Claims Trends

A Review of Claims Activity in the Mutual Fund Industry (January 2023–March 2024)

ICIMutual

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Abbreviations used in this *Claims Trends*:

'33 Act	Securities Act of 1933
'34 Act	Securities Exchange Act of 1934
CFTC	U.S. Commodity Futures Trading Commission
DOJ	U.S. Department of Justice
DOL	U.S. Department of Labor
ERISA	Employee Retirement Income Security Act of 1974
EXAMS	Division of Examinations of the SEC
FINRA	Financial Industry Regulatory Authority
IAA	Investment Advisers Act of 1940
ICA	Investment Company Act of 1940
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 2023 saw a modest year-over-year increase 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 2019–2023, 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 in recent years. (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 few years. 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, no new prospectus liability lawsuits were filed in 2023 and early 2024, but there were developments in earlier prospectus liability lawsuits.[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.

While no new prospectus liability lawsuits were filed in 2023 and early 2024, there were developments in earlier prospectus liability lawsuits.

- *Alleged Misrepresentations of Investment Objective and Breach of Fiduciary Duty:* In June 2022, a lawsuit alleging both '33 Act and '34 Act violations was filed in federal district court against a fund, its board of trustees (including independent trustees), its investment adviser, and certain officers, alleging 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.[3] In August 2023, the district court granted the defendants' motion to dismiss the lawsuit.[4] No appeal was filed.

- *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, subsequently consolidated, allege that a mutual fund, its adviser, its trustees (including independent trustees) and certain officers, and its 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.[5] The parties to the consolidated lawsuit reached a settlement agreement (which also settled another lawsuit that was filed in New York state court in August 2022 against many of the same defendants[6]). In December 2023, the state court approved a final settlement of the lawsuit for up to $48 million.[7]

  Many of the same defendants were involved in three other lawsuits (on a consolidated basis) that were initiated in 2021 and 2022 and variously alleged '33 Act and/or '34 Act violations.[8] Each of these other lawsuits has concluded pursuant to voluntary dismissals, most recently in March 2024.[9] 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.[10]

- *Alleged Failure to Follow Investment Objective:* In October 2020, a plaintiff filed a New York 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.[11] The defendants' motion to dismiss, filed in May 2021, was granted in part and denied in part in February 2023.[12] The litigation remains pending.

- *Alleged Misrepresentations of Investment Strategy:* In August 2021, a class action lawsuit was filed in New York 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.[13] In March 2023, the state court approved a $145 million settlement of the lawsuit.[14] The litigation is now concluded.

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.[15]

Disclosure-based lawsuits often include allegations of both '34 Act violations and '33 Act violations, as evidenced by the first two sets of lawsuits discussed in the previous section but may also be brought solely under the '34 Act. For example, in January 2024, plaintiffs alleged that an investment adviser and a payroll company misrepresented the qualifications of the distributor in sales of mutual funds to retirement plans.[16] Two motions to dismiss, filed by separate defendants in March 2024, remain pending.[17]

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 no new section 36(b) proceedings have been initiated against fund advisers in recent years, 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 and has not done so in recent years.[18] Nonetheless, the Division of Examinations has made fund fees a priority for 2024.[19] Of note, in 2022, the SEC's Division of Enforcement reportedly conducted a "fact-finding inquiry" of fund groups with respect to fees and performance.[20] To date, the results of this "fact-finding inquiry" remain unclear.

Section 36(b) Lawsuits and the Plaintiffs' Bar

As discussed in prior *Claims Trends*, over the period 2000–2018, the plaintiffs' bar initiated twenty-nine section 36(b) lawsuits, involving a total of twenty-six fund groups.[21] This wave of excessive fee lawsuits finally ended in 2021, with a final resolution of the last pending lawsuit.[22] No new section 36(b) lawsuits appear to have been filed since 2018.

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.

From March 2022 to June 2022, five substantially similar class action lawsuits (later consolidated) were 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.[23] The defendants' motions to dismiss, filed in January 2023, were granted in part and denied in part in November 2023.[24] In March 2024, the plaintiffs filed an amended complaint.[25]

An unrelated lawsuit filed in September 2018 alleged that a mutual fund's investment adviser and trustees (including independent trustees), along with the fund as a nominal defendant, violated their fiduciary duties and contractual obligations under state and common law by permitting the fund to invest in and "prop up" another fund within the same trust. In March 2023, the Fifth Circuit upheld the district court's May 2020 dismissal of this lawsuit, thereby ending the lawsuit.[29]

Closed-End Fund Litigation: Litigation involving closed-end funds under state or common law has often involved activist shareholders of closed-end funds (see box, below). Although these challenges have historically involved state or common law issues, many recent closed-end fund lawsuits—chiefly initiated by one activist shareholder—raise a federal law issue (specifically, whether certain closed-end fund governance provisions violate the ICA).

Closed-End Fund Litigation Alleging ICA Violations

In January 2021, an activist shareholder filed a direct lawsuit in federal court in New York against several closed-end funds and their trustees (including independent trustees).[30] The lawsuit alleged that the "control share acquisition" bylaw amendments adopted by the funds violate the ICA.[31] The lawsuit sought rescission of those amendments, citing a 2019 Second Circuit decision holding that section 47(b) of the ICA provides an implied private right of action for rescission of contracts that violate the ICA.[32] In March 2021 and April 2021, respectively, the defendants filed

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.[26] 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).[27]

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.[28] Of note, as described in the text, one shareholder has been particularly active in challenging the governance practices of a number of closed-end funds offered by various fund groups.

a motion to dismiss the lawsuit, and the plaintiffs filed a motion for summary judgment.[33] The district court's February 2022 order granting summary judgment was affirmed by the Second Circuit in November 2023.[34]

The permissibility of "control share" bylaw amendments under the ICA is also at issue in other litigation. In a lawsuit filed in state court in July 2020, the same activist shareholder filed counterclaims against an investment adviser, certain closed-end funds, and their trustees (including independent trustees), challenging each fund's control share bylaw amendment, as well as another bylaw amendment.[35] In January 2023, in an order granting in part and denying in part the parties' motions for partial summary judgment, the court held that each fund's control share bylaw amendment violated the ICA and ordered rescission of the control share bylaw amendment.[36] A trial in the litigation is scheduled for September 2024.

In June 2023, the same activist shareholder filed another control share lawsuit against sixteen Maryland-domiciled closed-end funds and the trustees (including independent trustees) of certain of those funds challenging the funds' adoption of control share bylaw provisions under the ICA.[37] In August 2023, the fund defendants filed a motion to dismiss, which the district court granted as to five defendant funds (and their associated trustees, including independent trustees) and denied as to the remaining defendants in September 2023.[38] In October 2023, the remaining defendant funds (including independent trustees of certain funds) filed motions to dismiss, which, in December 2023, the district court denied and granted summary judgment to the plaintiffs, holding that the bylaws at issue violate the ICA and ordering the rescission of the bylaws.[39] In late December 2023 and early January 2024, a number of the defendants (including independent trustees) appealed the district court's decision.[40] The appeals remain pending.

In May 2023, a different activist shareholder filed a lawsuit in a federal court in Massachusetts against an investment adviser and the trustees (including independent trustees) of a closed-end fund challenging, among other things, the control share provision in the fund's bylaws under the ICA.[41] Defendants filed a motion to dismiss in August 2023.[42] In October 2023, pursuant to a stipulation by the parties, the district court dismissed the lawsuit with prejudice.[43] The lawsuit appears to be substantively concluded, with a remaining dispute over attorneys' fees.

In January 2024 and March 2024, the activist shareholder involved in most of the "control share" lawsuits filed two additional complaints in federal court in New York with respect to closed-end funds alleging violations of the ICA. The first lawsuit, filed against a closed-end fund and its directors (including independent directors), alleges that the closed-end fund's "poison pill" plan violates the ICA.[44] The second lawsuit, filed against a closed-end fund and its trustees (including independent trustees), alleges that a bylaw provision "entrenches" the board in violation of the ICA.[45] Both lawsuits are in their early stages.

