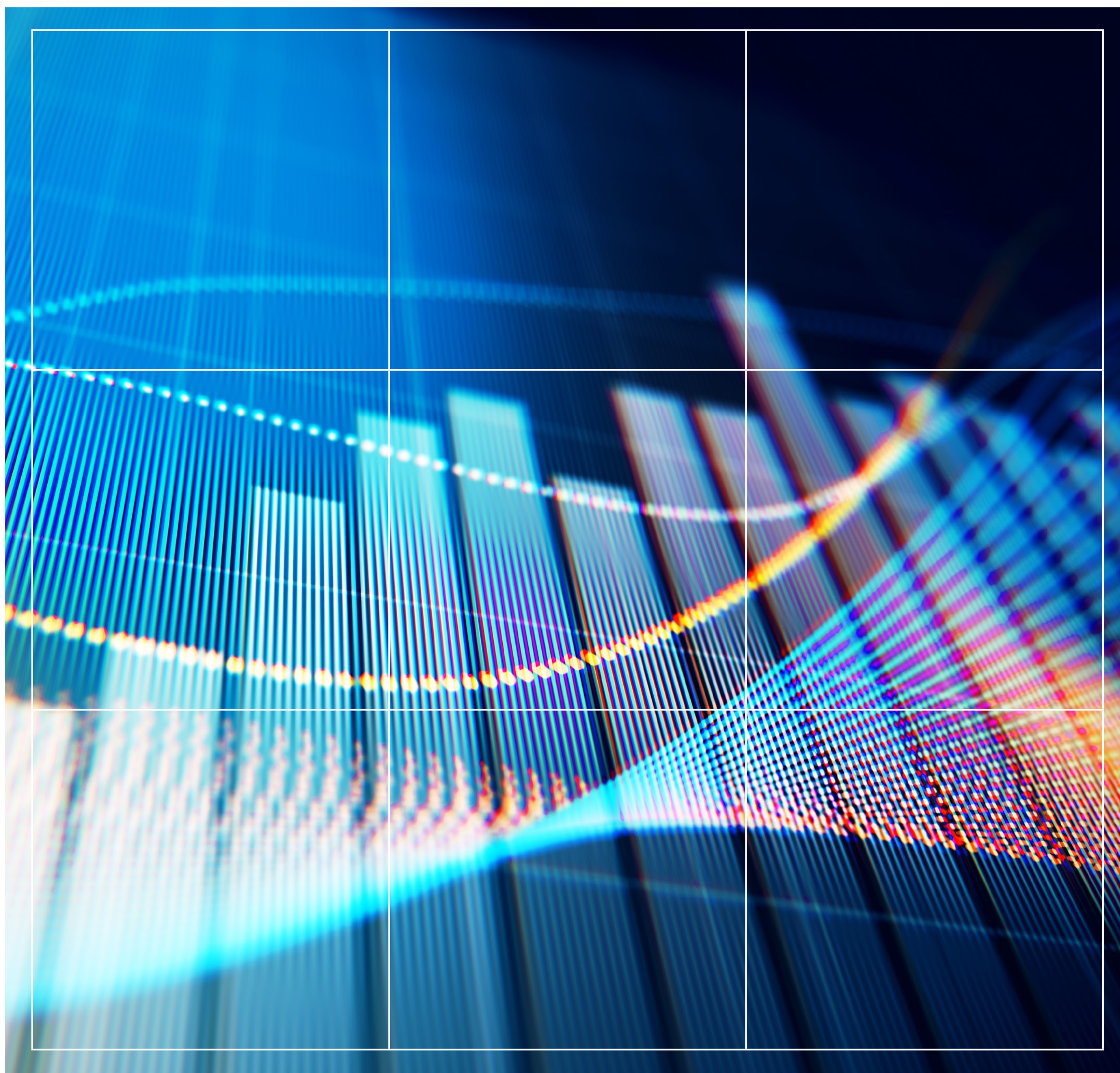
SUMMARY

2023 ICI INVESTMENT MANAGEMENT CONFERENCE



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2023 INVESTMENT MANAGEMENT CONFERENCE

Sponsored by the Investment Company Institute

March 19-22, 2023

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ICI President's Address

Speaker: **Eric J. Pan**, President and CEO, Investment Company Institute

Mr. Pan began his remarks by talking about the conference agenda and noting that SEC Commissioner Mark Uyeda and the Division of Investment Management (IM) Director, William Birdthistle, as well as staff from the SEC's Enforcement and Examinations Divisions and IM, would be speaking.

Mr. Pan noted that mutual funds and ETFs have been the greatest democratizing force in investing, providing retail investors with access to professional management and the capital markets. At the same time, the cost of funds has declined significantly, with average expense ratios for bond and equity mutual funds falling by more than one-half between 1996 and 2021, even as the industry offers more product choice.

He turned to the current regulatory landscape, warning that when policymakers favor banking-style regulation over the current disclosure-based regime, regulators will seek to eliminate as much risk as possible from the financial system rather than promoting policies that will do the most good for the most people. He added that the historical regulatory approach has worked well for so long, in part because it recognizes the risks inherent in investing and allows investors to take different levels of risk and to pay different prices for different risk levels. He added, "While we should be open to good ideas from any corner of the world, we also should continue to appreciate the strengths and unique characteristics of our markets."

Mr. Pan expressed his concerns about the pace and scale of the SEC's current agenda. The SEC has issued numerous rule proposals with overly truncated comment periods and atypically shorter implementation periods for adopted rules without pausing to attempt to understand the cumulative effect of these rules on the markets and investors. He characterized many of the rules as "solutions in search of articulated problems."

Mr. Pan touched upon several examples, beginning with the proposed amendments to Rule 35d-1 (the Fund Names Rule). He explained that the proposal tries to make a fund's name do too much, potentially causing investors to place too much reliance on a few words to describe the fund. In addition, he noted that the SEC estimates it will cost as much as $5 billion to implement the proposed changes.

Mr. Pan commented on several other proposed rules, starting with proposed Rule 206(4)-11 on outsourcing by investment advisers (the Outsourcing Rule) and amendments to Rule 204-2 (the Recordkeeping Rule) which, if adopted,

would create significant burdens on advisers without enhancing investor protection.

He addressed the proposed amendments to Rule 22c-1 which would require the adoption of swing pricing for mutual funds and a "hard close" cutoff, remarking that the proposal is "breathtaking in scope." He explained that the proposal lacks a comprehensive analysis to support its adoption and, instead, invoked the concepts of dilution and resiliency. He pointed out that ICI data show that, depending on the fund type, dilution ranges from minimal to nonexistent. In his view, "[t]he data simply do not support the SEC's sledgehammer-like approach." In addition, he noted that the proposal ignores the sizeable compliance costs of the rules, as well as the negative impact on small- and mid-size funds that tend to have fewer resources.

Mr. Pan discussed the timing challenges presented by the proposed hard close, noting that the rule would impair investors' ability to place trades and receive timely information about market events. He added that investors on the West Coast would be even worse off due to their time zone. He noted that, while there is significant opposition to this proposal, including opposition from a bipartisan group within Congress, the ICI will continue to engage with the SEC and the SEC staff in good faith on this and other proposed rules.

Keynote Remarks: William A. Birdthistle

Speaker: **William A. Birdthistle**, Director, Division of Investment Management, Securities and Exchange Commission

Director Birdthistle began by indicating that there are three trends on which the IM staff is focused, and that he would comment on how recent rulemakings could address some of the threats to investors that these trends could pose.

The Pattern and Pace of Technological Advancement. Director Birdthistle noted that the pace of "technological advancement and complexity" in asset management, including the use of distributed ledger technology, decentralized finance products, and artificial intelligence and machine learning, impacts how advisers provide services to clients. As a consequence, IM is devoting attention to not only traditional areas of focus like disclosure and conflicts of interest, but also to asset managers' responsibilities in light of these technologies.

Director Birdthistle noted that no current SEC regulation requires firms to adopt and implement comprehensive cybersecurity programs. To address this, the SEC had proposed cybersecurity risk management rules for investment advisers and registered funds that would require advisers and funds to take steps to mitigate and disclose cybersecurity risks, to

enhance disclosures of cybersecurity incidents and to report significant cybersecurity incidents to the SEC. He added that the SEC recently proposed amendments to Regulation S-P that would require registered funds and investment advisers to adopt written policies and procedures for incident response programs that address unauthorized access to or use of customer information, as well as requiring timely notification to individuals affected by an information security incident so that they can take steps to protect themselves.

Director Birdthistle touched upon the SEC's recent proposals to redesignate and amend the existing custody rule as Rule 223-1 under the Advisers Act (the Safeguarding Rule). He explained that the proposals are designed, in part, to address technological advancements in custody, including the use of blockchain technology to record ownership and transfers of assets.

Demographic Changes. Director Birdthistle described changing demographics as the second trend on which IM is focused. He anticipated a massive shift in our population over the coming decade as a result of the continuing wave of "Baby Boomer" retirements, adding that "all Baby Boomers will be 65 or older by 2030." He remarked that IM is focused on ensuring that investors have the "highest quality disclosure available to make informed investment decisions." He discussed amendments to the requirements for annual and semiannual shareholder reports provided by mutual funds and ETFs adopted in late 2022, explaining that these streamlined reports will be shorter and more visually engaging while highlighting key information and facilitating comparisons to other products. Director Birdthistle encouraged the industry to engage IM's staff with any questions in advance of the compliance date.

Director Birdthistle mentioned the SEC's release containing proposed changes to the Fund Names Rule. He shared his view that a fund's name provides an early indication of whether the fund is suitable, adding that it is important that investor expectations are aligned with the meaning that a fund's name conveys.

Director Birdthistle highlighted the work of the SEC's Office of Minority and Women Inclusion (OMWI), which invites regulated entities every two years to conduct and submit voluntary self-assessments of their diversity policies and practices. Last year, OWMI published a Diversity Assessment Report, and the results of the report "revealed a disappointingly low [nine percent] response rate." He encouraged firms to consider submitting survey data to OMWI.

On a related note, IM recently published a staff FAQ on investment advisers' fiduciary duty and consideration of diversity, equity and inclusion (DEI) factors when recommending other

investment advisers to or selecting other advisers for their clients. The FAQ concluded that, provided the use of DEI factors is consistent with a client's objectives, the scope of the relationship and the adviser's disclosures, then an adviser may consider DEI factors in making such a recommendation.

Market Growth and Outsourcing. The third trend on which IM is focused, Director Birdthistle said, is the growth in both the number of service providers in the asset management market and the types of underlying products. Director Birdthistle noted that, in response to growth in demand, advisers are providing a wider variety of services and offering a greater range of investment products, all while dealing with competitive fee pressures. He explained that this growth stems, in part, from the shift away from defined benefit plans toward defined contribution plans and the rise of do-it-yourself savings and investment platforms that provide easy access to brokerage and advisory accounts. He cautioned, however, that clients might not realize that their adviser has engaged service providers such as model or index providers, software companies or even compliance professionals.

Director Birdthistle observed that many clients would be surprised to know the extent to which third parties are involved in the provision of advisory services, with most clients assuming that the adviser will perform the functions required to deliver advisory services. He also cautioned that outsourcing of the administration of records or compliance functions may involve a service provider obtaining access to sensitive personally identifiable information of clients, which, if mishandled, could expose clients to identity theft.

With respect to index providers or sub-advisers, Director Birdthistle worried about the risk of client harm in which the adviser outsources functions that are necessary to the provision of advisory services without appropriate oversight. He noted that to address these risks, the SEC proposed the Outsourcing Rule to enhance the focus by both advisers and the SEC on ensuring that advisers fulfill their fiduciary obligations when engaging third parties to perform necessary advisory functions. The proposal would require due diligence prior to engaging a service provider and ongoing monitoring of service providers. He concluded by noting that outsourcing could potentially introduce several layers of risk to the relationship between a client and its adviser.

The full text of Director Birdthistle's remarks is available here.

General Session: Sprinting a Marathon: Keeping up with the SEC's Rulemaking Activity

Moderator: **Susan Olson**, General Counsel, Investment Company Institute

Speakers: **Sarah G. ten Siethoff**, Deputy Director and Associate for Rulemaking, Division of Investment Management, Securities and Exchange Commission

Mara Shreck, Head of Regulatory Affairs Asset and Wealth Management, J.P. Morgan Chase & Co.

Joshua Ratner, Head of Americas Operations, Pacific Investment Management Company LLC

Paulita Pike, Partner, Ropes & Gray LLP

Number and Breadth of Rule Proposals. Ms. Olson described the volume of recent SEC rule proposals affecting funds and investment advisers, which are being issued at historically high numbers and with shorter comment periods than usual. She noted that the purpose of the panel would be to address key aspects of many of those proposals. Ms. Olson asked Ms. ten Siethoff whether there were common goals and themes connecting the proposals. Ms. ten Siethoff acknowledged the volume of rule proposals, noting that the pace and approach has been consistent with what the SEC staff had previously indicated the industry could expect. She also explained that transparency and resiliency are at the core of these proposals.

