2024 ICI Investment Management Conference

ROPES & GRAY

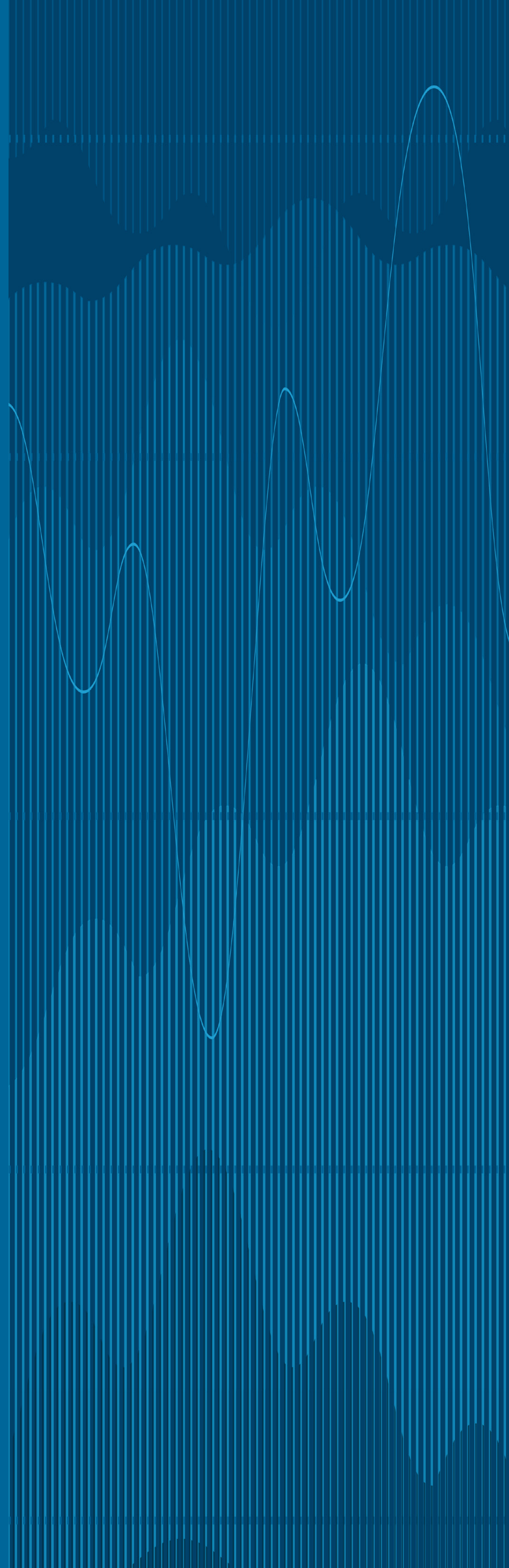


TABLE OF CONTENTS

Welcoming Remarks 3

General Session - Building to a Crescendo? Assessing the SEC's 2024 Investment Management Rulemaking Activity 3

General Session - ESG Around the Globe: Running in Circles 4

Session A: Navigating the Regulatory Rapids: A Survival Guide for CCOs 6

Session B: Key Developments in the Unlisted Closed-End Fund Market 7

Session C: Current Issues in Retirement Savings 8

Keynote Conversation 9

Session D: Fund Board Perspectives on Regulation, Governance, and Industry Developments 11

Session E: Updated More than Annually: Disclosure Trends and Frequent Comments from the SEC 12

The Future of Diversity and Inclusion: A Conversation with Legal and DE&I Practitioners 13

The Art of Perception: See What Matters 14

Keynote Address - "Another Century of Progress: How ICI Is Advocating for Investors and Against Over-Regulation" 14

General Session – The Rise of the Courts and the Regulatory Process 15

General Session – Asset Management Trends: The (Not So Distant) Past, Present, and Future 16

Session F: Advisers in the SEC Spotlight: Takeaways for Retail SMA Programs 17

Session G: Artificial Intelligence and the Fund Industry 19

Session H: Modernizing the 1940 Act Regulatory Regime 19

General Session – Reading the Tea Leaves: Signals from the SEC's Divisions of Exams and Enforcement 21

General Session – Responsible AI: Navigating AI Governance, Ethics, and Risk in a Changing Regulatory World 21

Lawyers Who Attended the Conference or Contributed to the Preparation of This Summary 23

Welcoming Remarks

Speaker: Terry Nilsen
President and Chief Operating Officer,
Hennessy Advisors

Ms. Nilsen welcomed the crowd and provided details about the conference, noting that the panels would cover topics such as artificial intelligence (AI), the pace and scope of regulatory proposals, environmental, social and governance (ESG) issues and many others.