Other Closed-End Fund Litigation

In December 2021, a shareholder filed a derivative and class action lawsuit against a closed-end fund's adviser, sub-adviser, and trustees (including independent trustees), alleging breaches of fiduciary duties and breach of contract with respect to the management of the fund during market volatility in 2020.[46] The defendants' motion to dismiss, filed in March 2021, was granted in part and denied in part in February 2023.[47] In January 2024, the state court stayed the lawsuit pending the court's consideration of a settlement reached in principle by the parties.[48]

Regulatory Developments

The SEC pursued an active enforcement agenda in fiscal year 2023, bringing 501 original or "standalone" enforcement actions (including eighty-six "standalone" proceedings against investment advisers or investment companies). In its announcement of enforcement results for fiscal year 2023, the SEC emphasized its focus on, among other things, addressing misconduct that prevented effective oversight of the securities industry, rewarding meaningful cooperation, and holding entities and individuals accountable for their misconduct.[49]

The SEC's agency-wide priorities were also reflected in various rules adopted in 2023, including those regarding investment company names[50] and cybersecurity disclosures of public companies.[51] Certain other rule proposals—including rules proposed in 2022 regarding (1) environmental, social, and governance ("ESG") issues for registered funds and (2) cybersecurity risk management for investment advisers and registered funds—have yet to be adopted. With respect to the growing use of artificial intelligence ("AI"), the SEC proposed new rules in July 2023 regarding the use of predictive analytics by broker-dealers and investment advisers.[52]

In addition to agency-wide priorities, other focus areas may be communicated by SEC staff in speeches and other guidance. For example, in February 2023, the SEC's Division of Investment Management issued a bulletin reminding funds and their boards about ICA rules regarding fund fee waivers and expense reimbursement arrangements.[53]

SEC Enforcement Actions

In fiscal year 2023, approximately one sixth 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).[54] 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

Administrative proceedings initiated and/or resolved by the SEC in 2023 and early 2024 against advisers (and/or their affiliates) of registered funds involved various issues, including unlawful service as an investment adviser and principal underwriter to registered funds ($10 million in disgorgement and penalties),[55] unlawful pre-arranged cross trades involving several registered money market funds,[56] misrepresentations regarding investment disclosures ($2.5 million penalty),[57] failure to develop a mutual fund anti-money laundering program ($6 million penalty),[58] failure to communicate an ETF's fee structure to its board ($1.75 million penalty),[59] use of a prohibited joint transaction to the detriment of an ETF ($4.4 million penalty),[60] misstatements regarding an adviser's ESG investment process and related policies and procedures ($19 million penalty),[61] failure to waive mutual fund advisory fees as required by its advisory

Use of "Off-Channel" Electronic Communications

In February 2024, the SEC brought administrative actions against broker-dealers, investment advisers, and dual registrants for their failures to maintain and preserve records of certain communications. In all, sixteen entities were collectively fined over $81 million for failing to monitor employees' use of unauthorized messaging apps (such as WhatsApp).[62] These administrative proceedings follow dozens of others that the SEC (along with the CFTC) has brought in the past two years, with the fines imposed in these actions totaling over $1.5 billion. The SEC has indicated that it will continue to pursue possible violations by fund industry participants of federal recordkeeping requirements.[63]

agreement ($2.5 million penalty),[64] and inadequate disclosure of the use of paired interest rate swaps in a closed-end fund ($9 million penalty).[65]

With respect to administrative proceedings initiated and/or resolved by the SEC in 2023 and early 2024 against advisers (and/or their affiliates) outside the registered fund space, of particular note are two so-called "AI-washing" proceedings. In March 2024, the SEC settled with two investment advisers for misleading statements regarding the use of AI in managing advisory assets.[66] These proceedings came in the wake of an SEC investor alert, issued in early 2024, regarding potential fraudulent use of AI.[67]

Civil Litigation

In addition to the administrative proceedings involving advisers (and/or their affiliates) of registered funds described above, the SEC may also initiate civil litigation against advisers (and/or their affiliates) of registered funds, as well as against fund officers, inside directors (and, less frequently, fund independent directors), and employees.

In May 2023, the SEC initiated litigation against a registered fund's adviser, its principals, and its trustees (including independent trustees) alleging the fund failed to monitor the liquidity of the fund's investments and assigned inappropriate liquidity levels to certain securities.[81] The defendants' motion to dismiss, filed in July 2023, remains pending.[82]

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

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, various states have engaged in activity with respect to ESG matters.

- **Regulation:** In 2023 and early 2024, the SEC did not propose any new rules regarding ESG issues. As of the time this publication went to press, the SEC had yet to finalize its May 2022 proposed rules to enhance disclosures by certain investment advisers and investment companies about ESG investment practices.[68] In September 2023, the SEC adopted an updated "Names Rule" under the ICA, which addresses, among other things, fund names referring to a focus on ESG factors.[69]
- **Examinations:** While ESG was not specifically named in EXAMS' priorities for the SEC's 2024 fiscal year, public statements by EXAMS staff indicate that it remains a focus area.[70]
- **Enforcement:** The SEC's Division of Enforcement continued to focus on ESG issues. In September 2023, the SEC brought a settled administrative action against an investment adviser for failing to integrate ESG compliance practices in researching and monitoring investments.[71] In addition, the Division sent subpoenas to certain asset managers in 2023 with respect to marketing materials and other disclosures related to ESG products.[72] International regulators have also brought actions against investment advisers for allegedly overstating funds' ESG investment policies.[73]
- **DOL:** In February 2023, the DOL issued a final rule regarding the duties of plan fiduciaries with respect to, among other things, the consideration of ESG factors and exercising shareholder rights (the "ESG Rule"). The ESG 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.[74] Since the February 2023 effective date, at least two lawsuits have challenged the ESG Rule. In January 2023, twenty-five states filed a lawsuit alleging that the DOL's rule violates ERISA.[75] In September 2023, the district court ruled in favor of the DOL, holding that it had not acted arbitrarily or capriciously in adopting the ESG Rule. The states' appeal of the district court's decision, filed in October 2023, remains pending.[76] Another lawsuit, filed in February 2023 by a private litigant, remains pending.[77]
- **State Activity:** State activity with respect to ESG matters has included (1) legislation proposed or adopted by certain states banning the investment of state assets in ESG funds, and (2) the filing by state attorneys general of civil investigative demands upon fund groups, alleging the fund groups engaged in methods, acts, or practices deemed unlawful in violation of certain state laws.[78] In December 2023, the state of Tennessee sued an investment adviser alleging that the adviser's ESG activities violated the state's consumer protection laws.[79] In March 2024, the state of Mississippi issued a cease-and-desist order against same investment adviser for making false and misleading statements to investors.[80]

registered investment companies (and other clients).[83] The lawsuit remains in its early stages.

In another lawsuit, filed in February 2022, the SEC alleged that an officer and control person of a registered fund's investment adviser perpetrated a fraudulent valuation scheme to mask the fund's performance.[84] In a parallel action, the CFTC initiated a lawsuit against the same individual alleging improper valuation of swaps in registered commodity pools.[85] In addition, the DOJ filed a criminal action against the same individual, who pled guilty in November 2022.[86] The district court's decision, in April 2023, to deny the defendant's motion to withdraw the guilty plea is on appeal, which appeal remains ongoing.[87] The SEC and CFTC lawsuits have both been stayed pending the outcome of the DOJ's action. In June 2023, the SEC filed a lawsuit against an investment adviser involved in the lawsuits noted above, alleging improper valuation of assets in both a registered mutual fund and a private fund.[88] The SEC obtained a judgment against the defendant later that same month.[89] 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.[90]

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.[97] For the SEC's 2024 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, advisers' compliance programs, conflicts of interest, proprietary trading, safeguarding of client assets, marketing practices, fiduciary obligations (particularly with respect to compensation arrangements), information security and operational resiliency, and crypto assets. EXAMS has also indicated a focus on selecting and using third party service providers.[98] Of note, ESG—a focus in recent years—was not specifically named.

