LIFE, ANNUITY, AND RETIREMENT SOLUTIONS INDUSTRY

Volume III, September 2024

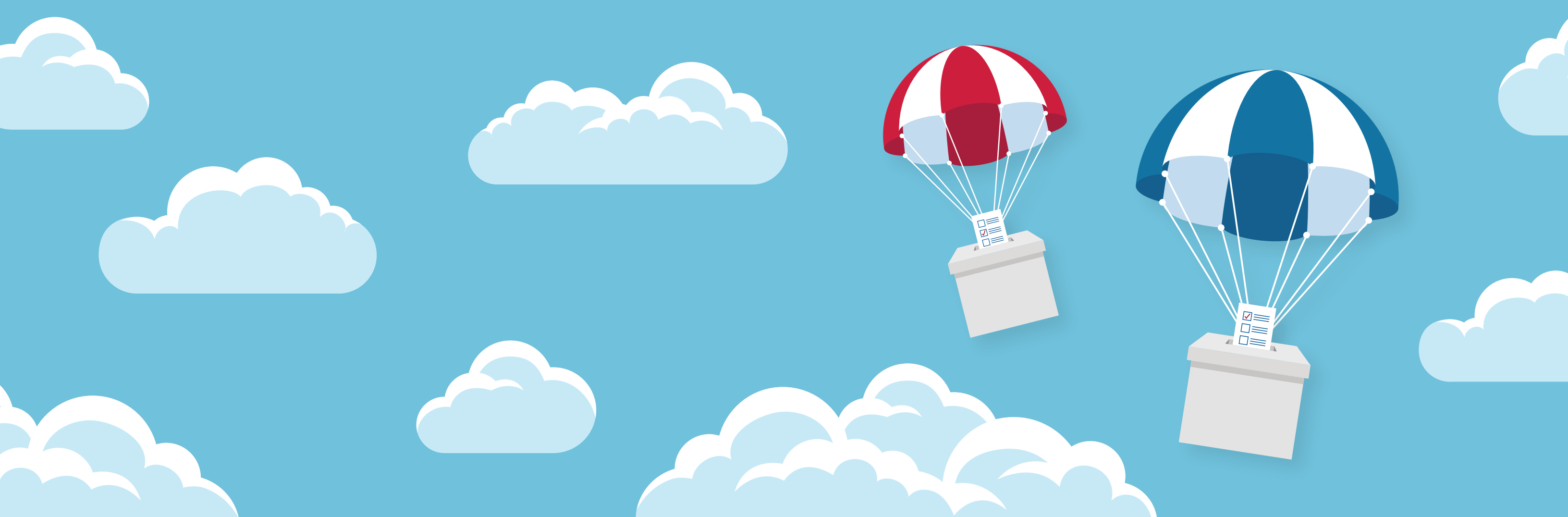
EXPECTFOCUS®

LEGAL ISSUES AND DEVELOPMENTS FROM CARLTON FIELDS

UP IN THE AIR—

HOT INDUSTRY ISSUES FOR AN ELECTION YEAR

CARLTON FIELDS



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Gone With the Wind?
Closed-End Funds Risk Extinction

BY THOMAS LAUERMAN

Shares of SEC-registered closed-end funds (CEFs) have long held significant potential advantages for some investors. For example, unlike shares of mutual funds (which are open-end funds), CEF shares cannot be redeemed by the shareholder at any time for their then-current net asset value, allowing a CEF to invest its assets in less liquid securities. This enables a well-managed CEF to provide potentially better returns for investors who have relatively long-term investment horizons, including many investing for retirement income.

The potential for such benefits is generally greater for investors who purchase their CEF shares in a secondary market (such as a securities exchange), rather than as part of a primary offering of the CEF shares. The reason is that CEF shares generally trade in the secondary market at a price that often is less — sometimes substantially less — than the shares' net asset value. (And this article is not talking about those types of closed-end funds whose shares are not customarily traded in secondary markets.)

For decades, various types of shorter-term investors also have employed strategies to profit from secondary market purchases of CEF shares at a discount from net asset value. In recent years, however, a few hedge funds and other activist investors have been especially active in pursuing strategies of this type.

For example, an activist investor may purchase enough shares to install its own directors or otherwise dominate a CEF's board, including by threatened or actual proxy contests. The activist investor thus may be able to cause the CEF to liquidate, convert to open-end status, make tender offers for its shares at inopportune times, or replace the CEF's investment manager. Such transactions may enable longer-term investors — as well as the activist investor — to profit from eliminating or reducing (at least temporarily) the discount at which the CEF's shares were trading. Nevertheless, transactions initiated by an activist investor often are, at least to some degree, contrary to the interests and objectives of the longer-term investors in a CEF.

CEFs typically have in place control share, staggered board, and other provisions to help resist takeovers that may be adverse to the interests of the majority of shareholders. Such provisions, however, have not reduced the success rate of activist investor assaults on CEFs very dramatically.

In this connection, activist investors are aided by the fact that many CEF shares are held by institutions (for the institution's own account or for the benefit of other investors) that retain proxy voting advisory firms to advise them on how to vote such shares. The Investment Company Institute and others who think the CEF concept has considerable merit for many investors believe that proxy voting advisory firms often fail to give due consideration to the differences between CEFs and other publicly traded companies. Thus, proxy advisory firms often wrongly view CEF anti-takeover provisions and other management efforts as inappropriate management self-entrenchment and, therefore, recommend votes that support activist investors against CEFs.

CEFs have been so beset by activist investors, among other things, that CEF sponsors have almost completely stopped organizing new CEFs. Accordingly, the number of existing CEFs has fallen from over 600 in 2005 to approximately 400 last year.

In part to make abusive initiatives by activist investors more difficult, the New York Stock Exchange has proposed to eliminate the annual shareholder meeting requirement for CEFs. The Investment Company Institute and others who think the CEF concept has considerable merit for many investors also have pushed for Congress to rein in the activist investors' practices. These efforts have not yet borne fruit and, for its part, the SEC has not shown any interest in taking sides in this matter.

So, as matters stand, CEFs' long-term outlook remains cloudy at best.

Up, Up, and Away for RILA Regulation

SEC Adopts Long-Awaited Framework

BY HARRY EISENSTEIN

On July 1, 2024, pursuant to congressional mandate, the SEC adopted a new registration framework for registered index-linked annuities (RILAs). In addition, the SEC has extended the ambit of this framework to include market-value adjustment annuities (MVAs). *See* "New SEC RILA Rules: Implementation Issues and Practical Considerations" and "A Sea Change in RILA Regulation: Navigating the New Waters." Among other things, the framework adopted by the SEC will allow RILA and MVA issuers to use the same registration form, Form N-4, that is used to register variable annuities and, in most but regrettably not all respects, to enjoy the same regulatory treatment in registering and marketing these products as do issuers of variable annuity contracts.

Insurers will be able to register RILAs and MVAs using the new form as early as September 23, as well as take advantage of the more favorable filing and fee payment rules discussed below. This applies both to new issuers and to those RILA issuers who wish to update their existing registration statements using Form N-4. In addition, May 1, 2026, is the latest effectiveness date by which all post-effective amendments to registration statements for existing RILAs and/or MVAs must comply with the requirements of Form N-4, as well as the date after which all initial registration statements for RILAs and/or MVAs must comply with Form N-4.

The following is a summary of important elements of the new framework:

- **Significant Amendments to Form N-4**. While Form N-4 is designed to elicit insurance-related disclosure relevant to annuity investors generally, the form has been significantly amended — primarily to address the investment-related features, operations, and risks of investing in RILAs and MVAs. Many of the requirements codify past practices on disclosure for RILAs and MVAs, but there is a strong focus in the amended form on strengthened, and somewhat repetitive, risk disclosure. Importantly, *there also are new disclosure requirements that apply to all Form N-4 filers, regardless of whether a RILA or an MVA is being registered*.

- **Ability to Satisfy Prospectus Delivery Obligations Through the Use of a Summary Prospectus**. The SEC has amended Rule 498A under the Securities Act of 1933 (Securities Act), the variable product "summary prospectus" rule, to allow insurers to include RILA and MVA information in summary prospectuses.

- **Payment of Registration Fees in the Same Manner as Variable Annuities**. RILA and MVA issuers will be able to pay registration fees in arrears, as is the case with variable annuities. In addition, the new fee payment rules will permit registrants to net redemptions against new sales and pay registration fees just on net sales (or carry forward credit for net redemptions). This netting provision also means that rollovers of amounts from prior periods will be effectively treated as having a net zero effect on registration fees.

- **Parity With Variable Annuities on Related Filing Rules**. To provide RILA issuers with the same streamlined filing rules as are used by variable annuity issuers, related filing rules have been amended to, among other things, allow post-effective amendments — including annual updates and "off-cycle" amendments — to become effective immediately, as well as eliminate the current requirement to file new "refresh" registration statements every three years.

- **Allowing Changes in Limits on Index Gains for New Periods to Be Posted Online**. In a change from the proposal, the SEC agreed to allow RILA issuers to disclose current limits on index gains by including a website address where those limits could be found and incorporating by reference the information on the website into the prospectus, as opposed to having to file a multitude of prospectus supplements for those changes.

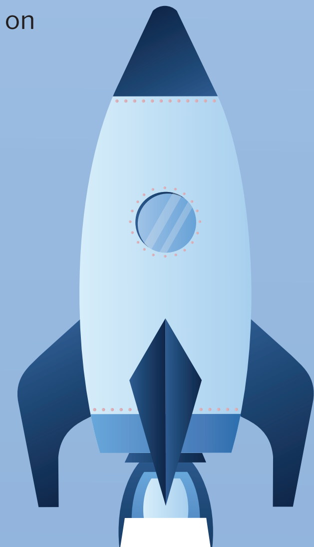
- **Use of SAP Financial Statements in RILA Registration Statements**. Registration statements for RILAs and MVAs generally will be allowed to include financial statements prepared in accordance with state statutory accounting principles (SAP) for insurance companies instead of generally accepted accounting principles (GAAP), subject to the same conditions and limitations as variable annuities, without having to obtain SEC staff permission.