Liquidity, Hard Close and Swing Pricing Proposals. Ms. ten Siethoff summarized aspects of the liquidity risk management, hard close, swing pricing and related Form N-PORT proposals. She explained that, in each case, these proposals were aimed at securing resiliency for investors in the face of possible dilution caused by net redemptions. She further noted the large number of comments received on the proposals, stating that the SEC staff was hard at work reviewing the comments.

Ms. Olson asked Mr. Ratner to summarize key issues of interest or concern for fund investors. He first addressed the proposed hard close requirement, noting the ways it would disadvantage a number of investors, particularly retirement plans. He also cautioned that swing pricing would introduce uncertainties into fund net asset values (NAVs), which are central to the integrity of funds today. Ms. Shreck agreed with Mr. Ratner's concerns, highlighting the practical challenges of implementing swing pricing in the context of intermediary relationships. With respect to liquidity risk management, Ms. Shreck indicated that she hopes the SEC staff considers unintended consequences and what products – other than obvious ones (like bank loan funds) – would be affected by the elimination of the "less liquid" bucket.

Ms. Olson asked Ms. Pike to summarize views she has heard from independent directors on these proposals. Ms. Pike stated that more than 30 boards have written comment letters, which she said is unprecedented in the history of the industry. She explained that this was particularly telling given that these proposals are unrelated to governance. Ms. Pike summarized the themes present in most of the comments letters, stating that they express concern with the lack of data to substantiate that the industry has a dilution problem, the SEC proposing measures that would affect certain investors and not others (creating "second-class" citizens), the demise of products that have proven to be resilient and have not caused issues for investors and the erosion of confidence in the fund industry associated with NAVs that would swing in unpredictable ways.

Money Market Funds, Outsourcing, Cybersecurity, Securities Lending and Custody. Ms. Olson asked Ms. ten Siethoff to share how the SEC staff was reviewing comments provided in response to the latest round of proposed money market fund reforms. Ms. ten Siethoff said that the SEC staff is busy going through the comments. She indicated that she could not commit to a timeline or next steps but noted that the money market fund proposal fits squarely with the SEC's theme of resiliency. Ms. Shreck summarized some of the key implications for investors of the proposal, including swing pricing, explaining how it would affect the investor experience and outlining some operational difficulties in implementation. She also outlined some of the concerns associated with the proposed requirement that money market funds float their NAV when confronted with negative interest rates, highlighting the high costs of implementation, among other issues.

Ms. ten Siethoff outlined key aspects of the SEC's proposed Outsourcing Rule and cybersecurity risk management proposal, referring largely to the points made by Director Birdthistle in his keynote address earlier in the day. Ms. Olson asked Mr. Ratner to address recommendations that he might have related to the many reporting changes implicated by various SEC proposals. Mr. Ratner noted the importance of identifying individuals who can begin now to think about potential enhancements and changes to reporting and recordkeeping. He summarized key changes associated with these proposals. He also identified certain challenges associated with them. With respect to cybersecurity risk management, Mr. Ratner pointed to the requirement that a supplement be filed within 48 hours of certain incidents to disclose the nature of the incident, whether it is ongoing or addressed, when it was discovered, and other details of the incident. Mr. Ratner explained that some of these disclosures could be challenging in light of state data breach laws, which generally would not be preempted by

the proposal. He also questioned the value to investors.

As to the proposed Outsourcing Rule, Mr. Ratner indicated that the proposal's challenges included the need for advisers to identify and assess subcontractors to service providers covered by the proposal, as well as the prescriptive nature of the proposal, which veers from principles-based regulation. Ms. ten Siethoff addressed the proposed Safeguarding Rule, noting that while the industry seems to be focused on the fact that it would make custody of digital assets difficult, if not impossible, there are other aspects of the proposal that are equally important. She noted that prior to issuing the proposal, the SEC staff spent time reviewing existing custody arrangements and practices in the industry. Ms. Shreck outlined key changes in the proposal, commenting on them in the context of safeguarding protocols followed by J.P. Morgan. Mr. Ratner stated that the proposal requiring that indemnification provisions be tied to a negligence standard is particularly challenging in situations in which an adviser is directed by its clients to use a particular custodian. He also outlined difficulties in implementing what would be new requirements with respect to foreign sub-custodians.

ESG. Ms. Pike briefly summarized key aspects of the SEC's proposed amendments to rules and reporting forms (the ESG Proposals) to enhance ESG practices and disclosures as they relate to boards. She explained that, on the one hand, boards are quite familiar with the concepts they would be required to oversee, such as how a fund measures progress towards its stated objectives, the time horizon used to measure progress and how the fund votes proxies on certain matters. On the other hand, Ms. Pike explained that it is atypical for these details to be in fund disclosures or part of a compliance program. From that perspective, Ms. Pike noted that boards are likely to be "in the weeds" with respect to ESG investments. She explained that because directors are responsible for information in the registration statements they sign, this set of initiatives, if adopted, would require a great deal of time and attention to detail. She noted that CCOs are likely to be similarly impacted. Mr. Ratner discussed the concern that fund disclosures would be date-specific with respect to certain ESG topics and require information from companies that are held by funds, but that at least some of those companies would not yet have disclosed the needed information in light of the rolling disclosure deadlines for operating companies. Ms. Shreck echoed this concern and outlined other questions prompted by the proposal, including with respect to interactions with portfolio companies and proxy voting.

Market Reform Initiatives. Ms. ten Siethoff indicated that, once again, the key

principles behind recent reform initiatives like proposed Regulation Best Execution, the definition of broker-dealer, and the T + 1 proposal are resiliency and transparency. She also observed that the industry has not seemed to focus on these proposals as much as some of the others discussed on the panel. She encouraged the industry to weigh in because these are significant and affect shareholders. Ms. Shreck described the work that J.P. Morgan is doing to consider and respond, as appropriate, to the proposals. She noted that these are arguably some of the most sweeping regulatory proposals since the adoption of Regulation NMS in 2005. Mr. Ratner also summarized the work that PIMCO is doing to address these initiatives, agreeing with Ms. Shreck's observations.

Ms. Pike stated that, as directors try to evaluate the numerous regulatory initiatives together, they seem somewhat perplexed by Chair Gensler's admission that he is acting, in part, at the behest of banking regulators. She noted that, especially in light of recent events with Silicon Valley Bank and other regional banks, many directors wonder why banking regulators – which seem to have their own problems to address – are focusing on the fund industry, and why the SEC seems to be so reliant on them rather than on comments received from the industry on these various proposals. Ms. ten Siethoff stated that the SEC has always had open communication lines with other regulators and that the practice continues. Ms. Pike noted that many directors have kept a close eye on how SEC Commissioners are voting on proposals. She said that many have observed that most votes are split 3–2 and ask whether the SEC is too politicized to regulate the industry effectively.

Ms. ten Siethoff closed the panel by encouraging the industry to continue to weigh in on proposals. She said that the SEC appreciates and benefits from comments.

Session A: Fund Disclosure Developments: Implementing the SEC's New Tailored Shareholder Report and Form N-PX Requirements

Moderator: **Erica L. Evans**, Assistant General Counsel, Investment Company Institute

Speakers: **Jill M. Forte**, Senior Counsel, Thrivent Financial

Megan C. Johnson, Partner, Dechert LLP

Timothy W. McHale, Senior Counsel, Capital Research and Management Company

The panelists discussed the SEC's recently adopted amendments to the shareholder report and proxy voting disclosure requirements. Ms. Evans provided an overview of the session, and explained that, in October, the SEC adopted rule and form amendments relating to annual and semiannual shareholder reports and that, in

November, it adopted amendments to the form used by funds to report information about their proxy votes. She noted that both sets of changes would go into effect in July 2024.

Amendments to Proxy Voting Disclosure. Ms. Johnson provided an overview of the amendments to the proxy voting reporting requirements, noting that the amendments expand the proxy voting information that a fund is required to report on Form N-PX. She said that each report must disclose whether a matter is proposed by the issuer or a security holder, employ the same language used in the issuer's form of proxy to identify proxy voting matters, categorize the subject matter of each of the reported proxy voting matters using a specified list of categories and disclose the number of shares of any securities that were on loan and not recalled to vote. She said that funds would be required to file their first reports on the amended form by August 31, 2024, covering the reporting period commencing on July 1, 2023 and ending on June 30, 2024.

In commenting on her firm's preparation for these changes, Ms. Forte stated her expectation that data sourcing and validation would be among the more challenging aspects of compliance due to the coordination that would be required among a fund's various service providers, including any sub-advisers and service providers used for proxy voting and securities lending. She noted that funds should work with their proxy vendors to ensure that the vendors can map their own coding into the new subject-matter categories required in the form. With respect to the increased reporting regarding securities on loan, she noted that the rule provides an opportunity for firms to review their practices regarding securities lending and recalling shares to vote.

Amendments to Shareholder Reports. Ms. Johnson provided an overview of the amendments to shareholder reports. She said that the amendments call for open-end funds to prepare concise and visually engaging reports that highlight key information that the SEC deems important for retail investors. She explained that, after the compliance date, funds will no longer be able to deliver combined reports; instead, each report can include only a single share class of a single fund in which a shareholder is invested. With respect to the form of the new shareholder reports, Ms. Johnson stated that the proposing release included a sample report that was not included in the adopting release. Ms. Evans noted her understanding that the SEC staff was working on developing a revised sample.

In discussing the challenges in ensuring readiness for compliance, Mr. McHale noted that the amendments are technical and cut across functional groups and that it would be necessary for the legal, accounting, and operations teams to

work through the changes together. He said that the requirement that each report cover only a single share class of a single fund would present the biggest challenge, noting that his firm currently prepares slightly fewer than 100 reports each year but, after the compliance date, that number would increase to over 2,000 – a volume that would require a currently unknown scalable, automated solution.

Ms. Johnson noted that the release amended the scope of Rule 30e-3 under the 1940 Act to preclude open-end funds from using notice and access to satisfy shareholder report transmission requirements. Ms. Forte commented that this amendment was disappointing after the considerable time and resources that complexes have recently spent implementing that rule. Mr. McHale agreed, stating that, while the rule isn't perfect, it is a step in the right direction toward electronic delivery.

Ms. Johnson then discussed the changes to the management's discussion of fund performance (MDFP) requirements, noting that the release provided guidance on what is meant by an "appropriate broad-based securities market index" for which performance must be shown alongside the performance of the fund. She reported that the release revises the definition to specify that the broad-based securities market index must represent the overall applicable domestic or international equity or debt markets, as appropriate, and provides certain examples of the types of indices that would satisfy the definition.

In explaining how his firm is approaching this change, Mr. McHale said that all existing fund benchmarks are being mapped based on asset class and geography to identify funds for which a newly defined "broad-based securities market index" will need to be identified. He said that any proposed indices would be socialized with the fund's portfolio managers and directors prior to implementation and noted that many funds likely would include their current benchmarks as supplemental indices. He highlighted anticipated challenges in selecting and showing the indices, noting the difficulty in selecting a single index for multi-asset funds and target date funds. In discussing the narrative MDFP disclosure, Mr. McHale suggested that the disclosure could be drafted at the fund level as opposed to creating a bespoke narrative for each share class.

Ms. Johnson noted that the amendments will require disclosure of any material changes to the fund made during the reporting period, including any changes in the fund's name, investment objective, principal investment strategies or risks, adviser or sub-advisers, or annual operating expenses, among other things. Mr. McHale commented that, while the

determination of materiality would be critical to these disclosures, firms consider the question of materiality in other contexts, and the same decision-making process would apply.

In response to an audience question regarding whether any trade groups were working to roll back the changes to the shareholder reports or proxy voting disclosures, Ms. Evans said that the ICI had no plans to do so.

Session B: SMAs and CITs for Retail Investors: Regulatory and Compliance Considerations

Moderator: **Sarah A. Bessin**, Deputy General Counsel, Markets, SMAs & CITs, Investment Company Institute

Speakers: **Vadim Avdeychik**, Partner, Clifford Chance US LLP

Kasey Lekander, Senior Vice President and Deputy General Counsel, State Street Global Advisors

Deidre E. Walsh, Managing Director, Morgan Stanley Eaton Vance

Ms. Bessin reviewed various statistics highlighting the dramatic growth in assets invested in retail separately managed accounts (Retail SMAs) and collective investment trusts (CITs) over the past decade, noting that growth in Retail SMAs and CITs had significantly outpaced growth in long-term mutual fund assets during that time period. She also referenced the increasing role of CITs in large 401(k) plans.

Mr. Avdeychik provided an overview of Retail SMAs and CITs. He noted that CITs generally rely on Section 3(c)(11) of the 1940 Act to avoid registration under the 1940 Act and discussed the conditions of that exemption, including that a CIT must be "maintained by a bank" and consist solely of assets of one or more trusts for certain types of retirement plans (*e.g.*, 401(k) plans).

The panelists discussed key drivers of growth in Retail SMAs and CITs. Ms. Lekander noted that CITs typically have lower expenses, greater customization and more flexibility around fee schedules than mutual funds. Ms. Walsh noted that Retail SMAs have benefited from lower fees and lower investment minimums relative to past periods, and added that they can provide greater customization, transparency of holdings and tax benefits (*e.g.*, tax loss harvesting) than pooled vehicles.