She noted that ICI President Eric Pan would have a fireside chat with Commissioner Peirce. She also noted that 2024 is the 100th anniversary of the mutual fund, adding that the fund industry has provided a legacy of transparency, accountability and investor protection.

General Session - Building to a Crescendo? Assessing the SEC's 2024 Investment Management Rulemaking Activity

Moderator: Matt Thornton, Associate General Counsel, Investment Company Institute

Panelists: Dalia Blass, Partner, Sullivan & Cromwell

Margaret Carey, Senior Vice President, Deputy General Counsel, Fidelity Investments

Naseem Nixon, Counsel, Capital Research and Management Company

Sarah ten Siethoff, Deputy Director and Associate Director for Rulemaking, Division of Investment Management, Securities and Exchange Commission

Mr. Thornton explained that the goal of the panel is to examine the rulemaking efforts of the SEC. In response to a question, Ms. Blass indicated that under Chair Gensler, the pace of rulemaking has been significantly faster than under Chair Clayton or Chair White, including a 75% increase in major rules, and that 2024 shows no signs of slowing. Ms. Blass stated that she wished she had finished the retail access and exemptive application proposals when she was Director of the Division of Investment Management (IM).

Following a question from Mr. Thornton that noted the recent climate disclosure rule from the Division of Corporation Finance (Corp Fin), Ms. ten Siethoff responded that the IM fund and adviser ESG proposals had received far fewer comments than the Corp Fin rule. She indicated that the staff would consider the overall regulatory landscape, adding that the fund and adviser proposal was narrower than the Corp Fin rule and that the IM proposal is not that different from what is already required to be disclosed.

Mr. Thornton asked Ms. Nixon where the ESG rules will have an impact, and she responded that issuers want more clarity on ESG and integration, and that there is concern over making too much disclosure about ESG. Ms. Carey added that, as a fundamental manager, her firm looks at sustainability, governance and other factors as part of its portfolio management process. In response to a question regarding her impression of the Corp Fin rule, Ms. Blass noted that there are six lawsuits already, so these issues are unlikely to be resolved quickly.

Ms. Carey discussed the impact of the names rule, adding that the final rule reflected some helpful changes such as the elimination of daily testing. She explained that a significant number of funds are impacted, especially growth and value funds. Ms. ten Siethoff then talked about what the staff is seeing on the names rule and money market funds rule from Division of Examinations (Exams) staff. With respect to more substantive rules, she noted that those rules are sent to the Exams staff before the rules take effect and that the Exams staff receives training from the IM staff, while an exam module is provided for the SEC's regional offices.

Mr. Thornton asked when the staff determines to issue frequently asked questions (FAQs) guidance. Ms. ten Siethoff indicated that the staff encourages parties to contact the staff with questions but noted that IM has not received many questions on the names rule. She added that the staff only prepares FAQs when they get questions, and in some situations, the staff does not provide answers. Ms. Blass discouraged people from asking questions of the staff, noting that doing so may provide an opportunity for the staff to regulate beyond the text of the rules. Ms. Nixon agreed, noting that in navigating gray areas, it is best practice to document the rationale for the choice made in case the staff asks. Ms. ten Siethoff noted that if the staff disagrees with a position, it will make that call. She added that the staff is often reluctant to weigh in where there can be multiple answers.