- **Significant Changes in How RILA and MVA Sales Materials Are Regulated**. Sales materials for RILAs and MVAs are now subject to the fair and balanced disclosure requirements of Rule 156 under the Securities Act, as is the case with sales materials for variable products. Nonetheless, with one exception, the SEC did not amend Rules 482 or 433 under the Securities Act to cover RILAs or MVAs. Therefore, distribution of RILA sales materials is restricted to those preceded or accompanied by a prospectus filed with the SEC. The exception, which represents a change from what was proposed, is that the few RILA and MVA issuers who are "seasoned issuers," and so would have qualified to disseminate these materials without a prospectus delivery requirement, may continue to do so.

- **Expanded Disclosure Requirements for Fixed Investment Options in a Combination Contract**. More disclosure will be required regarding non-registered fixed investment options in annuity contracts with variable, MVA, and/or RILA investment options, notwithstanding concerns raised by several commenters regarding the jurisdictional foundation for the disclosure requirements imposed on such non-securities.

- **Non-Variable Insurance Products That Remain Subject to the Existing Registration Regime**. Other registered non-variable insurance products, such as indexed-linked life insurance policies and contingent deferred annuities, will still be registered on an "S-form" and be subject to the disclosure requirements on those forms. In addition, these products will remain subject to existing rules on amendments, registration fee payments, and financial statement preparation.

There remains a host of outstanding interpretive questions and implementation challenges ahead, not the least of which is the requirement that RILA and MVA sales materials comply with the content requirements of Rule 156 by September 23, regardless of whether the registration statements for these products have been updated to comply with Form N-4. Nonetheless, the new registration framework for RILAs and MVAs is a win-win for investors and the industry. To take advantage of the benefits of the new framework, however, much work lies ahead, and registrants interested in taking advantage of those benefits in time for the next update season will have to move quickly.



Tropical Storm or Category 5? Unanswered Questions at the Heart of the Supreme Court's Recent Administrative Law Decisions

BY SCOTT ABELES

When legal historians look back on the U.S. Supreme Court's 2024 term, the most eye-popping decisions will almost certainly be the immunity and ballot access claims lodged by former President Trump. Those opinions are, however, fated to directly impact a very small group of potential future litigants. The recent term's administrative law decisions, in contrast, intrinsically impact a much wider swath of parties — spanning regulators, the regulated, and the general citizenry — so will likely lap the Trump dispositions in importance long term.

By how much cannot yet be known. Each decision reviewed here reduces the power of administrative agencies but begs fundamental questions for resolution in future proceedings.

Removing the Government's Thumb From the Scale: *Loper Bright Enterprises v. Raimondo*

In *Loper Bright*, a six-justice majority held that the Supreme Court's 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.* — the court's third-most-cited opinion, with more than 19,000 cites — was wrongly decided. *Chevron* held that when a statute contains an ambiguity or gap, courts should presume Congress intended the agency to resolve the ambiguity, or fill the gap. When the agency did so, *Chevron* directed courts to defer to the agency's interpretation if reasonable, even if the court would come to a different conclusion in reviewing the text de novo.

According to the majority, *Chevron* was "fundamentally misguided" and conflicted with the Administrative Procedure Act's direction that courts, not agencies, are to decide "all relevant questions of law" arising on review of agency action. While agencies have expertise within their domains, the judiciary is the constitutionally authorized "expert" on statutory construction. The APA's assignment of ultimate interpretive authority to courts is consistent with the courts' historical role, while *Chevron*, the court wrote, was a misguided departure from it.

The court did not reach the petitioners' alternative ground for overturning *Chevron*, based on the Constitution's separation of powers principle. That means, *in theory*, that Congress can amend the APA and restore *Chevron* deference. In practice, we can presume from their concurrences that Justices Thomas and Gorsuch would deem that amendment an unconstitutional appropriation of judicial authority. The other four justices in the majority did not embrace that view but did not reject it either.

But in finding the APA "codifies for agency cases the unremarkable, yet elemental proposition ... that courts decide legal questions by applying their own judgment," *Loper Bright* strongly suggests that mandated agency deference is out of step with more than just the APA. If broad delegations of interpretive authority are deemed unconstitutional, our nation's 100-year-old experiment with a strong, federal administrative state will be significantly curtailed.

Leveling the Playing Field: *SEC v. Jarkesy*

The Dodd-Frank Act authorized the SEC to use its in-house tribunals to prosecute securities fraud cases and seek civil penalties. Industry and the defense bar had long argued that this kind of agency "home field advantage"

skewed justice by providing those who authorized a set of charges the power to oversee the case and issue judgment. In *Jarkesy*, the Supreme Court held that, at least in cases involving claims based in the common law (like fraud) that seek penalties available at common law (like monetary penalties), the Seventh Amendment's guarantee of trial by jury requires that an Article III court (and its attendant protections, like broad discovery and unified rules of civil procedure and evidence), not an in-house forum, be used.

The immediate effects on the SEC may not be large. Given this challenge and others, the SEC has been, in the main, limiting its use of administrative proceedings to settled cases, with contested cases going to federal court. Yet the SEC isn't the only agency that seeks statutory penalties in-house — the Commodity Futures Trading Commission, Federal Trade Commission, Department of Justice, and Environmental Protection Agency are among at least two dozen agencies that do — and all will need to reevaluate their enforcement slates to determine if such matters must be brought in federal court, whether they are cognizable there, and whether the penalties they seek are recoverable. Short-term gains, at least, should accrue to enforcement targets negotiating settlements, given their increased bargaining power.

But here, again, the Supreme Court avoided the more far-reaching questions presented. In the underlying decision that *Jarkesy* affirmed, the Fifth Circuit found the Seventh Amendment violation but also found that Congress violated the nondelegation doctrine through an overbroad authorization of enforcement power to the SEC. It also found that restrictions on executive branch officials' discretion to remove administrative law judges violated the separation of powers principle. The Supreme Court did not reach (or reject) these alternative holdings. As with *Loper Bright*, *Jarkesy* may go down as a footnote to a larger project of fundamentally diminishing the administrative state.

Killing the Clock: *Corner Post Inc. v. Board of Governors of the Federal Reserve System*

A case that *should* have a limited footprint is *Corner Post*. The court found that the default statute of limitations for a facial challenge to the legality of a regulation (six years) accrued from the plaintiff's injury, not from the regulation's issuance. The question mattered because the petitioner, Corner Post, came into existence eight years after the relevant rule, too late to lodge a challenge if limitations accrued from enactment.

The holding substantially eliminates the statute of limitations for substantive rulemaking challenges covered by *Corner Post* because of the ease with which new entities can be created. Even the SEC's Rule 10b-5, now celebrating its 90th year, is technically ripe for facial, even pre-enforcement, challenge by an entity subject to its potential enforcement. *Corner Post* leaves open whether its rule applies when a regulated party complains about *procedural* rulemaking defects. If an agency fails to abide by, for example, its notice and comment obligations, there is a reasonable argument that the only plausibly injured entities are those in existence upon publication. Footnote 8 to the opinion suggests that at least some procedural challenges may not have the plaintiff-specific limitations periods that substantive challenges will have under *Corner Post*.

Corner Post, unlike the cases discussed above, does not present lurking constitutional questions. Congress may freely establish limitations periods for federal statutes, so can "fix" *Corner Post* with a stroke of its pen. The salutary benefits of certainty engendered by statutes of repose likely outweigh *Corner Post*'s authorization of challenges that either (i) no other entity thought worth bringing over six years or (ii) were unsuccessful when brought by a different plaintiff. *Corner Post*'s legacy will depend, consequently, on whether Congress overrules it by legislation.

Consent West-Winds: The Dark Cloud of Dark Patterns

BY PATRICIA CARREIRO AND ELLIOTT SIEBERS

What happened?

On September 4, the California Privacy Protection Agency, the agency responsible for enforcing the California Consumer Privacy Act (CCPA), issued an enforcement advisory on "dark patterns" and their inability to constitute valid consent.

Why does it matter?

Any business whose consent is considered invalid would likely face allegations that all processing activities subject to the CCPA (excluding data collected, processed, sold, or disclosed subject to the federal Gramm-Leach-Bliley Act, its implementing regulations, or the California Financial Information Privacy Act) and on which that consent is based are unlawful and subject to civil penalties of up to $2,500 per violation, and up to $7,500 for willful violations. Going further, consent is a near-ubiquitous concept, and California's view of what constitutes valid consent is likely to shift the winds on what constitutes valid consent — and what is conversely considered invalid, deceptive, or unfair — more generally.

What is a dark pattern?

Dark patterns are "choice architectures that have the substantial effect of subverting or impairing a consumer's autonomy, decision-making, or choice." Like clouds, this can take many forms, particularly when interpreted by an aggressive regulator. The advisory stressed two important aspects for valid consent (i.e., not being a dark pattern): plain-language explanations and symmetrical choices. A "symmetrical choice" means that consumers can exercise more privacy-protective choices as easily as they can exercise less privacy-protective choices. The advisory provides some examples:

Not Symmetrical or Unequal Choice

When the business's process for opting out of the sale/sharing of their personal information takes more steps than the process to opt back in.

See 11 CCR § 7004(a)(2)(A).

A process to opt in to the sale of personal information that only gives the choice of "yes" and "ask me later."

See 11 CCR § 7004(a)(2)(B).

Symmetrical or Equal Choice

A website banner seeking the consumer's consent to use a consumer's personal information that offers the choices "accept all"and "decline all."

See 11 CCR § 7004(a)(2)(C).

A process to opt in to the sale of personal informationthat gives the choice of "yes" and "no."

See 11 CCR § 7004(a)(2)(B).

Ultimately, "dark patterns are about effect, not intent," and identifying them can feel like searching for shapes in the clouds.

What should I consider doing?

1. Keep an eye on the sky. These consent winds may sweep east.
2. Review consent interfaces and processes for dark clouds the CPPA might call a "dark pattern." Ask:
   - Is the language easy to read, in plain language, and free of legal jargon?
   - Is the path to the less privacy-protective choice longer or more difficult to reach than the more privacy-protective choice?
   - Is it more time-consuming for a consumer to make a more privacy-protective choice?

Here's hoping for sunny, cloud-free days ahead!

SEC Penalties for Off-Channel Communications: Still Blowing in the Wind

BY NATALIE NAPIERALA

The SEC has increased its enforcement efforts against firms that are registered as broker-dealers and/or investment advisers for alleged violations of federal securities laws involving "off-channel communications." Such communications generally include those made by firm personnel through means other than official firm accounts or firm-approved platforms and include communications via firm employees' personal accounts or devices.

