) (order dismissing lawsuit).

[96] Patterson v. Morgan Stanley, No. 16-cv-6568, 2019 U.S. Dist. LEXIS 174832 (S.D.N.Y. Oct. 7, 2019) (order granting motion to dismiss).

[97] Meiners v. Wells Fargo & Co., 2017 U.S. Dist. LEXIS 80606 (D. Minn. May 26, 2017) (order granting motion to dismiss), *aff'd*, 898 F.3d 820 (8th Cir. Aug. 3, 2018).

[98] Wayman v. Wells Fargo & Co., No. 17-cv-5153 (D. Minn. Feb. 13, 2018) (notice of voluntary dismissal); Patterson v. Capital Grp. Cos., Inc., No. 17-cv-4399 (C.D. Cal. Feb. 14, 2018) (notice of voluntary dismissal, following court's granting of motion to dismiss plaintiff's first amended complaint on January 23, 2018).

[99] Severson v. Charles Schwab & Co. Inc., No. 17-cv-285 (N.D. Cal. Nov. 20, 2019) (order staying the lawsuit pending arbitration and administratively closing the lawsuit, subject to re-opening if a petition to enforce any arbitration award is filed). To date, the lawsuit has not been re-opened.

[100] Becker v. Wells Fargo & Co., No. 20-cv-1803 (N.D. Cal. filed Mar. 13, 2020) (filing of complaint) (transferred to Becker v. Wells Fargo & Co., No. 20-cv-2016 (D. Minn. filed Sept. 22, 2020)); Gomes v. State St. Corp., No. 21-cv-10863 (D. Mass. filed May 25, 2021) (filing of complaint); Conlon v. The Northern Tr. Co., No. 21-cv-2940 (N.D. Ill. filed June 1, 2021) (filing of complaint); Kohari v. MetLife Grp., Inc., No. 21-cv-6146 (S.D.N.Y. filed July 19, 2021) (filing of complaint).

[101] Becker v. Wells Fargo & Co., No. 20-cv-2016 (D. Minn. Jan. 6, 2022) (filing of notice of settlement); Becker v. Wells Fargo & Co., No. 20-cv-2016 (D. Minn. Feb. 17, 2022) (order relating to scheduling).

[102] Gomes v. State St. Corp., No. 21-cv-10863 (D. Mass. July 26, 2021) (filing of motion to dismiss); Conlon v. The Northern Tr. Co., No. 21-cv-2940 (N.D. Ill. Sept. 3, 2021) (filing of motion to dismiss); Kohari v. MetLife Grp., Inc., No. 21-cv-6146 (S.D.N.Y. Oct. 6, 2021) (filing of motion to dismiss).

[103] Goetz v. Voya Fin., Inc., No. 17-cv-1289 (D. Del. filed Sept. 8, 2017) (filing of complaint).

[104] Goetz v. Voya Fin., Inc., No. 17-cv-1289 (D. Del. Feb. 4, 2020) (order granting in part and denying in part motion to dismiss).

[105] Goetz v. Voya Fin., Inc., No. 17-cv-1289 (D. Del. July 14, 2021) (order dismissing lawsuit with prejudice).

[106] Wong v. FMR LLC, No. 19-cv-10335 (D. Mass. Aug. 8, 2019) (order to consolidate Bailis v. FMR LLC, No. 19-cv-10654 (D. Mass. filed Apr. 5, 2019); Sills v. FMR LLC, No. 19-cv-11595 (D. Mass. filed July 23, 2019); Summers v. FMR LLC, No. 19-cv-10501 (D. Mass. filed Mar. 18, 2019); and *Wong*).

[107] Wong v. FMR LLC, No. 19-cv-10335 (D. Mass. Feb. 14, 2020) (order granting motion to dismiss).

[108] Wong v. FMR LLC, 990 F.3d 50 (1st Cir. Mar. 5, 2021) (order affirming district court's ruling).