The panelists discussed opportunities and challenges for CITs and Retail SMAs. Mr. Avdeychik commented on the potential impact of recent SEC rulemaking on CITs, noting in particular that the SEC's proposed amendments to Rule 22e-4 (the Liquidity Rule) could trigger a shift in 401(k) assets to CITs. Ms. Lekander observed that the Department of Labor (DOL)'s new rules relating to ESG investing and proxy voting apply to CITs and noted that State Street had implemented a proxy voting program that permits certain institutional

investors in pooled vehicles to select the proxy voting policies to be applied to their *pro rata* share of pool assets. The panelists discussed the SECURE 2.0 Act and the further legislative and regulatory changes necessary to permit 403(b) plans to invest in CITs.

The panelists reviewed compliance considerations for CITs. Ms. Walsh discussed the implications of using an affiliated trust company relative to a third-party trust company. She noted that third-party platforms can facilitate market entry but also require a process for monitoring the third party's performance of certain required banking functions. Ms. Bessin noted a recent SEC enforcement action relating to a CIT's compliance with the "maintained by a bank" requirement.

Mr. Avdeychik reviewed various regulatory considerations relating to Retail SMAs, including the SEC's proposed Outsourcing Rule and request for comment on index providers. Ms. Walsh discussed compliance considerations applicable to Retail SMAs. She noted that it is prudent for advisers to take steps to ensure that intermediaries offering advisers' Retail SMA strategies are operating in compliance with applicable regulatory requirements, including Regulation Best Interest. Ms. Walsh reviewed the requirements of Rule 3a-4 under the 1940 Act, a safe harbor from investment company status. She noted that the customization afforded to Retail SMA clients with respect to investment strategies, restrictions and reporting also supports compliance with Rule 3a-4.

The panelists reflected on the greatest opportunities and challenges in the next five years for offering Retail SMAs and CITs. Ms. Walsh noted the challenges posed by increased regulation and the importance of business readiness and maintaining adequate compliance and other resources to support asset growth. Ms. Lekander noted that innovation in areas such as direct indexing and proxy voting and the challenges of maintaining low costs in an already complex regulatory framework, makes offering Retail SMAs and CITs more challenging.

Ms. Bessin noted that the ICI had heard from many of its members regarding their growing interest in CITs and Retail SMAs, and had expanded the scope of its mandate to include those areas.

Session C: Cross-Discipline Collaboration as the Industry Landscape Evolves

Moderator: **Keith Lawson**, Deputy General Counsel, Tax Law, Investment Company Institute

Speakers: **Allison M. Fumai**, Partner, Dechert LLP

Joy L. Lopez, Head of Investment Tax and Vice President, Dimensional

Dana S. Smith, Managing Director, Fund Administration, Charles Schwab Investment Management, Inc.

The panel discussed strategies for internal and external coordination, product considerations and compliance complexities associated with a number of common fund manager initiatives, such as converting separately managed accounts (SMAs) to ETFs and managing European Union (EU) tax reclaim recoveries. Mr. Lawson asked each panelist to describe how their tax, accounting, securities law, operations and other key stakeholder groups are organized. Ms. Fumai noted that her first calls are often to her tax and ERISA colleagues to spot potential issues when a client comes to her with a new proposal. Ms. Smith noted the need for operational teams to be ready to innovate and keep up with the pace of business change. Ms. Lopez observed the importance of bringing a variety of departments and groups to the table to discuss new business initiatives at their outset.

Product Considerations. Ms. Fumai described manager considerations when converting existing products (namely, SMAs) to ETFs. She noted that many managers have effected similar conversions of mutual funds to ETFs, although there are a number of differences to be mindful of with respect to SMAs. Among other considerations, she noted that managers should think about the following questions: Is accountholder approval necessary? What assets are held by the contributing portfolio? What are the tax implications to the SMA holder? Are there affiliated transaction issues to work through? Will the ETF be passive or actively managed? Can the ETF use the prior performance track record? Ms. Lopez added that managers should be mindful of non-US tax implications; just because a transaction is tax free in the US does not mean that foreign markets will respect that tax classification. Ms. Smith observed the difficulties associated with the valuation and investor reporting processes in these conversions. She noted that if there isn't already a daily pricing process in place for an SMA, this can often be a hurdle when converting it into an ETF.

Generating Yield. The panelists next discussed the impact on yield-generating techniques of tax, accounting and securities law considerations. Ms. Smith stated that the first step when considering any modification to an existing product is to ask what the manager is trying to achieve with the change and what are the risks

associated with new processes. She noted that enhanced automation is often necessary with new product changes, and this typically takes time to implement. Ms. Smith walked the audience through an example of an investment strategy enhancement focused on increasing current income through the use of derivatives. She noted that it is important to find the right mix of ordinary income and gains and to think about how the income will be taxed. She also noted the importance of education portfolio management teams about the potential impact to a portfolio's ordinary income and capital gains.

Ms. Fumai added that, in Ms. Smith's example, a manager will also need to think about proposed modifications in light of Rule 18f-4 under the 1940 Act (the Derivatives Rule), as well as the Liquidity Rule and the SEC's proposed amendments thereto. Ms. Lopez added that managers should think about and be prepared to respond to questions regarding currency denominations and tax elections.

Tax Reclaim Recovery. Mr. Lawson then introduced the topic of EU tax reclaims, which he noted was first discussed at the ICI's conference in 1989. He explained that the EU has treaties that deal with how EU member states apply their tax regimes to each other and rights with respect to cross-border investments. He noted that Article 63 of the Treaty on the Functioning of the European Union applies to third parties – non-EU member states – as well such that a US fund can take advantage of the treaty if it's considered comparable to, say, a French fund. He noted that the comparability analysis is very detailed and that the ICI has made available a whitepaper on this topic that ICI members may find useful.

Ms. Lopez then led a discussion regarding tax and accounting consequences of mutual fund tax reclaims, and a fund board's involvement in this process. She explained the importance of monitoring markets for changes in tax laws, administrative procedures and other policies, as well as watching statutes of limitations, in order to ensure maximum treaty entitlements for a fund. She described a typical board's involvement with the process, which is at a high level but often involves the board approving a fund's pursuit of claims and who (the adviser or the fund) would bear the associated cost. Ms. Fumai noted that boards may be updated annually on the status of these reclaims, or sometimes more often. She stated that a board will be focused on the cost-benefit analysis of pursuing claims in various jurisdictions.

Withholding – Transfers of Partnership Interests. Ms. Lopez then summarized a new tax regulation – Section 1446(f) of the Internal Revenue Code – that requires 10% withholding by the transferee of a US partnership interest held by

a foreign person if the partnership is engaged directly or indirectly in US business activity. She walked through with the audience which departments and groups would be responsible for various processes associated with compliance with this new regulation. She also described the role of a custodian or clearing broker who is responsible for the withholding. Ms. Lopez noted that the managers may want to consider whether to manage their US and non-US portfolios differently in light of this new regulation.

Keynote Remarks

Speaker: **Mark Uyeda**, Commissioner, Securities and Exchange Commission

In his remarks, Commissioner Uyeda cited the 14 separate rulemakings adopted or proposed by the SEC in the last 18 months affecting asset managers and investment companies, as well as numerous proposals affecting public company issuers. He pointed out that, unlike the regulatory initiatives following the 2008 financial crisis, there has been no Congressional directive mandating this high volume and pace of SEC rulemaking activity. He observed that significant compliance challenges and costs will no doubt result from the SEC's "rush to rulemaking," which he suggested will disproportionately hurt smaller fund complexes and their advisers and potentially make mutual funds more expensive and less attractive as investment options for 401(k) and similar plans in comparison to less regulated alternatives such as CITs. He expressed concerns that this will drive smaller firms out of the industry, potentially leading to "a concentration of strategies, a decrease in choice for investors, and the potential for large financial monoliths that vote and invest the same way."

Commissioner Uyeda suggested that the SEC has been focused on rulemakings based on unrealistic expectations of how the world functions. He cited as an example the SEC's rule proposal mandating that open-end funds institute swing pricing and a hard 4:00 p.m. Eastern Time close, among other requirements, which in his view looks to Europe and academic papers envisioning systems completely different from the US experience. He observed that the SEC's rulemaking proposals "are interrelated and interconnected, yet these proposals are not evaluated pragmatically and holistically," including with respect to economic and cost-benefit analysis. He suggested that the SEC should publicly state its views on the overall problem being addressed and "should not try to avoid its obligations under the Administrative Procedure Act to have a reasoned basis by dividing its regulatory response into small, compartmentalized proposals."

Open-End Fund Liquidity. Commissioner Uyeda indicated that the SEC's recent liquidity and swing pricing proposals are rooted in a deep

concern among academics and prudential regulators (such as the Financial Stability Board, headquartered in Basel, Switzerland, and European central banks) that the "liquidity transfer" provided by open-end funds (by allowing investors to make daily NAV purchases and redemptions while holding generally less-liquid assets) is a source of systemic risk. He suggested that this narrative has been focused on European funds and then applied to US mutual funds "with only glancing references to the fundamental differences that exist," including with respect to distribution channels, regulatory requirements and types of investors between the United States and Europe. He recommended that the SEC use publicly available information on Form N-PORT and other sources to test the hypothesis before completely changing the current system for US mutual funds. In this regard, he questioned assertions that the severe market events of March 2020 provide evidence that "mutual funds present systemic risk that must be addressed through tools like swing pricing and more restrictive liquidity requirements" and noted skepticism that the crisis has given banking regulators "an excuse to fulfill a longstanding goal to regulate the mutual fund industry in a prudential manner."

ESG. Commissioner Uyeda cited the three ESG-related proposals issued by the SEC in 2022 (one for corporate issuers, one for investment advisers and registered funds and one relating to registered fund names) as "continuing on the theme of overlapping, complex proposals that are not grounded in practical reality." He expressed concern that the various regulatory attempts to address ESG issues may be intended to force particular investment or operational outcomes rather than to benefit the financial returns of investors. He suggested that the existing disclosure regime works well in requiring funds to disclose ESG-related information that is material to an investment decision from an economic standpoint. Commissioner Uyeda pointed to the EU's sprawling sustainability finance regime (including the EU Corporate Sustainability Reporting Directive, the EU Sustainable Finance Disclosure Regulation and the EU Taxonomy Regulation) as a "cautionary tale," including its significant implementation challenges, conflicting standards and interdependence and potential to create a large drag on the economy. He advised that the SEC should give significant thought as to how it sequences any final ESG-related rules given that fund and adviser disclosures, as proposed, would rely in part on corporate disclosures.

Commissioner Uyeda described the Fund Names Rule as presenting significant challenges. He noted that the proposal would significantly extend the 80% minimum assets test under the Fund Names Rule to names that imply investments that have, or investments whose issuers have, "particular characteristics" that the SEC did not

define but indicated would include subjective terms such as "value," "growth" and "ESG," among others. He suggested that the benefits of the proposal to investors, if any, do not appear to be compelling or justifiable in light of the "astounding costs" of implementation, which the SEC estimates to be up to $5 billion, or $500,000 per fund, as well as the significant additional burdens that would be imposed on SEC staff resources to process the amended prospectus disclosures that will result.

Practical Areas for Improvement. Commissioner Uyeda concluded by providing his views on practical areas for improvement in the SEC's rulemaking focus and process. He suggested that the SEC's efforts should focus on "projects that provide tangible improvements for investors by providing clear guidelines to firms in meeting their regulatory obligations" while being sensitive to the current economic environment. He advocated that the SEC should issue concept releases on important topics, produce thoughtful analysis of the data currently gathered, hold public roundtables and publish views for public comment rather than proceeding immediately to rulemaking. He recommended that the SEC continue to focus on improved fund disclosure for investors, including through the use of investor testing, citing Form N-14 and Form N-2 as examples of outdated and dense fund forms that are "likely information overload for investors and costly for funds to complete." In this regard, he noted his support for the SEC's adoption of rule and form amendments to create streamlined shareholder reports for ETFs and mutual funds.

The full text of Commissioner Uyeda's remarks is available here.

Session D: Fund Governance in an Era of Regulatory Deluge

Moderator: **Thomas T. Kim**, Managing Director, Independent Directors Council

Speakers: **Patricia Louie**, Independent Director, Oakmark Funds

Kathryn L. Quirk, Lead Independent Trustee, Harbor Funds

Stephen J. Tate, Chief Legal Officer and General Counsel, Putnam Investments

The panelists discussed how their fund boards address regulatory changes. Each noted that external fund and/or independent legal counsel discusses regulatory proposals and developments at each regular board meeting, typically with management present, to share their perspectives on the how the proposals and developments might be expected to impact the funds and the adviser. Following the adoption of new or amended rules, the fund boards typically receive iterative presentations from the CCO or the relevant adviser personnel over time as proposed policies, procedures and board reporting regimes are developed. Ms. Quirk noted that IDC webinars

can be very helpful in enhancing directors' understanding of new regulatory requirements.