Generally, the SEC prohibits broker-dealers from engaging in such communications through broad record-keeping requirements imposed pursuant to Rule 17a-4 under the Securities Exchange Act of 1934. Registered investment advisers are subject to more narrow record retention requirements pursuant to four categories enumerated in Rule 204-2(a)(7) under the Investment Advisers Act of 1940.

Since 2021, the SEC has charged approximately 60 firms with off-channel record-keeping violations and imposed approximately $2.7 billion in fines and penalties against such firms. The amount of these fines and penalties, however, does not appear to reliably follow any statutory guideline or consistent method of analysis and application.

At the SEC Speaks Conference in June 2024, Deputy Director of Enforcement Sanjay Wadhwa stated that the staff assesses the facts and circumstances on a case-by-case basis to determine a penalty to recommend to the commission. Wadhwa provided the following six factors the Enforcement Division generally considers: (1) self-reporting, which is "the most significant factor in terms of moving the needle on penalties"; (2) cooperation — a firm that cooperates during the investigation "can still receive credit," even if it does not self-report; (3) size of the firm — the SEC assesses a firm's revenue and its number of registered professionals to ensure that the penalties are large enough to serve as an adequate deterrent against future violations; (4) scope of the violations, including how many individuals communicated off-channel and the total number of off-channel communications; (5) a firm's efforts to comply with record-keeping obligations and its remedial efforts; and (6) precedent established by the SEC's orders on these matters, which serve as a "guide," though they are "not determinative."

Despite these guidelines, fines for off-channel communications appear inconsistent and surprisingly high, especially because the SEC has not alleged any actual fraud, customer harm, or ill-gotten gains by the firm or its personnel in connection with these violations. Such an allegation could justify the imposition of significant penalties under the various statutes that set forth the maximum penalties that the SEC may impose in administrative proceedings based on "each act or omission" violating the securities laws. The penalty statutes set forth three enumerated tiers the SEC must observe in recommending penalties, although the SEC is not necessarily wed to complying with this tier structure in settlement negotiations. Tier 1, being the least severe, applies to any violation; Tier 2 applies to violations involving fraud, deceit, manipulation, or deliberate or reckless disregard of regulatory requirements; and Tier 3 applies to violations that also involve a substantial risk of loss to others or gain to the violator.

Given the apparent absence of such fraud or substantial risk, the violations alleged in the settled off-channel communication cases should constitute Tier 1 violations, for which the maximum penalty is $111,614 per violation. Yet, a study sampling 16 settlements of such record-keeping violations reveals a range of penalties from $10 million to $125 million. Accordingly, the study suggested, the dollar amount of these penalties would imply that the SEC has identified 89 to 1,110 Tier 1 violations in connection with the settlements — though no official statement indicates as much.

Compounding the ambiguity of the SEC's decision-making process in imposing penalties for such record-keeping violations is the lack of transparency on (a) how the SEC weighs and applies the six factors the Enforcement Division considers and (b) what the commission considers to be "each act or omission." Unless and until the commission or its staff provides more clarity on such matters, firms may have an understandable concern that, like the wind, the SEC's imposition of penalties for alleged off-channel communication violations is unfortunately inconsistent and unpredictable.

Changes for Producer Award Trips at IMOs?

Fiduciary Rule Suggests Turbulence Ahead

BY GINA ALSDORF

In April 2024, the U.S. Department of Labor issued its long-awaited retirement security rule, also known as the fiduciary rule, broadening the definition of who is an "investment advice fiduciary" under the Employee Retirement Income Security Act. Although independent marketing organizations (IMOs) are not necessarily covered directly by the rule, they would likely need to make changes to their incentive trip programs because of the rule's requirements for insurers and their producers. Litigation brought by industry groups has recently stayed the effective date of the rule, and the DOL is appealing the stays. So it is up in the air whether — and with what revisions — the rule might go into effect. At a minimum, however, the rule reflects a possible shift in the regulatory climate that warrants an assessment of the types of changes IMOs might be considering.

Producers as "Fiduciaries"

The DOL's retirement security rule would make producers "fiduciaries" where purchasers use assets from certain retirement accounts to fund their purchase of some insurance products such as fixed or fixed index annuities. This includes purchases with rollover funds from any account covered by ERISA or section 4975 of the Internal Revenue Code, including some 401(k) plans, private pensions, and individual retirement accounts.

IMOs' Role: Contests and Trips

IMOs support many producers (including independent insurance agents) who make such sales. For example, IMOs may provide producers with office space, training, compliance services, marketing, and even incentive compensation. An independent agent will work with an IMO to better compete with larger, more established insurance agencies. To incent additional sales, many IMOs run contests throughout the year and offer luxury trips as prizes for top producers. These trips often include international destinations, lavish accommodations, the opportunity to bring a companion, and amazing experiences like safaris.

Contests and Trips Result in Prohibited Transactions by Producer/Fiduciaries

Both ERISA and the Internal Revenue Code prohibit producers who are fiduciaries from receiving compensation (such as incentive trips from third parties) for sales related to recommendations of fixed annuities they make. Unless an exemption is relied upon, such a "prohibited transaction" would trigger excise taxes and other possible liabilities for the fiduciary. Compliance with an exemption, however, keeps transactions from being prohibited under ERISA and the Internal Revenue Code. For producers working with multiple insurers, the 2024 amendment to prohibited transaction exemption (PTE) 84-24 is the exemption they would most likely use.

Consequences of Reliance on PTE 84-24

PTE 84-24 requires, among other things, that producers' recommendations in a sales context be both prudent and loyal to the purchaser. Further, it requires that insurers not use quotas, bonuses, special awards, etc. that a reasonable person would conclude are likely to encourage a producer's noncompliance with those duties of prudence and loyalty. Insurers must also have procedures in place that detect and mitigate conflicts of interest and ensure compensation practices are not creating incentives for producers' noncompliance with the exemption.

PTE 84-24 does not by its terms impose these requirements directly on IMOs. Nevertheless, producers seeking to rely on the exemption, as well as insurers, will want assurances that IMOs' contests and trips are consistent with the requirements. They may even seek written representations and warranties from IMOs in that regard. As a practical matter, therefore, IMOs will be pressured to conform their contests and trips to the requirements of PTE 84-24.

Although the DOL did not ban any specific form of compensation in its final retirement security rule, it did specifically call out exotic travel as an area of concern and questioned whether prize trips are consistent with PTE 84-24. The preamble to the rule seems to imply that, if a trip is that amazing, it will encourage producers to make imprudent or disloyal recommendations to get that last sale and qualify for a trip, in violation of PTE 84-24.

The DOL did state that trips for educational conferences may be appropriate. But merely adding educational programming to exotic, luxury award trips will not necessarily make them permissible. Based on the preamble, it would still turn on whether the trip would be viewed as likely to result in recommendations that are disloyal or imprudent.

Accordingly, all the facts and circumstances around each trip will need to be weighed, and clear answers often may prove elusive. Trips based on specific production levels for a single product, over a limited time, are likely candidates for change. Broader criteria for awarding a trip would help to weaken any argument that a producer's desire to win a trip improperly motivated any given recommendation. For example, the criteria for being awarded a trip could include the sale of a broader range of products over a longer time period, as well as criteria aligned with client goals, such as client satisfaction, client retention, or client retirement readiness scores. The more exotic prize trips may need to be scaled back to just "nice" trips. Adding educational content also might help.

In addition to its requirements for prudence and loyalty, PTE 84-24 also requires that producers not receive more than "reasonable compensation." Reasonable compensation in the ERISA context has never meant the cheapest but has always meant reasonable based on the market, considering total cost, and the services provided. It is a facts-and-circumstances analysis.

Accordingly, it may often prove difficult to obtain clarity as to whether a given luxury trip awarded as a production bonus would constitute unreasonable compensation. However, to the extent that IMOs restructure incentives to be more conservative, as discussed above, the trips they award would be at less risk of being considered unreasonable compensation. On the other hand, trips awarded by IMOs that do not participate in any such trend toward conservatism may increasingly be regarded as outside of industry norms and therefore more at risk of being considered unreasonable compensation.

Aerial Overview: Recent Developments in Life, Accident, and Long-Term Care Litigation

BY STEPHANIE FICHERA

Video Evidence Meant No Triable Issue of Fact in Long-Term Care Coverage Dispute

In *Meyer v. Massachusetts Mutual Life Insurance Co.*, the U.S. District Court for the District of Colorado entered summary judgment for an insurer after video evidence showed that the insured was not entitled to the benefits he was receiving.

The plaintiff in *Meyer* purchased a long-term care policy that provided a benefit if the insured became "chronically ill." Under the policy, an insured was "chronically ill" if he had a "severe cognitive impairment," which required continual supervision by another person or substantial assistance with two or more activities of daily living.

After a field examiner and a psychologist concluded that the plaintiff suffered from severe cognitive impairment and required stand-by assistance with showering, dressing, and continence, the insurer determined that the plaintiff qualified as "chronically ill" and began to pay benefits under the policy.

A year later, the insurer sought to recertify that the plaintiff qualified for benefits and requested he complete a recertification form and submit current medical records. The insurer determined the records failed to establish that the plaintiff required "substantial supervision" or "substantial assistance" with activities of daily living.

The insurer also conducted surveillance of the plaintiff during this time. While under surveillance, the plaintiff was observed and recorded driving, walking, shopping, and bending over without assistance or difficulty. Based on this evidence, a medical doctor also concluded that the plaintiff did not have a severe cognitive impairment and did not require substantial assistance to complete activities of daily living.

Accordingly, the insurer terminated the plaintiff's benefit payments. The plaintiff filed suit, asserting claims for breach of contract and bad faith.

After viewing the video evidence, the court granted summary judgment in favor of the insurer. The court reasoned that the video clearly showed that the plaintiff did not require continual supervision or assistance with tasks of daily living. As a result, there were no triable issues of fact as to whether the insurer properly terminated the plaintiff's benefits.

Life Insurer Had No Affirmative Obligation to Withdraw More Than Authorized Payments to Keep Policy From Lapsing

In *Fric v. Allstate Life Insurance Co.*, the Fifth Circuit Court of Appeals affirmed summary judgment in favor of a life insurance company that did not increase an insured's automatic payments to cover an increase in premiums.

