

Claims Trends

A Review of Claims
Activity in the
Mutual Fund Industry
(January 2022–March 2023)

Table of Contents

Introduction	1
Disclosure.....	2
Prospectus Liability Lawsuits	2
Other Disclosure-Based Litigation	3
Fees.....	4
Potential SEC Enforcement of Section 36(b).....	4
Section 36(b) Lawsuits and the Plaintiffs’ Bar	4
Other Developments in Fee Litigation	4
Litigation under State Law	5
Regulatory Developments.....	7
SEC Enforcement Actions	7
SEC Examination Priorities.....	9
Other Regulators	10
Portfolio Management Errors	11
Other Litigation Developments	12
ERISA	12
Bankruptcy Claims Involving Issuers of Portfolio Securities.....	14
D&O/E&O Claims Data	15
D&O/E&O Notices by Subject (2022).....	15
D&O/E&O Insurance Payments by Category (2000–2022).....	16
Endnotes.....	17

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*. Although 2022 saw a modest year-over-year decrease in the overall number of claims submitted by ICI Mutual's insured fund groups, claims frequency for the year remained within historical norms. Over the five-year period 2018–2022, nearly 40% of ICI Mutual's insured fund groups have submitted at least one claim notice.

Unlike frequency, the severity of new claims can be more difficult to assess, particularly for civil lawsuits and regulatory investigations and proceedings, where it

can sometimes take years to establish the magnitude of losses (in the form of defense costs, settlements, and judgments). Even as the frequency of claims reported to ICI Mutual has remained within historical norms in recent years, ICI Mutual has seen increased claims severity. (See box below.)

Historically, higher severity claims have involved civil lawsuits or, in some cases, regulatory investigations and 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 or regulatory enforcement matters, can in some cases climb into eight figures.

Waves, One-Offs, and High Severity Clusters

ICI Mutual has long used the catchphrase “waves and one-offs” to describe the fund industry claims environment. This catchphrase has reflected the industry's experience over the decades with both waves of substantially similar claims involving multiple fund groups and one-off claims involving individual fund groups. Claims developments of late suggest that the catchphrase be amended to read “waves, one-offs, and high severity clusters.” The amendment reflects the emergence of clusters of claims that have little in common apart from their proximity in time and their high severity (with the exposure in each claim ultimately totaling \$10 million or more in settlements, defense costs, and/or corrective payments, prior to any insurance recovery).

ICI Mutual has itself experienced two high severity clusters in recent years, with the second having emerged over just the past eighteen months. While it is difficult to assess how often high severity clusters may be arising in the fund industry as a whole, it seems unlikely that they are limited to fund groups insured by ICI Mutual.

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.¹ As discussed below, 2022 and early 2023 saw the filing of new prospectus liability lawsuits, as well as developments in various lawsuits filed in recent years against fund industry defendants.²

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.

Disclosure issues remain an area of interest for regulators as well, and can and do lead to regulatory enforcement actions (see “Regulatory Developments” below).

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.

2022 and early 2023 witnessed the filing of new prospectus liability lawsuits as well as developments in earlier prospectus liability lawsuits.

- *Alleged Misrepresentations of Investment Objective and Breach of Fiduciary Duty:* In June 2022, a lawsuit alleging both ’33 and ’34 Act violations was filed against a fund, its board of trustees (including independent trustees), investment adviser, and certain officers.³ The plaintiffs alleged that the funds issued materially misleading disclosures in their offering documents relating to the use of leverage to achieve their investment objectives, and that the funds engaged in price manipulation.⁴ The plaintiffs’ latest amended complaint was filed in December 2022.⁵ The defendants’ motion to dismiss, filed in January 2023, remains pending.⁶

- *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 parties to this lawsuit reached a settlement agreement (which also settles another lawsuit that was filed in New York state court in August 2022 against many of the same defendants⁹). The parties’ motion for final approval of a settlement agreement was filed in December 2022 and remains pending.¹⁰

Another lawsuit against many of the same defendants, alleging both ’33 Act and ’34 Act violations, was filed in federal court in June 2021.¹¹ This lawsuit was stayed pending a court order in a related case brought by the SEC.¹²

In addition, two class action lawsuits against many of the same defendants, alleging ’34 Act violations, were filed in federal court in February and April 2021,¹³ and a third was filed in February 2022.¹⁴ One lawsuit was voluntarily dismissed in May

2021.¹⁵ The other two lawsuits were consolidated in April 2022, and the consolidated action was stayed in October 2022 pending the outcome of the proposed settlement in the related state court action, described above.¹⁶ As noted in “Regulatory Developments” below, some of the defendants in these lawsuits are involved in separate actions brought by the SEC, the CFTC, and the DOJ.¹⁷

- *Alleged Failure to Follow Investment Objective:* In October 2020, a plaintiff filed a state court action alleging ’33 Act violations against a registered fund, its adviser, its distributor, and its trustees (including independent trustees) and officers, alleging false and misleading registration statements and prospectuses.¹⁸ In May 2021, the defendants filed a motion to dismiss, which was granted in part and denied in part in February 2023.¹⁹ The litigation remains pending.
- *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.²⁰ The plaintiff voluntarily dismissed this lawsuit in January 2022.²¹
- *Alleged Misrepresentations of Investment Strategy:* In August 2021, a class action lawsuit was filed in state court 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.²² The parties reached a settlement of the lawsuit, which was approved by the state court in March 2023.²³

A class action lawsuit was filed in federal district court in May 2022 against the same fund, adviser, and its trustees (including independent trustees) with similar

allegations to those noted in the earlier lawsuit.²⁴ In July 2022, the district court dismissed the lawsuit without prejudice.²⁵

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, plaintiffs have historically had limited success in pursuing these lawsuits against fund industry defendants.²⁶

As discussed 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 2021 and 2022 in connection with the valuation of swap contracts.²⁷ Also as discussed above, ’34 Act violations were alleged in an ongoing lawsuit filed in June 2022 in connection with misrepresentations in two funds’ offering documents relating to the use of leverage to achieve their investment objectives.²⁸

Fees

Section 36(b) of the ICA imposes a fiduciary duty on investment advisers with respect to the compensation they receive for providing advisory services to registered investment companies. The section expressly authorizes both the SEC and fund shareholders to bring lawsuits in federal court for breaches of the fiduciary duty established by the section. Although 2022 saw no section 36(b) lawsuits initiated against fund advisers, fund fees remain a focus area for both the SEC and the plaintiffs' bar.

Potential SEC Enforcement of Section 36(b)

The SEC has exercised its authority to bring section 36(b) actions only a handful of times since the section's enactment in 1970.²⁹ As noted above, the SEC brought no such actions in 2022. This said, some observers have interpreted public remarks by an SEC official in 2022 as a signal that the agency may potentially be interested in using the section (or another legal avenue, such as section 15 of the ICA), perhaps on a selective basis, to address perceived overreaching by advisers with regard to fees.³⁰ Of note, over the past year, the SEC's Division of Enforcement has reportedly conducted a "fact-finding inquiry" of fund groups with respect to fees and performance.³¹

Section 36(b) Lawsuits and the Plaintiffs' Bar

As discussed at length in prior *Claims Trends*, over the period 2000–2018, the plaintiffs' bar initiated 29 section 36(b) lawsuits, involving a total of 26 fund groups.³² This wave of excessive fee lawsuits finally ended in 2021, with a final resolution of the last pending lawsuit.³³

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

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, a class action lawsuit was initiated 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 minimum investment requirements for retirement plans investing in certain institutional funds.³⁴ Four additional lawsuits were filed from April to June 2022 and were consolidated with the first lawsuit.³⁵ The plaintiffs filed a consolidated class action complaint in November 2022.³⁶ The defendants’ motions to dismiss were filed in January 2023 and remain pending.³⁷

In an unrelated lawsuit originally filed in September 2018, a mutual fund’s investment adviser and trustees (including independent trustees), along with the fund as a nominal defendant, were alleged to have 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. In March 2023, the Fifth Circuit upheld the district court’s May 2020 dismissal of this lawsuit.⁴² The time to appeal the Fifth Circuit’s decision has not expired.

As discussed in “Disclosure – Prospectus Liability Lawsuits” above, a lawsuit against a mutual fund, its adviser, its trustees (including independent trustees) and certain officers, and distributor, among others, was filed in New York state court in August 2022.⁴³ A motion for final approval of a settlement agreement of this lawsuit (and a related lawsuit) was filed in December 2022 and remains pending.⁴⁴

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, certain lawsuits also raise a federal law issue.

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).⁴⁵ The lawsuit alleged that the “control share acquisition” bylaw amendments adopted by the funds violate the ICA.⁴⁶ The lawsuit sought rescission of

Closed-End Fund Activism

Activist shareholders have long 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.³⁸ As activist shareholders have increased their efforts in recent years, a number of fund boards have taken steps to enhance their funds’ defenses (e.g., by implementing staggered or classified boards, or by imposing super-majority voting requirements).³⁹

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.⁴⁰ Of note, in addition to the lawsuits 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*.⁴¹

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.⁴⁷ The defendants filed a motion to dismiss the lawsuit in March 2021.⁴⁸ The plaintiffs responded by filing a motion for summary judgment in April 2021,⁴⁹ which the district court granted in February 2022.⁵⁰ An appeal of the district court's decision was filed in February 2022 and remains pending.⁵¹

Meanwhile, the permissibility of “control share acquisition” bylaw amendment under the ICA is also at issue in counterclaims filed by the same activist shareholder in another lawsuit filed in state court in July 2020.⁵² In that lawsuit, in January 2023, the court granted in part and denied in part the parties' motions for partial summary judgment.⁵³ The litigation remains pending.