[109] Johnson v. Russell Inv. Mgmt., No. 21-cv-743 (W.D. Wash. filed June 7, 2021) (filing of complaint).

[110] *See, e.g.*, Official Comm. of Unsecured Creditors of Tribune Co. v. JPMorgan Chase Bank, N.A., No. 10-ap-55841 (Bankr. D. Del. Mar. 26, 2013) (dismissed) & Kirschner v. Large S'holders, 10 F.4th 147 (2d Cir. Aug. 20, 2021), *cert. denied*, No. 21-1006 (U.S. Feb. 22, 2022) (both adversary proceedings in In re Tribune Co., No. 08-bk-13141 (Bankr. S.D.N.Y. filed Dec. 8. 2008)); In re Tribune Co. Fraudulent Conveyance Litig., No. 11-md-2296 (S.D.N.Y. filed Dec. 20, 2011); PR Adversary Proceedings, *infra* note 120.

In addition, a number of other recent bankruptcy cases (e.g., involving Nine West Holdings, Inc. and Sears Holdings) have also named funds as defendants by virtue of their status as passive holders or former holders of securities of the bankrupt issuers. *See* Sears Holdings Corp. v. Tisch, No. 20-ap-7007 (Bankr. S.D.N.Y. filed Oct. 15, 2020) (adversary proceeding in In re Sears Holdings Corp., No. 18-bk-23538 (Bankr. S.D.N.Y. filed Oct. 15, 2018)), *consol. with* Sears Holding Corp. v. Lampert, No. 19-ap-8250 (Bankr. S.D.N.Y. filed Apr. 17, 2019); In re Nine West LBO Secs. Litig., No. 20-md-2941 (S.D.N.Y. filed June 3, 2020).

[111] Kirschner v. Large S'holders, 10 F.4th 147 (2d Cir. Aug. 20, 2021), *cert. denied*, No. 21-1006 (U.S. Feb. 22, 2022) (*affirming* In re Tribune Co. Fraudulent Conveyance Litig., No. 11-md-2296, 2019 U.S. Dist. LEXIS 69081 (S.D.N.Y. Apr. 23, 2019) and In re Tribune Co. Fraudulent Conveyance Litig., No. 11-md-2296 (S.D.N.Y. June 13, 2019), which, respectively, denied a request in *Tribune* to amend the complaint to add a federal constructive fraudulent transfer claim and dismissed the federal law intentional fraudulent conveyance claim).

[112] Deutsche Bank Trust Co. Ams. v. Large Private Beneficial Owners (In re Tribune Co. Fraudulent Conveyance Litig.), 946 F.3d 66 (2d Cir. 2019) (order holding that the payments to the funds and other defendants were entitled to the protection of the "safe harbor" provision of the federal bankruptcy laws for financial institutions serving as conduits), *cert. denied*, No. 20-8 (U.S. Apr. 19, 2021).

The district court's opinion, In re Tribune Co. Fraudulent Conveyance Litig., 499 B.R. 310 (S.D.N.Y. Sept. 23, 2013), had initially been affirmed by the Second Circuit in March 2016 on grounds that the appellants' claims were preempted by section 546(e) of the Bankruptcy Code. Deutsche Bank Tr. Co. Americas v. Large Private Beneficial Owners (In re Tribune Co. Fraudulent Conveyance Litig.), 818 F.3d 98 (2d Cir. 2016), *reh'g denied* (July 22, 2016), *cert. dismissed*, No. 16-317 (May 17, 2019). The Second Circuit subsequently recalled this earlier decision in light of the U.S. Supreme Court's February 2018 decision in *Merit Mgmt. Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018), which involved the application of a "safe harbor" provision of the federal bankruptcy laws to financial institutions serving as conduits. In re Tribune Co. Fraudulent Conveyance Litig., No. 13-3992 (2d. Cir. May 15, 2018).

[113] In re Nine West LBO Secs. Litig., No. 20-md-2941 (S.D.N.Y. filed June 5, 2020) (filing of complaint).