The plaintiff was the primary beneficiary of a universal life insurance policy insuring the life of her husband. As the insured aged, the premium required to keep the insurance policy in force increased.

In 2017, the insured signed an autopay agreement, which authorized the insurer to automatically withdraw the amount necessary to cover the premium at that time. The autopay agreement also provided that the insurer could make changes to the payment amount upon "written, verbal, or electronic request(s)" by the insured.

By 2019, the amount authorized under the autopay agreement was not sufficient to cover the insured's increased premium. The insurer notified the insured of this fact and informed him that he had a 60-day grace period to make the necessary payments. After 60 days passed without payment, the insurer informed the insured that the policy had lapsed.

The insured passed away nearly a year later, prompting the plaintiff to file a claim for benefits. After that claim was denied, the plaintiff filed suit, claiming breach of contract, bad faith, fraud, and promissory estoppel.

The crux of the plaintiff's argument was that the insurer had a duty to increase the amount of the autopayment to cover the cost of the increased premium. The Fifth Circuit, affirming the district court's decision, disagreed. Under the terms of the autopay agreement, the insurer was only required to withdraw payments to the extent authorized. The court found that the insurer was to withdraw annually only the amount necessary to cover the 2017 premiums; therefore, it had no affirmative obligation to withdraw premiums sufficient to keep the policy in force.

Potential Beneficiary Necessary Party to Interpleader Action

In *Gerber Life Insurance Co. v. Harris*, the U.S. District Court for the District of Arizona held that it could not proceed with an action seeking payment of death benefits unless all potential beneficiaries were joined.

The underlying dispute concerned the distribution of death benefits for a life insurance policy that was issued to Fallon Harris in Illinois on behalf of her minor son. When applying for the policy, Harris named herself as the policyholder and did not identify a beneficiary. Under the policy's terms, this made Harris the policy's sole beneficiary.

Years later, Harris' son passed away at the age of 12 after sustaining multiple gunshot wounds. Harris, the sole beneficiary under the policy, was charged with the murder.

Because the insurance policy was issued in Illinois, it was subject to Illinois law, including the Illinois "slayer statute," which prohibits "any person who intentionally and unjustifiably causes the death of another" from receiving any property, benefit, or other interest by reason of the death. A few months after the insured passed, Harris' mother (and the insured's grandmother) filed a claim for policy benefits.

The insurer, recognizing that it had no interest in the policy benefits, but being unsure of who was entitled to them, filed an interpleader action. The court agreed there was uncertainty regarding who was entitled to the policy benefits but questioned whether necessary parties were missing from the action.

In the complaint, the insurer noted that, if Harris was deemed to have intentionally and unjustifiably caused her son's death, she would be barred from recovering the death benefit by the Illinois slayer statute. In this scenario, the death benefits would be disbursed as though Harris had predeceased the insured, and Harris' estate would become the beneficiary.

The court disagreed. The court relied on a clause in the policy providing that, if the policyholder died before the insured's 21st birthday, the beneficiary would become the policyholder, otherwise the legal guardian of the insured would become the owner. The court reasoned that, if the insured had another living parent whose parental rights had not been severed, this clause would make them the beneficiary of the policy and a necessary party to the action. The court held that it could not move forward with the action unless the insurer identified and joined any potential legal guardian. After complying with this request, the court granted the insurer's request to dismiss them from the case.

Plan Administrator's Denial of AD&D Claim Not Arbitrary and Capricious

In *Goldfarb v. Reliance Standard Life Insurance Co.*, the Eleventh Circuit Court of Appeals held that a plan administrator's denial of an accidental death and dismemberment (AD&D) claim under a policy governed by ERISA was not arbitrary and capricious.

This case concerned entitlement to benefits under an AD&D policy insuring the life of a medical doctor. An avid mountain climber, the insured traveled to Pakistan for a mountain climbing expedition. After scouting ahead, the insured's climbing partner observed that conditions would be too dangerous for them to continue their ascent. Despite these warnings, the insured continued the expedition alone.

The insured disappeared shortly thereafter. Due to conditions on the mountain, and the amount of time the insured was missing, he was presumed dead. Because the insured's body was never found, however, officials could not conclusively determine the cause of death.

The policy provided a death benefit for loss of life resulting from an injury, but only if the loss was caused "solely by an accident." The policy did not define the term "accident."

The policy's beneficiaries made a claim based on the insured's death. The insurer denied the claim because it could not determine whether the loss was caused "solely by an accident" as the true cause of the death was unknown. The district court, on cross-motions for summary judgment, granted judgment in favor of the beneficiaries, holding that the denial of benefits was arbitrary and capricious.

The Eleventh Circuit, applying federal common law, reversed. Because the term "accident" was ambiguous in the policy, the Eleventh Circuit, joining six other circuits, applied the definition established in *Wickman v. Northwestern National Insurance Co.* Under this standard, the court must consider the insured's subjective expectations of the likelihood of injury from engaging in the conduct that resulted in the loss. Where, as here, the insured's subjective expectations are unknowable, the court undertakes an objective analysis of whether a reasonable person, with the background and characteristics of the insured, would have viewed injury or death as highly likely to occur as a result of his intentional conduct. If such a person would view injury or death as highly likely to occur, then the death is not considered an accident.

Emphasizing the climbing partner's warnings and the dangerous conditions on the mountain, the Eleventh Circuit reasoned that even an experienced climber in excellent physical condition would have recognized a high likelihood of injury or death from continuing the climb alone. While the court acknowledged that the facts were susceptible to multiple interpretations, the court reasoned that this ambiguity could not overcome the broad deference given to plan administrators under the arbitrary and capricious standard. Accordingly, the court found that the insurer had a reasonable basis for denying the AD&D policy claim and granted summary judgment in its favor.

This article was co-authored by Carlton Fields summer associate David Safir.

FINRA's Sky Isn't Falling (Just Yet)

BY JOHN GIBBONS

Is FINRA constitutional? Two cases currently playing out in D.C. federal courts, *Alpine Securities Corp. v. FINRA* and *Kim v. FINRA*, tee up that question. But the Financial Industry Regulatory Authority is an unusual target for constitutional challenge, because it is not a government agency. As securities lawyers know, FINRA is a private Delaware corporation registered as a self-regulatory organization (SRO). As an SRO, FINRA (among other things) writes and enforces conduct rules for registered broker-dealer firms, monitors firms' compliance, administers broker qualification exams, and refers fraud and insider-trading investigations to the SEC.

As law students studying for the bar are advised, a private actor generally cannot violate the U.S. Constitution. So *Alpine* and *Kim* largely turn on whether FINRA acts as a private entity or as an arm of the government when it enforces conduct rules and securities laws.

In *Alpine*, the district court refused to enjoin FINRA's expedited proceeding against a broker-dealer. The court found that FINRA is not a state actor for constitutional purposes, emphasizing that: the government does not fund FINRA or select its board or officers; FINRA performs other functions (like administering exams) that the SEC does not share; and FINRA alone determines which of its member firms to investigate and discipline. FINRA's SRO role also did not violate the constitutional doctrine that limits the delegation of congressional powers to private parties, because FINRA's activities are statutorily subject to SEC oversight.

The broker-dealer in *Alpine* had a bit more luck before the D.C. Circuit, at least temporarily. In a barebones, per curiam order, a motion panel (2–1) temporarily enjoined FINRA's expedited proceeding. Judge Walker wrote a solo concurrence articulating his view that FINRA's activities violate Article II of the Constitution because FINRA wields executive power but is not subject to presidential control. FINRA hearing officers, he thought, were functionally identical to the SEC's administrative law judges, and so suffer from the same constitutional infirmity that the U.S. Supreme Court found in *Lucia v. SEC*. And Judge Walker brushed aside the notion that FINRA is "a nominally private corporation," characterizing its activities as controlled by the government "[f]rom start to finish" "with little to no room for private control."

A few months later, though, another D.C. district court judge, in *Kim*, refused to enjoin a different FINRA proceeding before one of its hearing officers. To begin with, the opinion in *Kim* declined to read the appellate court's order in *Alpine* "as effectively halting all FINRA enforcement actions." Rather, the court in *Kim* reached the same conclusion that the district court had reached in *Alpine*, and for somewhat similar reasons. Namely, FINRA's board is not appointed by public officials, it relies entirely on its own funding, and neither the SEC nor any other agency compels FINRA to take any action. That FINRA has a role alongside the SEC in regulating the securities market, *Kim* reasoned, did not necessarily mean the two act "jointly." And it would be a mistake to characterize SRO activities as functions traditionally reserved to the government for another reason: "securities industry self-regulation has a long tradition" in the U.S. stretching back to 1790. Judge Walker's concurrence in *Alpine* went astray, in the district court's view, because it didn't adequately address the threshold question for applying *Lucia*: whether FINRA is a state actor at all.

So two federal district court judges have expressed the view that FINRA likely acts as a private party in its SRO role, and at least one federal appellate judge believes FINRA wields government power. Both *Alpine* and *Kim* remain pending in the D.C. Circuit, with *Kim* held in abeyance until *Alpine* is resolved. In February, the *Alpine* merits panel (Judges Srinivasan, Millett, and Walker) held oral argument, followed by several rounds of supplemental briefing.

Regardless of who carries the day in the D.C. Circuit, the Supreme Court may be interested. Then again, maybe not: *Jarkesy v. SEC* presented similar nondelegation and Article II arguments this past term and the Supreme Court shied away. Instead, six justices avoided those complicated issues and opted to resolve *Jarkesy* on a Seventh Amendment point (right to jury trial) that, as it happens, offers little guidance for *Alpine* and *Kim*. So, although the sky hasn't fallen for FINRA, some dark clouds loom on the horizon.

FINRA and SEC Float Concerns Over Social Media Finfluencers

BY ANN FURMAN

Social media marketing is an important form of advertising in our digital world, particularly with a target audience of younger investors. This has caught the eye of FINRA and the SEC.