In December 2021, a shareholder filed a derivative and class action lawsuit against a different 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 2020.⁵⁶ The defendants' motion to dismiss, filed in March 2021, was granted in part and denied in part in February 2023.⁵⁷ The lawsuit remains pending.

In January 2022, a shareholder filed a direct lawsuit against another 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”).⁵⁸ The shareholder also alleged that the defendants redeemed the APS of other shareholders, but not those held by the plaintiff. The lawsuit was dismissed without prejudice in April 2022.⁵⁹ To date, it does not appear that the lawsuit has been re-filed.

Biometric Privacy Lawsuits Under State Law

Over the past two years, plaintiffs have filed a number of class action lawsuits in federal courts, alleging the defendant companies have obtained and used biometric information in violation of state privacy laws (typically, California and Illinois privacy laws).⁵⁴ These plaintiffs have alleged, among other things, that defendants obtained and used biometric information, such as voice recordings, to verify the identity of the caller without first obtaining express written consent of the caller. Most of these lawsuits have been filed outside of the investment management industry. To date, those relatively few lawsuits involving fund industry defendants appear to have been quickly resolved in the defendants' favor.⁵⁵

Regulatory Developments

The SEC pursued an active enforcement agenda in fiscal year 2022, bringing 462 stand-alone enforcement actions (i.e., proceedings other than “follow-on” proceedings or deregistration proceedings). In its announcement of enforcement results for fiscal year 2022, the SEC emphasized its focus on, among other things, deterring future violations and holding entities and individuals accountable for their misconduct.⁶⁰

The SEC’s agency-wide priorities were also reflected in various rule proposals issued in 2022, including proposals regarding environmental, social, and governance (“ESG”) issues and cybersecurity matters. (See boxes on the following pages.) The SEC also continues to focus on cryptocurrency and digital assets. In that regard, in February 2023, the SEC issued a release proposing an enhanced safeguarding rule for registered investment advisers, which has implications for custody and safekeeping of such assets.⁶¹

SEC Enforcement Actions

In fiscal year 2022, over a quarter of the civil and stand-alone actions brought by the SEC’s Division of Enforcement involved investment advisers and/or investment companies (including unregistered investment companies).⁶² 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 2022 and early 2023 against advisers (and/or their affiliates) of registered funds involved various issues, including an adviser’s undisclosed

conflicts of interest with respect to client investments in proprietary mutual funds,⁶³ misrepresentations regarding ESG disclosures,⁶⁴ improper valuation of a fund’s securities,⁶⁵ improper proxy voting policies and procedures,⁶⁶ and improper cross trades.⁶⁷

SEC administrative proceedings were also initiated or resolved against fund advisers and/or advisory personnel with respect to the non-registered fund activities. In May 2022, the SEC settled administrative proceedings with a registered adviser and two former portfolio managers with respect to the fraudulent concealment of the downside risks of a complex options trading strategy. Pursuant to the terms of the settlement, the adviser paid penalties to the SEC and restitution to investors and was barred from providing advisory services to registered investment companies for ten years.⁶⁸ At the same time, the SEC filed a related lawsuit against three former portfolio managers (including the two in administrative proceedings).⁶⁹ Two of the portfolio managers agreed to partial judgments.⁷⁰ The lawsuit remains pending.

In 2022, the SEC also initiated civil litigation against advisers (and/or their affiliates) of registered funds. In December 2022, the SEC filed a complaint against an asset management firm employee and another individual, alleging the parties fraudulently placed trades in certain securities ahead of trades made by the

Use of “Off-Channel” Electronic Communications

In September 2022, the SEC and CFTC brought administrative actions against banks, bank affiliates, broker-dealers, and an investment adviser for their failures to maintain and preserve records of certain communications.⁷¹ In all, over a dozen entities were collectively fined over \$1.8 billion for failing to monitor employees’ use of unauthorized messaging apps (such as WhatsApp).⁷² The SEC has since indicated that it will continue to pursue possible violations by fund industry participants of federal recordkeeping requirements.⁷³

registered investment companies (and other clients).⁷⁴ The lawsuit remains in its early stages.

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.⁷⁵ In a parallel action, the CFTC initiated a lawsuit against the same defendant alleging improper valuation of swaps in registered commodity pools.⁷⁶ In addition, the DOJ filed a criminal action against the same defendant, which action went to trial in November 2022 and remains pending.⁷⁷ The SEC and CFTC lawsuits have both been stayed pending the outcome of the DOJ's action.

As discussed in "Disclosure – Other Disclosure-Based Litigation" above, at the same time, several shareholder class action lawsuits relating to the same matter were filed.⁷⁸ As noted above, one of these lawsuits was

voluntarily dismissed, one was stayed by court order, and the last two were consolidated.⁸⁸

In November 2022, the SEC filed a lawsuit against one of the same funds that alleged improper valuation of fund securities, causing the fund's NAVs to be inflated.⁸⁹ The court issued a final judgment against the fund, permanently restraining and enjoining the fund from violating rule 22c-1 under the ICA.⁹⁰

In September 2021, the SEC brought a lawsuit alleging that an employee of an adviser to a registered fund had engaged in front-running of trades for the benefit of personal and family accounts.⁹¹ A criminal action by the DOJ filed in December 2021 resulted in a judgment against the same individual in April 2022.⁹² In July 2022, the district court issued a final judgment against the employee in the SEC proceeding, citing the findings of the district court in the parallel criminal case.⁹³

ESG-Related Regulatory Developments

Recent years have seen 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. The SEC continues to approach ESG matters through potential new regulations, examinations, and enforcement. Meanwhile, ESG has become politicized.

- **Regulation:** In May 2022, the SEC proposed rules to enhance disclosures by certain investment advisers and investment companies about ESG investment practices.⁷⁹ The SEC also proposed updates to the so-called "names rule" which, if adopted, would, among other things, require a fund with a name suggesting an ESG focus to invest its assets consistent with such fund's name.⁸⁰
- **Examinations:** In 2023, as in recent years, EXAMS included ESG investing as an examination priority. EXAMS indicated that its focus would include whether fund operations are consistent with fund disclosures, and whether ESG products are appropriately labeled.⁸¹ Industry sweep exams regarding ESG practices have taken place, resulting in a number of enforcement actions, as discussed below.
- **Enforcement:** The Division of Enforcement has brought actions against two investment advisers for their ESG practices. In May 2022, the SEC charged an investment adviser for misstatements and omissions about ESG considerations in making investment decisions for certain mutual funds that it managed.⁸² In November 2022, the SEC brought an enforcement action against an investment adviser of registered investment companies for failing to establish and maintain written policies and procedures for ESG research, and once policies and procedures were established, for failing to follow them consistently.⁸³
- **DOL:** In December 2022, the DOL released a final rule reversing an earlier position on the ability of ERISA plan fiduciaries to consider ESG factors in selecting plan investments. The new rule permits a plan fiduciary, both in selecting investments and whether/how to vote proxies, to evaluate ESG factors as any other potential investment factor.⁸⁴ In January 2023, 25 states joined a lawsuit alleging that the DOL's rule violates ERISA.⁸⁵
- **Political Fallout:** The recent emphasis on ESG issues and ESG-influenced investing has led to backlash activity by attorneys general, treasurers, and other officials from certain states.⁸⁶ This activity has included proposed or adopted state legislation or regulations to (1) restrict the ability of state authorities (including state public retirement plans) from doing business with or invest state assets through certain financial institutions and/or (2) to utilize state funds for purposes of ESG investment.⁸⁷

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).⁹⁴ For the SEC's 2023 fiscal year, EXAMS has indicated that, with respect to registered investment advisers, it will focus on compliance with newly adopted rules under the ICA and IAA, conformance with standards of conduct, fiduciary duties to clients, ESG issues, information security and operational resiliency, and digital assets.⁹⁵ EXAMS has also indicated a focus on compliance and supervisory programs with respect to electronic communications.⁹⁶

With respect to registered investment companies, EXAMS has indicated an ongoing focus on compliance programs and governance practices, disclosures, and accuracy of reporting to the SEC. EXAMS has also

indicated a focus on the fiduciary obligations of advisers to registered funds with respect to the receipt of compensation for their services to funds, boards' processes for assessing and approving advisory and other fund fees (particularly for those funds with weaker performance histories), and the effectiveness of funds' derivative risk management and liquidity risk management programs.¹⁰¹

Throughout the year, EXAMS also issues risk alerts that provide information about its examination findings and priorities. In 2022, EXAMS issued alerts on a range of topics, including observations from examinations of private fund advisers,¹⁰² investment adviser compliance issues relating to the use of material non-public information,¹⁰³ examinations focused on investment adviser marketing,¹⁰⁴ and observations from broker-dealer and investment adviser compliance examinations related to prevention of identity theft.¹⁰⁵

EXAMS has recently reported that in 2022 it examined more than 2,000 registered investment advisers. Overall, EXAMS completed over 3,000 exams and issued over 2,100 deficiency letters, while making over 190 referrals to the Division of Enforcement.¹⁰⁶

Cybersecurity Developments

In recent years, the SEC has increasingly focused on cybersecurity issues and has approached the issue on multiple fronts, including through potential new regulations, examinations, and enforcement. Indeed, in May 2022, the SEC nearly doubled the size of its Crypto Assets and Cyber Unit (formerly known as the Cyber Unit).⁹⁷

- **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.⁹⁸
- **Examinations:** The Division of Examinations (EXAMS) has, for many years, included cybersecurity as an examination priority and has issued risk alerts on the subject. EXAMS has noted that "... the current risk environment related to cybersecurity is considered elevated given larger market events, geopolitical concerns and the proliferation of cybersecurity attacks, particularly ransomware attacks."⁹⁹ As noted above, EXAMS' 2023 examination priorities continue to include cybersecurity.
- **Enforcement:** In actions involving firms outside the fund industry, the SEC settled administrative proceedings in July 2021 with several broker dealers and/or investment advisory firms for deficiencies in their customer identity theft prevention procedures.¹⁰⁰ To date, the SEC does not appear to have brought any cyber-related enforcement actions directly involving registered funds or advisers to registered funds.