The panel discussed the swing pricing and hard close proposals, during which Mr. Kim noted that the IDC and over 30 fund boards had submitted comment letters raising serious concerns. The panelists expressed concerns about the likelihood of investor confusion and the need for education regarding the swing factor and order cutoff times that are earlier and potentially variable across intermediaries, particularly because these changes would upend processes that have been simple and well understood for generations. The panelists also noted their concerns about the likely delay in publishing NAVs, the likelihood that the cost of developing new distribution and transfer agency systems that address the proposed rule changes would ultimately be passed along to fund shareholders, and the possibility that some intermediaries may choose to move their clients' assets to CITs, SMAs and other less-regulated vehicles rather than change their existing systems. The panelists noted that mutual funds already have a variety of tools available, including swing pricing and in-kind redemptions, that could be used on a fund-by-fund basis when warranted by the circumstances for a particular fund or transaction. Mr. Tate questioned whether the there was sufficient evidence of liquidity problems in open-end bank loan funds to warrant the draconian step of shutting down the entire asset class.

The panelists also discussed the proposed amendments to the Fund Names Rule, noting that requiring funds to return to compliance within 30 days may not always be in the best interests of shareholders. The panelists stated their expectation that breaches of the Fund Names Rule would be reported to the fund board in a manner similar to other compliance breaches.

The panelists discussed the current relief from the in-person meeting requirements of the 1940 Act, noting that while each of their boards were now meeting primarily in person, it was not unusual for a director or two to participate by videoconference, and Ms. Quick stated that while the directors met in person, most members of management participated by videoconference. Ms. Louie noted that the ability to meet virtually when necessary is important and that such meetings have gone well.

The panelists discussed the cybersecurity risk management rule, which they found to be overly prescriptive and detailed and provided little room for being tailored to the needs of particular funds. The panelists also discussed the increasing workloads of fund CCOs, noting that the SEC seems to be viewing Rule 38a-1 as all-encompassing. The panelists noted that responding to the tremendous volume of pending regulatory changes will involve

significant time and resources for fund boards, advisers, CCOs and other service providers, which could slow down product innovation for the next few years and could potentially make it harder for new entrants to join the industry and for small fund complexes to continue to compete.

The panelists discussed the desire of their boards, in considering director succession planning, to look for skill sets that compliment those of existing directors while recognizing that the board performs an oversight role.

Session E: The "Alt"–imate Product: Interval Funds, Tender-Offer Funds, and BDCs?

Moderator: **Kenneth Fang**, Associate General Counsel, Investment Company Institute

Speakers: **Ryan Brizek**, Partner, Simpson Thacher & Bartlett LLP

Lucie Enns, Vice President, Blackstone Inc.

Terry Gallagher, Executive Vice President, Director of Mutual Fund Accounting and Administration, UMB Fund Services, Inc.

Andrew Yongvanich, Managing Director, Global Products, Nuveen Fund Advisors, LLC

Alternative Retail Markets. Mr. Gallagher provided an overview of the interval fund and tender offer fund market. He said the size of these two products has grown from $30 billion in 2014 to over $100 billion in 2022, and that most of the growth has been in credit-based interval funds. He also noted that BDCs grew tremendously in 2021.

Mr. Yongvanich discussed client return profiles. He stated that as markets change, client needs also change, noting that it is becoming harder to generate alpha in more traditional markets. He said that private assets can provide an illiquidity premium to investors. He added that changes in bank regulation have increased opportunities for private credit, as private credit managers, through their funds, originate many of the loans that previously were originated by banks.

Ms. Enns indicated that Blackstone approached the retail space from its established alternatives business, contrasting that with Nuveen, which expanded from more traditional products to retail products. She said that sponsors offering alternative retail products are trying to make available strategies that were previously available only to institutional investors. She noted that certain institutional features, such as the drawdown structure, can be difficult to manage for retail investors.

Considerations for Sponsors. Mr. Brizek discussed various factors that should be considered when determining whether to launch an alternative retail product, such as: What is your investor base? Will it be limited to accredited investors, qualified clients or qualified purchasers?

What is the desired asset class? He explained that the asset class will help drive the decision on the proper "wrapper" for the product. He noted that BDCs can use more leverage than other registered products, which can be helpful for many credit products; however, they are not generally appropriate for funds of private funds. Tender-offer funds, he noted, are more suited for funds of private funds. With respect to interval funds, he stated that, although they are popular, they generally need to have a more liquid portfolio than tender-offer funds. Mr. Brizek advised that sponsors also need to be cognizant of the fact that the SEC staff appears to be looking to prevent some investment strategies from being offered in a mutual fund structure.

Mr. Gallagher then described several of the issues he sees when working with registered alternative products. In particular, he observed the importance of the fund sponsor articulating its distribution strategy, understanding how it will access investments and considering how – and how often – investments will be valued. He observed that alternative retail products typically take longer to launch than "regular" funds and that sponsors will need to be mindful of this fact. He added to Mr. Brizek's earlier advice, noting that the "wrapper" should be based on the investment strategy, not vice versa.

Ms. Enns discussed some additional challenges with alternative retail products, such as maintaining the sponsor's reputation while expanding into a different line of business, partnering with service providers that will allow the sponsor to scale appropriately and ensuring that the sponsor has internal teams and infrastructure to sustain the new business. She observed that sponsors may need to retrofit an existing strategy to comply with 1940 Act requirements, for example, to comply with co-investment rules.

Distribution-Related Matters. Mr. Yongvanich said that the alternative retail market was no longer entirely dependent on access to the largest broker-dealers and that companies such as iCapital and CAIS have made it easier to offer alternative strategies to retail investors. He said that Nuveen also had to adjust its sales teams to sell alternatives effectively, noting that Nuveen currently uses a specialist/generalist model. Ms. Enns added that Blackstone has built out its own distribution platform for these products.

Mr. Gallagher stated that it can be challenging to convince brokers and registered investment advisers that a well-constructed client portfolio can include some illiquid investments. Mr. Yongvanich stressed the importance of client education in this regard. For example, at some point in a market cycle, he said, investors will

experience volatility or potential limits on redemptions, and it is important to make sure clients appreciate these possibilities before making an investment.

Mr. Gallagher discussed some of the operational and administrative challenges arising from alternative retail products, including valuation, custody, accounting, recordkeeping, "regulated investment company" taxation requirements and distribution planning (including compliance with Section 19 of the 1940 Act). He also discussed the differences in investor reporting and seed audits for new funds.

Board Oversight. The panel discussed difficulties associated with boards' oversight of alternative products, including the difficulty of finding comparative expense and performance information and issues in comparing funds with different fee structures (*e.g.*, performance fees as compared to funds with higher management fees but no performance fees). The panelists also commented on efforts necessary to educate boards regarding compliance with the conditions of co-investment relief, which often requires boards to react and make findings quickly – sometimes within a few days.

Regulatory Considerations. Mr. Brizek elaborated on co-investments and other regulatory requirements. With respect to co-investments, he explained that many alternative products will seek to co-invest with private funds, which, under current SEC positions, requires co-investment exemptive relief. He noted that, although SEC has prescribed a form exemptive application, the process is not an easy one and often requires nine months to a year to obtain the requested relief. He added that the disclosure process is faster than the exemptive relief process.

Mr. Brizek also explained that these products often must seek "multi-class" exemptive relief in order to permit them to offer more than one share class in accordance with Rule 18f-3, similar to mutual funds. Although applications for multi-class relief are not as involved as applications for co-investment relief, he noted that the SEC expects different forms of applications for tender-offer funds, private BDCs and public BDCs.

The panel then discussed issues particular to BDCs and tender-offer funds, including the election of BDC status under the 1940 Act and the SEC's expectation that tender-offer funds pay for tendered shares "promptly" (*i.e.*, pay 95% of the tender proceeds within 65 days of the expiration of the offer).

Session F: Market Structure Reform: Implications for Investment Management

Moderator: **Nhan Nguyen**, Assistant General Counsel, Investment Company Institute

Speakers: **Tim Crowley**, Senior Vice President and Portfolio Manager, PIMCO

Mehmet Kinak, Vice President, Global Head of Systematic Trading & Market Structure, T. Rowe Price Associates, Inc.

Zachary J. Zweihorn, Partner, Davis Polk & Wardwell LLP

Mr. Nguyen provided an overview of the market structure issues implicated by the SEC's aggressive rulemaking agenda, noting that the SEC had proposed 4,400 pages of regulations with only about 75 days to comment on each rule. He shared a chart summarizing the 15 different rule proposals.

Mr. Crowley indicated that much of the SEC's focus is on liquidity, which is provided by primary dealers and proprietary trading firms. He added that liquidity used to be provided only by primary dealers. In addition, he noted that the primary liquidity instruments are Treasury and Treasury derivatives, but the supply of liquidity is not always consistent.

Mr. Kinak agreed, explaining that there is significant trading fragmentation, with 16 different exchanges and numerous alternative trading systems (ATSs) and dark pools. He also noted that with the migration to electronic fixed income trading and the move to bilateral trading with primary dealers and proprietary trading firms, liquidity remains a challenge.

Mr. Zweihorn indicated that there does not appear to be a single driving force behind the SEC's proposed regulations. He could identify no specific market event, such as the problems with meme stocks or the flash rally, that the regulations respond to, nor could he point to any example of systemic risk. Instead, he explained, the SEC has advanced bigger proposals than necessary in an attempt to solve more problems than they have actually identified – in essence, solutions in search of problems.

Mr. Crowley expressed his view that the SEC has three primary goals – market stability, market resiliency and fair, efficient trading. Mr. Kinak commented that equities do not present market resiliency concerns. He noted that there have been no issues with the operation of market-wide circuit breakers and that trading volumes have exploded without the markets experiencing challenges. He also highlighted that Chair Gensler talks about information asymmetry presenting trading problems. The SEC's solution is to require trading firms and venues to report trade data as quickly as possible. He stated that transparency can be problematic when an institution is trading,

as their trades and strategies represent proprietary intellectual property. With respect to equities, he explained that there is already significant competition, adding that he does not think that retail execution will be impacted by the market structure rules proposed and adopted by the SEC.

Mr. Zweihorn described Rule 605, noting that it is the least controversial market structure reform. Rule 605 requires public reporting of certain trading data. He described the proposed revised "tick" regime, which will require a dynamic tick size that changes based on recent liquidity. He explained that current rules require quoting at one-cent intervals, but that the revised rules will require changes to the actual quoted rate. He described the order competition/payment-for-order-flow proposals, which will direct retail order flow to exchange auctions. Finally, he detailed Regulation Best Execution, which essentially rolls up existing MSRB, FINRA and common law rules regarding execution and adds certain procedural rules and additional duties where there are conflicts of interest.

Mr. Kinak commented that the market is being redesigned for self-directed individuals, whose trades average 100 shares (as opposed to all trades, which average approximately 10,000 shares). He added that the resulting lack of liquidity and size benefits retail investors but harms institutions. He explained that Chair Gensler believes that there are conflicts of interest that harm retail investors, but Mr. Kinak expressed his view that it is better to have good trading results for retirement plans than for retail investors to save a few pennies. He stated that there is definitely segmentation in the market, but added that most retail trades end up being executed by one of three wholesale trading firms. Finally, he commented that, while institutions would love to have access to more liquidity, they do not want to be on the other side of retail trading where there is some theme behind the retail trading, such as with meme stocks.

Mr. Zweihorn explained that the SEC points to the Treasury markets as the driver of reforms, but the market structure reform proposals are much broader, touching on issues such as who is an exchange and who is a dealer?

Mr. Nguyen described the proposals relating to the registration of ATSs for government securities, dealer registration and central clearing for cash repo transactions. Mr. Crowley added that virtually all of the risk transfer in the Treasury markets has migrated from primary dealers to other liquidity providers. Expanding on this point, he noted that holdings by primary dealers have essentially stayed the same while the overall Treasury market (excluding STRIPS and TIPS, which trade almost exclusively with primary dealers) has quadrupled in size.

Mr. Crowley noted that the current proposals would not have done anything to mitigate the current banking crisis. Instead, the SEC should change its focus to attempt to figure out how to foster all-to-all Treasury and Treasury derivatives trading, which would improve liquidity. He added that the investment grade credit market has more all-to-all trading and is more resilient as a result.

Mr. Nguyen commented that there is an inherent challenge in applying existing regulatory frameworks for regulating exchanges and dealers, which do not always work for evolving markets. Mr. Crowley agreed, suggesting that "one-size-fits-all" structures are not nuanced enough to be helpful. He added that, while post-trade transparency is improving and pre-trade transparency exists, it is likely that efforts to force more transparency will lead to less transparency in the long run. Mr. Zweihorn concurred that less transparency is a likely unintended consequence of the SEC's market structure proposals. Instead, the SEC should develop specific goals and then focus on what it will take to make the necessary changes to reach those goals.

Mr. Kinak wondered whether payment for retail order flow leads to better or worse results for retail investors, suggesting that the brokers receive benefits when wholesalers pay for order flow and that restricting payments for order flow will increase costs for retail investors. He added that the SEC's disparagement of payment for order flow has resulted in retail investors not appreciating how payment for order flow benefits them. Mr. Zweihorn agreed, noting that the rule proposal will not benefit retail investors and will make payment for order flow uneconomical.