Social media influencers in the financial services industry (informally dubbed "finfluencers") receive compensation from broker-dealers, investment advisers, or others to promote financial products on social media platforms such as TikTok, Facebook, Instagram, YouTube, X, Stocktwits, Reddit, and Twitch. Through a variety of social media influencer programs (or referral programs), finfluencers with large online followings may receive bonuses, rewards, incentives, or other compensation for referring new customers to open accounts at a firm or purchase securities from a firm.

FINRA Finfluencer Sweep. To gain a better understanding of firm practices related to the acquisition of customers through social media, FINRA conducted a targeted examination (finfluencer sweep), commencing in September 2021.

FINRA sought information on how firms manage their regulatory obligations, including those related to information collected from customers acquired through social media. In addition to reasonable broker-dealer supervision of social media influencers and review and retention of social media influencer communications, FINRA is concerned about associated privacy issues such as the collection of browser cookies obtained from customers or individuals who provide nonpublic information but are not onboarded as customers.

FINRA's finfluencer sweep sought 10 items of information relating to social media influencers, referral programs, and related general information, and 10 items of information relating to compliance with SEC Regulation S-P governing the privacy of consumer financial information, such as written supervisory procedures, privacy notices, and opt-out notices.

In February 2023, FINRA provided an update on the finfluencer sweep. FINRA organized its review in two parts: first, firms' use of social media influencer and referral programs to promote their products and services and recruit new customers; and second, firms' privacy notices (and options to opt out) regarding the collection and sharing of their usage information. The update identified firm practices to assist firms in evaluating their social media influencer and referral programs, including whether their practices and supervisory systems are reasonably designed to address relevant risks. The update also stressed compliance with Regulation S-P obligations and other regulations for protecting customer nonpublic information with non-affiliated third parties.

FINRA Enforcement Actions. Thus far in 2024, FINRA has settled three finfluencer-related enforcement actions (on March 15, April 3, and June 10). Each action censures and fines a firm for alleged violations of FINRA Rules 2210 and 2010. FINRA alleges in each action that social media influencer posts were not fair or balanced, or were inappropriately exaggerated or promissory. FINRA also alleges that each firm did not review or approve the content of influencer posts, retain influencer communications, or have a reasonable system in place for supervising influencer communications. The June 10 action also alleges violations of Regulation S-P relating to inaccurate privacy notices and sharing nonpublic information (including customer names, email addresses, Social Security numbers, birthdates, and state IDs) with non-affiliated third parties for marketing purposes.

SEC Enforcement and Guidance. For its part, on February 16, 2024, the SEC announced a settled action against a registered investment adviser for not disclosing a social media influencer's role in the launch of a new exchange-traded fund. The SEC's complaint alleges that the influencer's involvement, and details of an anticipated licensing arrangement, were not disclosed to the independent trustees of the trust in connection with their approval of the management fee. The complaint alleges violations of Section 15(c) of the Investment Company Act of 1940 and Sections 206(2) and 206(4) of the Investment Advisers Act of 1940. Without admitting or denying the violations, the investment adviser agreed to a censure and fine of $1.75 million.

The SEC is concerned that some social media influencers may be full of hot air. To address this concern, the regulator has issued investor alerts addressing risks associated with social media and investing. Among them, the SEC warned college students that they "should exercise caution before following any investment advice from a social media source" and "not be swayed by testimonials or celebrity endorsements when making an investment decision."

As to the outlook from here, although the use of finfluencers may not be under a dark regulatory cloud, persistent fluffy white ones, at least, are definitely in the forecast.

Practical Thoughts for Sponsors About Current ERISA Forfeiture Litigation

BY GINA ALSDORF AND IRMA SOLARES

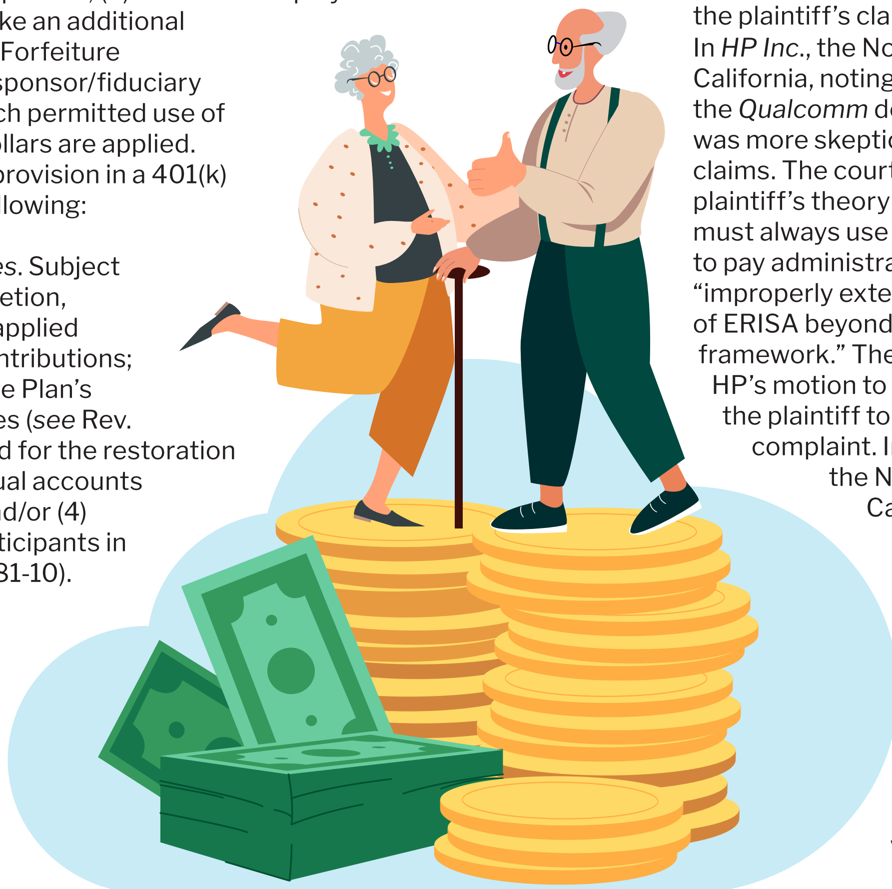
A notable trend in ERISA litigation has emerged as in-house attorneys look to mitigate the risks of coming waves of class action litigation. Beginning in late 2023, there have been several challenges to the use of forfeiture dollars in retirement plans. Currently, 10 actions have been filed advancing a novel theory brought forward by the plaintiffs' bar that plan sponsors misused forfeited matching contributions, including class actions in California district courts against Intuit Inc., Thermo Fisher Scientific Inc., Qualcomm Inc., HP Inc., Honeywell International Inc., Tetra Tech Inc., and Mattel Inc. We believe small changes to your plan documents, processes, and procedures could greatly enhance your ability to avoid or withstand these complaints.

A forfeiture can occur in retirement plans that have a vesting schedule for employer-matching contributions. Although individuals are always vested 100% in their own deferral contributions, this is not necessarily so with employer contributions, which may be subject to a vesting schedule. Where an individual leaves before the time his or her matching dollars are vested, the match will become forfeiture dollars. Forfeiture dollars are considered assets of the plan under Internal Revenue Code section 401(a)(2) and ERISA section 403(c)(1) and must thus be used for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable plan administration costs. According to the Internal Revenue Service, which reaffirmed its position in 2023, 401(k) plan forfeitures can be used for any of three permitted purposes: (1) to pay plan administrative expenses; (2) to reduce employer contributions; or (3) to make an additional allocation to participants. Forfeiture provisions often give the sponsor/fiduciary some discretion as to which permitted use of forfeiture dollars those dollars are applied. For example, a forfeiture provision in a 401(k) plan might look like the following:

> *Allocation of Forfeitures*. Subject to the Employer's discretion, Forfeitures may be (1) applied to reduce Employer contributions; (2) applied to reduce the Plan's administrative expenses (*see* Rev. Ruling 84-156); (3) used for the restoration of participants' individual accounts previously forfeited; and/or (4) reallocated among participants in the Plan (*see* Rev. Rul. 81-10).

Most of the plans at issue in the California litigation contain similar forfeiture allocation language. What appears to be an issue resolved by principles of contract construction and plain plan language has been mired in controversy, with differing results among the California federal district courts to date. The plaintiffs allege that ERISA imposes a fiduciary duty on plan sponsors to act solely in the interest of the participants and for the exclusive purpose of providing benefits to plan participants and that the employers breached this duty by choosing to use forfeited funds to reduce their own future contributions to the plan instead of reducing the administrative expenses that are borne by participants. In so doing, the plaintiffs allege, the employers chose to put their own interests ahead of the interests of the plan participants by choosing not to act for the exclusive purpose of benefiting plan participants.

Motions to dismiss have been filed in each case with mixed results. In the *Qualcomm* action, dismissal was denied outright on the basis that the plaintiff's claims were plausible. In *HP Inc.*, the Northern District of California, noting that it did not find the *Qualcomm* decision persuasive, was more skeptical of the plaintiff's claims. The court reasoned that the plaintiff's theory that a fiduciary must always use forfeited funds to pay administrative costs would "improperly extend the protection of ERISA beyond its statutory framework." The court granted HP's motion to dismiss but allowed the plaintiff to file an amended complaint. In the *Intuit* action, the Northern District of California granted in part and denied in part Intuit's motion to dismiss but declined to dismiss the claims for breach of fiduciary duty. To date, none of these actions has been dismissed with prejudice.



How can sponsors protect themselves from being sued for misuse of the forfeiture dollars?

One way would be to remove from the plan document any employer discretion in this regard. For example, the plan document could state that any forfeiture dollars will be used first to restore participants' individual accounts that were previously forfeited under circumstances where the plan requires such restoration; next, to offset the plan sponsor's contributions; next, to pay administrative expenses of the plan; and finally, to increase the balances of all other participant accounts.

An ERISA fiduciary has a fiduciary duty to follow a plan document, so long as it is not contrary to ERISA; and, if the plan document gives the fiduciary no discretion, the fiduciary arguably cannot be considered to be in breach of its duty. Nevertheless, it also could be argued that, to the extent that the forfeiture allocation priorities prescribed in the plan document benefit the employer, the fiduciary would have a duty to ignore the plan document and allocate forfeitures in a manner that more directly benefits participants. This argument is undercut to some extent by the fact that any or all of these uses of forfeiture amounts are clearly permitted under federal tax law. In any event, mandatory priorities in the plan document for how such amounts must be allocated will at least be a stumbling block for a plaintiff looking to sue.

