

# Investment Management Update

## Table of Contents

|   |   |
|---|---|
| Court Remands Short Sale Rule and Securities Lending Rule to SEC .....  | 1 |
| SEC Dismisses Suit against Adviser and Independent Trustees .....   | 2 |
| Regulatory Priorities Corner .....  | 3 |
| Upcoming Compliance Dates .....   | 3 |
| SEC Permits Closed-End Funds to Exclude Shareholder Proposals to Declassify Trustees .....  | 3 |
| NYSE Revives Bid to End Closed-End Fund Annual Meeting Requirements.....  | 4 |
| SEC Settles Enforcement Matters against an Adviser’s President and CCO for Backdating SEC Exam Response.....                          | 4 |
| Additional Ropes & Gray Alerts And Podcasts Since Our April – June IM Update .....  | 5 |
| SEC Announces Spring 2025 Regulatory Agenda.....  | 5 |
| SEC Issues New Guidance for Registered Closed-End Funds Investing in Private Funds.....   | 5 |
| Planning to Take Advantage of Executive Order on Alternatives in 401(k)s: Five Key Takeaways and Five Action Items for Managers ..... | 5 |
| Welcome Relief – CFTC Staff Extends No-Action Relief on Position Aggregation Requirements.....  | 5 |
| District Court Strikes Down \$40 Million Settlement Agreement in Target Date Funds Case Based on Parallel SEC Settlement .....        | 5 |
| Supreme Court to Consider Closing a Back Door to Fund Litigation Claims under the Investment Company Act.....                         | 6 |

The following summarizes recent legal developments of note affecting the investment management industry:

## Court Remands Short Sale Rule and Securities Lending Rule to SEC

On August 25, 2025, the U.S. Court of Appeals for the Fifth Circuit issued its [decision](#) regarding a challenge by industry trade groups to (i) Rule 13f-2 under the Securities Exchange Act and related reporting requirements on Form SHO (the “Short Sale Rule”)<sup>1</sup> and (ii) Rule 10c-1(a) under the Exchange Act requiring certain persons to report information about securities loans (the “Securities Lending Rule”).<sup>2</sup>

The Court agreed with the trade groups’ argument that the SEC “failed fully to assess the economic impact of the two Rules, as required by the [Administrative Procedure Act (the “APA”)] and the Exchange Act.” In particular, the Court noted that the SEC was “required to consider the Rules’ collective economic impact” given the two rules’ “significant interplay and their nearly concurrent promulgation” and “was thus not free to ignore the economic impact of the Short Sale Rule upon the Securities Lending Rule.”

Because the SEC’s economic analysis failed to consider this impact, the Court held that the SEC had failed to justify the two rules under the APA and the Exchange Act. The Court remanded the Short Sale Rule and the Securities Lending Rule to the SEC “to allow the agency to consider and quantify the cumulative economic impact of the Rules.”

On September 5, 2025, SEC Chairman Paul S. Atkins issued a public [statement](#) in which he stated that he had directed the SEC staff “to evaluate the rules in light of the opinion and make recommendations for appropriate Commission action, including potential changes to the rules and adjustments to the related compliance dates.”

- 1 On February 7, 2025, the SEC issued an [order](#) postponing compliance with the Short Sale Rule such that initial Form SHO reports from institutional investment managers that engage in short sales of “equity securities” exceeding certain thresholds will be due by February 17, 2026 (for the January 2026 reporting period).
- 2 On July 30, 2025, the SEC issued an [order](#) postponing compliance with the Securities Lending Rule such that a broker-dealer that makes a covered securities loan on behalf of itself or another person must report certain information regarding the transaction beginning September 28, 2026.

## SEC Dismisses Suit against Adviser and Independent Trustees

As reported in a prior Ropes & Gray [Alert](#), in May 2023, the SEC filed a civil complaint in the U.S. District Court for the Northern District of New York against a mutual fund’s adviser for aiding and abetting violations of Rule 22e-4 (the “Liquidity Rule”) by the mutual fund it advised and whose Liquidity Risk Management Program (“LRMP”) it administered. The complaint also claimed that the fund’s two independent trustees, the fund’s portfolio manager and the fund’s CCO aided and abetted the fund’s Liquidity Rule violations.