DEI Practices in the Asset Management Industry: Legal Considerations and Challenges

Moderator: **Kathy Vanderziel**, Senior Vice President and Senior Counsel, Capital Research and Management Company

Speakers: **Joseph Allessie**, Deputy General Counsel, Harris Associates, Chief Legal Officer, Oakmark Funds

Stephen Denny, Head of Human Resources, Diversity & Inclusion, Putnam Investments

This panel explored DEI efforts in investment advisers' workforces. Ms. Vanderziel invited the panelists to discuss diversity initiatives undertaken by their respective firms. Mr. Allessie described efforts to utilize technology to better understand the characteristics of candidates who are interviewed and those who are ultimately hired, as well as to develop a broader candidate pool. He noted success in using software to help set parameters around hiring to remove unconscious bias from the process. Mr. Denny explained that, in his experience, grassroots

diversity efforts can be just as important as those that are initiated from the top down. He discussed the need to find creative ways to reach out to diverse candidates and to diversify the team involved in recruiting, as well as the importance of considering carefully the pipeline within a firm as part of implementing succession planning efforts.

Mr. Denny highlighted efforts at his firm to provide training to employees addressing implicit bias, unconscious bias, micro-inequities, diversity awareness and individual responsibility in the professional space. As part of this, he noted a focus on workforce engagement and thinking about ways to ensure the firm is meeting the needs of everyone in the organization. Mr. Denny also discussed work his firm is doing externally with community groups, including universities from which they recruit candidates, to study factors that cause racial wealth gaps to persist.

The panel discussed the importance of addressing not only they "D" in DEI, but the "E" and "I," as well. They focused on the importance of equal access to opportunities for everyone, from mentorship to promotion opportunities.

In their discussion, the panelists emphasized the importance of involving the legal department in conversations regarding diversity efforts, noting that laws governing discrimination in the workplace apply to everyone in the workplace. They noted a gap that often exists between DEI professionals and internal legal counsel and discussed the need to bring all stakeholders to the table to create a DEI program that is authentically focused on improving productivity and the employee experience.

The panelists also discussed data collection, including through self-identification initiatives, acknowledging the challenges for encouraging employees to disclose information about themselves that may help their employer better understand the workforce. they noted the importance of clear communication with employees regarding not only what information is being collected, but also what the employer intends to do with it, what they don't intend to do with it and how long the information will be stored. the panelists recognized the need to put people at ease so that they feel comfortable providing information, explaining that employees who understand why their employer is collecting information about them are more likely to provide such information. both panelists also emphasized the criticality of safe storage of data and limiting who has access to raw data, not only from a legal perspective but from a credibility perspective, as well.

General Session: The SEC's History: Perspectives on a Changing Regulatory Landscape

Moderator: **Sara P. Crovitz**, Partner, Stradley Ronon Stevens & Young, LLP

Speakers: **Barry P. Barbash**, Senior Counsel, Willkie Farr & Gallagher LLP

Andrew J. ("Buddy") Donohue, Former Chief of Staff and Director of Investment Management Division, Securities and Exchange Commission

Paul Roye, Former Senior Vice President, Capital Research and Management Company

Ms. Crovitz introduced the panelists, each of whom had served as director of IM during the following tenures: Mr. Barbash from 1993-1998, Mr. Roye from 1998-2005 and Mr. Donohue from 2006-2010. She proceeded to ask each panelist's views on various industry topics, including how the panelist thought about each topic during his tenure as director and how he thinks about the topic now.

Distribution-Related Fees and Disclosures. Mr. Barbash recalled that he gave a speech at this same conference almost 25 years ago on distribution-related fees. He observed that there have been a number of articles on the topic, highlighting its importance to investors. He acknowledged that it is difficult to conduct a comparative analysis of distribution-related fees because investors invest through various products and platforms (*e.g.*, through variable insurance products). Mr. Barbash noted that current Director Birdthistle has discussed providing investors with individual fee statements, which was an idea that IM had considered during Mr. Barbash's tenure.

Mr. Roye added that while Mr. Barbash had started an initiative on the topic, Mr. Roye was tasked with completing it. Mr. Roye recalled his first day on the job where he found on his desk a bottle of bourbon (there was some debate as to whether it was Pappy Van Winkle or Jim Beam) and a note saying, "you have to complete a fee study." He noted that such a study was completed in 2000 and examined all kinds of funds and fees going back 20 years. IM's conclusion at that time was that the framework Congress established for independent directors' oversight of fees worked. Mr. Roye noted that IM under his tenure did consider individual fee statements but concluded that it would be too operationally burdensome, and decided instead to include in fund shareholder reports disclosure of expense ratios to give investors an idea of what they are paying.

Late Trading/Market Timing Scandal and the "Hard Close" Proposal. Ms. Crovitz asked Mr. Roye to comment on his experience as director dealing with late trading and market timing scandals. Mr. Roye recalled that it was a dark period for the industry. He noted that the SEC and the New York Attorney General at the time were

aggressive in bringing cases and enforcement actions in response to these market abuses. His view of IM's role was to figure out, from a policy standpoint, how to address this problem. One of the ideas proposed was a so-called "hard close," which received many comments from the industry. Mr. Roye noted that, curiously, the ICI had supported a hard close at that time. He stated that, after much consideration, IM determined that the impact of a hard-close requirement would be too great, particularly for retirement plan participants and market participants on the West Coast, and that such a requirement would disrupt the ecosystem of the industry. Mr. Roye said that he thinks a hard close of the type contained in the SEC's proposal to require swing pricing, is still not workable today. He noted, in fact, that the issues may be even more acute today than they were during his tenure. Mr. Barbash added commentary on how the soft close developed over time via SEC no-action letters.

Outreach to Independent Directors. Ms. Crovitz noted that director outreach was an important initiative to Mr. Donohue during his tenure as director. She cited remarks from Director Birdthistle regarding the Section 15(c) process and the SEC staff beginning to investigate this area and asked for Mr. Donohue's views on this as the former director and a current fund independent director. Mr. Donohue underscored the importance of the independent directors' role as "watchdogs." His observation after years in the industry is that boards have different ways of doing their jobs and communicating their positions to management and that it is important that boards continue to have that flexibility. Mr. Donohue said that the idea of sending out enforcement staffers to figure out the 15(c) process may increase the SEC staff's knowledge base, but there are other ways that this may be done. One of the challenges as a regulator, Mr. Donohue observed, is that the industry participants that come to you for guidance or advice are not always doing what you think they should – should there be a regulatory response to this fact? He said that you have to think about what tools you have and which ones are best suited to the issue. His approach was to let the industry know what IM was thinking and that they did not have to send out staffers from OCIE because industry participants felt comfortable having a dialogue. Mr. Roye agreed with Mr. Donohue that sending examination staffers to investigate the 15(c) process is not helpful to the industry.

Mr. Barbash commented on Mr. Donohue's use of the term "watchdogs" in relation to independent directors. He stated that the SEC over the years has attempted to change the independent director role from watchdog to gatekeeper, requiring directors to be more involved in the operation of the funds. He questioned that view. He observed the vast volume of materials that boards now have to

review. Mr. Donohue recalled that having to fit board materials in two paper books that the directors could carry was good discipline; with electronic materials, there's an inclination just to post more materials. He agreed with Mr. Barbash that the role of directors has expanded over time.

Operational Issues. Ms. Crovitz asked the panelists to comment on the structure of the SEC's various divisions during their tenures and what they thought was effective or ineffective. Mr. Barbash recalled that, during his tenure, OCIE and IM were spun out and he didn't love that idea. He thought having the exam staff paired up with the rulemaking staff was valuable and allowed for a coherent strategy as to how to oversee the industry and what to focus on. Mr. Donohue noted that now more than 50% of the SEC staff is focused on enforcement, which has both benefits and costs.

Ms. Crovitz then asked each of the panelists what they would focus on if they were named director again tomorrow. Each panelist commented on how rewarding his time as director was, but some questioned whether they would take the job again today, noting that it has become more political. Mr. Barbash stated that he would focus on the retirement area, which has not been a major focus of the SEC to date. Mr. Roye would focus on issues that are important to investors such as digital engagement practices (*e.g.*, social media) and new and complex products (*e.g.*, crypto). Mr. Donohue said that being the director was his favorite job and that he would try to take a broad approach to solving issues by talking to Commissioners about different philosophies and trying to build a consensus.

Advice to the Current Director. Ms. Crovitz asked the panelists to give their advice to Director Birdthistle and the SEC staff on how to protect investors without stifling innovation. Each former director agreed that it was a delicate balance. Mr. Barbash commented on how this balance played out with the innovation of money market funds and ETFs, and Mr. Donohue commented on widespread industry changes stemming from the creation of FSOC. Mr. Roye agreed with not stifling innovation, but said that more thought needs to be put into whether certain types of funds and asset classes are appropriate in an open-end fund framework. He noted that the industry is seeing the by-products of those considerations now, citing the liquidity risk management rule as an example.

The panelists discussed their views on policymaking and crisis management, noting that skills in these areas were important as Director. Ms. Crovitz asked the panelists to give advice to Director Birdthistle in this regard. Mr. Barbash commented on the importance of having close communication and a good relationship with the SEC staff, understanding how they operate and

what they need. Mr. Roye said to "move quickly, get industry buy-in and move forward." Mr. Donohue said to know what information you have, what's actionable and what's not, and to keep it cool. "Frequently, the solution is the industry," Mr. Donohue said, "listen to them."

General Session: The Topic du Jour: Is ESG Investing Financial, Political, or Both?

Moderator: **Dorothy M. Donohue**, Deputy General Counsel, Securities Regulation, Investment Company Institute

Speakers: **Michael P. Kreps**, Principal, Groom Law Group

Rob McKenna, Partner, Orrick, Herrington & Sutcliffe LLP

Amy D. Roy, Partner, Ropes & Gray LLP

ESG Investment Statistics and Legislative Activity. The panel began with Ms. Donohue providing the audience with current ESG investment statistics, including data on the total net assets of funds that invest according to ESG criteria and their share of total fund assets in the industry. Specifically, Ms. Donohue noted that as of the end of 2022, funds that invest according to ESG criteria represented 8.6% of the total number of funds and that such funds reflected more than 16% of all newly launched funds in 2022.

Ms. Roy discussed the state-by-state map that Ropes & Gray maintains that tracks relevant ESG-related legislation, executive actions and initiatives and coalition activities, as well as changes to state retirement plan investment policies, across the US. While certain of the blue- and green-shaded states in the map reflected pro-ESG investing activity, Ms. Roy noted that much of the activity has been reflected in the orange- and yellow-shaded states reflecting anti-ESG investing activity, such as actions restricting the use of ESG factors in investing and actions that target entities allegedly boycotting certain industries, like energy companies.

Mr. McKenna addressed in greater detail the current political dynamics in the red and blue states as they relate to ESG investing. Specifically, Mr. McKenna noted that ESG investing has become the number one issue for Republican Attorneys General and state treasurers, with both emphasizing the need to protect state pension funds from asset managers taking what they believe are non-pecuniary ESG factors into consideration when investing as opposed to focusing solely on the financial returns for investors. On the other side of the political spectrum, Democratic leaders fully support the consideration of ESG factors in investing and even suggest that such considerations are necessary for a manager's compliance with its fiduciary duties.

Given this political divide, Ms. Donohue asked the panelists what asset managers are

supposed to do going forward. Mr. McKenna said, first and foremost, managers have to follow the law. He referenced a bill currently pending in Kansas that ensures the only consideration in investing is maximizing financial returns. Ms. Roy raised practical considerations for advisers, including to fully disclose the adviser's focus on the maximization of financial returns in disclosures and to avoid discussing ESG investing in the same breath as the firm's broader sustainability efforts. She also cautioned managers (i) to be diligent and measured in their communications with investors about ESG and related commitments and (ii) to remain disciplined before agreeing to new management agreement terms and when completing periodic certifications as to the terms, including certification of compliance with any given state's law, which may have shifted since any earlier certification given the fast-paced changes in legislation.

Litigation Risk and Potential Theories of Liability. The panel next discussed the various potential theories of liability that regulators or plaintiffs might pursue against asset managers in connection with ESG investing and related disclosures. Ms. Roy discussed the pending investigations by Republican state Attorneys General's offices, which seem based in part on a theory of breach of fiduciary duty. According to Republican state officials, she noted, ESG investing is a violation of a fiduciary's duty of loyalty wherein the adviser is using client assets to pursue the adviser's social agenda at the expense of pursuing pecuniary returns for shareholders. She noted that red state officials also suggest a breach of duty of care based on the belief that ESG investing enhances shareholder value, pointing to the recent underperformance of certain ESG-focused funds as evidence of this breach.

Mr. Kreps weighed in on a breach of fiduciary duty theory from an ERISA perspective, noting how rampant litigation has been in this space with most large plan sponsors having been sued recently. He explained that managing money solely in the interest of plan participants, as ERISA fiduciaries are required to do, means first focusing on the financials. Only after having done that and determining investment options that are functionally equivalent from a financial perspective, he said, can an ERISA fiduciary look to other factors, such as ESG (assuming the particular ESG factors under consideration do not otherwise further financial returns).