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 January 2023, FINRA, a self-regulatory organization for the broker-dealer industry, published its annual Examination and Risk Monitoring Report, which reports on findings from recent examinations and indicates where FINRA might focus its resources over the coming year. The report also discusses FINRA's priorities, which for the coming year include digital assets, anti-money laundering, fixed income fair pricing, cybersecurity and technological governance, and manipulative trading.¹⁰⁷ In December 2022, FINRA brought a regulatory action against an investment adviser for not providing certain customers with mutual fund sales charge waivers and fee rebates to which they were entitled.¹⁰⁸

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, climate-related financial risk,¹⁰⁹ the transition from LIBOR,¹¹⁰ cybersecurity,¹¹¹ regulation of digital assets,¹¹² and ESG investing.¹¹³

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 February 2022 filed simultaneous complaints against an officer of a registered fund and registered commodity

pools with respect to valuation issues.¹¹⁴ As noted above, in September 2022, both the SEC and CFTC brought administrative actions against a number of financial institutions for their failure to establish and maintain records of certain electronic communications.¹¹⁵

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 above, the DOL has issued a rule regarding the consideration of ESG factors in selecting investment options in retirement plans. In March 2022, the DOL issued a release addressing the use of crypto assets in retirement plans.¹¹⁶

Recent years have seen increased activity by state regulators against the asset management industry. Massachusetts recently entered into a multimillion-dollar settlement with an investment manager with respect to capital gains distributions by target date funds and the resulting tax implications for shareholders.¹¹⁷ These same allegations are the basis of a class action lawsuit filed in March 2022 in district court, which is discussed in more detail under "Litigation under State Law" above.¹¹⁸ In addition, as noted in the box on page 8, there has been recent state legislative and regulatory activity relating to ESG investing.

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.¹¹⁹ “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.¹²⁰

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.

ICI Mutual has received claims associated with operational errors in a number of areas over the years. 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),¹²¹ 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.

Other Litigation Developments

In addition to the fee, disclosure, and state law-based lawsuits already discussed, 2022 and early 2023 also saw other noteworthy litigation developments.

ERISA

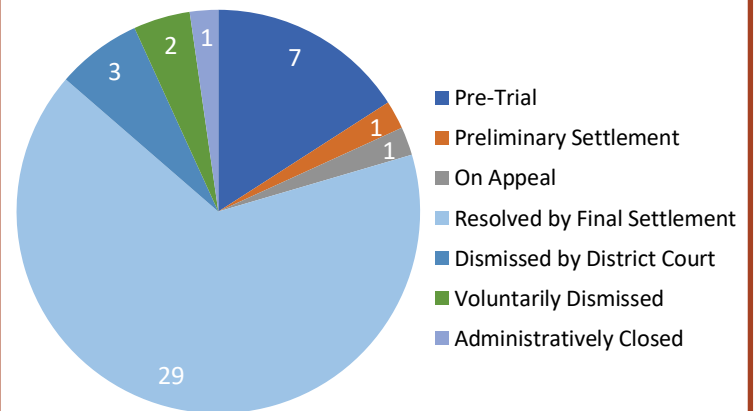
As reported in past *Claims Trends*, the plaintiffs' bar has used ERISA as a legal avenue to attack the fund industry.¹²² 2022 and early 2023 saw the filing of new ERISA-based lawsuits, as well as developments in existing lawsuits, involving asset managers and/or their affiliates.

“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

Procedural Status of Proprietary Funds Lawsuits
Initiated 2011–2023 (as of March 31, 2023)



investigate providing non-mutual fund alternatives such as collective trusts).

Since 2011, the plaintiffs' bar has initiated at least 44 such lawsuits involving 42 fund groups (with four of these lawsuits having been initiated since January 2022).¹²³ As discussed below, seven of the lawsuits remain in the pre-trial stage of the litigation process, one has a settlement pending, one has been dismissed by the court with the dismissal on appeal, and 35 have been fully resolved. Of the fully resolved lawsuits, 29 lawsuits were resolved through final monetary settlements, three were dismissed by the courts (with one of these dismissals affirmed on appeal), two were voluntarily dismissed by the parties, and one was administratively closed by the court.

The preliminary and final monetary settlements reached to date in these “proprietary funds” lawsuits collectively total over \$390 million.¹²⁴

- *Lawsuits in the Pre-Trial Stage:* Seven lawsuits remain in the pre-trial stage of the litigation process. Motions to dismiss have yet to be filed in two of these lawsuits,¹²⁵ and motions to dismiss are pending in three others.¹²⁶

In a sixth lawsuit, the motion to dismiss was denied in December 2021.¹²⁷ In the seventh lawsuit, defendants' motion for summary judgment and the plaintiffs' motion for partial summary judgment, both filed in September 2022, remain pending.¹²⁸

- *Lawsuit with Proposed Settlement:* In one lawsuit, plaintiffs filed a motion for preliminary approval of a settlement in March 2023.¹²⁹ The motion remains pending.
- *Lawsuit Dismissed by the Court and On Appeal:* In one lawsuit, the court granted the defendants' motion for summary judgment in September 2022. In October 2022, the plaintiff filed an appeal of the district court's decision.¹³⁰ The appeal remains pending.
- *Lawsuits Resolved by Final Settlements:* Twenty-nine of the lawsuits have reached final monetary settlements. One of these final monetary settlements was approved by a district court in 2022.¹³¹
- *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, thereby concluding the lawsuit.¹³² A second lawsuit was concluded following a ruling granting defendants' motion to dismiss.¹³³ In the third lawsuit, in August 2018, the Eighth Circuit affirmed the district court's dismissal, thereby concluding the lawsuit.¹³⁴
- *Lawsuits Voluntarily Dismissed by the Parties:* Two lawsuits closed in 2018 pursuant to voluntary dismissals.¹³⁵

- *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.¹³⁶

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 (with developments in 2022) 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.¹³⁷ In the first lawsuit, the district court issued an order granting final approval of settlement in June 2022, thereby ending the lawsuit.¹³⁸ In a second lawsuit, a motion to dismiss remains pending, and the lawsuit has been stayed pending mediation.¹³⁹ In the two remaining lawsuits, the district courts denied the defendants' motions to dismiss, and the lawsuits remain pending.¹⁴⁰

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."

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.

In a “proprietary funds”-like class action lawsuit filed in June 2021, a plaintiff participating in her employer’s retirement plan 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.¹⁴¹ These affiliated mutual funds, according to the plaintiffs, had higher fees and lower performance than the fees and performance of similar funds. The lawsuit was stayed and administratively closed in July 2022, pending the plaintiff’s exhaustion of administrative remedies, and was re-opened by the district court in March 2023.¹⁴² The lawsuit remains pending.

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, one bankruptcy-like proceeding involved Puerto Rico, an American territory.¹⁴³

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 certiorari regarding the Second Circuit’s 2021 decision affirming dismissal of the litigation trustee’s intentional

fraudulent conveyance claims against the shareholder defendants.¹⁴⁴

Nine West Holdings Bankruptcy: The *Nine West Holdings* proceeding involves actual and constructive fraudulent conveyance claims under state law.¹⁴⁵ In August 2020, the district court issued an order dismissing certain claims as barred by a “safe harbor” provision of the federal bankruptcy laws.¹⁴⁶ An appeal of the dismissal of the “safe harbor” claims was filed in November 2020 and remains pending. Oral argument before the Second Circuit took place in March 2022.¹⁴⁷

Sears Holdings Bankruptcy: The *Sears Holdings* proceeding, filed in October 2020, involved actual and constructive fraudulent conveyance claims under state and/or federal law.¹⁴⁸ A motion to dismiss was filed in January 2021, and a hearing on the motion was held in March 2021.¹⁴⁹ While the motion was pending, the parties, including certain fund complexes, entered into a settlement agreement, which was approved in September 2022.¹⁵⁰