With respect to registered investment companies, EXAMS has indicated an ongoing focus on compliance programs and governance practices, disclosure, and valuation. EXAMS has also indicated a focus on the board oversight of fund fees and expenses, including the implementation of fee waivers and reimbursements. EXAMS also stated that examinations might include derivatives risk management assessments.[99]

EXAMS recently reported that it had established specialized teams to better address emerging issues and risks associated with crypto assets, financial technology, AI, and cybersecurity.[100]

Artificial Intelligence and Investment Management

In July 2023, the SEC issued a rule proposal aimed at the use of predictive data analytics and AI by broker-dealers and investment advisers.[91] While there are indications that the SEC has broader concerns about the use of these technologies,[92] the rule proposal focuses on potential conflicts of interest that might arise from their implementation. Some industry observers anticipate further rulemaking in this area, given that the proposed rules address only one of five risks identified by the SEC (with the others being bias, financial fraud, privacy and intellectual property concerns, and the stability of the markets).[93]

As broker-dealers and investment advisers have started to deploy AI in certain departments and workflows,[94] the SEC's EXAMS is reportedly reviewing the use of AI.[95] In March 2024, as discussed on the previous page, the SEC settled administrative proceedings against two investment advisers (outside the registered fund space) for their alleged "AI washing," where the advisers' disclosure of AI practices overstated their actual use.[96]

Throughout the year, EXAMS also issues risk alerts that provide information about its examination priorities and findings. In 2023 and early 2024, EXAMS issued alerts on a range of topics, including observations from examinations of newly registered advisers,[101] observations from examinations of investment advisers and investment companies concerning LIBOR transition preparedness,[102] areas of examination focus relating to the adviser marketing rule,[103] a discussion of EXAMS' approach to examinations,[104] and observations related to security-based swap dealers.[105]

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 2024, FINRA, a self-regulatory organization for the broker-dealer industry, published its annual Regulatory Oversight 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 cybersecurity/technology management, anti-money laundering, crypto assets, AI, and manipulative trading.[106]

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, AI,[107] cyber resilience,[108] digital assets/blockchain,[109] and off-channel communications.[110]

In recent years, the CFTC and the SEC have 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.[111] In September 2023, both the SEC and CFTC brought administrative actions against a number of financial institutions (chiefly, broker-dealers) for their failure to establish and maintain records of certain electronic communications.[112]

In December 2023, a state attorney, acting on behalf of the state of Tennessee, sued an investment adviser alleging that the adviser's ESG activities violated the state's consumer protection laws.[113] In March 2024, the same investment adviser was the target of a cease and desist issued by Mississippi's Secretary of State for the adviser's allegedly misleading disclosures regarding its approach to ESG investing.[114] (See box on p. 8.)

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.[115] "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.[116]

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. Recent examples include the following:

- *Trades of Portfolio Securities:* As a result of errors by an investment adviser to a mutual fund, the incorrect security was sold to unwind a swap agreement.
- *Compliance with Investment Restrictions:* As a result of errors by an investment adviser to a client account, a security was purchased for the account in violation of the client's investment restrictions.
- *Valuation:* As a result of errors by an ETF's fund accounting services provider, the net asset value per share of the ETF was understated over a several-month period.
- *Portfolio Composition:* As a result of errors, an investment adviser failed to execute a securities trade that had been executed for other similarly managed advisory clients.

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),[117] 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, 2023 and early 2024 also saw other noteworthy litigation developments.

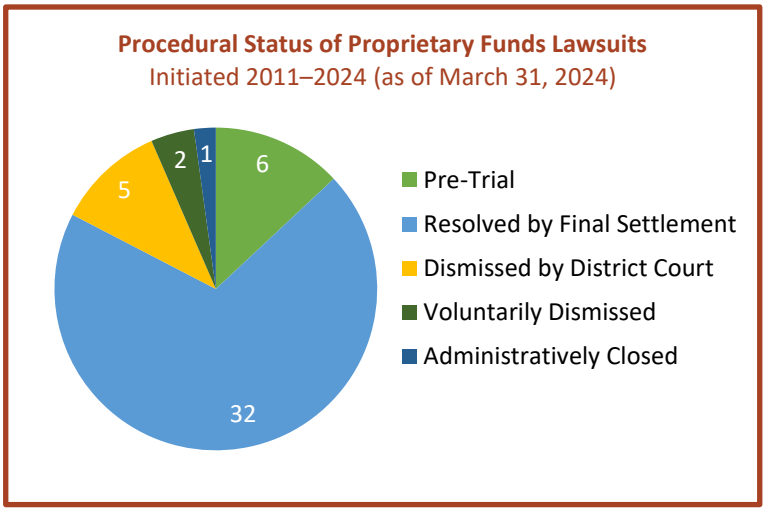
ERISA

As reported in past *Claims Trends*, the plaintiffs' bar has used ERISA as a legal avenue to attack the fund industry.[118] 2023 and early 2024 saw the filing of new ERISA-based lawsuits,[119] 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 underperformed relative to purportedly similar *non*-proprietary funds (i.e., funds offered by other asset managers). Such lawsuits may also include other allegations (e.g., that the defendants engaged in self-dealing, failed to include in their in-house plans the lowest-cost share classes of the proprietary funds at issue, and/or failed to adequately investigate providing non-mutual fund alternatives such as collective trusts).



Since 2011, the plaintiffs' bar has initiated at least forty-six such lawsuits (on a consolidated basis) involving forty-three fund groups (with three of these lawsuits having been initiated since January 2023). As discussed below, six of the lawsuits remain in the pre-trial stage of the litigation process and forty have been fully resolved. Of the fully resolved lawsuits, thirty-two lawsuits were resolved through final monetary settlements, five were dismissed by the courts (with one of these dismissals affirmed on appeal and with the time to appeal yet to expire in another), 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 $460 million.[120]

- *Lawsuits in the Pre-Trial Stage:* Six lawsuits remain in the pre-trial stage of the litigation process. In March 2024, defendants filed a motion to compel arbitration and a motion to dismiss in one of these lawsuits.[121] A motion to dismiss is pending in a second lawsuit, and a motion for judgment on the pleadings is pending in a third lawsuit.[122] In a fourth lawsuit, the motion to dismiss was granted in part and denied in part in

January 2024.[123] In a fifth lawsuit, the motion to dismiss was granted in part and denied in part in August 2022, and class certification was granted in August 2023.[124] In a sixth lawsuit, plaintiffs filed a motion for summary judgment in October 2023. The motion remains pending.[125]

- *Lawsuits Resolved by Final Settlements:* Thirty-two of the lawsuits have reached final monetary settlements. Twenty-nine settlements were reached prior to 2023. Three lawsuits, with settlements totaling over $70 million, reached final monetary settlements in 2024.[126]

- *Lawsuits Dismissed by the Courts:* Five of the lawsuits have been dismissed by the courts. In one lawsuit, the court granted the defendants' motion for summary judgment in September 2022, which was affirmed by the Second Circuit in February 2024.[127] A second lawsuit was concluded following a ruling granting defendants' motion to dismiss.[128] In a third lawsuit, following a bench trial, the district court issued a judgment in favor of the defendants in January 2019, thereby concluding the lawsuit.[129] In a fourth lawsuit, in August 2018, the Eighth Circuit affirmed the district court's dismissal, thereby concluding the lawsuit.[130] In a fifth lawsuit, in March 2024, the district court granted the defendants' motion to dismiss; the time for an appeal of that decision has not yet expired.[131]

- *Lawsuits Voluntarily Dismissed by the Parties:* Two lawsuits closed in 2018 pursuant to voluntary dismissals.[132]

- *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.[133]

In addition to the lawsuits described above challenging the inclusion of proprietary *registered* funds as investment options in in-house retirement plans, at least three lawsuits filed in 2020 and 2021 have challenged asset managers' inclusion of proprietary *non-registered* funds (typically, index funds and/or target date funds structured as collective investment trusts or separate accounts) as investment options in their in-house retirement plans. In one such lawsuit, the district court denied the defendants' motion to dismiss in August 2022, and the lawsuit remains pending.[134] In a second lawsuit, the plaintiffs' motion for preliminary approval of settlement was filed in February 2024 and remains pending.[135] In a third lawsuit, the plaintiffs' motion for preliminary approval of settlement was filed in November 2023 and remains pending.[136]

MISMANAGEMENT LAWSUITS

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

In a "proprietary funds"–like class action lawsuit filed in June 2021, 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

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.

adviser as underlying investments for plan assets.[137] These affiliated mutual funds, according to the plaintiff, 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.[138] The lawsuit remains pending.