Mr. McKenna discussed consumer protection and antitrust theories of liability being explored by red state officials. He explained that, under the consumer protection theory, Republican officials have asserted that financial sector companies are "lying" to consumers given their focus on alternative agendas outside of financial returns. Under the antitrust theory, Mr. McKenna

discussed allegations of concerted action and group boycotts of certain industries, noting that he anticipates lawsuits on these theories to be filed as early as later this year or early next year.

SEC and FINRA Enforcement Activity. Ms. Donohue turned the panelists' attention to recent activity from the SEC and FINRA on ESG investing. Ms. Roy discussed the current administration's focus on ESG and the concept of "greenwashing" – or the overselling of a fund's or adviser's ESG efforts in disclosures to investors. She talked in detail about two SEC enforcement settlement orders in May and November of 2022 and noted how the two orders provide a good road map into how the SEC is approaching its investigations of greenwashing. In particular, Ms. Roy noted the SEC's focus on reconciling an adviser's external statements about ESG with internal statements, policies, and procedures and the actual ESG practices of the adviser's compliance and investment professionals. She said that, if an adviser purports to use any kind of ESG ranking or scoring methodology in reviewing or selecting securities, the SEC wants to see the backup documentation for how those ratings are used and applied and whether they are being used in a manner consistent with both external and internal statements and policies.

As to FINRA, Ms. Roy explained that the group has been focused on how advisers describe and market their different products, with FINRA staff comparing fund advertisements to their prospectuses for consistency. Most recently, she noted, FINRA issued its 2023 annual exam and risk monitoring report, which describes findings from its examination program with respect to sales material promoting ESG factors. Ms. Roy summarized the findings, noting that FINRA found that some member firms were using fund communications that contained claims that were inconsistent with or unsupported by the fund's offering documents. She stated that, by way of recently published guidance, FINRA recommended that advisers balance statements promoting ESG factors by prominently describing the risks associated with ESG funds, including that (i) ESG-related strategies may not result in favorable investment performance, (ii) there is no guarantee that the fund's ESG-related strategy will be successful, and (iii) the fund may forego favorable market opportunities in order to adhere to ESG-related strategies or mandates.

What's Next? All panelists agreed that ESG will remain a focus of the industry and its regulators (and likely plaintiffs) for the foreseeable future. Mr. McKenna advised industry participants to be engaged and focus on legislative policy change, emphasizing that trade associations need to be active and remain steadfast. Ms. Roy noted that, while the past couple of years have been focused on rulemaking and legislation, she

anticipates that the next couple of years will focus on the enforcement of those rules and policies across various regulatory fronts and courthouses.

Sink or Swim? Evaluating the SEC's Liquidity, Swing Pricing, and Hard Close Proposal

Moderator: **Matthew Thornton**, Associate General Counsel, Investment Company Institute

Speakers: **Melissa S. Gainor**, Partner, Kirkland & Ellis LLP

Jason Kadavy, Senior Vice President – Fund Administration, Voya Investment Management

Erin Kennedy, Senior Counsel, Dodge & Cox

Lisa Shea, Senior Vice President, Northern Trust

The panel examined the effects of each area of the ambitious liquidity and swing pricing proposals. Mr. Thornton noted that, taken in their totality, the proposals would have a dramatic effect on the industry if adopted as proposed and were wildly unpopular with the industry, as evidenced by the extensive comment file. The panel also considered whether other, less dramatic approaches would be more prudent.

Proposed Amendments to the Liquidity Risk Management Rule. The panelists described the biggest challenges they observed for the industry in implementing the changes to Rule 22e-4 if adopted as proposed. Ms. Gainor highlighted several aspects of the proposed rule, including the need to classify the liquidity of investments daily instead of monthly, the elimination of the ability to classify the liquidity of investments based on asset class and the changes to the liquidity buckets.

Ms. Kennedy said that the cumulative impact of the proposals would be substantial, identifying the significant operational burden of classifying all investments every day as an example. She focused on the changes that she believes have the potential to change the classifications that funds apply because those changes may substantially affect fund investment strategies and holdings. She said that requiring the use of the 10% stressed trade size would increase the size of the position that funds consider in making their classifications by between 200% and 1000%. Requiring evaluations of the liquidation challenges posed by a larger position could increase the chance of positions being classified as illiquid and could yield other unexpected results. For example, she noted that applying the 10% required trade size to a very large (*e.g.*, $100 billion) large-cap equity fund could result in such a large trade size for a security that it could be difficult to conclude that the position is liquid, while a smaller fund with the exact same holdings might have an easier time concluding that the holding is liquid because its stressed trade size is smaller in absolute terms. She said that this outcome would imply that a large fund presents greater liquidity risk but that many in the industry would say that is typically not the

case because larger funds tend to have smoother fund flows and less volatility in their AUM. Also, the chance that a fund experiences a 10% outflow over a short period of time will be greater for a smaller fund than a larger fund. She noted that the disparity of this proposed rule change's impact seems especially arbitrary.

Mr. Kadavy agreed that each fund will be affected differently and that this kind of prescriptive, untailored approach to regulation leaves much to be desired. He noted two significant effects of the proposal as follows:

- Moving the less illiquid category to illiquid, which is really about bank loans that can be sold into the market quite easily at carrying value, but that often take longer to settle. He cited the tools available to advisers for managing liquidity in this scenario, such as dedicated lines of credit, and the fact that the industry has successfully managed these types of assets through market crises to support the idea that the asset class should remain available in the mutual fund and ETF wrapper.
- An overly prescriptive approach to determining the value impact standard.
    - The 20% average daily trading volume threshold for listed securities takes into account neither the ability to liquidate an ETF holding through the redemption process nor the liquidity of the underlying positions received from the ETF and instead requires weighting the volume over the preceding 20 days evenly when it often makes more sense to allocate more weight to the volume on more recent days.
    - The false precision sought by the rule when it comes to the 1% threshold proposed for non-listed positions that are already being carried at an exit price, especially for securitized debt or similar asset classes for which there are fewer readily available trades.

Assuming There is a Case for Changing the Liquidity Framework to Some Extent – What Should the SEC Do? All of the panelists agreed that the SEC should take a less prescriptive approach. Ms. Kennedy encouraged the SEC to adopt a principles-based approach. She said there might be a temptation to use bucketing because it is easily converted into structured data for reporting and mining. Her view was that, while it may feel like doing so results in an objective approach, it narrowly focuses on those classifications at the expense of adequately taking into account the various sources of liquidity available to mutual funds and their risk management activities. While principles-based rules may be more difficult to

enforce from a regulatory perspective, she encouraged the SEC to seek ways to broaden its focus and look beyond asset classifications, particularly for funds that are investing in somewhat less-liquid asset classes.

Proposed Swing Pricing Amendments and the Hard Close. Ms. Shea said that it is no surprise that swing pricing has not been implemented in the US while some use it in Europe due to the prevalence of the agency trading model in the US and a different structure in Europe, which is not as heavily driven by defined contribution plans. She noted that in Europe, cut off times for trades are often quite early – such as noon local time. She said that the US investor population has the advantage of accessing a full day's trading now and that the hard close would take that away from investors. While some have suggested that this might push investors away from mutual funds and into CITs, she noted that some intermediaries will not want to invest in and maintain two different processing systems for similar products, so CITs might follow suit and adopt the earlier cutoff times that will be required for mutual funds.

Ms. Shea also noted that it may be virtually impossible to draft understandable, useful disclosure for investors about a swing factor, which is an indeterminate fee that may be imposed depending on who else transacts in the fund on a given day. She noted that requiring complex and imprecise new disclosures is at odds with the path toward simplicity and clarity in disclosure that the industry has been pursuing (in part, due to other SEC requirements).

The panelists agreed that it is unclear whether there is sufficient evidence of a problem that would justify such dramatic changes. The panelists encouraged the SEC to provide additional clarity about the problem that it believes needs to be fixed, suggesting that more disclosure about the mutuality of transaction costs or potentially having funds transact in up to four decimal places might offer helpful ways to address the apparent concerns. They also encouraged the SEC to focus on *material* or *substantial* dilution, as opposed to *any* dilution, noting that these costs are generally relatively small when viewed in the context of investors being provided with professional investment management services in a diversified portfolio at a relatively low price.

Proposed Changes to Form N-PORT. The panelists again noted that the proposed changes will affect funds differently, noting that for funds that tend to take larger positions, there is an increased risk of front-running/free-riding, effectively taking trading value away from fund investors.

Final Thoughts. The panelists encouraged the SEC to look for more targeted ways to address the issues of concern, to go beyond what looks

good on the page, and to take into account the details and substantial costs of implementation and the costs of considerable upheaval simply to fix what may be relatively modest or poorly defined potential issues.

Session G: Addressing Compliance Challenges in Today's Unprecedented Economic and Regulatory Environment

Moderator: **Trevor E. Swanberg**, Vice President and Chief Compliance Officer, John Hancock

Speakers: **Katherine M. Primas**, Chief Compliance Officer, Dodge & Cox

Elizabeth B. Scalf, Chief Compliance Officer, US Bank Global Fund Services

Kristin A. Snyder, Partner, Debevoise & Plimpton LLP

This panel focused on the challenges facing asset management firm compliance departments, with a focus on practical suggestions for navigating the current environment. Mr. Swanberg reviewed current challenges, noting that the breakneck pace of SEC rulemaking coupled with volatile market conditions and emergence from the pandemic has stressed compliance departments.

The panelists discussed technology and testing. Ms. Scalf noted that, although technology is often thought of as a solution to problems, integrating new vendors can increase complexity; in particular, significant platform changes can be disruptive. She suggested a focus on smaller changes, asking whether it is possible to eliminate particular processes or to rely on an existing process that has a non-compliance purpose as a reliable compliance check. She said that it was important always to consider whether the best solution involved people or technology, training or testing, or some combination thereof. Ms. Primas said that process review was important, recommending that compliance teams consider each year whether there are ways to improve testing. She noted that compliance consultants often brought new perspectives. Ms. Snyder added that there may be ways for compliance teams to leverage work done by IT departments (as in the case of cybersecurity) or by implementing automated processes (such as for trade allocation).

Mr. Swanberg asked the panelists how they adapted when there was simply too much work to do. Ms. Scalf said that, when requesting additional resources, demonstrating to senior management how the compliance department's work assisted processes in other parts of the firm was helpful. Ms. Primas said that it was important to have a dynamic, risk-based program that can facilitate a focus on the most important areas and that she challenged her staff to consider whether currently assigned risk ratings were appropriate or whether they should be changed, resulting in resource allocation changes. She said that her

organization had an internal audit committee (although no internal audit function) that was also helpful in establishing testing priorities. Ms. Snyder noted that compliance departments were always resource-challenged in testing and that there was always a pressure to prioritize. She said that the compliance department could be assisted by consultants on a temporary basis, by seconding employees from other parts of the firm, by internal audit (if available) and by making sure that groups within the firm were coordinated.

Mr. Swanberg asked whether there were any matters that were so important that they required the CCO's personal attention. Ms. Primas said that direct CCO involvement was appropriate when there was a significant enforcement action (*e.g.*, electronic communications), when the SEC's Division of Examinations was focused on a particular issue or when there was a new regulation. Ms. Scalf said that it was important for CCOs to be involved at the beginning of a project to ensure that the correct workstreams were created. She said that the CCO should assign specific tasks (*e.g.*, developing Rule 2a-5 or Rule 18f-4 policies and procedures) to specific people and should check in with those people rather than doing the work directly.

Turning to rulemaking, Ms. Snyder observed that, whether or not the current pace of rulemaking continued, the implementation dates for current new rules would extend for several years, keeping compliance departments busy for some time. She said that the SEC staff appeared to be more aggressive in terms of the Wells notice process, adding pressure through enforcement. She commented on the staff's priorities, noting a desire to increase reviews of investment advisers and their information security practices and a desire to review the Section 15(c) process at investment companies.

In light of this, Mr. Swanberg asked, should CCOs change their approaches to managing compliance programs? Ms. Scalf said that a regulatory change-management process, looking out several years, was important. Ms. Primas said that it was important to get ahead of the curve where possible by leveraging existing processes to address elements of proposed rules.

Ms. Swanberg noted that a common theme among CCOs was a desire for additional resources. Ms. Scalf noted that it was difficult to find helpful metrics, given that a compliance department is considered successful when nothing happens. She said that it was important to educate senior management about this fact. She also said that, insofar as compliance touches virtually every aspect of the firm, one could position resource requests to align with senior management's business focus. She said that compliance should be positioned as a cost-saving group insofar as it prevented fines and other costly issues. Ms. Primas agreed that it was hard to produce metrics

that directly advocated for additional resources. She noted that activity levels (*e.g.*, how many trades were reviewed or how many pre-clearance requests were reviewed) could be provided, however. She noted that doing so was always worthwhile to demonstrate to senior management and fund boards what the compliance department was doing. She also recommended keeping senior management and fund boards informed about newly proposed and adopted rules so that they could understand what the compliance department was working on and the value it was adding.