[114] In re Nine West LBO Secs. Litig., No. 20-md-2941 (S.D.N.Y. Aug. 27, 2020) (order on motion to dismiss). Of particular interest in this decision was the court's holding that Nine West, by virtue of its relationship with Wells Fargo, was a "financial institution" for the purposes of the transfers, and the payments made to public shareholders were both (i) settlement payments and (ii) payments made in connection with a securities contract and, therefore, protected by the "safe harbor" of section 546(e) of the Bankruptcy Code. Moreover, the court found that certain shareholder defendants (in particular, investment companies registered under the ICA) independently qualified as protected "financial institutions."

[115] In re Nine West LBO Secs. Litig., No. 20-md-2941 (S.D.N.Y. Nov. 19, 2020) (partial final judgment), *appeal docketed*, No. 20-3941 (2d Cir. Nov. 23, 2020).

[116] Sears Holdings Corp. v. Tisch, No. 20-ap-7007 (Bankr. S.D.N.Y. filed Oct. 15, 2020) (adversary proceeding in In re Sears Holdings Corp., No. 18-bk-23538 (Bankr. S.D.N.Y. filed Oct. 15, 2018)).

[117] Sears Holdings Corp. v. Tisch, No. 20-ap-7007 (Bankr. S.D.N.Y. filed Mar. 15, 2021) (consolidation and scheduling order).

[118] Sears Holdings Corp. v. Tisch, No. 20-ap-7007 (Bankr. S.D.N.Y. Jan. 19, 2021) (filing of motion to dismiss).

[119] In re Fin. Oversight & Mgmt. Bd. for Puerto Rico, No. 17-bk-3283 (D.P.R. filed May 3, 2017).

[120] *See, e.g.*, Special Claims Comm. of the Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Jefferies LLC, No. 19-ap-281 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Barclays Cap/Fixed, No. 19-ap-282 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Interactive Brokers Retail Equity Clearing, No. 19-ap-283 (D.P.R. filed May 2, 2019); Official Comm. of Unsecured Creditors v. Defendant 1E, No. 19-ap-284 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Defendant 1A, No. 19-ap-285 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Defendant 1B, No. 19-ap-286 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Defendant 1C, No. 19-ap-287 (D.P.R. filed May 2, 2019); Special Claims Comm. v. Defendant 1D, No. 19-ap-288 (D.P.R. filed May 2, 2019) (collectively, "PR Adversary Proceedings").

[121] In re Fin. Oversight & Mgmt. Bd. for Puerto Rico, No. 17-bk-3283 (D.P.R. Mar. 9, 2021) (filing of amended plan).

[122] In re Fin. Oversight & Mgmt. Bd. for Puerto Rico, No. 17-bk-3283 (D.P.R. Jan. 18, 2022) (approval of amended plan).

[123] Special Claims Comm. of the Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Jefferies LLC, No. 19-ap-281 (D.P.R. Mar. 27, 2022); Special Claims Comm. v. Barclays Cap/Fixed, No. 19-ap-282 (D.P.R. Mar. 27, 2022); Special Claims Comm. v. Interactive Brokers Retail Equity Clearing, No. 19-ap-283 (D.P.R. Mar. 27, 2022); Official Comm. of Unsecured Creditors v. Defendant 1E, No. 19-ap-284 (D.P.R. Mar. 27, 2022); Special Claims Comm. v. Defendant 1A, No. 19-ap-285 (D.P.R. Mar. 27, 2022); Special Claims Comm. v. Defendant 1B, No. 19-ap-286 (D.P.R. Mar. 27, 2022); Special Claims Comm. v. Defendant 1C, No. 19-ap-287 (D.P.R. Mar. 27, 2022); Special Claims Comm. v. Defendant 1D, No. 19-ap-288 (D.P.R. Mar. 27, 2022) (filings of voluntary dismissals of PR Adversary Proceedings).

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