Bankruptcy Claims Involving Issuers of Portfolio Securities

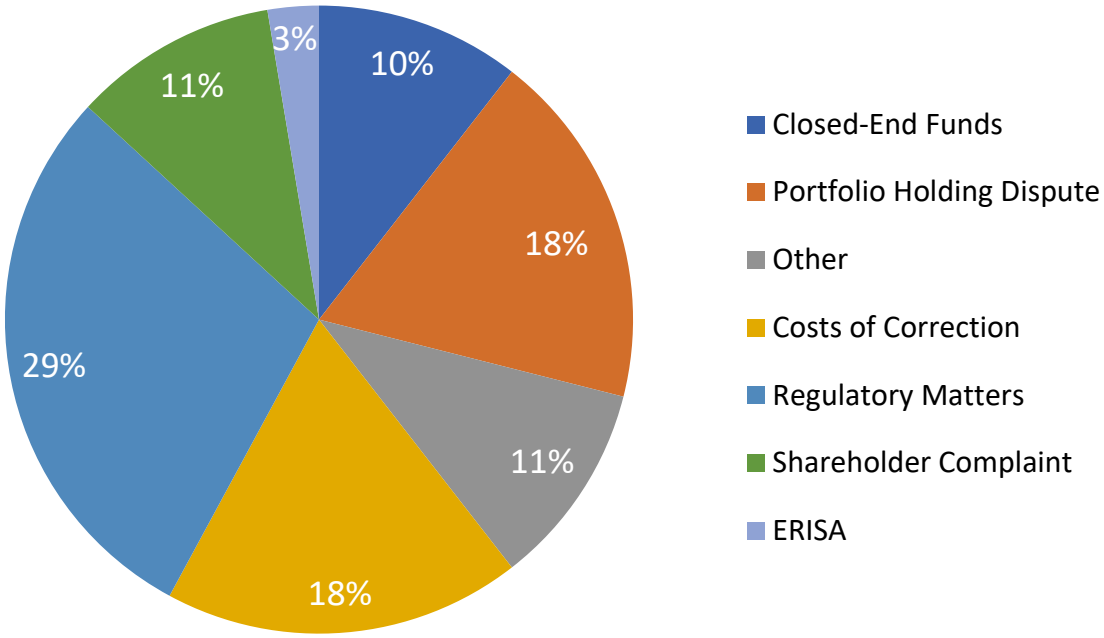
Mutual funds have sometimes been ensnared in proceedings arising from bankruptcies, for no reason other than the funds' status as passive holders or former holders of securities of the bankrupt issuers. In these "clawback" proceedings, bankrupt issuers and/or their creditors sought a return of pre-bankruptcy payments made to security holders or other creditors, including funds. Previous *Claims Trends* reported on the now-concluded bankruptcy proceedings of the Tribune Company and Sears Holdings, as well as Puerto Rico's bankruptcy-like proceeding.

A bankruptcy proceeding relating to Nine West Holdings remains active. This proceeding involves actual and constructive fraudulent conveyance claims under state law.[139] In August 2020, the district court issued an order dismissing certain claims as barred by a "safe harbor" provision of the federal bankruptcy laws.[140] An appeal of the dismissal of the "safe harbor" claims was filed in November 2020, and, in November 2023, the Second Circuit affirmed in part, vacated in part, and remanded the case for further proceedings.[141] In February 2024, the Second Circuit stayed its mandate pending the expected filing and disposition of a writ of certiorari to the U.S. Supreme Court.[142]

D&O/E&O Claims Data

D&O/E&O Notices by Subject (2023)

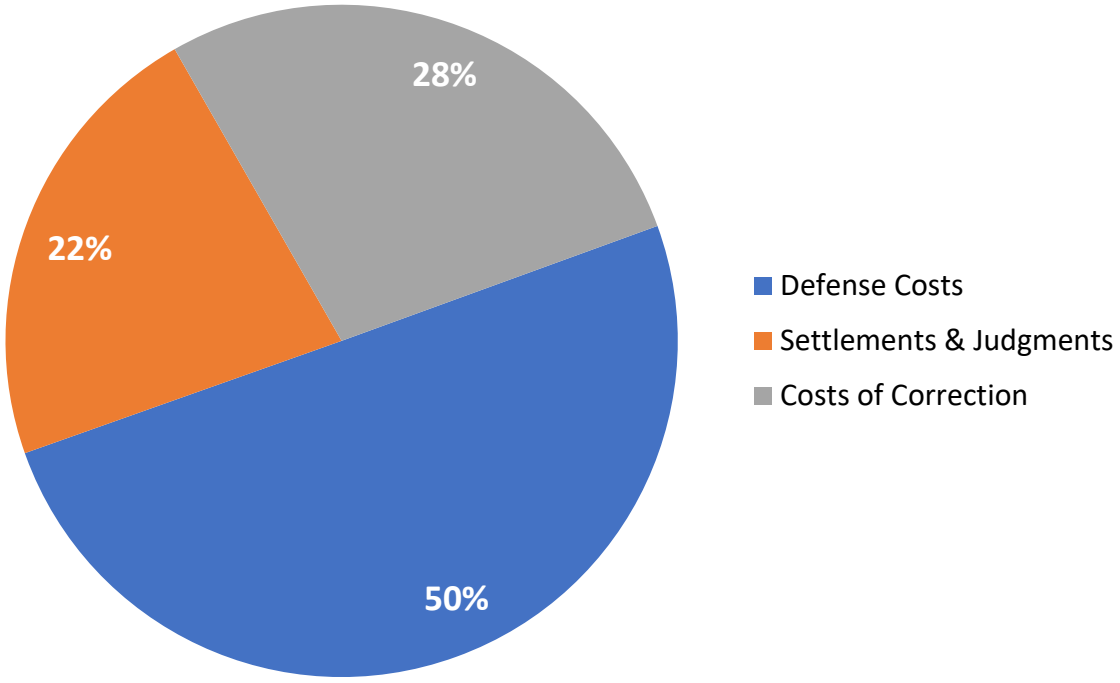
Regulatory matters, costs of correction matters, and portfolio holding disputes constituted the most common subjects of claims notices submitted under ICI Mutual D&O/E&O policies in 2023.



D&O/E&O Claims Data

D&O/E&O Insurance Payments by Category (2000–2023)

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, 2023.



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 (subsequently consolidated with additional lawsuits) 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. In re U.S. Oil Fund, LP Secs. Litig., No. 20-cv-4740 (S.D.N.Y. filed June 19, 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).

[4] Xu v. Direxion Shares ETF Tr., No. 22-cv-5090 (S.D.N.Y. Aug. 25, 2023) (order granting motion to dismiss).

[5] In re Infinity Q Diversified Alpha Fund Secs. Litig., No. 651295-2021 (N.Y. Sup. Ct. Apr. 15, 2021) (order consolidating Hunter v. Infinity Q Diversified Alpha Fund, No. 651295-2021 (N.Y. Sup. Ct. filed Feb. 24, 2021) & Rosenstein v. Tr. for Advised Portfolios, No. 651302-2021 (N.Y. Sup. Ct. filed Feb. 25, 2021)).

[6] Dominus Multimanager Fund, Ltd. v. Infinity Q Cap. Mgmt., LLC, No. 652906-2022 (N.Y. Sup. Ct. filed Aug. 12, 2022). Plaintiffs' allegations in this lawsuit include common law fraud, fraudulent inducement, fraudulent concealment, negligence, negligent misrepresentation, unjust enrichment, and aiding and abetting.

[7] In re Infinity Q Diversified Alpha Fund Secs. Litig., No. 651295-2021 (N.Y. Sup. Ct. Dec. 21, 2023) (order approving settlement for a guaranteed $45 million, with a potential to reach $48 million).

[8] Schiavi + Dattani v. Trust for Advised Portfolios, No. 22-cv-896 (E.D.N.Y. filed Feb. 17, 2022); Yang v. Tr. for Advised Portfolios, No. 21-cv-1047 (E.D.N.Y. filed Feb. 26, 2021) (later consolidated into Sokolow v. Tr. for Advised Portfolios, No. 21-cv-2317 (E.D.N.Y. filed Apr. 27, 2021)); Oak Fin. Grp., Inc. v. Infinity Q Diversified Alpha Fund, No. 21-cv-3249 (E.D.N.Y. filed June 8, 2021).

[9] Sokolow v. Tr. for Advised Portfolios, No. 21-cv-2317 (E.D.N.Y. filed May 10, 2021) (notice of voluntary dismissal); 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. Feb. 16, 2024) (parties' voluntary dismissal of lawsuit); Oak Fin. Grp., Inc. v. Infinity Q Diversified Alpha Fund, No. 21-cv-3249 (E.D.N.Y. Mar. 21, 2024) (order dismissing lawsuit pursuant to plaintiff's voluntary dismissal).

[10] SEC v. Velissaris, No. 22-cv-1346 (S.D.N.Y. filed Feb. 17, 2022) (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) (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). 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).

[11] Koza v. Mut. Fund Series Tr., No. 655297-2020 (N.Y. Sup. Ct. filed Oct. 14, 2020).

[12] Koza v. Mut. Fund Series Tr., No. 655297-2020, 2023 N.Y. Misc. LEXIS 672 (N.Y. Sup. Ct. Feb. 16, 2023) (order granting in part and denying in part defendants' motion to dismiss).

[13] Jackson v. Allianz Glob. Invs. US LLC, No. 651233-2021 (N.Y. Sup. Ct. filed Feb. 22, 2021).