Second, another avenue of attack appears to be the lack of communication of the forfeiture provisions. It would be a good step in mitigating potential risks to ensure the use of forfeiture dollars is clearly communicated to participants in the plan. The plan document, summary plan description, and any other plan communications regarding the forfeiture process and how forfeiture dollars are spent should be clear on the way forfeitures work. If you do not currently have a clear communication, it may be time to find a place in your annual participant notices to state the forfeiture procedures.

Third, consider adding an arbitration provision. The suit against Tetra Tech was stayed and referred to arbitration because the plan contained a "broad arbitration provision," as well as a "broad waiver of class, collective and representative actions" clause.

Finally, it is important to ensure your vesting provisions are being followed. If you have never audited your vesting and forfeiture processes to ensure conformity with your plan documents, it may be time for a self-audit.

Tontine Takeoff?
Old Concept Gets New Wings

BY THOMAS LAUERMAN

"Tontines" are a very old form of investment, and there have been many variations. The basic idea is that the longest surviving investors in tontines will be credited with tontine assets attributable to investors who predecease them. This concept is potentially quite useful in designing products for converting accumulated investment assets into a reliable income stream that provides an attractive rate of return.

Such "decumulation" products are, of course, currently in high demand as the boomer generation moves through its retirement phase. Annuities historically have been able to provide a reliable income stream for the life of an annuitant or other specified periods. Over the past several years, however, different types of non-annuity products have been developed that, by incorporating tontine-like features, aim to provide a higher rate of reliable income payments than possible under a conventional annuity.

Set out below is a high-level overview of one such product, brought to market by Stone Ridge Asset Management, that makes use of both an open-end mutual fund and a closed-end fund.

The Open-End Mutual Fund Phase

The mutual fund is a series-type open-end investment company registered with the SEC. This mutual fund imposes eligibility requirements such that all of the investors in any given series (referred to as a "cohort") are the same gender and age. The age requirement ranges from 60 to 75 years, depending on the series, as of the series' time of inception.

The initial offering of each mutual fund series' shares will be at a per-share price that is designed to enable that series to have sufficient assets to pay its scheduled distributions (as described further below). All subsequent issuances or redemptions of the series' shares are priced at their net asset value.

Thereafter, until the series' cohort reaches age 80:

- New members may join the cohort; and
- Any cohort member may purchase or redeem the fund series' shares at any time.

When a series cohort reaches age 80:

- Any remaining outstanding shares of that series attributable to cohort members who have died are terminated via a mandatory redemption at net asset value;
- The surviving cohort members are reminded of their right to redeem their shares at net asset value;
- If, after any redemptions occasioned by the above, the mutual fund's adviser determines that the series no longer has sufficient scale to reliably achieve its objectives, the adviser may decide it is appropriate to liquidate the series; and
- Otherwise, subject to approval by the fund's board and by a majority vote of the cohort members, the open-end fund series will be reorganized into a series of a closed-end fund, as described below. If such approval is not forthcoming, the board will consider what future course would be in the best interest of the series and its cohort.

The Closed-End Fund Phase

The closed-end fund is an SEC-registered series-type investment company. Cohort members can acquire closed-end fund shares only via the above-mentioned reorganization — which is designed to be tax-free — when the cohort reaches age 80. Pursuant to the reorganization, persisting cohort members' mutual fund series shares will be converted into closed-end fund series shares having the same net asset value. Thereafter, these cohort members will have **no ability to purchase or redeem shares** of the closed-end fund.

However, if a cohort member dies while owning closed-end fund shares, those shares are canceled and the investor's remaining interest in the closed-end fund is thus forfeited without compensation. **The fact that the forfeited value remains in the closed-end fund series, where it is available to support future distributions, helps to support a higher scheduled distribution rate for this product than otherwise would be possible**.

Fund Investments and Distributions

Both the mutual fund and the closed-end fund:

- Will invest primarily in U.S. government securities; and
- Plan to make scheduled monthly distributions to cohort members at a constant rate totaling $1 per share per year.

These distributions, which are expected to exceed the series' net investment income and capital gains, are not guaranteed by any party other than the relevant series. Thus, if a series runs out of funds to pay the scheduled distributions (which is a bigger risk during the closed-end fund phase), the related cohort's entire interest in the series will terminate without further payment to the cohort members.

The distributions are scheduled to continue until the cohort reaches age 100, and the product is designed with the intent that all the closed-end series' assets will be exhausted at, but not before, approximately that time. Any assets remaining in the series at that time will be paid out in a single liquidating distribution to the then-surviving cohort members.

Annuity-Like Aspects

Products that incorporate tontine-like features can require significant actuarial input similar to that required for complex annuity products. For example, under the product described above, it is actuarially challenging to adjust the initial purchase price of the mutual fund series' shares such that, given the scheduled $1 per share annual distribution rate and numerous variables, it is highly likely that the corresponding closed-end fund series' assets will not be exhausted until approximately the time when the cohort reaches age 100. Nevertheless, such products are different from traditional annuities, because there is no guarantee backing up the distribution payments, and the products have been regulated under federal securities law rather than state insurance law.

Future Flying Conditions

The current climate in the retirement market includes both persistent demand for attractive decumulation vehicles and intermittent investor aversion to purchasing annuities. These factors support the forecast of favorable prevailing winds for products that incorporate tontine-like features, given the relatively attractive rates and predictability of distribution payments that such products, properly designed, can offer.

Illustration Requirements May Be Up in the Air Again

BY ANN BLACK

At the National Association of Insurance Commissioners' Summer 2024 National Meeting, the Life Insurance and Annuities (A) Committee received a report of its Life Actuarial (A) Task Force and a presentation on indexed universal life (IUL) and fixed indexed annuity (FIA) illustrations. Judith French, director of the Ohio Department of Insurance and chair of the Life Insurance and Annuities Committee, stated that she looked forward to future discussions on the potential need for changes to IUL and FIA illustration regulations. The committee heard from the following:

- **The Life Actuarial Task Force**, which reported that the Indexed Universal Life (IUL) Illustration (A) Subgroup, as well as state regulators, have been reviewing illustrations and are questioning whether additional regulatory changes are needed. The subgroup's review has not been focused just on IUL products but also on other life insurance products and annuities.

  As to IUL illustrations, the subgroup has been assessing IUL illustration compliance with current Actuarial Guideline XLIX-A—The Application of the Life Illustrations Model Regulation to Policies With Index-Based Interest Sold on or After December 14, 2020 (AG 49-A). While the latest revisions to AG 49-A were found to be initially effective in addressing maximum illustrated rate company outliers, it was a surprise that the IUL illustrations included hypothetical returns or historical averages displayed in the illustrations alongside the maximum illustrated rates. As a next step, state insurance regulators will be following up with companies to better understand how companies see this practice as fitting within the current requirements.

- **Richard Weber of the Life Insurance Consumer Advocacy Center**, who reported on his presentation to the Consumer Liaison Committee. He also stated that consumers view the most favorable illustrated results as future projections of values under their IUL or FIA. He noted that even though IUL illustrations comply with the NAIC's Life Insurance Illustrations Model Regulation (#582), that model is 30 years old, and it did not contemplate indexed products. He criticized such illustrations' use of a constant interest rate, which is a hit-or-miss approach, as the actual interest credited would fluctuate between the guaranteed rate and, generally, the current cap. He pointed out that a single constant interest rate does not take a more realistic sequence of returns for the applicable index into account.

- **Two insurance companies**, who discussed the industry and insurer experience with the current illustration regulations and the range of disclosures and consumer and producer educational materials. The regulatory landscape is even more unsettled for FIA than for IUL illustrations, as only a limited number of states have adopted the Annuity Disclosure Model Regulation (#245)'s requirements for fixed annuity and FIA illustrations.

At the conclusion of these discussions, Fred Andersen, chair of the IUL subgroup, explained that state insurance regulators are reviewing life and annuity illustrations and other marketing materials. He said they plan to develop findings and discuss how best to address short-term and long-term issues. So it appears that annuity and life illustration requirements are probably up for considerable change, and where all this will land remains quite uncertain.

Court Enjoins FTC Noncompete Ban

Appeal Likely

BY JONATHAN STERLING AND BRENDAN GOOLEY

A federal judge in Texas has enjoined the Federal Trade Commission's ban on noncompete agreements, leaving the FTC's attempt to quash such agreements waiving in the breeze, at least for the time being.

Earlier this spring, the FTC issued a broad rule banning almost all noncompetes in for-profit businesses, subject to limited exceptions, including an exception for senior executives (defined as workers earning more than $151,164 annually who are in policymaking roles). More detail about the rule is available in our client alert, "Court Direction on FTC's Noncompete Ban Expected This Summer."

The FTC's rule was promptly challenged by numerous businesses seeking to enjoin it.

Courts issued conflicting decisions earlier this summer. In early July, the U.S. District Court for the Northern District of Texas enjoined the FTC's rule and stayed its effective date but applied its ruling only to the parties in the case and declined to issue a nationwide injunction. In late July, however, the U.S. District Court for the Eastern District of Pennsylvania declined to enjoin or stay the FTC's rule. In August, the Northern District of Texas enjoined the FTC's rule and stayed its effect nationwide, holding that the FTC lacked statutory authority to promulgate the rule and that it violated the Administrative Procedure Act in doing so.

The U.S. Supreme Court's recent decision overruling the long-standing *Chevron* deference doctrine is a wind at the back of those challenging the FTC rule, and for now businesses can breathe a sigh of relief. But employers that may be affected by the FTC noncompete rule would be well advised to be prepared to comply with the FTC rule in case compliance is needed in short order following an appeal.

Adviser Loses Customer Crypto

Wallet Key Custody Not Airtight

BY HARRY EISENSTEIN

On June 25, 2024, a final judgment was entered by a federal district court against investment adviser Lufkin Advisors LLC and its principal, Chauncey Lufkin, for losing access to a crypto wallet used to manage a client's investment, among other violations. Allegedly, the principal lost or forgot the password, or "key," needed to access the wallet, which had an estimated value of $10 million.