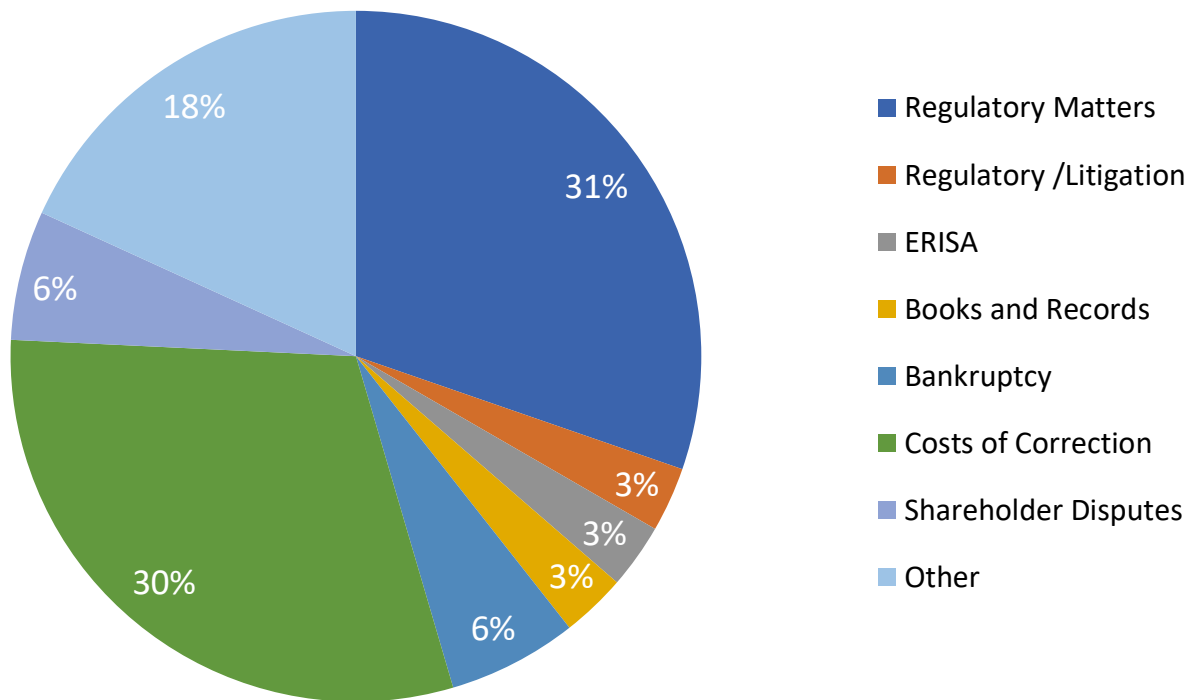
Puerto Rico Adversary Proceedings: The *Puerto Rico* proceedings arise from Puerto Rico’s difficulties in meeting its bond debt and unfunded pension obligations. Following the enactment of PROMESA in 2016, which allowed Puerto Rico to avail itself of federal bankruptcy-like proceedings, Puerto Rico filed to restructure its debt in 2017.¹⁵¹

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.¹⁵² In January 2022, the district court confirmed the amended bankruptcy plan filed by Puerto Rico’s federal oversight board, which plan became effective in March 2022.¹⁵³ The adversary proceedings were voluntarily dismissed in March 2022.¹⁵⁴

D&O/E&O Claims Data

D&O/E&O Notices by Subject (2022)

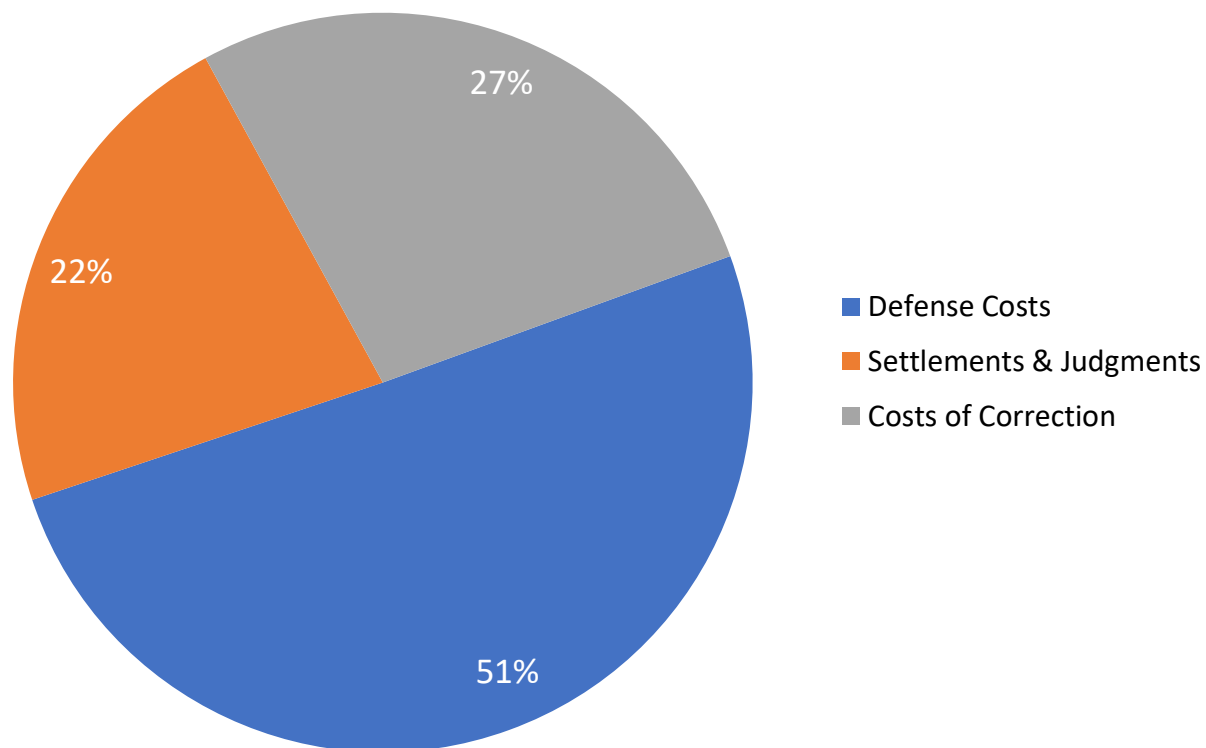
Regulatory matters and costs of correction matters constituted the most common subjects of claims notices submitted under ICI Mutual D&O/E&O policies in 2022. As shown in the chart below, a substantial percentage of notices received (the “Other” category) do not fall neatly into a broader category.



D&O/E&O Claims Data

D&O/E&O Insurance Payments by Category (2000–2022)

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, 2022.



Endnotes

- ¹ See generally ICI Mutual's 2010 Risk Management Study, MUTUAL FUND PROSPECTUS LIABILITY: UNDERSTANDING AND MANAGING THE RISK, <https://www.icimutual.com>.
- ² 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. *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). In September 2020, this lawsuit was consolidated with additional lawsuits with similar allegations that were filed in July and August 2020. 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)). A motion to dismiss, filed in April 2021, remains pending. 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).
- ³ *Xu v. Direxion Shares ETF Tr.*, No. 22-cv-5090 (S.D.N.Y. filed June 16, 2022) (filing of complaint).
- ⁴ *Id.*
- ⁵ *Xu v. Direxion Shares ETF Tr.*, No. 22-cv-5090 (S.D.N.Y. Dec. 5, 2022) (filing of third amended complaint).
- ⁶ *Xu v. Direxion Shares ETF Tr.*, No. 22-cv-5090 (S.D.N.Y. Jan. 20, 2023) (filing of motion to dismiss).
- ⁷ *Hunter v. Infinity Q Diversified Alpha Fund*, No. 651295-2021 (N.Y. Sup. Ct. filed Feb. 24, 2021) (filing of complaint); *Rosenstein v. Tr. for Advised Portfolios*, No. 651302-2021 (N.Y. Sup. Ct. filed Feb. 25, 2021) (filing of complaint).
- 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 *Dominus Multimanager Fund, Ltd. v. Infinity Q Capital Mgmt., LLC*, No. 652906-2022 (N.Y. Sup. Ct. filed Aug. 12, 2022) (filing of complaint). Plaintiffs' allegations in this lawsuit include common law fraud, fraudulent inducement, fraudulent concealment, negligence, negligent misrepresentation, unjust enrichment, and aiding and abetting.
- ¹⁰ In re *Infinity Q Diversified Alpha Fund Secs. Litig.*, No. 651295-2021 (N.Y. Sup. Ct. Dec. 27, 2022) (filing of motion for final approval of settlement).
- ¹¹ *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).
- ¹² *Oak Fin. Grp., Inc. v. Infinity Q Diversified Alpha Fund*, No. 21-cv-3249 (E.D.N.Y. Jan. 13, 2023) (filing of stay in lawsuit). The case is stayed pending the outcome of *SEC v. Infinity Q Diversified Alpha Fund*, No. 22-cv-9608 (S.D.N.Y. filed Nov. 10, 2022).
- ¹³ *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).
- ¹⁴ *Schiavi + Dattani v. Trust for Advised Portfolios*, No. 22-cv-896 (E.D.N.Y. filed Feb. 17, 2022) (filing of complaint).
- ¹⁵ *Sokolow v. Tr. for Advised Portfolios*, No. 21-cv-2317 (E.D.N.Y. filed May 10, 2021) (notice of voluntary dismissal).
- ¹⁶ In re *Infinity Q Diversified Alpha Fund and Infinity Q Volatility Alpha Fund, L.P. Secs. Litig.*, No. 21-cv-1047 (E.D.N.Y. Apr. 7, 2022) (order consolidating lawsuits).
- ¹⁷ *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).

In September 2022, the SEC brought a lawsuit against the individual who served as chief risk officer, chief compliance officer, head of operations, and former portfolio manager of the funds in question for his role in the matter described in these lawsuits. SEC v. Lindell, No. 22-cv-8368 (S.D.N.Y. filed Sept. 30, 2022) (filing of complaint). The SEC obtained a judgment against the individual in October 2022. SEC v. Lindell, No. 22-cv-8368 (S.D.N.Y. Oct. 6, 2022) (final judgment). A parallel lawsuit was filed in state court against the fund’s administrator (which provided all of the fund’s services that were not provided by the adviser) alleging violations of the ’33 Act. This lawsuit was stayed pending the outcome of the state court decision discussed in the text above. Sherck v. U.S. Bancorp Fund Servs., LLC, No. 22-cv-846 (Wis. Cir. Ct. filed Jul. 22, 2022).