[14] Jackson v. Allianz Glob. Invs. US LLC, No. 651233-2021 (N.Y. Sup. Ct. Mar. 13, 2023) (order approving settlement).

[15] 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.

16 Ylitalo v. ADP, Inc., No. 24-cv-55 (M.D. Fla. filed Jan. 16, 2024).

17 Ylitalo v. ADP, Inc., No. 24-cv-55 (M.D. Fla. Mar. 4, 2024) (filing of investment adviser defendant's motion to dismiss) & (M.D. Fla. Mar. 12, 2024) (filing of ADP's motion to dismiss).

18 *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 noted that the SEC "has pursued only two cases under Section 36(b) since 1970, and both were 30 years ago" and described 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, the SEC appears to have initiated only one section 36(b) lawsuit. *See* SEC v. AMMB Consultant Sendirian Berhad, No. 12-cv-1052 (D.D.C. filed June 26, 2012) (alleging that the defendant subadviser 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).

19 *See* SEC, EXAMS, 2024 Nat'l Exam Program Examination Priorities, 15–16 (Oct. 16, 2023), https://www.sec.gov/files/2024-exam-priorities.pdf.

20 *See, e.g.*, Nicole Jao, *More Enforcement Sweeps to Come: SEC*, IGNITES (Nov. 22, 2022), https://www.ignites.com/c/3833474/495854; Greg Saitz, *High Fees. Poor Performance, That'll Be $10B in Advisory Fees*, IGNITES (Sept. 20, 2022), https://www.ignites.com/c/3866164/501244.

21 These lawsuits were brought in the wake of a U.S. Supreme Court decision 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.

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

23 Verduce v. Vanguard Chester Funds, No. 22-cv-955 (E.D. Pa. filed Mar. 14, 2022); Liang v. Vanguard Chester Funds, No. 22-cv-1677 (E.D. Pa. filed Apr. 20, 2022); Harvey v. Vanguard Chester Funds, No. 22-cv-1741 (E.D. Pa. filed May 5, 2022); Richardson v. Vanguard Chester Funds, No. 22-cv-2091 (E.D. Pa. filed May 27, 2022); Lichtenstein v. Vanguard Chester Funds, No. 22-cv-2909 (E.D. Pa. filed July 25, 2022). The latter four 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).

24 In re Vanguard Chester Funds Litig., No. 22-cv-955 (E.D. Pa. Nov. 20, 2023) (order granting in part and denying in part motions to dismiss).

25 In re Vanguard Chester Funds Litig., No. 22-cv-955 (E.D. Pa. Mar. 8, 2024) (filing of amended complaint).

26 *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) (lawsuit dismissed on Sept. 30, 2020 pursuant to a stipulation for dismissal). *See also* Adrian D. Garcia, *The CEFs Caught in Saba Capital Challenges*, IGNITES (Mar. 11, 2024), https://www.ignites.com/c/4447414/579334; Keith Button, *With Hopes for Control Strategies Fading, CEFs Eye Poison Pill Strategies*, FUND DIRECTIONS (Feb. 28, 2024), https://funddirections.com/analysis/78632; Beagan Wilcox Volz, *Activist Poised to Wrest CEF from Franklin*, IGNITES (Aug. 29, 2023), https://www.ignites.com/c/4215753/534714; Alyson Velati, *'Hostile' Campaigns Against CEFs Surge*, IGNITES (June 14, 2023), https://www.ignites.com/c/4107454/531274; Alex Cardno, *CEF Activist Flexes Muscle amid Board Nominee Dispute*, FUND DIRECTIONS (Jan. 24, 2023), https://www.boardiq.com/c/3902154/504814.

27 *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); Inv. Co. Inst., *Shareholder Activism Threatens Closed-End Funds and Their Investors* (May 24, 2023), https://www.ici.org/viewpoints/23-closed-end-fund-threats (discussing impact of shareholder activism on closed-end funds and closed-end fund investors).

[28] 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).

[29] 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*, No. 18-cv-2360 (N.D. Tex. May 26, 2020) (order granting motion to dismiss).

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

[31] 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* SEC Staff Statement, Div. of Inv. Mgmt., *Control Share Acquisition Statutes* (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.

[32] *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).

[33] 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 defendants' joint motion to dismiss) & (S.D.N.Y. Jan. 14, 2021) (filing of plaintiffs' motion for summary judgment).

[34] Saba Cap. CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund, 88 F.4th 103 (2d Cir. Nov. 20, 2023), *aff'g*, No. 21-cv-327, 2022 U.S. Dist. LEXIS 29252 (S.D.N.Y. Feb. 17, 2022) (order granting summary judgment).

[35] Eaton Vance Sr. Income Tr. v. Saba Cap. Master Fund, Ltd., No. 2084-cv-1533 (Mass. Suffolk Cty. Sup. Ct. filed July 15, 2020). The other bylaw amendment at issue provides that a trustee may only be removed by vote of more than half of all outstanding shares (the "majority rule" amendment).

[36] 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 and requiring rescission of the control share amendment).

[37] Saba Cap. Master Fund, Ltd. v. ClearBridge Energy Midstream Opportunity Fund Inc., No. 23-cv-5568 (S.D.N.Y. filed June 29, 2023).

[38] Saba Cap. Master Fund, Ltd. v. ClearBridge Energy Midstream Opportunity Fund Inc., No. 23-cv-5568 (S.D.N.Y. Aug. 15, 2023) (filing of motion to dismiss) & (S.D.N.Y. Sept. 26, 2023) (order granting in part and denying in part fund defendants' motion to dismiss) (the defendants that were released from the lawsuit each had forum selection clauses that applied to the plaintiffs' claim, meaning the action had to be brought in state or federal court in the state of Maryland).

[39] Saba Cap. Master Fund, Ltd. v. ClearBridge Energy Midstream Opportunity Fund Inc., No. 23-cv-5568 (S.D.N.Y. Oct. 30, 2023) (filings of various defendants' motions to dismiss) & (S.D.N.Y. Dec. 5, 2023) (order denying motions to dismiss and granting summary judgment to Saba) & (S.D.N.Y. Jan. 4, 2024) (opinion).

[40] Saba Cap. Master Fund, Ltd. v. ClearBridge Energy Midstream Opportunity Fund Inc., No. 23-8104 (2d Cir. filed Dec. 28, 2023) (filing of lead appeal).

[41] Bulldog Investors LLP v. First Trust Advisors L.P., No. 23-cv-11034 (D. Mass. filed May 10, 2023).

[42] Bulldog Investors LLP v. First Trust Advisors L.P., No. 23-cv-11034 (D. Mass. Aug. 30, 2023) (filing of motion to dismiss).

[43] Bulldog Investors LLP v. First Trust Advisors L.P., No. 23-cv-11034 (D. Mass. Oct. 24, 2023) (order dismissing the lawsuit with prejudice).

[44] Saba Cap. Master Fund, Ltd. v. ASA Gold & Precious Metals, No. 24-cv-690 (S.D.N.Y. filed Jan. 31, 2024).

[45] Saba Cap. Master Fund, Ltd. v. BlackRock ESG Cap. Allocation Tr., No. 24-cv-1701 (S.D.N.Y. filed Mar. 6, 2024); *see also* Joe Morris, *Saba Bombards BlackRock in New Closed-End Campaign*, IGNITES (Mar. 7, 2024), https://www.ignites.com/c/4445454/578014.

[46] Blaugrund v. Guggenheim Fund Inv. Advisors, LLC, No. 2021-1094 (Del. Ch. Ct. filed Dec. 17, 2021).

[47] 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).

[48] Guggenheim Funds Inv. Advisors, LLC v. JB & Margaret Blaugrund Found., No. 2021-1094 (Del. Ch. Ct. Jan. 11, 2024) (order granting stay of case pending the court's consideration of a settlement in principle reached by the parties).

[49] *See* SEC, Press Rel., SEC Announces Enforcement Results for FY 2023 (Nov. 15, 2023), https://www.sec.gov/news/press-release/2023-234. *See also* Davis Polk, SEC enforcement against public companies – A recap of 2023, *Insights* (Jan. 3, 2024), https://www.davispolk.com/insights/client-update/sec-enforcement-against-public-companies-recap-2023 (describing the SEC's focus on individuals outside of the financial reporting or regular disclosure process).

[50] *See* SEC, Press Rel., SEC Adopts Rule Enhancements to Prevent Misleading or Deceptive Investment Fund Names (Sept. 20, 2023), https://www.sec.gov/news/press-release/2023-188.