The action was the first-ever case concerning enforcement of the Liquidity Rule, which prohibits a mutual fund or ETF from investing more than 15% of its net assets in illiquid investments and requires funds to adopt an LRMP to assess and govern their liquidity risks. If a mutual fund or ETF’s illiquid investments exceed the 15% limit, the Liquidity Rule requires the fund to promptly take remedial action.

### BACKGROUND

- From June 2019 through June 2020, the fund held approximately 21% to 26% of its net assets in illiquid investments. The largest illiquid investment held by the fund consisted of a MedTech issuer’s shares (“Shares”) that the fund purchased in private placement transactions.
- The fund’s two independent trustees made up the Board’s Valuation Committee and Audit Committee. The SEC asserted that, through their valuation work on the Shares, the independent trustees both knew that the Shares were illiquid because the Shares were subject to legal and contractual restrictions on transfer.
- In 2018 and early 2019, the fund’s counsel repeatedly advised the fund Board and the adviser of the Liquidity Rule’s requirements and urged them to develop a strategy to comply with the 15% illiquid limit. In a February 2019 memo to the Board, fund counsel reminded the Board that the fund would be required to adopt and implement an LRMP on or before June 1, 2019, and that the Board would have oversight responsibility for the LRMP. At the Board’s March 2019 Board meeting, fund counsel again reminded the Board and the adviser that the fund was “well over” the 15% illiquid investment limit.
- At some point between May 22 and June 2, 2020, the portfolio manager and CCO defendants and the interested trustee decided that the Shares should be classified as illiquid.
- On June 2, 2020, the fund’s new counsel emailed the CCO defendant asking whether he had scheduled a call with the

Board to discuss the Form N-LIQUID filing, necessitated by the “illiquid” classification of the Shares.

- On June 16, 2020, the fund filed a Form N-LIQUID with the SEC in which the fund stated that its illiquid investments exceeded 15% of net assets on February 21, 2020, and that 24% of its net assets were then illiquid, comprised entirely of the Shares. On the same day, the CCO defendant emailed the Board informing them of the filing,
- On June 30, 2020, the interested trustee spoke with the SEC staff by phone, and the SEC staff expressed their concern that the Shares were not accurately valued and, as a result, the net asset value for the fund might not be accurate. Immediately after this call, the fund stopped selling shares. On August 28, 2020, the Board approved a wind-down proposal for the fund, including the creation of a liquidating trust. On September 8, 2020, the fund liquidated. The next day, the fund filed a notice of deregistration with the SEC, which the SEC approved.

### SEC ALLEGATIONS AGAINST THE INDEPENDENT TRUSTEES

According to the SEC, between June 1, 2019 and June 15, 2020, the fund did not review the liquidity classification of the Shares on a monthly basis as required by the Liquidity Rule.

In its complaint, the SEC alleged that, between June 1, 2019 and June 15, 2020, the independent trustees, through failure of oversight, “substantially assisted the fund’s classification of the Shares as ‘less liquid.’” They “knew or recklessly disregarded that the [Shares] were illiquid within the meaning of the Liquidity Rule, and that there was no reasonable basis supporting a less liquid classification.”

In addition, “by failing to exercise reasonable oversight over the Fund’s LRMP, the independent trustees violated their duties and responsibilities to the Fund.” Therefore, the independent trustees knowingly or recklessly provided substantial assistance to the fund with respect to its violations of the Liquidity Rule.

### SUBSEQUENT DEVELOPMENTS

In June 2024, in *Loper Bright Enterprises v. Raimondo*, the U.S. Supreme Court overturned its 1984 decision in *Chevron v. National Resources Defense Council*. The *Loper* decision ended federal courts’ deference to federal agencies’ interpretation of their organic statutes (the organizations tasked with implementing these statutes). Not surprisingly, *Loper* has led to more litigants challenging federal agencies’ constructions of statutes, including the SEC’s interpretation of statutes granting it power to promulgate regulations.

In March 2025, the federal district court permitted the defendants, including the independent trustees, to file motions to address the

Supreme Court's decision in *Loper*. In April 2025, the defendants filed a motion to dismiss, arguing that *Loper* supported their arguments that the SEC lacked congressional authority to issue the Liquidity Rule.

The SEC attorneys informed the court in May that the parties had agreed “in principle to a resolution of this matter,” pending approval of the SEC commissioners. On July 11, 2025, the SEC and the defendants filed with the court a [joint stipulation](#) to dismiss the enforcement matter with prejudice. The court granted the dismissal, with the SEC noting that its decision to seek dismissal “does not necessarily reflect the Commission’s position on any other case.”