- ¹⁸ Koza v. Mut. Fund Series Tr., No. 655297-2020 (N.Y. Sup. Ct. filed Oct. 14, 2020) (filing of complaint).
- ¹⁹ Koza v. Mut. Fund Series Tr., No. 655297-2020 (N.Y. Sup. Ct. May 20, 2021) (filing of motion to dismiss); Koza v. Mut. Fund Series Tr., No. 655297-2020 (N.Y. Sup. Ct. Feb. 16, 2023) (order granting in part and denying in part defendants’ motion to dismiss).
- ²⁰ 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).
- ²¹ Hays v. Am. Cent. Cap. Portfolios, No. 21-cv-8625 (N.D. Cal. Jan. 31, 2022) (filing of notice of voluntary dismissal).
- ²² Jackson v. Allianz Glob. Invs. US LLC, No. 651233-2021 (N.Y. Sup. Ct. filed Feb. 22, 2021) (filing of complaint).
- ²³ Jackson v. Allianz Glob. Invs. US LLC, No. 651233-2021 (N.Y. Sup. Ct. Mar. 13, 2023) (order approving settlement).
- ²⁴ Cole v. Allianz Glob. Invs. U.S. LLC, No. 22-cv-747 (S.D. Cal. filed May 24, 2022) (filing of complaint).
- ²⁵ Cole v. Allianz Glob. Invs. U.S. LLC, No. 22-cv-747 (S.D. Cal. July 20, 2022) (order granting joint motion for dismissal without prejudice).
- ²⁶ 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).
- 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 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.
- ²⁷ 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); 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); Schiavi + Dattani v. Tr. for Advised Portfolios, No. 22-cv-896 (E.D.N.Y. filed Feb. 17, 2022) (filing of complaint).
- ²⁸ Xu v. Direxion Shares ETF Tr., No. 22-cv-5090 (S.D.N.Y. filed June 16, 2022) (filing of complaint).
- ²⁹ See Milbank, Tweed, Hadley & McCloy, *The SEC’s Mutual Fund Fee Initiative: What to Expect*, 16 Secs. Litig. & Reg., at 2 (Nov. 16, 2010) (in 2010, authors note that the SEC “has pursued only two cases under Section 36(b) since 1970, and both were 30 years ago,” and describe how the SEC’s historical inactivity in the area was consistent with past policy views expressed by the agency), https://www.milbank.com/images/content/1/0/1033/111610_Westlaw_SCL1614_Commentary_Cavoli.pdf. Since the above-cited article was published, there appears to be only one section 36(b) lawsuit initiated by the SEC. See SEC v. AMMB Consultant Sendirian Berhad, No. 12-cv-1052 (D.D.C. filed June 26, 2012) (contrary to representations made to a fund’s board, the defendant subadviser allegedly failed to provide certain services to the subadvised fund and collected subadvisory fees for services that were not provided) (defendant subadviser consented on July 13, 2012 to entry of a final judgment for violations of sections 36(b) and 15(c) of the ICA and of anti-fraud provisions of the IAA).
- ³⁰ See, e.g., Deloitte, *Fund Managers: Prepare for the next wave of Section 36(b) litigation and Section 15(c) enforcement* (Sept. 2022), [https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Advisory/us-advisory-fund-managers-prepare-for-the-next-wave-of-section-36\(b\)-litigation-and-enforcement.pdf](https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Advisory/us-advisory-fund-managers-prepare-for-the-next-wave-of-section-36(b)-litigation-and-enforcement.pdf); Greg Saitz, *High Fees. Poor Performance, That’ll Be \$10B in Advisory Fees*, IGNITES (Sept. 20, 2022), <https://www.ignites.com/c/3866164/501244>. See also William Birdthistle, Remarks at the ICI

Investment Management Conference (Mar. 28, 2022), <https://www.sec.gov/news/speech/birdthistle-remarks-ici-investment-management-conference-032822>.

³¹ See, e.g., Nicole Jao, *More Enforcement Sweeps to Come: SEC*, IGNITES (Nov. 22, 2022), <https://www.ignites.com/c/3833474/495854/more-enforcement-sweeps-come>; Greg Saitz, *‘Widows and Orphans’? Who Owns High-Fee, Poor-Return Funds*, IGNITES (Nov. 1, 2022), <https://www.ignites.com/c/3804814/490534>; Greg Saitz, *High Fees. Poor Performance, That’ll Be \$10B in Advisory Fees*, IGNITES (Sept. 20, 2022), <https://www.ignites.com/c/3866164/501244>.

³² These lawsuits were brought in the wake of the decision by the U.S. Supreme Court, in *Jones v. Harris Associates L.P.*, that affirmed the use of the so-called “Gartenberg standard” (as articulated in *Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*, 694 F.2d 923 (2d Cir. 1982)) for assessing the liability of fund advisers in excessive fee cases brought under section 36(b). *Jones v. Harris Assocs. L.P.*, 559 U.S. 335 (2010).

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

³³ *Obeslo v. Great-West Cap. Mgmt., LLC*, 2021 U.S. App. LEXIS 22435 (10th Cir. July 26, 2021).

³⁴ *Verduce v. Vanguard Chester Funds*, No. 22-cv-955 (E.D. Pa. filed Mar. 14, 2022) (filing of complaint).

³⁵ *Liang v. Vanguard Chester Funds*, No. 22-cv-1677 (E.D. Pa. filed Apr. 20, 2022) (filing of complaint); *Harvey v. Vanguard Chester Funds*, No. 22-cv-1741 (E.D. Pa. filed May 5, 2022) (filing of complaint); *Richardson v. Vanguard Chester Funds*, No. 22-cv-2091 (E.D. Pa. filed May 27, 2022) (filing of complaint); *Lichtenstein v. Vanguard Chester Funds*, No. 22-cv-2909 (E.D. Pa. filed July 25, 2022) (filing of complaint). These lawsuits were consolidated into *In re Vanguard Chester Funds Litig.*, No. 22-cv-955 (E.D. Pa. May 16, 2022) (order consolidating *Liang* and *Harvey* lawsuits) & (Sept. 16, 2022) (order consolidating *Richardson* and *Lichtenstein* lawsuits).

³⁶ *In re Vanguard Chester Funds Litig.*, No. 22-cv-955 (E.D. Pa. Nov. 16, 2022) (filing of consolidated complaint).

³⁷ *In re Vanguard Chester Funds Litig.*, No. 22-cv-955 (E.D. Pa. Jan. 27, 2023) (filing of motions to dismiss).

³⁸ See, e.g., *Saba Cap. CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund*, 2022 U.S. Dist. LEXIS 29252 (S.D.N.Y., Feb. 17, 2022) (district court granted summary judgment to plaintiff, finding changes implemented to fund bylaws imposed unequal voting rights among shareholders in violation of the ICA); *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). See also Ben Sheng, *Summer of Saba: Secret deal, ‘misleading’ tactics may give activist edge in fund takeover*, FUND DIRECTIONS (Sept. 2, 2022), <https://funddirections.com/news/78178/summer-of-saba-secret-deal-misleading-election-tactics-may-give-activist-edge-in-fund-takeover/>; Ben Sheng, *Saba targets \$44m New Ireland Fund with director nomination*, FUND DIRECTIONS (Apr. 19, 2022), <https://funddirections.com/news/78065/saba-targets-44m-new-ireland-fund-with-director-nomination/>; Ben Sheng, *CEF activism poised to rebound following slow 2021: report*, FUND DIRECTIONS (Apr. 7, 2022), <https://funddirections.com/analysis/78039/cef-activism-poised-to-rebound-following-slow-2021-report/>.

³⁹ See *Inv. Co. Inst., Recommendations Regarding the Availability of Closed-End Fund Takeover Defenses*, 15–16 (Mar. 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-Act. Letter (Nov. 15, 2010), <https://www.sec.gov/divisions/investment/noaction/2010/bouldertotalreturn111510.htm>.

⁴⁰ 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).