[51] *See* SEC, Press Rel., SEC Adopts Rules on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure by Public Companies (July 26, 2023), https://www.sec.gov/news/press-release/2023-139.

[52] *See* SEC, Press Rel., SEC Proposes New Requirements to Address Risks to Investors from Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers (July 26, 2023), https://www.sec.gov/news/press-release/2023-140.

[53] SEC, Div. of Inv. Mgmt. Bulletin, Differential Advisory Fee Waivers (Feb. 2, 2023), https://www.sec.gov/investment/differential-advisory-fee-waivers (also discussing potential for improper cross-subsidization).

[54] *See* SEC, Press Rel., SEC Announces Enforcement Results for FY 2023 (Nov. 14, 2023), https://www.sec.gov/news/press-release/2023-234, at addendum, https://www.sec.gov/files/fy23-enforcement-statistics.pdf (indicating that eighty-six, or approximately 18%, of its standalone actions in fiscal year 2023 were against investment companies/investment advisers).

[55] In re Credit Suisse Secs. (USA) LLC, File No. 3-21811 (SEC Dec. 13, 2023), https://www.sec.gov/files/litigation/admin/2023/34-99158.pdf (finding a registered investment adviser and underwriter to be ineligible to provide services to registered investment companies under the ICA).

[56] In re Elsa M. Doyle, File No. 3-21705 (SEC Sept. 22, 2023), https://www.sec.gov/files/litigation/admin/2023/ia-6429.pdf (finding that portfolio manager unlawfully arranged cross trades among several registered money market funds).

[57] In re BlackRock Advisors, LLC, File No. 3-21786 (SEC Oct. 24, 2023), https://www.sec.gov/files/litigation/admin/2023/ia-6468.pdf (finding that the adviser to a closed-end fund inaccurately described a fund investment in periodic reports).

[58] In re DWS Inv. Mgmt. Americas, Inc., File No. 3-21707 (SEC Sept. 25, 2023), https://www.sec.gov/files/litigation/admin/2023/ia-6431.pdf (finding that registered funds failed to develop and implement a reasonably designed anti-money laundering program to comply with the Bank Secrecy Act and applicable regulations).

[59] In re Van Eck Assocs. Corp, File No. 3-21857 (SEC Feb. 16, 2024), https://www.sec.gov/files/litigation/admin/2024/ic-35132.pdf (finding that an investment adviser did not inform an ETF's board of directors of the specifics of the fee structure).

[60] In re ETF Mgrs. Grp., LLC, File No. 3-21542 (SEC Aug. 1, 2023), https://www.sec.gov/files/litigation/admin/2023/34-98034.pdf (finding that an investment adviser settled private litigation with securities lending revenue from a registered ETF).

[61] In re DWS Inv. Mgmt. Americas, Inc., File No. 3-21709 (SEC Sept. 25, 2023), https://www.sec.gov/files/litigation/admin/2023/ia-6432.pdf (finding the adviser failed to adopt and implement reasonably designed policies and procedures concerning the adviser's integration of ESG factors in research and investment recommendations for certain actively managed ESG-integrated mutual funds and separately managed account strategies advised by the adviser).

[62] *See, e.g.*, In re Cambridge Inv. Research, Inc. & Cambridge Inv. Research Advisors, Inc., File No. 3-21847 (SEC Feb. 9, 2024), https://www.sec.gov/files/litigation/admin/2024/34-99498.pdf; In re Lincoln Fin. Advs. Corp. and Lincoln Fin. Secs. Corp., File No. 3-21848 (SEC Feb. 9, 2024), https://www.sec.gov/files/litigation/admin/2024/34-99499.pdf; In re Guggenheim Secs. LLC and Guggenheim Partners Inv. Mgmt. LLC, File No. 3-21851 (SEC Feb. 9, 2024), https://www.sec.gov/files/litigation/admin/2024/34-99502.pdf; In re Oppenheimer & Co., Inc., File No. 3-21852 (SEC Feb. 9, 2024), https://www.sec.gov/files/litigation/admin/2024/34-99503.pdf. *See also* Joe Morris, *Invesco, Voya Targeted in WhatsApp Probe*, IGNITES (Aug. 10, 2023), https://www.ignites.com/c/4192944/533904; David Isenberg, *WhatsApp Probe Extends to Credit*

Agencies, Dual Registrants, IGNITES (Oct. 2, 2023), https://www.ignites.com/c/4262814/551044; Joe Morris, *BlackRock Swept Up in Messaging Apps Probe*, IGNITES (Feb. 27, 2023), https://www.ignites.com/c/3952494/512634.

63 *See, e.g.*, SEC, Press Rel., Sixteen Firms to Pay More Than $81 Million Combined to Settle Charges for Widespread Recordkeeping Failures (Feb. 9, 2024), https://www.sec.gov/news/press-release/2024-18; SEC, Press Rel., SEC Charges 10 Firms with Widespread Recordkeeping Failures (Sept. 29, 2023), https://www.sec.gov/news/press-release/2023-212; SEC, Press Rel., SEC Charges 11 Wall Street Firms with Widespread Recordkeeping Failures (Aug. 8, 2023), https://www.sec.gov/news/press-release/2023-149; CFTC, Press Rel. No. 8762-23, CFTC Orders Four Financial Institutions to Pay Total of $260 Million for Recordkeeping and Supervision Failures for Widespread Use of Unapproved Communication Methods (Aug. 8, 2023), https://www.cftc.gov/PressRoom/PressReleases/8762-23.

64 In re PIMCO LLC, File No. 3-21489 (SEC June 16, 2023), https://www.sec.gov/files/litigation/admin/2023/ia-6328.pdf (finding that an investment adviser failed to waive advisory fees as required by its mutual fund advisory agreement).

65 In re PIMCO LLC, File No. 3-21490 (SEC June 16, 2023), https://www.sec.gov/files/litigation/admin/2023/ia-6329.pdf (finding that a registered investment adviser improperly used paired interest rate swaps in a closed-end fund).

66 SEC, Press Rel., SEC Charges Two Investment Advisers with Making False and Misleading Statements About Their Use of Artificial Intelligence (Mar. 18, 2024), https://www.sec.gov/news/press-release/2024-36; In re Delphia (USA) Inc., File No. 3-21894 (SEC Mar. 18, 2024), https://www.sec.gov/files/litigation/admin/2024/ia-6573.pdf; In re Global Predictions, Inc., File No. 3-21895 (SEC Mar. 18, 2024), https://www.sec.gov/files/litigation/admin/2024/ia-6574.pdf (finding the advisers falsely claimed to use artificial intelligence in their investment processes).

67 SEC Investor Alert & Bulletin, Artificial Intelligence (AI) and Investment Fraud: Investor Alert (Jan. 25, 2024), https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-alerts/artificial-intelligence-fraud. *See* Wilmer Hale, *SEC Brings Two More "AI Washing" Enforcement Actions Against Investment Advisers, Continuing Its Pursuit of Misstatements Related to AI* (Mar. 27, 2024), https://www.wilmerhale.com/-/media/files/shared_content/editorial/publications/wh_publications/client_alert_pdfs/20240327-sec-brings-two-more-ai-washing-enforcement-actions-against-investment-advisers-continuing-its-pursuit-of-misstatements-related-to-ai.pdf.

68 *See* SEC, Press Rel., SEC Proposes to Enhance Disclosures by Certain Investment Advisers and Investment Companies about ESG Investment Practices (May 25, 2022), https://www.sec.gov/news/press-release/2022-92.

69 *See* SEC, Press Rel., SEC Adopts Rule Enhancements to Prevent Misleading or Deceptive Investment Fund Names (Sept. 20, 2023), https://www.sec.gov/news/press-release/2023-188.

70 *See* Speech, Grubir S. Grewal, Remarks at Ohio State Law Journal Symposium 2024: ESG and Enforcement of the Federal Securities Laws (Feb. 23, 2024), https://www.sec.gov/news/speech/grewal-ohs-022324.

71 In re DWS Inv. Mgmt. Americas, Inc., File No. 3-21709 (SEC Sept. 25, 2023), https://www.sec.gov/files/litigation/admin/2023/ia-6432.pdf.

72 *See* Alfred Wilkinson, *SEC Sends Subpoenas to Asset Managers over ESG Marketing*, IGNITES (Aug. 15, 2023), https://www.ignites.com/c/4199144/534114.

73 *See, e.g.*, Chris Larson, *Vanguard Accused of Greenwashing Australian ESG Fund*, IGNITES (July 25, 2023), https://www.ignites.com/c/4168204/534074.