## Regulatory Priorities Corner

The following brief updates exemplify trends and areas of current focus of relevant regulatory authorities:

### UPCOMING COMPLIANCE DATES

The following is a reminder of the upcoming compliance dates of significant SEC rulemakings.

1. [Amended Form N-CEN](#). Funds that are subject to Rule 22e-4 will be required to comply with the Form N-CEN amendments for reports filed on or after **November 17, 2025**. The related SEC release is summarized in a Ropes & Gray [Alert](#).
2. [Amended Regulation S-P Requirements](#). The amendments to Regulation S-P require broker-dealers, registered investment companies (including business development companies), and registered investment advisers to adopt written policies and procedures creating an incident response program to deal with unauthorized access to customer information, including procedures for notifying persons affected by the incident within 30 days. The compliance date is **December 3, 2025**. The related SEC release is summarized in a Ropes & Gray [Alert](#).
3. [EDGAR Next Transition](#). As described in a Ropes & Gray [Alert](#), on September 27, 2024, the SEC adopted rule and form amendments to enhance the security and account management of its electronic filing system, EDGAR. The amendments, collectively referred to as “EDGAR Next,” are intended to address current security flaws in EDGAR access. The EDGAR Next transition period began March 24, 2025 and includes changes to account access and management. These changes apply to all filers, including individuals and entities that file under Section 13 or 16 filings. The changes do not take effect until **September 15, 2025**, meaning that, until then, filers will still be able to access their EDGAR accounts and file on EDGAR as they currently do. However, beginning September

15, filers that have not enrolled in EDGAR Next will be unable to file on EDGAR.

### SEC PERMITS CLOSED-END FUNDS TO EXCLUDE SHAREHOLDER PROPOSALS TO DECLASSIFY TRUSTEES

On June 27, 2025, the staff of the SEC Division of Investment Management issued no-action letters to each of the Eaton Vance New York Municipal Bond Fund ([here](#)) and the Eaton Vance California Municipal Bond Fund ([here](#)) (each a “Fund”). In both instances, Saba Capital Management, L.P. (“Saba”), the adviser to a private fund, submitted a shareholder proposal for inclusion in the Fund’s proxy materials to be distributed by the Fund in connection with its 2025 annual meeting of shareholders. The Saba proposal asked shareholders to request that the Fund’s board of trustees “take all necessary steps in its power to declassify the Board so that all directors are elected on an annual basis starting at the next annual meeting of shareholders.”

Each Fund is organized as a Massachusetts business trust. In the underlying no-action requests (the “Request Letters,” [here](#) and [here](#)), each Fund maintained that it could exclude the Saba proposal pursuant to Rule 14a-8(b)(1) under the Exchange Act because Saba did not hold “securities entitled to vote on the proposal,” as determined pursuant to the Fund’s declaration of trust and bylaws. The Request Letters asserted that:

- There is no statute under Massachusetts law that provides specific voting rights to shareholders of a Massachusetts business trust. Instead, the rights of shareholders of a Massachusetts business trust, including matters on which shareholders are entitled to vote, are expressly enumerated within the trust’s declaration of trust.
- Saba held securities that were entitled to vote only on matters expressly enumerated in a Fund’s declaration of trust, which did not include a proposal, like Saba’s, requesting that the Fund’s board take all necessary steps to declassify the board. Shareholders of the Fund have no right to vote on a non-binding advisory proposal requesting that the board take steps to declassify the board, unless the board first determines that it is necessary or desirable that shareholders be afforded such vote.

Both no-action letters stated that “there appears to be a basis for your view that the Proposal may be excluded in reliance on Rule 14a-8(b)(1)” because Saba did not hold securities entitled to be voted on the proposal. Accordingly, both no-action letters confirmed that the staff would not recommend enforcement action to the SEC if the requesting Fund excluded the Saba proposal from its proxy materials to be distributed by the Fund in connection with its 2025 annual meeting of shareholders.

## NYSE REVIVES BID TO END CLOSED-END FUND ANNUAL MEETING REQUIREMENTS

On June 6, 2025, New York Stock Exchange LLC (the “NYSE”) filed a [revised](#) proposed rule change (the “Proposal”) with the SEC to exempt closed-end funds from the NYSE’s requirement to hold annual shareholder meetings.