Mr. Thornton asked about the money market funds rule, and Ms. Carey responded, indicating that she was mostly pleased with changes in the final rule, including that the SEC had eliminated swing pricing. She did note that mandatory redemption fees and the related reporting requirements make it difficult to gather and process information in time to impose fees. Ms. Nixon noted that her firm was planning on converting its large prime money market fund to a government fund due to the costs and compliance challenges of the rule. Mr. Thornton agreed that the mandatory redemption fees are a challenge. He asked Ms. ten Siethoff whether it is a good policy outcome if assets in institutional prime money market funds decline and there are fewer providers. Ms. ten Siethoff asserted that these funds have faced challenges and suggested that the rule offers a reset opportunity.

Mr. Thornton asked about the liquidity, swing pricing and hard close proposal, and Ms. Nixon responded, suggesting that the proposal had gone too far, and adding that she hoped that swing pricing would be removed from the final rule. She pointed to a variety of concerns, including

problems with systems, adding that the proposed hard close presents a particular problem for retirement plans and clients on the West Coast. She explained that the pivot to redemption fees is also a challenge for many funds, especially large funds, as is the stressed trade size of 10%. In response to a question about what commenters on the proposed rule got right, Ms. ten Siethoff stated that the staff knew that swing pricing would be poorly received, in part because the infrastructure does not exist to comply with the proposed requirements. She added that the work on T+1 implementation has given the staff insight into the need to modernize systems apart from swing pricing. Ms. Blass weighed in, noting that there was not enough focus in the comment file on the liquidity risk management rules. Ms. ten Siethoff indicated that the staff understands that the stressed trade size is too large and also that money market funds and longer-term funds differ.

Mr. Thornton addressed AI, asking whether the SEC's predictive data analytics proposal is too broad in light of Chair Gensler's recent speech on AI issues. Ms. ten Siethoff responded, indicating that the staff received useful comments on narrowing the scope of the proposal. Ms. Blass expressed her views about the SEC's authority to implement these rules. She added that the proposal would effectively rewrite Regulation Best Interest (Reg BI) and the marketing rule and would also impact the proposed outsourcing rule.

Addressing the adviser outsourcing proposal, Ms. Carey noted that, as a fiduciary, her firm already performs significant due diligence on affiliates and third parties. She explained that her firm operates an intricate compliance structure but is still not in a position to perform due diligence on vendors that use unidentified subcontractors, some of whom are not required to maintain records under the federal securities laws. She added that the proposal's ADV disclosures pose competitive and security risks. When asked why the SEC proposed a rule rather than publishing guidance on the topic, Ms. ten Siethoff explained that, while advisers are fiduciaries, Exams staff has observed issues associated with third-party record-keepers. She noted that a rule will provide greater specificity about third-party oversight requirements. Ms. Blass explained her belief that proposed rules need to work with existing rules and, since advisers are already fiduciaries, the proposed rule is unnecessary. She also stated that, in her view, the SEC does not have authority to promulgate the proposal under Advisers Act Section 206(4), noting that it is not fraudulent, deceptive or manipulative to engage third-party service providers.

The panel discussed the pace of rule adoptions and related compliance deadlines, with Ms. Nixon noting that the rapid pace of rulemaking, the truncated comment periods and overlapping rule implementation dates put pressure on the SEC's mandate to ensure fair and orderly markets. She then walked through the examples of the names rule adoption, ESG proposal, outsourcing proposal and cybersecurity proposal. With respect to cybersecurity, Ms. Nixon noted that, as a fiduciary, her firm is already doing many of the things the proposed rule would mandate. However, she noted that some parts of the proposed rule are challenging, especially the 48-hour time frame for reporting significant events, which may result in reports that do not reflect all of the relevant information.

Discussing the safeguarding proposal, Ms. Blass noted that certain proposed requirements are inconsistent with banking rules and added that, even if Dodd-Frank authorizes the expansion of the scope of the custody rule from securities to all assets, the SEC should not necessarily take that step. As an example, she noted that real estate already has a custody infrastructure and subjecting that existing infrastructure to additional SEC regulation is unnecessary. She explained that the SEC appears to want to capture all assets managed by advisers, including crypto and digital assets, but the SEC lacks the authority to directly regulate custodians. Ms. ten Siethoff agreed that the desire to regulate crypto custody was one of the drivers of the proposal but added that the failure of certain banks during the proposal's rule-writing period contributed to the approach taken in the proposal.