- ⁴¹ See *Saba Cap. CEF Opportunities 1 Ltd. v. Nuveen Floating Rate Income Fund*, No. 2022 U.S. Dist. LEXIS 29252 (S.D.N.Y. Feb. 17, 2022) (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). In one lawsuit, the fund group filed a lawsuit against an activist shareholder for the latter’s “false and misleading proxy solicitation conducted in violation of ... [the ’34 Act] ...” *Johnson v. Saba Cap. Mgmt., L.P.*, No. 22-cv-4915 (S.D.N.Y. filed June 12, 2022). The plaintiff voluntarily dismissed the lawsuit on February 15, 2023.
- ⁴² *Lanotte v. Highland Cap. Mgmt. Fund Advisors, L.P.*, No. 20-10649, 2023 U.S. App. LEXIS 7362 (5th Cir. Mar. 28, 2023), *aff’g*, *Lanotte v. Highland Cap. Mgmt. Fund Advisors, L.P.*, No. 18-cv-2360 (N.D. Tex. May 26, 2020) (order granting motion to dismiss).
- ⁴³ *Dominus Multimanager Fund, Ltd. v. Infinity Q Cap. Mgmt., LLC*, No. 652906-2022 (N.Y. Sup. Ct. filed Aug. 12, 2022) (filing of complaint).
- ⁴⁴ *In re Infinity Q Diversified Alpha Fund Secs. Litig.*, No. 651295-2021 (N.Y. Sup. Ct. Dec. 27, 2022) (filing of motion for final approval of settlement).
- ⁴⁵ *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).
- ⁴⁶ See discussion of control share acquisition statutes at note 39 *supra*.
- ⁴⁷ 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 this 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).
- ⁴⁸ *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).
- ⁴⁹ *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).
- ⁵⁰ *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).
- ⁵¹ *Saba Cap. CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund*, No. 22-407 (2d Cir. filed Feb. 25, 2022) (filing of appeal).
- ⁵² *Eaton Vance Sr. Income Tr. v. Saba Cap. Master Fund, Ltd.*, No. 2084-cv-1533 (Mass. Suffolk Cty. Sup. Ct. filed July 15, 2020). Also at issue in the lawsuit is the validity of another bylaw amendment, which provides that a trustee may only be removed by vote of more than half of all outstanding shares (the “majority rule” amendment).
- ⁵³ *Eaton Vance Sr. Income Tr. v. Saba Cap. Master Fund, Ltd.*, No. 2084-cv-1533 (Mass. Suffolk Cty. Sup. Ct. Jan. 21, 2023) (order granting in part and denying in part motions for partial summary judgment).
- ⁵⁴ See, e.g., Cal. Penal Code § 637.3 (“No person or entity in this state shall use any system which examines or records in any manner voice prints or other voice stress patterns of another person to determine the truth or falsity of statements made by such person without his or her express written consent given in advance of the examination or recordation.”).
- ⁵⁵ See, e.g., *Moore v. T. Rowe Price Ret. Plan Svcs., Inc.*, No. 22-cv-1673 (S.D. Cal. filed Oct. 27, 2022) (filing of complaint) & (Feb. 23, 2023) (filing of notice of voluntary dismissal); *Laughead v. The Charles Schwab Corp.*, No. 22-cv-1498 (S.D. Cal. filed Oct. 3, 2022) (filing of complaint) & (Feb. 23, 2023) (filing of notice of voluntary dismissal); *Blanzar v. FBS*, No. 22-cv-1372 (S.D. Cal. filed Sept. 11, 2022) (filing of complaint) & (Feb. 3, 2023) (order granting motion to dismiss); *Ortiz v. Vanguard Marketing Corp.*, No. 22-cv-1685 (S.D. Cal. filed Oct. 28, 2022) (filing of complaint) & (Feb. 13, 2023) (filing of notice of voluntary dismissal).
- ⁵⁶ *Blaugrund v. Guggenheim Fund Inv. Advisors, LLC*, No. 2021-1094 (Del. Ch. Ct. filed Dec. 17, 2021) (filing of complaint).
- ⁵⁷ *Blaugrund v. Guggenheim Fund Inv. Advisors, LLC*, No. 2021-1094 (Del. Ch. Ct. Feb. 23, 2023) (order granting in part and denying in part defendants’ motion to dismiss).

- ⁵⁸ Leader Cap. Fund v. Eaton Vance Sr. Floating Rate Tr., No. 22-cv-5009 (W.D. Wash. filed Jan. 7, 2022) (filing of complaint).
- ⁵⁹ Leader Cap. Fund v. Eaton Vance Sr. Floating Rate Tr., No. 22-cv-5009 (W.D. Wash. Apr. 8, 2022) (district court dismissed lawsuit without prejudice).
- ⁶⁰ See SEC, Press Rel., SEC Announces Enforcement Results for FY 2022 (Nov. 15, 2022), <https://www.sec.gov/news/press-release/2022-206>. See also David Isenberg, *'Ad Hoc' Is Over: The SEC's Impact on Fund Compliance Teams*, IGNITES (Jan. 12, 2023), <https://www.ignites.com/c/3883464/503584/over-impact-fund-compliance-teams>. The SEC has reportedly sought to streamline the Wells process by excluding the senior leadership of the Enforcement Division from Wells meetings unless they involve novel issues or raise significant policy questions. See Justin Anderson, *SEC Enforcement: 2022 Year in Review*, Paul, Weiss, Rifkind, Wharton & Garrison LLP (Feb. 1, 2023), <https://www.paulweiss.com/practices/litigation/white-collar-regulatory-defense/publications/sec-enforcement-2022-year-in-review?id=45933>.
- ⁶¹ SEC, Proposed Rule, Safeguarding Advisory Client Assets, 88 FR 14672 (Mar. 9, 2023), <https://www.sec.gov/rules/proposed/2023/ia-6240.pdf>. See also Statement on Proposed Rule Regarding the Safeguarding of Advisory Client Assets (Feb. 15, 2023), <https://www.sec.gov/news/statement/uyeda-statement-custody-021523>.
- ⁶² SEC, Press Rel., SEC Announces Enforcement Results for FY 2022 (Nov. 15, 2022), <https://www.sec.gov/news/press-release/2022-206>, at addendum (indicating that 85, or approximately 26%, of its stand-alone actions in fiscal year 2022 were against investment companies/investment advisers).
- ⁶³ In re City Nat'l Rochdale, LLC, File 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).
- ⁶⁴ In re BNY Mellon Inv. Adviser, Inc., File No. 3-20867 (SEC May 23, 2022), <https://www.sec.gov/litigation/admin/2022/ia-6032.pdf> (finding that the subadviser to several mutual funds made investments that were inconsistent with the funds' prospectus disclosure that represented that all of the funds' investments were screened for ESG considerations); In re Goldman Sachs Asset Mgmt., L.P., File No. 3-21245 (SEC Nov. 22, 2022), <https://www.sec.gov/litigation/admin/2022/ia-6189.pdf> (finding that an investment adviser failed to adopt and implement policies and procedures governing how ESG factors were evaluated as part of the investment process).
- ⁶⁵ In re Garrison Pt. Cap. LLC, File No. 3-20876 (SEC June 3, 2022), <https://www.sec.gov/litigation/admin/2022/ia-6039.pdf> (finding that a fund's subadviser overstated NAV by misvaluing "odd-lot" bonds); In re Alphacentric Advisors LLC, File No. 3-20877 (SEC June 3, 2022), <https://www.sec.gov/litigation/admin/2022/ia-6040.pdf> (finding that a registered investment adviser failed to oversee the subadviser's valuation of portfolio securities).
- ⁶⁶ In re TOEWS Corp., File No. 3-21113 (SEC Sept. 20, 2022), <https://www.sec.gov/litigation/admin/2022/ia-6139.pdf> (finding that an investment adviser failed to take steps to determine that proxy votes cast at shareholder meetings on behalf of registered funds were cast in the funds' best interest).
- ⁶⁷ In re Legal & Gen'l Inv. Mgmt. Am., Inc., File No. 3-21244 (SEC Nov. 21, 2022), <https://www.sec.gov/litigation/admin/2022/ia-6188.pdf> (finding that a registered investment adviser effected cross trades between registered funds and other affiliates without complying with statutory requirements for such trades).
- ⁶⁸ In re Allianz Global Investors U.S. LLC, No. 3-20855 (SEC May 17, 2022) (settling respondent agreeing to pay over \$1 billion in penalties to the SEC and over \$5 billion in restitution to investors, and to be barred from providing advisory services to registered investment companies for ten years), <https://www.sec.gov/litigation/admin/2022/34-94927.pdf>; In re Stephen G. Bond-Nelson, No. 3-20854 (SEC May 17, 2022), <https://www.sec.gov/litigation/admin/2022/34-94926.pdf>; In re Trevor L. Taylor, No. 3-20853 (SEC May 17, 2022), <https://www.sec.gov/litigation/admin/2022/34-94925.pdf>. See also Press Rel., SEC Charges Allianz Global Investors and Three Former Senior Portfolio Managers with Multibillion Dollar Securities Fraud (May 17, 2022), <https://www.sec.gov/news/press-release/2022-84>; Beagan Wilcox Volz, *Allianz Barred from Fund Biz; Voya Swoops In*, IGNITES (May 17, 2022), <https://www.ignites.com/c/3609564/463364>.

The adviser and the two former portfolio managers simultaneously pled guilty to criminal charges involving the same conduct. DOJ, Office of Public Affairs, *Three Portfolio Managers and Allianz Global Investors U.S. Charged in Connection with Multibillion-Dollar Fraud Scheme* (May 17, 2022), <https://www.justice.gov/opa/pr/three-portfolio-managers-and-allianz-global-investors-us-charged-connection-multibillion>; U.S. v. Tournant, No. 22-cr-276 (S.D.N.Y. filed May 17, 2022) (filing of indictment); U.S. v. Trevor Taylor, No. 22-cr-149 (S.D.N.Y. filed Mar. 3, 2022) (filing of indictment); U.S. v. Stephen Bond-Nelson, No. 22-cr-137 (S.D.N.Y. filed Mar. 3, 2022) (filing of indictment); U.S. v. Allianz Global Investors U.S. LLC., No. 22-cr-279 (S.D.N.Y. filed May 17, 2022) (filing of consent/preliminary order of forfeiture/money judgment).

A related class action lawsuit involving the use of the same investment strategy by a registered fund was filed in May 2022. *Cole v. Allianz Glob. Invs. U.S. LLC*, No. 22-cv-747 (S.D. Cal. filed May 24, 2022) (filing of complaint). In July 2022, the district court dismissed the lawsuit without prejudice. *Cole v. Allianz Glob. Invs. U.S. LLC*, No. 22-cv-747 (S.D. Cal. July 20, 2022) (order granting joint motion for dismissal without prejudice).