74 DOL, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822 (Dec. 1, 2022).

75 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.

76 Utah v. Walsh, No. 23-cv-16, 2023 U.S. Dist. LEXIS 168696 (N.D. Tex. Sept. 21, 2023) (order granting defendants' cross-motion for summary judgment), *appeal docketed*, Utah v. Su, 23-11097 (5th Cir. filed Oct. 30, 2023) (filing of appeal).

77 Braun v. Walsh, No. 23-cv-234 (E.D. Wisc. filed Feb. 28, 2023).

78 *See, e.g.*, News Rel., Governor Ron DeSantis Signs Legislation to Protect Floridians' Financial Future & Economic Liberty (May 2, 2023), https://www.flgov.com/2023/05/02/governor-ron-desantis-signs-legislation-to-protect-floridians-financial-future-economic-liberty/; Governor's Office, State of Montana, Governor Gianforte Signs Pro-Freedom, Pro-Free Enterprise Bills Into Law, State of Montana Newsroom (Apr. 26, 2023), https://news.mt.gov/Governors-Office/Governor_Gianforte_Signs_Pro-Freedom_Pro-Free_Enterprise_Bills_Into_Law.

79 State of Tenn. ex rel. Skrmetti v. BlackRock, Inc., No. 23-cv-618 (Cir. Ct. Tenn. filed Dec. 18, 2023).

80 *See* Alfred Wilkinson, *BlackRock Accused by Mississippi of 'Misleading' Investors on ESG*, IGNITES (Mar. 28, 2024), https://www.ignites.com/c/4465604/582903.

[81] SEC v. Pinnacle Advisors, LLC, No. 23-cv-547 (N.D.N.Y. filed May 5, 2023).

[82] SEC v. Pinnacle Advisors, LLC, No. 23-cv-547 (N.D.N.Y. July 11, 2023) (filing of motion to dismiss).

[83] SEC v. Billimek, No. 22-cv-10542 (S.D.N.Y. filed Dec. 14, 2022).

[84] SEC v. Velissaris, No. 22-cv-1346 (S.D.N.Y. filed Feb. 17, 2022) (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 86)).

[85] CFTC v. Velissaris, No. 22-cv-1347 (S.D.N.Y. filed Feb. 17, 2022) (lawsuit stayed by the district court on March 28, 2022, pending the outcome of the criminal trial (*see infra* note 86)).

[86] USA v. Velissaris, No. 22-cr-105 (S.D.N.Y. filed Feb. 16, 2022) (filing of indictment); No. 22-cr-105 (S.D.N.Y. Nov. 21, 2022) (filing of guilty plea).

[87] USA v. Velissaris, No. 22-cr-105 (S.D.N.Y. Apr. 10, 2023) (order denying motion for withdrawal of guilty plea); No. 22-cr-105 (S.D.N.Y. Apr. 20, 2023) (filing of appeal).

[88] SEC v. Infinity Q Cap. Mgmt., LLC, No. 23-cv-5081 (S.D.N.Y. filed June 16, 2023).

[89] SEC v. Infinity Q Cap. Mgmt., LLC, No. 23-cv-5081 (S.D.N.Y. filed June 30, 2023) (filing of judgment).

[90] Yang v. Tr. for Advised Portfolios, No. 21-cv-1047 (E.D.N.Y. filed Feb. 26, 2021); Sokolow v. Tr. for Advised Portfolios, No. 21-cv-2317 (E.D.N.Y. filed Apr. 27, 2021); Oak Fin. Grp., Inc. v. Infinity Q Diversified Alpha Fund, No. 21-cv-3249 (E.D.N.Y. filed June 8, 2021); Schiavi + Dattani v. Tr. for Advised Portfolios, No. 22-cv-896 (E.D.N.Y. filed Feb. 17, 2022).

[91] *See* SEC, Press Rel., SEC Proposes New Requirements to Address Risks to Investors From Conflicts of Interest Associated With the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers (July 26, 2023), https://www.sec.gov/news/press-release/2023-140. *See also* Sabrina Kharrazi, *SEC's AI Rule May Be the Priciest Rule Ever: ICI Chief*, IGNITES (Feb. 12, 2024), https://www.ignites.com/c/4419594/574264.

[92] SEC Chair Gary Gensler, Speech, "AI, Finance, Movies, and the Law," Prepared Remarks before the Yale Law School (Feb. 13, 2024), https://www.sec.gov/news/speech/gensler-ai-021324.

[93] Jonathan A. Forman, *The SEC proposes expansive new rules to govern use of AI in the securities industry*, BAKERHOSTETLER INSIGHTS (Sept. 5, 2023), https://www.bakerlaw.com/insights/the-sec-proposes-expansive-new-rules-to-govern-use-of-ai-in-the-securities-industry/.

[94] *See, e.g.*, Melat Kassa, *Here's How Fund Shops Are Using Generative AI*, IGNITES (Mar. 4, 2024), https://www.ignites.com/c/4443004/578464; Melat Kassa, *Generative AI Is Booming. But Can Policy Keep Up?*, IGNITES (Feb. 26, 2024), https://www.ignites.com/c/4434884/576754; Beagan Wilcox Volz, *Vendor Costs, Manual Processes on State Street's Chopping Block*, IGNITES (Feb. 28, 2024), https://www.ignites.com/c/4436634/576754.

[95] Sabrina Kharrazi, *SEC's Exams Unit Targets AI*, IGNITES (Nov. 20, 2023), https://www.ignites.com/c/4327794/559234; SEC, EXAMS, 2024 Nat'l Exam Program Examination Priorities, 7 (Oct. 16, 2023), https://www.sec.gov/files/2024-exam-priorities.pdf.

[96] *See* note 66, *supra*.

[97] SEC, EXAMS, 2024 Nat'l Exam Program Examination Priorities, 11–17 (Oct. 16, 2023), https://www.sec.gov/files/2024-exam-priorities.pdf.

[98] *Id. See also* Joe Morris, *Overpriced Funds High on Exams Agenda,* IGNITES (Oct. 17, 2023), https://www.ignites.com/c/4284044/554124; *SEC Flags Cyber Risks, Crypto & AML as Key Exam Priorities,* LAW360 (Oct. 16, 2023), https://www.law360.com/articles/1733160; SEC Chair Gensler, Statement on the Approval of Spot Bitcoin Exchange-Traded Products (Jan. 10, 2024), https://www.sec.gov/news/statement/gensler-statement-spot-bitcoin-011023.

[99] SEC, EXAMS, 2024 Nat'l Exam Program Examination Priorities, 15–16 (Oct. 16, 2023), https://www.sec.gov/files/2024-exam-priorities.pdf.

[100] *Id.* at 3.

[101] SEC, EXAMS, Risk Alert: Observations from Examinations of Newly-Registered Advisers (Mar. 27, 2023), https://www.sec.gov/files/risk-alert-newly-registered-ias-032723.pdf.

[102] SEC, EXAMS, Risk Alert: Observations from Examinations of Investment Advisers and Investment Companies Concerning LIBOR-Transition Preparedness (May 11, 2023), https://www.sec.gov/files/risk-alert-libor-transition-preparedness-051123.pdf.

[103] SEC, EXAMS, Risk Alert: Examinations Focused on Additional Areas of the Adviser Marketing Rule (June 8, 2023), https://www.sec.gov/files/risk-alert-marketing-rule-announcement-phase-3-060823.pdf.

[104] SEC, EXAMS, Risk Alert: Investment Advisers: Assessing Risks, Scoping Examinations and Requesting Documents (Sept. 6, 2023), https://www.sec.gov/files/risk-alert-ia-risk-and-requesting-documents-090623.pdf.

[105] SEC, EXAMS, Risk Alert: Observations Related to Security-Based Swap Dealers (Jan. 10, 2024), https://www.sec.gov/files/risk-alert-sbsd-011023.pdf.

[106] FINRA, 2024 Annual Regulatory Oversight Report (Jan. 9, 2024), https://www.finra.org/rules-guidance/guidance/reports/2024-finra-annual-regulatory-oversight-report.

[107] *See, e.g.*, Opening Statement of Commodity Futures Trading Commissioner Christy Goldsmith Romero, Sponsor of the CFTC Technology Advisory Committee, on Responsible Artificial Intelligence, Cyber Resilience & Decentralized Finance (Jan. 8, 2024), https://www.cftc.gov/PressRoom/SpeechesTestimony/romerostatement010824.