Among other things, the court directed the adviser to refrain from violating Rule 206(4)-2 under the Investment Advisers Act of 1940, also known as the "custody rule." Further, the SEC subsequently revoked Lufkin LLC's SEC registration and barred Mr. Lufkin from association with securities industry participants. Curiously, however, it is not clear that compliance with the existing custody rule would have prevented this loss.

For example, the current rule requires an adviser to maintain client "funds or securities" over which it has custody with a qualified custodian (e.g., certain banks or broker-dealers). Some client investments, however, (including some crypto assets) may be deemed neither "funds" nor "securities," which can create uncertainty regarding custodial obligations under current requirements. In fact, in February 2023, the SEC proposed to replace the custody rule with a new rule to address perceived gaps in current protections. *See* "SEC Proposes to Remake Advisers Act Custody Rule for a Modern World."

Would the proposed rule have protected the client any better? If complied with, almost certainly. Unlike the current rule, the proposed rule would require an adviser to safeguard client "assets," not simply client "funds or securities," by maintaining such assets with a qualified custodian (subject to certain exceptions), among other things. Use of the term "assets," rather than "funds or securities," would subject many non-traditional investments, including those crypto assets that could not already be considered funds or securities, to the proposed rule's protections. Under the proposed rule, those protections would require that the custodian maintain "possession or control" of the advisory client's assets.

Several approaches may exist, or be developed, that would satisfy this requirement in the context of crypto assets. For example, among other possible approaches, the custodian could maintain exclusive possession or control of crypto assets, or it could generate and maintain the private keys granting access to advisory client crypto assets such that the client's adviser would be unable to change beneficial ownership of those assets without the custodian's involvement. If, however, an adviser can transfer beneficial ownership of an advisory client's crypto assets without the participation of the custodian, because, for example, the adviser alone possesses the only private key granting access to those assets, the requirements of the proposed rule would not be satisfied.

The proposed rule, however, has generated much controversy and resistance among crypto industry participants, not least because the proposed requirement of continuous control is at odds with crypto asset trading practices. The SEC reopened the comment period for the proposal last year, and in testimony before a Senate Appropriations Committee in June of this year, Chair Gary Gensler noted that he has asked SEC staff about potentially re-proposing the rule. In sum, the prospects for its adoption remain quite hazy at this time.

NAIC Still Juggling Multiple AI and Machine Learning Initiatives

BY ANN BLACK AND ERIN VANSICKLE

The many balls that the various National Association of Insurance Commissioners groups currently have in the air focusing on life insurers' use of artificial intelligence and machine learning were reflected in the reports presented at the NAIC Summer National Meeting in Chicago:

- **The Accelerated Underwriting (A) Working Group** reported that it has completed work on its "Regulatory Guidance and Considerations," which was referred to the Market Conduct Examination Guidelines (D) Working Group as a basis for needed revisions to the *Market Regulation Handbook*.

  The regulatory guidance is designed to provide a framework for regulators reviewing life insurers' use of accelerated underwriting programs and is divided into three areas of focus: regulatory considerations, strategies for review, and request for information. The regulatory guidance is based on the NAIC's principles on artificial intelligence and the model bulletin on the use of artificial intelligence by insurers, each adopted by the NAIC in 2020 and 2023, respectively.

  In its reference to the Market Conduct Examination Working Group, the Accelerated Underwriting Working Group recognized that specific guidance pertaining to accelerated underwriting in the *Market Regulation Handbook* is necessary to alert market conduct examiners to the novel data and processes used by life insurers in accelerated underwriting. The referral also recommended that the handbook reference the regulatory guidance.

  The Life Insurance and Annuities Committee adopted the regulatory guidance and approved the referral.

- **The Life Workstream of the Special (EX) Committee on Race and Insurance** reported that a survey was being developed to ask life insurers about the use of criminal history in underwriting. The workstream plans to schedule a meeting in late September to discuss the survey.

- **The Third-Party Data and Models (H) Task Force** was established to address regulator concerns regarding insurers' use of third-party data and models. The task force is currently evaluating existing regulatory frameworks' utility for insurance regulators. It has been considering, for example, a "risk-focused" approach, a "market analysis" approach, and the "Colorado" approach for developing a regulatory framework.

- **The Big Data and Artificial Intelligence (H) Working Group** has completed surveys of the use of AI and machine learning by personal passenger auto, homeowners, and life insurers and is now working on a health insurer survey. Also, while working on new surveys, consumer groups have called for the working group to conduct follow-up on the prior surveys. The working group reported it will first conduct target follow-up meetings with auto insurers.

  The working group also heard a presentation on the limitations of the use of Bayesian Improved First Name and Surname Geocoding (BIFSG) to help identify potential racial bias in the testing of AI and machine learning models. This included an example in which BIFSG incorrectly inferred the race of the presenter.

In various meetings, Iowa Insurance Commissioner Doug Ommen spoke of the need for further collaboration among the different NAIC groups on these topics. Collaboration will certainly be essential to avoid dropping any of these many balls that the NAIC is currently juggling.

A Birds Eye View of the Current Standings of AI Guidance and Requirements by States

BY ANN BLACK AND ALEXANDRA BEGUIRISTAIN

Since the 2023 adoption by the National Association of Insurance Commissioners of its model bulletin on the use of AI systems by insurers, states have been adopting the model bulletin or draft requirements of their own. Below is a bird's eye view of the current standings of AI guidance and requirements by states.

As of August 2024, a total of 17 states have adopted the NAIC model bulletin. Three states have separate AI requirements or guidance.

Early Adopters

Between February 2024 & April 2024

Adopted the NAIC AI Model Bulletin: Alaska, New Hampshire, Nevada, Connecticut, Vermont, Illinois, Rhode Island, Pennsylvania, Kentucky, Maryland, and Washington

States With Separate AI Requirements: Colorado and California

Newest Adopters

Between May 2024 & August 2024

Adopted the NAIC AI Model Bulletin: Washington, D.C., Nebraska, Virginia, Arkansas, Michigan, and West Virginia

State With Separate AI Guidance: New York

Going Up: SEC Cyber Incident Reporting

Regulation S-P Amendments Take It to Next Level

BY PATRICIA CARREIRO

On May 16, 2024, the SEC breathed new life into its decades-old Regulation S-P, which requires firms to adopt policies and procedures for the protection of customer information and records. The amended rule balloons the entities and data subject to Regulation S-P and creates new obligations for covered institutions such as broker-dealers, investment companies, registered investment advisers, and transfer agents. Larger entities must comply with the amended rule by December 3, 2025, while smaller entities will have until June 3, 2026. To rise to the revised requirements, covered institutions must:

1. **Adopt a written incident response program reasonably designed to detect, respond to, and recover from unauthorized access to or use of customer information.** This program must include policies and procedures to:
   - Assess the nature and scope of any incident involving unauthorized access to or use of customer information;
   - Take appropriate steps to contain and control the incident; and
   - Notify individuals if their information was, or is reasonably likely to have been, accessed or used without authorization, unless the information involved is not reasonably likely to be used in a manner that could cause substantial harm or inconvenience. This must be done "as soon as practicable," but no later than 30 days after becoming aware that unauthorized access to or use of customer information has occurred or is reasonably likely to have occurred.

   Covered institutions may delay notification beyond 30 days only if the U.S. attorney general informs the SEC in writing that the required notice would pose a substantial risk to national security or public safety.

2. **Establish, maintain, and enforce written policies and procedures reasonably designed to ensure oversight of service providers**, including to ensure that affected individuals receive any required notices. This includes ensuring service providers take reasonable measures to protect against unauthorized access to or use of customer information and provide notification to the covered institution as soon as possible, but no later than 72 hours after becoming aware that a breach in security has occurred.
3. **Comply with newly inflated safeguards and disposal rules for nonpublic personal information received from customers** (including customers of other financial institutions) and document compliance with the same. The required retention period for these records varies by entity type, so covered institutions should review and potentially revise their record-keeping practices, including their document retention and deletion policies and examination preparations.

The revised Regulation S-P does, however, come with some favorable tailwinds: it codifies the FAST Act exception to Regulation S-P's annual reporting requirements, meaning that the revised regulation does not require covered institutions to mail an annual privacy notice if the institution's data practices do not trigger opt-out rights and its policies and practices have not changed from its most recent disclosure to customers.

Some practical, potentially unintended, consequences of these revisions include:

1. The 72-hour notice requirement for service providers to notify covered institutions of a breach may actually be longer than what institutions' contracts with customers currently provide. In our experience, many parties have typically settled upon 48 hours (rather than 72 hours) for such notifications.
2. Rising disclosures and requirements surrounding cyber incidents necessarily increase litigation risk, giving plaintiffs further fodder for feeding frenzies after any incident.

Reading the winds, the revision's use of a 72-hour notification requirement may also signal that the SEC has reconsidered the 48-hour notification period included in its proposed rules relating to cybersecurity risk management for investment advisers, registered investment companies, and business development companies, which had drawn significant blowback from the industry.

Outlook Dark for the SEC's ESG Rule After *Loper Bright*

BY JUSTIN CHRETIEN

For 40 years, the standard of review for agency rulemaking was set forth in the U.S. Supreme Court's 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc. Chevron* held that when a statute is silent or ambiguous on a specific issue, courts should defer to the agency's interpretation if it is based on a permissible construction of the statute. It was under the *Chevron* deference standard that the ESG rule proposal was drafted. Now, following the Supreme Court's June 2024 decision in *Loper Bright Enterprises v. Raimondo*, federal courts will no longer defer to agency interpretations, casting a stormy future for the SEC's pending ESG rule.

The ESG Rule Proposal

Shortly after proposing its climate disclosure rule for public companies, the SEC proposed a broader rule for investment funds to enhance disclosures regarding their environmental, social, and governance (ESG) investment practices. *See* "SEC Proposes Fund ESG Disclosure Channels: Different ESG Strategies Must Row in Their Lanes," *Expect Focus – Life, Annuity, and Retirement Solutions* (August 2022). The rule has not been finalized, and the SEC may be waiting to see if it can first successfully implement the climate disclosure rule, which is currently stayed pending judicial review, before issuing a final version of the ESG rule.