Mr. Swanberg said that he was in the habit of informing senior management when he felt the industry was in a "risk-off" environment (*i.e.*, we do not want to be operating in a gray area right now) or a "risk-on" environment (*i.e.*, perhaps we can operate in a gray area now) and that it was very helpful to illustrate this with data rather than a narrative explanation. He suggested itemizing time spent on specific new rules to demonstrate the necessary work and need for resources. He said that this resonated with senior management. Ms. Snyder noted that the SEC's Examinations staff often asked for compliance metrics such as the number of compliance personnel per AUM, per registered representative, and so on.

Mr. Swanberg asked the panelists whether there was a risk that, if an exam ended with no deficiencies, senior management might perceive that compliance was not in need of additional resources. Ms. Snyder said that it might depend on whether the exam was focused (a deep dive) or broad. She said that it was important to indicate how other parts of the firm were mobilized to respond to the exam. She said that this was an aggressive moment in terms of examinations, not a time to be complacent about compliance.

Mr. Swanberg asked for practical tips for getting the best people into compliance, motivating them and building a culture that keeps those people in the compliance department. Suggestions ranged widely – providing snacks, expressing empathy with the challenges that employees are facing and reminding employees that they have an opportunity to see from their seats in compliance broad regulatory developments across the whole firm. Ms. Scalf also noted that the work-from-home environment allowed her to recruit talent from a much broader pool, and Ms. Primas noted that rotating employees through different groups within compliance could help to keep things interesting.

SESSION H: FUND INDUSTRY CIVIL LITIGATION: YEAR IN REVIEW

Moderator: **Julia Ulstrup**, Senior Vice President and General Counsel, ICI Mutual Insurance Company

Speakers: **Pamela M. Conover**, Vice President and Deputy General Counsel, T. Rowe Price Associates, Inc.

Michael K. Isenman, Partner, Goodwin Proctor LLP

Stephen G. Topetzes, Partner K&L Gates LLP

The panel began with a discussion of excessive fee litigation. Mr. Topetzes noted that historically much of this litigation has been grounded in Section 36(b) of the 1940 Act. He gave an overview of Section 36(b), including how it establishes a fiduciary duty for investment advisers with respect to the receipt of compensation and that it creates a private right of action for shareholders to bring lawsuits challenging the reasonableness of such fees and seeking to recover damages. Mr. Topetzes explained that the *Jones v. Harris Associates* decision in the US Supreme Court established the governing legal standard for claims under Section 36(b).

Mr. Topetzes provided statistics on recent fee litigation, noting that, since *Jones* was decided in 2010, there have been 29 lawsuits brought under Section 36(b) against the advisers to 26 different fund groups, but that no new claims have been asserted since 2018. He stated that, since 1970, when the 1940 Act was amended to include Section 36(b), no plaintiff has ever prevailed by establishing liability against an adviser for excessive fees. Mr. Topetzes observed that a recent development among plaintiffs is "books and records" demands targeted at specific funds pursuant to various state provisions, sometimes bylaw provisions, that provide shareholders certain rights to request and inspect fund records with respect to governance and business matters. Requests in this regard have focused on the contract review and approval process under Section 15(c) of the 1940 Act, he explained, as well as relationships with service providers, with an emphasis on consideration of board fiduciary duties. This effort by members of the plaintiffs' bar suggests possible claims under state laws for fiduciary duty violations in connection with the approval of allegedly excessive fees, according to Mr. Topetzes.

Mr. Isenman noted that since these requests are governed by state law and fund governance documents, in some states (like Delaware), a fund can restrict shareholders' ability to make such requests, so long as such restrictions are included in the fund's organizational documents. Ms. Conover noted that this development underscores the importance of the board's Section 15(c) process and the need to monitor industry developments, review and

refresh process and materials, engage periodically with litigators for advice and updates, consider privilege issues and focus on 15(c) requests and responses to ensure all questions have sufficient responses and information provided on fund-by-fund basis. As the industry lives in an environment where there are economic incentives for people to bring claims, Mr. Topetzes said, 15(c) processes should be dynamic and not static – with participants being responsive to circumstances (*e.g.*, underperformance with respect to one fund, a troubled sector, an unfortunate circumstance that impacted the adviser's personnel). He warned that advisers and boards should be sure to build a record that shows due consideration of such issues, so the business judgment exercised by disinterested board members is entitled to strong deference.

Turning to prospectus liability litigation, Mr. Isenman explained that these are cases that challenge the sufficiency of fund disclosures. He explained that these cases are typically brought under the Securities Act of 1933 Act and/or the Securities Exchange Act of 1934 Act, and they allege that there are misrepresentations or omission in funds' registration statements or other disclosures. Mr. Isenman observed that cases frequently do not make it past the motion to dismiss. He noted that we see upticks in these types of cases during extended bear markets and periods of market turmoil, when funds see substantial underperformance that plaintiffs will assert is tied to material misstatements or omissions in fund disclosures. The primary remedy under the 1933 Act is rescission, Mr. Isenman stated, which means investors must have suffered an actual loss and not simply underperformance relevant to market returns. He noted that, while 2022 was not a great year for markets, it was not the extended bear market of the type that makes these cases particularly attractive.

Mr. Isenman observed that recent claims have focused on more exotic types of products, such as those employing leverage and derivatives strategies that suffered substantial losses or product failure. These events triggered a number of claims, some of which were resolved by settlement, he noted, while others are still being litigated. He explained that examples include allegations of misrepresentation regarding valuation procedures or how the fund's investment strategy is implemented. Ms. Conover stated that this underscores the importance of revisiting and refreshing the disclosure review process, as funds cannot simply "set it and forget it" when it comes to disclosure. She said that it is key to build a record of regular review of disclosure in shareholder reports, websites and other marketing materials to determine that ongoing communications are consistent with prospectus disclosure. Ms. Conover also noted that providing regular educational updates to the board on the

fund's and adviser's prospectus review process is also an advisable practice. Mr. Topetzes further noted the importance of review of disclosures regarding ESG investing practices – a review whose rigor should match that of other investment process disclosures.

Turning to litigation under state and common law, in addition to the books and records requests already discussed, Mr. Isenman noted that recent activity has involved a couple of overlapping categories of cases. The first is closed-end fund activist litigation, which tends to arise in circumstances where activists seek to exploit discounts in a fund's market price relative to its NAV, he explained. The activists build up a substantial position in a fund and then seek to obtain seats on board or some other fund action allowing the activist to realize a benefit relative to the discount. Mr. Isenman stated that the recent litigation involves challenges to two types of anti-takeover provisions in fund organizational documents (i) majority vote provisions, in which a contested seat for spot on board requires the challenger to receive the votes of a majority of outstanding shares in order to oust the incumbent and (ii) control share provisions, which are akin to statutory provisions on the books of half of the states. He described the mechanics of shareholder provisions, as well as the history of the SEC staff's evolving position regarding the legality of control share provisions under the 1940 Act.

Mr. Topetzes provided an overview of one recent case, in which a federal judge in the Southern District of New York ruled that a control share provision adopted by a closed-end fund violated Section 18(i) of the 1940 Act, which generally requires that each issued fund share be a voting share, and that all shares have equal voting rights. He said that this decision is now on appeal to the US Court of Appeals for the Second Circuit. Mr. Topetzes then discussed a separate Massachusetts state court decision, where the judge adopted the reasoning of the New York federal court to likewise find a control share provision to violate Section 18(i). At the same time, he noted, the Massachusetts judge also ruled that it was not a breach of the fund trustees' fiduciary duties to have adopted the control share provision or a separate majority vote provision that the board also adopted. He explained that this litigation remains pending, with additional disputed claims to be addressed at a trial.

Mr. Isenman stated that the second category of state law claims is breach of fiduciary duty lawsuits, frequently (though not exclusively) filed in state court. Such claims may challenge decisions by advisers and/or oversight by boards. He said that such actions are sometimes filed as derivative actions, other times as direct actions. Most derivative lawsuits have been resolved in favor of fund groups without significant settlements, he observed. According to Mr.

Isenman, one challenge is that they can drag on for long time before getting resolved. The cases tend to be highly fact specific.

Mr. Isenman noted that there are new plaintiffs' firms entering this litigation space and offering novel theories of liability. He provided an overview of a recent case where a large provider of target date funds reduced the investment minimum amount for one suite of funds, which resulted in a number of 401(k) plan participants moving shares from a second suite of slightly more expensive funds offered by same provider and overseen by the same board. He explained that the resulting redemptions from the second suite of funds caused those funds to have a higher rate of capital gains distributions than the past. Mr. Isenman noted that some shareholders in the second suite of funds held shares outside of retirement plans and, therefore, it was a taxable event for them. He explained that the plaintiff's theory was that the adviser and the board had a fiduciary duty to each shareholder of the second suite of funds and allegedly violated that duty by lowering the investment minimum in the first suite of funds. Mr. Isenman stated that this case is still in the motion-to-dismiss phase and raises interesting questions about the nature and scope of fiduciary duties, including to whom they are owed. He believes the potential for such litigation highlights an important, general practice point: the importance of the record of the board's considerations in approving changes. He concluded by stating that the business judgment rule under state law provides important protections of such decisions, protections that hinge on a record of board consideration of the fund's best interests.

General Session: Expecting the Unexpected: Looking Backward and Forward at the Exams and Enforcement Divisions

Moderator: **Christopher Michailoff**, Senior Counsel, TD Securities USA LLC

Speakers: **Andrew Dean**, Co-Chief, Asset Management Unit, Division of Enforcement, Securities and Exchange Commission

Vanessa L. Horton, Associate Regional Director, Division of Examinations, Securities and Exchange Commission

Dabney O'Riordan, Partner, Quinn Emanuel Urquhart & Sullivan, LLP

Corey Schuster, Co-Chief, Asset Management Unit, Division of Enforcement, Securities and Exchange Commission

The panel discussed the work and priorities of the Division of Examinations and the actions of the Division of Enforcement over the past year. It also explored the SEC's approach to overseeing registrants' compliance efforts and industry views on recent enforcement actions.

Overview of Enforcement Actions. Mr. Dean began by providing an overview of the Division of Enforcement's Asset Management Unit. He explained that the Asset Management Unit is a national, specialized unit that is staffed by approximately 50 industry experts and attorneys across 10 of the SEC's 12 offices that focuses on misconduct by investment advisers, investment companies and private funds.

Mr. Schuster discussed certain of the Asset Management Unit's current priorities. He explained that, given the relatively large amount of investments in private funds (approximately $21 trillion), one of the Asset Management Unit's focus areas is private funds, including issues relating to conflicts of interest, calculation of fees and expenses, code of ethics and material non-public information, cybersecurity and custody. Many of these issues are applicable to investment companies, as well, according to Mr. Schuster. He noted that the Asset Management Unit spends a lot of time looking at investment advisers and private funds that present systemic risks, citing as an example the recent charges against Archegos Capital Management, LP (Archegos) for allegedly orchestrating a fraudulent scheme that resulted in billions of dollars in losses, including losses to Archegos's counterparties.

Another priority of the Asset Management Unit, according to Mr. Schuster, is valuation, which applies to both investment companies and private funds. Mr. Schuster pointed to recent charges against a former Chief Investment Officer and founder of an investment adviser for allegedly engaging in a fraudulent scheme to overvalue assets held by an investment company and private fund managed by the adviser. Mr. Schuster noted that the Asset Management Unit has observed an uptick in valuation issues during periods of market turmoil.

Mr. Schuster then turned to ESG investing, referring to it as a "big focus area." He discussed recent charges against (i) an adviser for policies-and-procedures failures involving two mutual funds and one separately managed account strategy marketed as ESG investments and (ii) another adviser for misstatements and omissions about ESG considerations in making investment decisions for certain mutual funds that it managed. Mr. Schuster also provided an update on the Climate and ESG Task Force within the Division of Enforcement, noting that it continues to develop initiatives to proactively identify ESG-related misconduct.

The last priority area Mr. Schuster discussed was gatekeeper accountability. He noted that the Asset Management Unit is focused on ensuring that gatekeepers, such as boards, accountants and attorneys, are fulfilling their own professional responsibilities and not giving cover to

investment advisers, investment companies and private funds engaged in possible misconduct. Mr. Schuster reminded the audience that the SEC has brought enforcement actions against gatekeepers who engaged in wrongdoing themselves or attempted to cover up wrongdoing, engaged in conduct that crossed a clear line, or failed meaningfully to implement compliance programs, policies and procedures for which the gatekeeper had direct responsibility. He referred to the recent charges against a big four accounting firm for cheating by its audit professionals on exams required to obtain and maintain Certified Public Accountant licenses and for withholding evidence of this misconduct from the Division of Enforcement.

Mr. Dean briefly touched upon the Asset Management Unit's focus on cybersecurity and custody. He noted that a recent sweep conducted by the Asset Management Unit that led to charges against nine investment advisers for failing to comply with requirements relating to safekeeping client assets and/or to timely update their SEC disclosures to reflect the status of audits of financial statements for the private funds they advised, underscored the importance of meeting custody obligations to secure client assets and to protect investors.