[108] *Id.*

[109] *Id. See also* CFTC, Dissenting Statement of Commissioner Christy Goldsmith Romero on Bitnomial's Clearinghouse Application for a Bespoke, Vertically Integrated Cryptocurrency Market Structure (Dec. 18, 2023), https://www.cftc.gov/PressRoom/SpeechesTestimony/romerostatement121823b; Speech of Commissioner Kristin N. Johnson: Beyond Policing for Fraud: Post-Crisis Crypto-Corporate Governance Reforms, Blockchain Association Policy Summit (Nov. 30, 2023), https://www.cftc.gov/PressRoom/SpeechesTestimony/opajohnson9.

[110] *See, e.g.*, Statement of Commissioner Kristin N. Johnson Regarding CFTC's Twentieth Offline Communications Case, (Sept. 29, 2023), https://www.cftc.gov/PressRoom/SpeechesTestimony/johnsonstatement092923.

[111] SEC v. Velissaris, No. 22-cv-1346 (S.D.N.Y. filed Feb. 17, 2022); CFTC v. Velissaris, No. 22-cv-1347 (S.D.N.Y. filed Feb. 17, 2022). 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).

[112] *See, e.g.*, SEC, Press Rel., SEC Charges 10 Firms with Widespread Recordkeeping Failures (Sept. 29, 2023), https://www.sec.gov/news/press-release/2023-212; SEC, Press Rel., SEC Charges 11 Wall Street Firms with Widespread Recordkeeping Failures (Aug. 8, 2023), https://www.sec.gov/news/press-release/2023-149; CFTC, Press Rel. No. 8762-23, CFTC Orders Four Financial Institutions to Pay Total of $260 Million for Recordkeeping and Supervision Failures for Widespread Use of Unapproved Communication Methods (Aug. 8, 2023), https://www.cftc.gov/PressRoom/PressReleases/8762-23. *See also* Statement of Commissioner Christy Goldsmith Romero In Support of Holding Interactive Brokers Accountable for Widespread Use of Whatsapp and Personal Text Messaging to Evade Regulatory Oversight (Sept. 29, 2023), https://www.cftc.gov/PressRoom/SpeechesTestimony/romerostatement092923.

[113] State of Tenn. ex rel. Skrmetti v. BlackRock, Inc., No. 23-cv-618 (Cir. Ct. Tenn. filed Dec. 18, 2023).

[114] Press Rel., *Mississippi Secretary of State Issues Order Against BlackRock for Alleged Securities Fraud Related to ESG Investment Strategy with Possible Multimillion-dollar Penalty* (Mar. 27, 2024), https://www.sos.ms.gov/press/mississippi-secretary-state-issues-order-against-blackrock-alleged-securities-fraud-related.

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

[116] 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.

[117] *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.

[118] *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.

[119] The three lawsuits filed in 2023 were Pover v. The Capital Grp. Cos., Inc., No. 23-cv-9657 (C.D. Cal. filed Nov. 14, 2023); Koroly v. Federated Hermes Inc., No. 23-cv-1563 (W.D. Pa. filed Aug. 30, 2023); and Rocke v. Allianz Asset Mgmt. of Am., L.P., No. 23-cv-98 (C.D. Cal. filed Jan. 17, 2023).

[120] The 2024 final settlements were: Rocke v. Allianz Asset Mgmt. of Am., L.P., No. 23-cv-98 (C.D. Cal. Mar. 18, 2024) ($7.5 million); In re G.E. ERISA Litig., No. 17-cv-12123 (D. Mass. Mar. 8, 2024) ($61 million); Pecou v. Bessemer Tr. Co., No. 22-cv-377 (D.N.J. Feb. 4, 2024) ($5 million).

The pre-2023 final settlements were as follows: Feinberg v. T. Rowe Price Grp., Inc., No. 17-cv-427 (D. Md. Jul. 6, 2022) ($7 million); 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).

[121] Pover v. The Capital Grp. Cos., Inc., No. 23-cv-9657 (C.D. Cal. Mar. 4, 2024) (filing of motion to compel arbitration and motion to dismiss).

[122] Koroly v. Federated Hermes Inc., No. 23-cv-1563 (W.D. Pa. Nov. 20, 2023) (filing of motion to dismiss); Ravarino v. Voya Fin., Inc., No. 21-cv-1658, 2023 U.S. Dist. LEXIS 102404 (D. Conn. June 13, 2023) (order granting in part and denying in part motion to dismiss); Ravarino v. Voya Fin., Inc., No. 21-cv-1658 (D. Conn. Dec. 29, 2023) (filing of defendants' motion for judgment on the pleadings, renewing their request that the district court revisit one count that it denied in the previous motion to dismiss).

[123] Schissler v. Janus Henderson US (Holdings) Inc., No. 22-cv-2326, 2024 U.S. Dist. LEXIS 11060 (D. Colo. Jan. 22, 2024) (order granting in part and denying in part motion to dismiss).

[124] Cho v. Prudential Ins. Co. of Am., (D.N.J. Aug. 22, 2022) (order granting in part and denying in part motion to dismiss) & No. 19-cv-19886 (D.N.J. Aug. 29, 2023) (order granting class certification). In October 2023, the court granted defendants leave to file a motion for summary judgment; however, the parties were to provide these documents to each other in lieu of filing them with the court. A status conference is scheduled for May 21, 2024.

[125] Waldner v. Natixis Inv. Mgrs., N.P., No. 21-cv-10273 (D. Mass. Oct. 6, 2023) (filing of motion for summary judgment).

[126] Rocke v. Allianz Asset Mgmt. of Am., L.P., No. 23-cv-98 (C.D. Cal. Mar. 18, 2024) ($7.5 million settlement); In re G.E. ERISA Litig., No. 17-cv-12123 (D. Mass. Mar. 8, 2024) ($61 million settlement); Pecou v. Bessemer Tr. Co., No. 22-cv-377 (D.N.J. Feb. 4, 2024) ($5 million settlement).

[127] 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), *aff'd*, 2024 U.S. App. LEXIS 3418 (2d Cir. Feb. 14, 2024).

[128] 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).

[129] 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).

[130] 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).

[131] Bloom v. AllianceBernstein L.P., No. 22-cv-10576, 2024 U.S. Dist. LEXIS 54196 (S.D.N.Y. Mar. 25, 2024) (order granting motion to dismiss).

[132] 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).

[133] Severson v. Charles Schwab Corp., No. 17-cv-285 (N.D. Cal. Nov. 20, 2019) (order staying lawsuit pending arbitration and administratively closing lawsuit).

[134] Conlon v. The Northern Tr. Co., No. 21-cv-2940 (N.D. Ill. Aug. 8, 2022) (order denying motion to dismiss).

[135] Gomes v. State St. Corp., No. 21-cv-10863 (D. Mass. Feb. 12, 2024) (filing of motion for preliminary approval of settlement).

[136] Kohari v. MetLife Grp., Inc., No. 21-cv-6146 (S.D.N.Y. Nov. 20, 2023) (filing of motion for preliminary approval of settlement).

[137] Johnson v. Russell Inv. Mgmt., No. 21-cv-743 (W.D. Wash. filed June 7, 2021) (transferred to Johnson v. Russell Inv. Mgmt., No. 22-cv-21735 (S.D. Fla. filed June 7, 2022)).

[138] 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) & (S.D. Fla. Mar. 20, 2023) (order reopening case).

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

[140] 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."

[141] In re Nine West LBO Secs. Litig., No. 20-3941 (2d Cir. Nov. 23, 2023) (order affirming in part, vacating in part, and remanding the case for further proceedings). A petition for rehearing *en banc* or, in the alternative, for rehearing *en banc* was denied in January 2024. In re Nine West LBO Secs. Litig., No. 20-3941 (2d Cir. Jan. 3, 2024). Notably, the Second Circuit affirmed the dismissal of claims against the public shareholder defendants, but reversed the dismissal related to payments made to former directors, officers, and employees of Jones Group. The Second Circuit held that whether Nine West qualified as a "financial institution" for purposes of section 546(e) was properly analyzed on a transfer-by-transfer basis rather than a contract-by-contract basis. For an entity to qualify as a financial institution by virtue of another financial institution serving as its agent, the Second Circuit held that agency relationship must pertain to the transaction at issue. The Second Circuit held that Nine West qualified as a financial institution as to the transfers to the public shareholders, but not as to the transfers to the directors, officers, and employees.

[142] In re Nine West LBO Secs. Litig., No. 20-3941 (2d Cir. Feb. 5, 2024) (order staying mandate pending the filing and disposition of a writ of certiorari with the U.S. Supreme Court).

Note

This *Claims Trends* is current through March 31, 2024. 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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