As proposed, the ESG rule would require registered investment advisers, registered investment companies, and business development companies to provide information regarding their ESG investment practices. The proposal sets forth a three-tier spectrum of disclosures for: (1) funds that use ESG factors in investment decisions, but not in a significant way; (2) funds with names suggesting an ESG focus or focus on ESG factors by using them as a significant or main consideration; and (3) funds that are ESG-focused and seek to achieve a specific goal. These disclosures must be made not only in prospectuses but also in annual reports and adviser brochures. And most burdensome, the proposal requires the funds to provide aggregated emissions data for the entire portfolio.

In support, the SEC's proposing release asserts:

> While the Commission has not generally prescribed specific disclosures for particular investment strategies, ESG strategies differ in certain respects that we believe necessitate specific requirements and mandatory content to assist investors in understanding the fundamental characteristics of an ESG fund or an adviser's ESG strategy in order to make a more informed investment decision.

Lack of Statutory Authority

The strongest challenge to the ESG rule, as proposed, is that the SEC lacks the statutory authority to adopt it.

But following *Loper Bright*, courts will no longer defer to the SEC's interpretation of its own authority under federal securities laws when that authority is unclear. Instead, to determine whether Congress in fact meant to confer a power that the agency has asserted, courts will look to the words of a statute in their context and with a view to their place in the overall statutory scheme.

The SEC cites sections 8, 24, 30, and 38 of the Investment Company Act of 1940 and sections 203, 204, and 211 of the Investment Advisers Act of 1940 as statutory authority for implementing the ESG rule. These sections grant the SEC the authority to require information, records, and documents deemed "necessary or appropriate in the public interest or for the protection of investors." However, these provisions do not mention the types of ESG practices contemplated by the proposed rule. And courts have specifically cautioned the SEC against interpreting "public interest" too broadly. For example, in *Business Roundtable v. SEC* (1990), the D.C. Circuit emphasized that "'public interest' is never an unbounded term" and that SEC rulemaking is "limited to the purposes Congress had in mind when it enacted the legislation."

Legislative History

The legislative history of the Investment Company Act and the Investment Advisers Act describes an extraordinarily large number of problems and types of problems that those acts were designed to address. This history includes, for example, a massive four-year congressionally mandated investment trust study and related multivolume report by the SEC that formed the basis of lengthy and comprehensive congressional hearings leading up to the acts' passage. But nothing in the legislative history, or in the text of either act, could fairly be interpreted as reflecting congressional intent to authorize the SEC to adopt the types of requirements contained in the proposed ESG rule. Thus, despite the SEC's policy arguments, the authority it cites appears insufficient.

Significantly, in 1975, after Congress passed the National Environmental Policy Act of 1969 requiring agencies to consider environmental values in decision-making (but not providing statutory authority for climate-related disclosures), the SEC proposed a new rule regarding environmental and social disclosures, stating that "it is generally not authorized to consider the promotion of social goals unrelated to the objectives of the federal securities laws."

The SEC reiterated this position in a 2016 concept release on business and financial disclosure under Regulation S-K:

> In 1975, the Commission considered a variety of "environmental and social" disclosure matters, as well as its own authority and responsibilities to require disclosure under the federal securities laws. Following extensive proceedings on these topics, the Commission concluded that it generally is not authorized to consider the promotion of goals unrelated to the objectives of the federal securities laws when promulgating disclosure requirements, although such considerations would be appropriate to further a specific congressional mandate.

Nothing has changed since the SEC issued this guidance in 2016. As a result, despite the SEC's policy arguments in its ESG rule proposal, its cited authority appears insufficient, as it is not supported by the text or legislative history of the Investment Company Act or the Investment Advisers Act. Moreover, the SEC itself indicated as recently as 2016 that it did not believe it had the authority to make such a rule.

In sum, under *Chevron*, there may have been a colorable argument that the ESG rule proposal is based on a permissible construction of the cited statutory authority. But under *Loper Bright*, without any deference to the SEC's interpretation, this argument appears untenable. The ESG rule proposal, if finalized in its current form, will likely be vacated by the courts.

Mutual Funds vs. Collective Investment Fund

Equal Investor Protection on the Horizon?

BY WILLIAM KOTAPISH

For more than a year, SEC Chair Gary Gensler has, in some public forums, been mentioning concerns about gaps in the regulation of collective investment funds (CIFs), as compared to that of registered open-end investment companies, i.e., mutual funds. CIFs are maintained by banks or trust companies and are similar to mutual funds, except that investment in a CIF generally is limited to entities, such as certain types of employer-sponsored retirement plans, that meet specified eligibility criteria.

Given the similarities, Gensler views disparity in the regulation of the two types of investment vehicles with suspicion. In Gensler's view, one area that calls for alignment of regulatory approaches is liquidity risk management. Over the years, the SEC has promulgated numerous rules designed to manage liquidity and dilution risks for mutual funds, often in response to specific market events. These included the money market fund reforms in 2010 and 2014 in response to the 2008 financial crisis, as well as the liquidity risk management rules of 2023 in response to the 2020 market events.

Gensler has specifically mentioned that the rules governing CIFs lack limits on illiquid investments, minimum required levels of liquid assets, or limits on leverage. He also has mentioned that, unlike mutual funds, CIFs are not required to regularly report to investors on their investment holdings and are not subject to oversight by a board with independent directors. For some time, the SEC staff, at Gensler's direction, have been in discussion with banking regulators about narrowing the regulatory gaps in at least some such respects.

As a practical matter, mutual funds and CIFs often are in competition for the same investors, and disparate regulation can impact these vehicles' costs and investment characteristics in ways that significantly affect their performance and competitive position. Indeed, Gensler has upon occasion emphasized in the context of CIFs that, when regulations don't treat like activities alike, market participants may seek to arbitrage such differences.

Clearly, not every regulatory disparity need be eliminated. For example, although CIFs, unlike mutual funds, are not subject to regulation under the Investment Company Act of 1940, much of that regulation would be superfluous because of the regulation to which CIFs are subject under the banking laws, and the fact that banks and trusts do have certain fiduciary responsibilities with respect to their CIFs.

Accordingly, thoughtful balancing should be a significant part of any efforts by the SEC staff and bank regulators toward parity in the regulation of CIFs and mutual funds.

NAIC Privacy Draft Model Gets Its Balloon Burst

BY PATRICIA CARREIRO

After years of development work, the National Association of Insurance Commissioners' Privacy Protections Working Group's efforts are again caught in a windstorm.

The working group began its efforts at creating a new privacy model over five years ago. Its efforts culminated with a draft privacy model, Insurance Consumer Privacy Protection Model Law (#674), on February 6, 2023. The draft, however, has faced strong headwinds and underwent stormy revisions. A June 12, 2024, vote appears to have burst the draft model's balloon for good, and the working group is now back to flying its kite from existing Model #672. Blustery conditions will likely continue.

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NEWS AND NOTES

Carlton Fields earned top rankings for 11 practices and 24 of its attorneys in ***Chambers USA 2024***, including insurance.

Carlton Fields has been recognized in the 2025 edition of ***The Best Lawyers in America***, with more than 180 attorneys featured in the guide. In addition, more than 40 of the firm's lawyers were named to the "Ones to Watch" list and 12 attorneys were named "Lawyer of the Year" for their practice areas in their communities.

Markham Leventhal and **Irma Solares** were among the Carlton Fields lawyers named to the **BTI Client Service All-Stars 2024** list, an annual listing of attorneys selected by corporate counsel for delivering the absolute best in client service. Markham was also named to the "Top 50 Most Viewed" BTI Client Service All-Stars 2024 list, out of nearly 1500 attorneys, singling out the all-star attorneys who were most searched for by name.

Carlton Fields has been recognized as one of the top law firms in the country for diversity, ranking in ***The American Lawyer*'s 2024 Diversity Scorecard** for the 17th consecutive year. The firm ranked No. 7 in the nation for minority representation and among the top firms for LGBTQ+ and women in law. The firm was also ranked No. 6 nationally among firms with 251–600 attorneys with the highest representation of minorities in their equity partnerships and No. 18 for overall representation of minority attorneys in ***Law360*'s 2024 Diversity Snapshot**, as well as one of the top law firms in the nation for female attorneys in ***Law360*'s 2024 Women in Law** report.

Carlton Fields sponsored the **National Alliance of Life Companies Fall Conference** on September 11–13 in Marana, Arizona. **Jason Gould** spoke on class action litigation updates.

The firm is proud to serve as a sponsor of the **American Council of Life Insurers Annual Conference** on September 25–27 in Chicago, Illinois.

The firm is a sponsor of the **National Association for Fixed Annuities Annuity Distribution Summit** on October 2–3 in Dallas, Texas.

We are pleased to participate in the **Association of Life Insurance Counsel Fly-In** on October 17 in New York, where **Trish Carreiro** and **Markham Leventhal** will speak on privacy class action claims impacting the life insurance industry.

Carlton Fields will support the **ALI CLE Conference on Life Insurance Company Products** on November 7–8 in Washington, D.C. **Richard Choi** will once again serve as co-chair of the conference and **Trish Carreiro**, **Justin Chretien**, **Tom Conner**, **Harry Eisenstein**, and **Barry Weissman** will speak.

Carlton Fields welcomes the following attorneys to the firm: shareholders **Brett Henson** (construction, Tampa), **Brian Morris** (white collar crime and government investigations, New York), and **Grace Pan** (intellectual property, New York); senior counsel **Kristen Murphy** (health care, Tampa) and **Elliot Siebers** (cybersecurity and privacy, Los Angeles); of counsel **Abigail Roberts** (construction, Miami); and associates **Brian Allen** (construction, Tampa), **Amanda Brahm** (labor and employment, Hartford), **Kyle Bruno** (real estate and commercial finance, Tampa), **Drew Domina** (white collar crime and government investigations, Tampa), **Richard Anderson** (construction, Tampa), **Pamela Hayati** (business litigation, Los Angeles), **Levon Kalanjian** (business litigation, Miami), **Morgan Klein** (intellectual property, New York), **Kevin McKendry** (real estate and commercial finance, Tampa), and **Ashley Mallon** (creditors' rights and bankruptcy, Tampa).

Carlton Fields would like to thank our insurance clients, who served as the tailwind driving our recent recognition as one of *Law360*'s "Practice Groups of the Year." Honoring the attorney teams responsible for the industry's most impactful litigation wins and major deals, the award recognized the firm's insurance group for its expertise in handling class actions, complex commercial litigation, and regulatory matters for some of the largest insurers in the world over the past year.

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