- Specifically, the Proposal would amend provisions of the NYSE Listed Company Manual by exempting new closed-end funds from the requirement to hold annual shareholder meetings. Newly listed funds could opt to include annual meetings in their bylaws.
- The Proposal refines terms of the NYSE’s 2024 proposal, which would have applied to all closed-end funds. The NYSE withdrew that proposal in early 2025 due to strong public reactions and scrutiny from the SEC.
  - The Proposal underscores that “there are significant differences between CEFs and listed operating companies that justify exempting CEFs from the Exchange’s annual meeting requirement.” In particular, the Proposal notes that the 1940 Act “includes specific requirements with respect to the election of directors by CEF shareholders, while there is no such requirement under federal law for listed operating companies” and requires that “directors who are not ‘interested persons’ . . . comprise at least 40% of an investment company’s board.
  - Additionally, the Proposal highlights that, in addition to the director election provisions described above, the 1940 Act “requires that a majority of directors who are not [interested persons] approve significant actions, such as approval of the investment advisory agreement between a CEF and its investment advisor.”

The ICI submitted a [comment letter](#) supporting the NYSE’s revised approach. In its letter to the SEC, the ICI stated that the NYSE proposal would “protect newly listed CEFs from predatory activists,” which “would undoubtedly help open-up the listed CEF IPO market and facilitate capital formation by removing a key disincentive to launching in the listed CEF market.”

On July 25, 2025, the SEC issued an [order](#) designating September 15, 2025 as the date by which the SEC will either approve or disapprove, or institute proceedings to determine whether to disapprove, the Proposal.

## SEC SETTLES ENFORCEMENT MATTERS AGAINST AN ADVISER’S PRESIDENT AND CCO FOR BACKDATING SEC EXAM RESPONSE

On July 11, 2025, the SEC issued separate orders announcing that it had settled related enforcement matters with the President ([order](#)) and the Chief Compliance Officer (the “CCO”) ([order](#)) of a registered investment adviser (the “Adviser”).

In both orders, the SEC alleged that the SEC staff sent an examination request letter to the CCO in 2021 in which, among other things, the staff requested any records documenting the Adviser’s most recent annual compliance review performed pursuant to Rule 206(4)-7 under the Advisers Act and any records documenting compliance testing performed during the three-year examination period.

- Although documentation of an adviser’s annual compliance review is not required under Rule 206(4)-7, the Adviser’s policies and procedures required that a written annual compliance report be created and that the President and the CCO meet to discuss the report.
- After receiving the SEC request letter, instead of responding that the Adviser did not have any records responsive to the SEC staff’s request, the CCO created three documents that were styled as “Annual Compliance Calendars” that purported to memorialize contemporaneous annual compliance reviews for the prior three years. The CCO signed and backdated the documents and presented the documents to the President, who also signed and backdated the documents. The Adviser, through the CCO, then provided the backdated documents to SEC staff.

Based upon its allegations, the SEC concluded that the President and the CCO both willfully aided, abetted, and caused the Adviser’s violation of Section 204(a) of the Advisers Act (requiring registered investment advisers to maintain and preserve certain books and records) and Rule 204-2(a)(17)(ii) thereunder (requiring registered investment advisers to maintain any records documenting the investment adviser’s annual review of its policies and procedures).

Without admitting or denying the SEC’s findings, the President and the CCO agreed to being censured and to pay civil penalties of \$20,000 and \$10,000, respectively.

## Additional Ropes & Gray Alerts And Podcasts Since Our April – June IM Update

### SEC ANNOUNCES SPRING 2025 REGULATORY AGENDA

*September 8, 2025*

On September 4, 2025, the Office of Information and Regulatory Affairs published the semi-annual “Unified Agenda of Regulatory and Deregulatory Actions” of the various federal agencies. The Unified Agenda includes the SEC’s Spring 2025 Current Agenda containing the items from the Division of Investment Management, as well as the SEC’s current timing estimates. From other SEC Divisions, the Current Agenda also contains several crypto-related rulemakings. [Read More >](#)

### SEC ISSUES NEW GUIDANCE FOR REGISTERED CLOSED-END FUNDS INVESTING IN PRIVATE FUNDS

*August 18, 2025*

As previously described in a May Ropes & Gray Alert, the SEC staff no longer requires retail closed-end funds to limit their investments in private funds – *i.e.*, funds relying upon Sections 3(c)(1) or 3(c)(7) of the 1940 Act (“private funds”) – to 15% of their net assets.