- 69 SEC v. Tournant, No. 22-cv-4016 (S.D.N.Y. filed May 17, 2022) (filing of complaint).
- 70 SEC v. Tournant, No. 22-cv-4016, 2022 U.S. Dist. LEXIS 100364 (S.D.N.Y. June 1, 2022) (partial judgments against two defendants).
- 71 Press Rel., SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures (Sept. 27, 2022), <https://www.sec.gov/news/press-release/2022-174>; Press Rel., CFTC Orders 11 Financial Institutions to Pay Over \$710 Million for Recordkeeping and Supervision Failures for Widespread Use of Unapproved Communication Methods, CFTC Rel. No. 8599-22 (Sept. 27, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8599-22>; Press Rel., JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay \$125 Million Penalty to Resolve SEC Charges (Dec. 17, 2021), <https://www.sec.gov/news/press-release/2021-262>; Press Rel., CFTC Orders JPMorgan to Pay \$75 Million for Widespread Use by Employees of Unapproved Communication Methods and Related Recordkeeping and Supervision Failures, CFTC Rel. No. 8470-21 (Dec. 17, 2021), <https://www.cftc.gov/PressRoom/PressReleases/8470-21>.
- 72 Joe Morris, *SEC Pings Fund Firms Over WhatsApp*, IGNITES (Oct. 12, 2022), <https://www.ignites.com/c/3783634/488814>.
- 73 Joe Morris, *BlackRock Swept Up in Messaging Apps Probe*, IGNITES (Feb. 27, 2023), <https://www.ignites.com/c/3952494/512634>.
- 74 SEC v Billimek, No. 22-cv-10542 (S.D.N.Y. filed Dec. 14, 2022) (filing of complaint).
- 75 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 77)).
- 76 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 77)).
- 77 USA v. Velissaris, No. 22-cr-105 (S.D.N.Y. filed Feb. 16, 2022) (filing of indictment) & (Nov. 21, 2022) (beginning of trial).
- 78 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); 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); Schiavi + Dattani v. Tr. for Advised Portfolios, No. 22-cv-896 (E.D.N.Y. filed Feb. 17, 2022) (filing of complaint).
- 79 SEC, Proposed Rule, Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654 (June 17, 2022), <https://www.sec.gov/news/press-release/2022-92>.
- 80 *See* SEC, Proposed Rule, Investment Company Names, 87 Fed. Reg. 36594 (June 17, 2022); Press Rel., SEC Proposes Rule Changes to Prevent Misleading or Deceptive Fund Names (May 25, 2022), <https://www.sec.gov/news/press-release/2022-91>; David Isenberg, *SEC: ESG Funds Comply with Names Rule Now*, IGNITES (Sept. 9, 2022), <https://www.ignites.com/c/3743364/482404>.
- 81 SEC, EXAMS, 2023 Nat'l Exam Program Examination Priorities, 9–17 (Feb. 7, 2023), <https://www.sec.gov/files/2023-exam-priorities.pdf>.
- 82 In re BNY Mellon Inv. Adviser, Inc., No. 3-20867 (SEC May 23, 2022), <https://www.sec.gov/litigation/admin/2022/ia-6032.pdf>.
- 83 In re Goldman Sachs Asset Mgmt., No. 3-21245 (SEC Nov. 22, 2022), <https://www.sec.gov/litigation/admin/2022/ia-6189.pdf>.
- 84 Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822 (Dec. 1, 2022).
- 85 Utah v. Walsh, No. 23-cv-16 (N.D. Tex. filed Jan. 26, 2023); Joe Morris, *25 States Sue to Stop DOL's ESG Rule*, IGNITES (Jan. 27, 2023), <https://www.ignites.com/c/3911004/506754>.

- ⁸⁶ See, e.g., *The State of Anti-ESG State Legislation*, Morgan, Lewis & Bockius (Aug. 25, 2022) (describing these two broad categories of state legislation and including a chart summarizing them), <https://www.morganlewis.com/blogs/mlbenebits/2022/08/the-state-of-anti-esg-state-legislation>; *The challenge of investing in the face of state anti-ESG legislation*, Morgan, Lewis & Bockius (Aug. 24, 2022) (noting that “these anti-ESG Bills vary considerably from state to state,” but that “[a]lmost all ... require state entities to take certain anti-ESG actions, be it divesting from companies that engage in ESG investing or refusing to contract with companies that engage in ESG discrimination (the definition of which varies somewhat state-to-state)”), <https://www.reuters.com/legal/legalindustry/challenge-investing-face-state-anti-esg-legislation-2022-08-24/>; Joe Morris, *Louisiana Blacklists BlackRock from State Investments*, IGNITES (Oct. 6, 2022), <https://www.ignites.com/c/3777154/485444>; Brenna Goth, *State Lawmakers Push Texas-Style Business Penalties Against ESG*, BLOOMBERG LAW (Jan. 30, 2023), <https://news.bloomberglaw.com/esg/state-lawmakers-push-texas-style-business-penalties-against-esg>.
- ⁸⁷ See, e.g., Sajil Kishan, *Republicans Prepare to Ramp Up Their Anti-ESG Campaign in 2023*, BLOOMBERG LAW (Dec. 29, 2022), <https://news.bloomberglaw.com/environment-and-energy/republicans-prepare-to-ramp-up-their-anti-esg-campaign-in-2023>; Steven Mufson, *Meet the group sharpening the GOP attack on ‘woke’ climate policies*, WASH. POST (Jan. 30, 2023), <https://www.washingtonpost.com/climate-environment/2023/01/30/climate-change-sustainable-investing/>.
- ⁸⁸ *Sokolow v. Tr. for Advised Portfolios*, No. 21-cv-2317 (E.D.N.Y. May 10, 2021) (filing voluntary dismissal); *Oak Fin. Grp., Inc. v. Infinity Q Diversified Alpha Fund*, No. 21-cv-3249 (E.D.N.Y. Jan. 13, 2023) (order staying lawsuit); *In re Infinity Q Diversified Alpha Fund and Infinity Q Volatility Alpha Fund L.P. Secs. Litig.*, No. 21-cv-1047 (E.D.N.Y. Apr. 8, 2022) (order consolidating cases).
- ⁸⁹ *SEC v. Infinity Q Diversified Alpha Fund*, No. 22-cv-9608 (S.D.N.Y. filed Nov. 10, 2022) (filing of complaint).
- ⁹⁰ *SEC v. Infinity Q Diversified Alpha Fund*, No. 22-cv-9608 (S.D.N.Y. Nov. 17, 2022) (final judgment).
- ⁹¹ *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).
- ⁹² *USA v. Polevikov*, No. 21-cr-774 (S.D.N.Y. filed Dec. 15, 2021) (filing of complaint) & (Apr. 22, 2022) (final judgment).
- ⁹³ *SEC v. Polevikov*, No. 21-cv-7925 (S.D.N.Y. July 29, 2022) (final judgment).
- ⁹⁴ SEC, EXAMS, 2023 Nat’l Exam Program Examination Priorities, 9–17 (Feb. 7, 2023), <https://www.sec.gov/files/2023-exam-priorities.pdf>.
- ⁹⁵ *Id.*
- ⁹⁶ *Id.* See also *SEC Pings Fund Firms Over WhatsApp*, IGNITES (Oct. 12, 2022), <https://www.ignites.com/c/3783634/488814>; Joe Morris, *BlackRock Swept Up in Messaging Apps Probe*, IGNITES (Feb. 27, 2023), <https://www.ignites.com/c/3952494/512634>. This area of focus is longstanding, as indicated by a 2018 Risk Alert: Observations from Investment Adviser Examinations Relating to Electronic Messaging (Dec. 14, 2018), <https://www.sec.gov/files/OCIE%20Risk%20Alert%20-%20Electronic%20Messaging.pdf>.
- ⁹⁷ See Press Rel., SEC Nearly Doubles Size of Enforcement’s Crypto Assets and Cyber Unit (May 3, 2022), <https://www.sec.gov/news/press-release/2022-78>.
- ⁹⁸ 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>.
- ⁹⁹ SEC, EXAMS, 2023 Nat’l Exam Program Examination Priorities, 9–17 (Feb. 7, 2023), <https://www.sec.gov/files/2023-exam-priorities.pdf>.
- ¹⁰⁰ See, e.g., Press Rel., SEC Charges JPMorgan, UBS, and TradeStation for Deficiencies Relating to the Prevention of Customer Identity Theft (July 20, 2022), <https://www.sec.gov/news/press-release/2022-131>; Press Rel., Morgan Stanley Smith Barney to Pay \$35 Million for Extensive Failures to Safeguard Personal Information of Millions of Customers (Sept. 20, 2022), <https://www.sec.gov/news/press-release/2022-168>.
- ¹⁰¹ SEC, EXAMS, 2023 Nat’l Exam Program Examination Priorities, 16 (Feb. 7, 2023), <https://www.sec.gov/files/2023-exam-priorities.pdf>.