Penalties and Disgorgement. Mr. Michailoff turned the conversation to the topic of penalties ordered and disgorgement sought by the SEC. He highlighted the fact that money payments during fiscal year 2022 in SEC actions, comprising civil penalties, disgorgement and pre-judgment interest, totaled $6.4 billion – the most on record in SEC history. Mr. Michailoff explained that, of the total payments, civil penalties were also the highest on record and that disgorgement decreased by 6% from fiscal year 2021. He asked Messrs. Dean and Schuster to provide some insight into the Division of Enforcement's process for determining how much to recommend to the SEC in penalties or disgorgement.

Mr. Dean reiterated recent remarks by Gurbir S. Grewal, the Director of the Division of Enforcement, about how the Division recently sought to recalibrate penalties to more effectively promote deterrence and eliminate the idea that penalties are just another business expense. He explained that there are a variety of factors that the Division of Enforcement takes into consideration when determining the amount of penalties or disgorgement to seek that is very case specific. Mr. Dean explained that the Division of Enforcement evaluates the misconduct in light of the statutory penalty guidelines and considers prior judicial opinions and SEC orders and guidance. He noted that meaningful cooperation with the SEC by alleged wrongdoers may result in reduced penalties or no penalties at all.

Ms. O'Riordan provided her perspective as a member of the defense bar on the recent trend in penalties and disgorgement. The uptick in penalties, particularly with respect to compliance-only cases such as recent charges against 17 market participants for widespread recordkeeping failures, has had an impact on market participants. She predicted that the Division of Enforcement would continue to conduct proactive enforcement sweeps and initiatives that specifically target recurring issues and that issues relating to cryptocurrencies would remain a priority of the Division of Enforcement.

Role of Gatekeepers. Mr. Michailoff asked Messrs. Dean and Schuster to return to the topic of gatekeepers. With respect to compliance personnel, Mr. Schuster stated that the SEC has made it clear that chief compliance officers must have support and cooperation from business personnel to perform their jobs effectively. He further stated that "the Commission seeks to hold compliance personnel liable when they engaged in wrongdoing, attempted to cover up wrongdoing, crossed a clearly established line and failed to meaningfully implement compliance programs and policies and procedures for which they have oversight responsibility."

Examinations. Ms. Horton discussed the work and priorities of the Division of Examinations. She noted that the Division of Examinations, which employs approximately 600 accountants, attorneys, industry experts, quantitative analysts and others in the field and in the SEC's various offices, is currently in a "hiring frenzy." Ms. Horton discussed the Division of Examinations' risk-based approach to preventing fraud and monitoring risk, explaining that they employ data-driven, risk-based targeting methodologies to assess and monitor risk and to determine the entities and scope of risk areas to examine. She also remarked that the Division of Examinations is now more involved in the rulemaking process than in the past.

Ms. Horton stated that, of the examinations conducted by the Division of Examinations, approximately 70% result in a deficiency letter, 20% result in a no-comment letter and 10% are referred to the Division of Enforcement. With respect to potential sweeps or initiatives in the future, Ms. Horton warned that each of the focus areas identified in the 2023 Examination Priorities will likely be part of some sort of sweep or initiative. She explained that, although most examinations have recently not been conducted onsite/in the field, the Division of Examinations expects to resume regular field work soon, given that the staff will be returning to working from the office soon.

Mr. Michailoff asked Ms. Horton to comment on recent reports about market participants being concerned about the increasing

length of questions received from the Division of Examinations as part of examinations and about the increasing amount of time it has been taking for examinations to be concluded. Ms. Horton explained that, during the COVID-19 pandemic, the Division of Examinations gave registrants more time to respond to examination inquiries, given the circumstances, but that is no longer the case. She also confirmed that the list of initial requests and questions sent to registrants as part of examinations has not changed.

Ms. Horton discussed the SEC's recent rulemaking activity. She stated that the pace of rulemaking has been faster than in the past and that new Rule 206(4)-1 under the Advisers Act (the Marketing Rule), in particular, represents a "sea change" for the Division of Examinations. Ms. Horton explained that the Division of Examinations has adopted an examination process with respect to the Marketing Rule that will mostly involve evaluating policies and procedures, ensuring proper controls and compliance by investment advisers with the substantive requirements of the Marketing Rule.

Another new rule that the Division of Examinations is focused on is Rule 18f-4 under the 1940 Act (the Derivatives Rule), according to Ms. Horton. She explained that, as part of their examinations, the Division of Examinations will evaluate a fund's derivatives risk management program and policies and procedures to ensure proper oversight by the fund's board.

On Rule 2a-5 under the 1940 Act (the Valuation Rule), Ms. Horton stated that the Division of Examinations will be evaluating board oversight practices and whether appropriate disclosures are being made to the board, recordkeeping practices, whether adjustments have been made to valuation methodologies, policies and procedures, governance practices and service provider oversight. She added that it is customary for the Division of Examinations to review the minutes of board meetings and that the Division of Examinations will assess on a case-by-case basis whether it will want to communicate directly with members of a board as part of an examination of Valuation Rule practices.

Mr. Michailoff asked the panelists to comment on the off-channel electronic communications sweep being conducted by the SEC. He referred the audience and panelists to recent charges by the SEC against 15 broker-dealers and one affiliated investment adviser for widespread and long-standing failures by the firms and their employees to maintain and preserve electronic communications. Mr. Dean noted that he encourages firms to self report to the SEC if they are aware of potential recordkeeping violations concerning off-channel electronic communications, as doing so could result in a

reduction in potential penalties. Ms. O'Riordan advised that firms should review the recent SEC orders and the undertakings therein and take preemptive steps to prevent similar violations from occurring. She also reported concerns among many that the SEC's approach to combating off-channel electronic communications is a "push for perfection" which, she noted, could potentially be counterproductive.

Ms. Horton discussed the Division of Examinations' approach to determining whether to refer a particular matter to the Division of Enforcement. She noted that the Division of Examinations does not apply a "one-size-fits-all" approach and takes a number of factors into account, including (i) harm to investors, (ii) recidivist conduct, (iii) fraud, (iv) seriousness of violation and whether it has been addressed by the registrant, (v) profits, (vi) intentionality and recklessness, (vii) frequency and (viii) potential for recovery by investors. Messrs. Dean and Schuster noted that the Division of Enforcement takes similar factors into consideration when determining whether to initiate an enforcement action. Mr. Schuster added that the Division of Enforcement will also consider whether the registrant engaged in deceptive conduct during the examination and whether the registrant is cooperating with the SEC.

Mr. Michailoff asked Ms. O'Riordan to share her thoughts on what registrants could do to avoid being referred to the Division of Enforcement by the Division of Examinations. Ms. O'Riordan noted that it is helpful to (i) produce documents requested by the Division of Examinations in a timely manner, (ii) be candid and cooperative with the Division of Examinations, (iii) if questions are going in a particular direction, take proactive steps to address the problem and (iv) if a deficiency letter has been issued, to provide a comprehensive and thoughtful response.

General Session: Cyber Security and Ethics: Partners or Antagonists?

Moderator: **Marty Burns**, Chief Information Security Officer, Investment Company Institute

Speakers: **Micaela R.H. McMurrough**, Partner, Covington & Burling LLP

Kimberly Vargo, Shareholder, Vedder Price P.C.

Heather L. Rosing, CEO and Shareholder, Klinedinst PC

The panel discussed what it means to have a robust cybersecurity program, the expectation of clients, employees and investors that their information and investments will be protected, recent regulatory and legislative developments relating to cybersecurity and the role of ethics.

Recent Developments and Government Actions. The panel began with each panelist discussing their perspective on cybersecurity and, in the case of Ms. Rosing, on ethics. Ms. McMurrough discussed recent developments relating to cybersecurity. She noted that the cybersecurity environment is extremely dynamic, with multiple moving parts. Ms. McMurrough stated that cybersecurity threats are regularly evolving, noting the increase in cybersecurity incidents during recent years due in part to information security vulnerabilities exposed by remote work. Another reason for the uptick in cybersecurity incidents, according to Ms. McMurrough, is the use of additional tools by threat actors seeking to do harm.

Ms. McMurrough turned to the government's involvement in cybersecurity, including the role of courts in deciding cases relating to cybersecurity incidents and an active federal executive branch. She noted that the Executive Order on Improving the Nation's Cybersecurity issued on May 12, 2021 has led to a "cascade of developments" relating to cybersecurity. Ms. McMurrough provided an overview of regulatory trends, explaining that there is a trend toward mandatory incident reporting, with new and proposed rules across different government agencies requiring entities to self report incidents to regulators.

Ms. Vargo provided an overview of recent SEC rulemaking initiatives concerning cybersecurity. She discussed three rules proposed by the SEC on March 15, 2023 (i) proposed enhancements to Regulation S-P (the regulation protecting privacy of consumer financial information) to require broker-dealers, investment companies, registered investment advisers and transfer agents to notify individuals affected by certain types of data breaches that may put them at risk of harm, (ii) a proposed new rule, form and related amendments requiring entities that perform critical services to address their cybersecurity risks and (iii) proposed amendments to expand the scope of entities subject to Regulation Systems Compliance and Integrity (Regulation SCI) with respect to their automated and similar systems that directly support certain key securities market functions. She also noted that the SEC had reopened the public comment period for rules proposed in February 2022 to require registered funds and advisers to have cybersecurity risk management policies and procedures.

Board Oversight. Ms. Vargo turned to the cybersecurity-related oversight responsibilities of fund boards. She began by noting that not every board is the same and that there isn't only one appropriate approach. Ms. Vargo explained that boards should request the information and ask the questions they feel are necessary to satisfy their

fiduciary obligations. She noted that they may do so through the Section 15(c) review process by requesting information relating to the adviser's or sub-adviser's cybersecurity program, insurance and resources, as well as through quarterly and annual reporting to the board and educational sessions. Ms. Vargo also explained that it is important for boards to be aware of the adviser's process for escalating reports of cybersecurity incidents to the board.

Mr. Burns remarked that recent SEC rulemaking initiatives suggest that there is a trend toward increasing the involvement of boards in the oversight of cybersecurity programs. He asked Ms. Vargo to comment on whether boards should establish committees tasked with overseeing cybersecurity. Ms. Vargo observed that, in her experience, boards have not done so. Ms. McMurrough agreed, noting that the SEC does not seem to have required that board members be cybersecurity experts.

Law Firms. Ms. Rosing provided an overview of how cybersecurity incidents have impacted law firms. She noted that, as of 2019, approximately 26% of all law firms have experienced a cybersecurity attack, while only approximately 30% of law firms have incident response protocols in place. Ms. Rosing noted that public and private companies are giving enhanced attention to their outside counsel's cybersecurity programs and procedures for dealing with cybersecurity incidents, in some cases requiring that law firms implement trainings and have in place processes for overseeing the cybersecurity programs of the vendors that they employ.

Hypothetical Scenarios. Mr. Burns presented a number of scenarios and asked the panelists to respond to them. The first scenario involved a business email compromise. Ms. McMurrough observed that this scenario represents the classic problem of human error. She noted that companies should have technical measures in place to screen for external emails and should implement training programs aimed at preventing employees from having their emails hacked through the identification of suspicious activity. Ms. McMurrough explained that, once an email has been compromised, companies should have procedures in place for conducting investigations of what information may have been leaked and for determining the scope of the potential damage. This could give rise to data breach notifications to clients or customers and potentially to regulators, according to Ms. McMurrough. Mr. Burns noted that over 90% of all breaches are caused by human error.

Ms. Rosing observed that, in the case of law firm emails being comprised, attackers are in many cases looking for information about upcoming financial transactions – such as transfers

from a client to the law firm or from a third party to a law firm for the benefit of a client – in the hopes of being able to divert those transaction payments for malicious purposes.

Mr. Burns introduced the second scenario involving a third-party breach similar to the 2020 breach of the SolarWinds network that allowed hackers to access every network running the compromised SolarWinds software. Ms. McMurrough highlighted the importance of conducting thorough due diligence of third-party vendors from whom a company buys its software, noting that it is critical that companies validate the trustworthiness of vendors and the integrity of the software that they employ. Ms. Vargo highlighted the role that boards play in ensuring that the proper due diligence is being conducted.

Final Thoughts. Mr. Burns concluded by asking the panelists to share final thoughts with the audience. Ms. McMurrough reiterated her earlier remarks about the dynamic nature of the cybersecurity environment, evolving threats and technologies and the necessity for companies to regularly revisit their cybersecurity programs and keep an eye on the evolving case law. Ms. Vargo warned that boards should remain vigilant and informed of cybersecurity-related threats and trends, understand the design and effectiveness of cybersecurity programs and maintain an ongoing dialogue with management about information security matters. Finally, Ms. Rosing commented that companies utilizing outside counsel should inform themselves about outside counsel's existing cybersecurity protocols, insurance policies and notification requirements to ensure that confidential information remains confidential.

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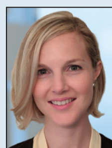

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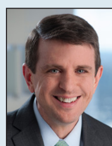

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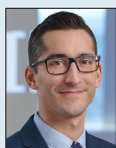

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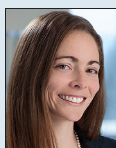

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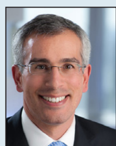

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