On August 15, 2025, the Division of Investment Management issued ADI 2025-16, titled “Registered Closed-End Funds of Private Funds” (the “Guidance”). The Guidance, which is limited to registered closed-end funds that are not listed on an exchange, provides important updates for retail closed-end funds that invest more than 15% of their net assets in private funds, including clarification of regulatory protections, disclosure expectations, and filing requirements. [Read More >](#)

### PLANNING TO TAKE ADVANTAGE OF EXECUTIVE ORDER ON ALTERNATIVES IN 401(K): FIVE KEY TAKEAWAYS AND FIVE ACTION ITEMS FOR MANAGERS

*August 11, 2025*

On August 7, 2025, President Trump issued a long-rumored executive order (the “Order”) that calls for expanded access to private equity and other alternative investments for 401(k) plans and their participants. The Order arrives at a time when interest in such products is high, and we expect it to create further momentum behind the design and launch of new funds for this market. While it does not actually change the substantive requirements of ERISA, the Order directs the U.S. Department of Labor in conjunction with the SEC and the Department of the Treasury to work together

to facilitate greater availability of these asset classes to 401(k) investors. The existence of the Order is already adding to the activity in this area, and we believe this is a key time for asset managers who are interested in taking advantage of the opportunity to break into the 401(k) market.

The remainder of this Alert discussed five action items for managers interested in alternatives to consider now, and five key takeaways from the Order. [Read More >](#)

### WELCOME RELIEF – CFTC STAFF EXTENDS NO-ACTION RELIEF ON POSITION AGGREGATION REQUIREMENTS

*July 21, 2025*

The Commodity Futures Trading Commission Division of Market Oversight has issued relief extending the no-action positions previously granted with respect to certain position aggregation requirements under CFTC Regulation 150.4. Unlike previous extensions, the relief will remain in effect until the later of the effective or compliance date of a future rulemaking addressing the relevant aggregation and notice filing obligations. [Read More >](#)

### DISTRICT COURT STRIKES DOWN \$40 MILLION SETTLEMENT AGREEMENT IN TARGET DATE FUNDS CASE BASED ON PARALLEL SEC SETTLEMENT

*July 14, 2025*

On May 19, 2025, the United States District Court for the Eastern District of Pennsylvania (the “Court”) denied final approval of a \$40 million proposed settlement in a major class action lawsuit against The Vanguard Group, Inc. (“Vanguard”) and related parties (“Defendants”). The lawsuit stemmed from Vanguard’s decision to lower the investment minimum for its institutional target date funds (the “Institutional Funds”), which in turn caused a mass exodus from higher-cost retail target date funds (the “Retail Funds”). The settlement denial was triggered by a late-breaking challenge to the settlement raised by a member of the proposed class. A lawyer by trade, the class member objected to the settlement on the novel basis that Vanguard was already obligated to pay \$40 million to a Fair Fund pursuant to a parallel SEC settlement. This interesting challenge caught the Court’s attention. Ultimately, the Court agreed with the class member, denied approval of the settlement, and sent the case back to active litigation. This somewhat unexpected settlement denial highlights the importance of carefully considering and planning for the interplay between settlements with regulators and civil plaintiffs. [Read More >](#)

## SUPREME COURT TO CONSIDER CLOSING A BACK DOOR TO FUND LITIGATION CLAIMS UNDER THE INVESTMENT COMPANY ACT

July 2, 2025

On June 30, 2025, the U.S. Supreme Court agreed to hear a case that will determine whether Section 47(b) of the Investment Company Act of 1940 (“ICA”) creates a private right of action for shareholders of registered investment companies to bring lawsuits for alleged violations of the statute. The Second Circuit Court of Appeals has recognized such a right of action since 2019, opening a back door to litigation claims by private plaintiffs for alleged ICA violations, despite Congress having granted the SEC sole regulatory authority to enforce the ICA. Other circuit courts of appeal have rejected a Section 47(b) private right of action. The Supreme Court granted certiorari in *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.* to resolve the circuit split. The outcome of the appeal, to be heard in the Court’s October 2025 term, will have broad implications for registered funds governed by the ICA (including mutual funds, ETFs, and closed-end funds), as the litigation door opened by the Second Circuit risks upending the long-established regulatory structure that is the registered fund industry’s bedrock. [Read More >](#)

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If you would like to learn more about the issues in this IM Update, please contact your usual Ropes & Gray attorney contacts.

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