- ¹⁰² SEC, EXAMS, Risk Alert: Observations from Examinations of Private Fund Advisers (Jan. 27, 2022), <https://www.sec.gov/files/private-fund-risk-alert-pt-2.pdf>.
- ¹⁰³ SEC, EXAMS, Risk Alert: Investment Adviser MNPI Compliance Issues (Apr. 26, 2022), <https://www.sec.gov/files/code-ethics-risk-alert.pdf>.
- ¹⁰⁴ SEC, EXAMS, Risk Alert: Examinations Focused on the New Investment Adviser Marketing Rule (Sept. 19, 2022), <https://www.sec.gov/files/exams-risk-alert-marketing-rule.pdf>.
- ¹⁰⁵ SEC, EXAMS, Risk Alert: Observations from Broker-Dealer and Investment Adviser Compliance Examinations Related to Prevention of Identity Theft Under Regulation S-ID (Dec. 5, 2022), <https://www.sec.gov/files/risk-alert-reg-s-id-120522.pdf>.
- ¹⁰⁶ See SEC, EXAMS, 2023 Nat'l Exam Program Examination Priorities, 1 (Feb. 7, 2023), <https://www.sec.gov/files/2023-exam-priorities.pdf>.
- ¹⁰⁷ FINRA, Report on FINRA's Examination and Risk Monitoring Program (Jan. 10, 2023), <https://www.finra.org/sites/default/files/2023-01/2023-report-finras-examination-risk-monitoring-program.pdf>.
- ¹⁰⁸ FINRA Letter of Acceptance, Waiver, and Consent, No. 2021069495301 (Dec. 21, 2022), https://www.finra.org/sites/default/files/fda_documents/2021069495301%20Morgan%20Stanley%20Smith%20Barney%20LLC%20CRD%20149777%20AWC%20gg.pdf.
- ¹⁰⁹ See, e.g., Statement of Commodity Futures Trading Commission Chairman Rostin Behnam at the December 16, 2022 Financial Stability Oversight Council Meeting (Dec. 16, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement121622>. See also Opening Statement of Chairman Rostin Behnam before the Agricultural Advisory Committee (Dec. 7, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement120722>.
- ¹¹⁰ Statement of Commodity Futures Trading Commission Chairman Rostin Behnam at the December 16, 2022 Financial Stability Oversight Council Meeting (Dec. 16, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement121622>.
- ¹¹¹ *Id.*
- ¹¹² See, e.g., Statement of Commissioner Kristin N. Johnson Regarding CFTC Consent Order of \$2.8 Million in Restitution for Virtual Currency Fraud (Dec. 1, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/johnsonstatement120122>; Remarks of CFTC Commissioner Christy Goldsmith Romero before the International Swaps and Derivatives Association's Crypto Forum 2022, New York (Oct. 26, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/oparomero3>.
- ¹¹³ See, e.g., Keynote Address by Commissioner Christy Goldsmith Romero at FIA & SIFMA Asset Management Derivatives Forum, (Feb. 10, 2023), <https://www.cftc.gov/PressRoom/SpeechesTestimony/oparomero6>.
- ¹¹⁴ 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).
- ¹¹⁵ See Press Rel., CFTC Orders 11 Financial Institutions to Pay Over \$710 Million for Recordkeeping and Supervision Failures for Widespread Use of Unapproved Communication Methods (Sept. 27, 2022), <https://www.cftc.gov/PressRoom/PressReleases/8599-22>; Press Rel., SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures (Sept. 27, 2022), <https://www.sec.gov/news/press-release/2022-174>.
- ¹¹⁶ 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>.
- ¹¹⁷ See, e.g., Andrew Welsch, *Vanguard to Pay Massachusetts Investors Millions Over Target-Date Fund Tax Hit*, BARRONS (July 7, 2022), <https://www.barrons.com/advisor/articles/vanguard-target-date-capital-gains-massachusetts-51657222182>; Palash Gosh, *Vanguard to pay \$6 million to Massachusetts investors in some target-date funds*, PENSIONS & INVESTMENTS (July 8, 2022), <https://www.pionline.com/investing/vanguard-pay-6-million-massachusetts-investors-over-capital-gains-target-date-funds> (the state alleged that the investment manager's target date funds distributed large capital gains to fund shareholders, resulting in "unexpectedly large tax bills").

- ¹¹⁸ In re Vanguard Chester Funds Litig., No. 22-cv-955 (E.D. Pa. filed Mar. 14, 2022) (In January 2023, the defendants, including the funds, advisers, and independent trustees, filed motions to dismiss the consolidated complaint. The district court’s ruling on the motions is still pending).
- ¹¹⁹ 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 INSURED, at 35–36, <https://www.icimutual.com> (discussing insurance for the costs of correcting operations-based errors).
- ¹²⁰ In light of this claims experience, in July 2021, ICI Mutual published a risk management study entitled OPERATIONAL ERRORS AND INSURANCE: A GUIDE FOR INVESTMENT ADVISERS, <https://www.icimutual.com>. 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.
- ¹²¹ *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>.
- ¹²² *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>.
- ¹²³ The count of “proprietary funds” lawsuits set forth herein does not include cases that were consolidated into other cases.
- ¹²⁴ The 2022 final settlement was *Feinberg v. T. Rowe Price Grp., Inc.*, No. 17-cv-427 (D. Md. Jul. 6, 2022) (\$7 million).

The pre-2022 final settlements were 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); *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 million); *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 Am. 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).

- ¹²⁵ *Rocke v. Allianz Asset Mgmt. of Am., L.P.*, No. 23-cv-98 (C.D. Cal. filed Jan. 17, 2023) (filing of complaint); *Cho v. Prudential Ins. Co. of Am.*, No. 19-cv-19886 (D.N.J. Sept. 12, 2022) (filing of third amended complaint) (defendants’ motion to dismiss the second amended complaint was granted in part and denied in part on Aug. 12, 2022).
- ¹²⁶ *Bloom v. AllianceBernstein L.P.*, No. 22-cv-10576 (S.D.N.Y. Feb. 24, 2023) (filing of motion to dismiss); *Schissler v. Janus Henderson US (Holdings) Inc.*, No. 22-cv-2326 (D. Colo. Feb. 9, 2023) (filing of motion to dismiss); *Ravarino v. Voya Fin., Inc.*, No. 21-cv-1658 (D. Conn. Feb. 28, 2022) (filing of motion to dismiss).

- ¹²⁷ Waldner v. Natixis Inv. Mgrs., N.P., 2021 U.S. Dist. LEXIS 259886 (D. Mass. Dec. 20, 2021) (order denying motion to dismiss).
- ¹²⁸ In re G.E. ERISA Litig., No. 17-cv-12123 (D. Mass. Sept. 1, 2022) (filing of defendants' motion for summary judgment) & (Sept. 2, 2022) (filing of plaintiffs' motion for partial summary judgment).
- ¹²⁹ Pecou v. Bessemer Tr. Co., No. 22-cv-377 (D.N.J. filed Jan. 26, 2022) (filing of motion for preliminary approval of \$5 million settlement).
- ¹³⁰ Falberg v. The Goldman Sachs Grp., Inc., No. 19-cv-9910 (S.D.N.Y. Sept. 14, 2022) (order granting defendants' motion for summary judgment), *appeal docketed*, No. 22-2689 (2d Cir. filed Oct. 18, 2022).
- ¹³¹ Feinberg v. T. Rowe Price Grp., Inc., No. 17-cv-427 (D. Md. July 6, 2022) (final approval of \$7 million settlement).
- ¹³² 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).
- ¹³³ 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).
- ¹³⁴ 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).
- ¹³⁵ 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).
- ¹³⁶ Severson v. Charles Schwab & Co. Inc., No. 17-cv-285 (N.D. Cal. Nov. 20, 2019) (order staying lawsuit pending arbitration and administratively closing lawsuit, subject to re-opening if a petition to enforce any arbitration award is filed). To date, the lawsuit has not been re-opened.
- ¹³⁷ Gomes v. State St. Corp., No. 21-cv-10863 (D. Mass. filed May 25, 2021) (filing of complaint).
- ¹³⁸ Becker v. Wells Fargo & Co., No. 20-cv-2016 (D. Minn. June 30, 2022) (filing of final approval of settlement and entering final judgment and dismissal).
- ¹³⁹ Gomes v. State St. Corp., No. 21-cv-10863 (D. Mass. July 26, 2021) (filing of motion to dismiss) & (Mar. 6, 2023) (order staying case pending mediation).
- ¹⁴⁰ Conlon v. The Northern Tr. Co., No. 21-cv-2940 (N.D. Ill. Aug. 8, 2022) (order denying motion to dismiss); Kohari v. MetLife Grp., Inc., No. 21-cv-6146 (S.D.N.Y. Aug. 1, 2022) (order denying motion to dismiss) (an amended complaint was subsequently filed on Sept. 1, 2022).
- ¹⁴¹ Johnson v. Russell Inv. Mgmt., No. 21-cv-743 (W.D. Wash. filed June 7, 2021) (filing of complaint) (transferred to Johnson v. Russell Inv. Mgmt., No. 22-cv-21735 (S.D. Fla. filed June 7, 2022)).
- ¹⁴² Johnson v. Russell Inv. Mgmt., No. 22-cv-21735 (S.D. Fla. July 1, 2022) (order staying and administratively closing the case pending the plaintiff's exhaustion of administrative remedies); Johnson v. Russell Inv. Mgmt., No. 22-cv-21735 (S.D. Fla. Mar. 20, 2023) (order reopening case).
- ¹⁴³ *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 152.
- ¹⁴⁴ Kirschner v. Large S'holders, 10 F.4th 147 (2d Cir. Aug. 20, 2021), *cert. denied*, No. 21-1006 (U.S. Feb. 22, 2022).
- ¹⁴⁵ In re Nine West LBO Secs. Litig., No. 20-md-2941 (S.D.N.Y. filed June 5, 2020) (filing of complaint).
- ¹⁴⁶ In re Nine West LBO Secs. Litig., 482 F. Supp. 3d 187 (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.”

- ¹⁴⁷ 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).
- ¹⁴⁸ 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)).
- ¹⁴⁹ Sears Holdings Corp. v. Tisch, No. 20-ap-7007 (Bankr. S.D.N.Y. Jan. 19, 2021) (filing of motion to dismiss).
- ¹⁵⁰ Sears Holdings Corp. v. Tisch, No. 20-ap-7007 (Bankr. S.D.N.Y. Sept. 2, 2022) (order approving settlement agreement).
- ¹⁵¹ In re Fin. Oversight & Mgmt. Bd. for Puerto Rico, No. 17-bk-3283 (D.P.R. filed May 3, 2017).
- ¹⁵² *See, e.g.*, Special Claims Comm. of the Fin. Oversight & Mgmt. Bd. for PR 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”).
- ¹⁵³ In re Fin. Oversight & Mgmt. Bd. for Puerto Rico, No. 17-bk-3283 (D.P.R. Jan. 18, 2022) (approval of plan).
- ¹⁵⁴ PR Adversary Proceedings (D.P.R. Mar. 27, 2022) (filings of voluntary dismissals).

Note

This *Claims Trends* is current through March 31, 2023. 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 enforcement 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.

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