Mr. Thornton asked about the departure of IM Director Birdthistle, and Ms. ten Siethoff noted that new IM Director Greiner has a broad perspective that she brings from several other divisions of the SEC.

The panel concluded with Ms. Blass commenting on the four-year rulemaking cycle, noting that a change in administration would change the focus and tenor of the rulemaking process. She added that, in her view, regulators should focus on fostering capital formation, and she advised attendees that being Washington-savvy will be increasingly important.

General Session – ESG Around the Globe: Running in Circles

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

Panelists: Sara Crovitz, Partner, Stradley Ronon

Greg Dulski, Chief Regulatory Officer & Head of Government Affairs, Federated Hermes

Michael Littenberg, Partner, Ropes & Gray

SEC's Public Company Climate-Related Risk. The panel began with Ms. Donohue noting how, under the SEC's final climate rule for public operating companies overseen by Corp Fin, public companies will have to provide new disclosure in registration statements and annual shareholder reports. She noted that the SEC significantly watered down the requirements in the final rule compared to the initial proposal after receiving more than 24,000 comments from various stakeholders.

Mr. Littenberg discussed the various ways in which the final rules had been scaled back, including by eliminating Scope 3 emissions disclosures and subjecting Scope 1 and 2 emissions disclosures, required only for larger companies, to a materiality standard. He explained that the guiding principle for a materiality determination is whether a reasonable investor would consider the disclosure of

an item of information (e.g., a registrant's Scope 1 or 2 emissions) important when making an investment or voting decision or, for omissions, whether such reasonable investor would view the omission as having significantly altered the total mix information available. He explained that the materiality threshold will enable registrants in many cases to exclude disclosures they determine to be immaterial. However, he noted that registrants will still need to assess the materiality of such information, which can be a challenging and risky assessment when judged in hindsight. Mr. Littenberg added that the final rules also limit financial statement footnote disclosures primarily to severe weather events and other natural conditions.

Ms. Donohue asked Mr. Littenberg how the final public company rule is anticipated to affect registered funds and asset managers, noting that the only funds impacted by the public company rule as issuers are business development companies (BDCs) and exchange-traded products (ETPs). Mr. Littenberg explained that the final rule presents a mixed bag for investors, who will largely appreciate the rule's improvement over current voluntary sustainability disclosures by providing greater consistency and comparability, and may have hoped for more insight into public companies' Scope 3 emissions to better assess financial risks and opportunities in making investment decisions. Mr. Dulski added that the final rule will provide investors with more climate-related information than they have today, but investors still will not have comparable and consistent information because each firm will be making its own determination as to whether to disclose Scope 1 and 2 emissions.

Mr. Littenberg stated his expectation that companies will err on the side of disclosing more information to avoid being second-guessed by the SEC staff and civil plaintiffs. He added that such disclosures are likely to include qualifying language explaining that the company does not view the information as material.

Ms. Crovitz discussed the various challenges to the rule already asserted by multiple parties in multiple federal circuits, where the challengers assert that the court should stay the rule's effectiveness until after the challenges are resolved. In addition, some of these challenges assert that the rule does not meet procedural requirements under the Administrative Procedure Act (APA) and that the SEC lacks statutory authority to promulgate the rule. Mr. Littenberg explained that the final SEC climate requirements may not be as burdensome or additive for larger companies that are already disclosing much of the same information voluntarily. He also noted that many larger companies will be required to comply with other climate disclosure requirements that are more extensive than those required by the new SEC rule.

California Legislation and ESG Adviser and Fund Proposal. The panel discussed California's new laws requiring greenhouse gas emissions and climate risk disclosures. Ms. Crovitz explained that the state's Climate Corporate Data Accountability Act requires annual public disclosure of Scope 1, 2 and 3 Green House Gas (GHG) emissions by U.S.-organized entities doing business in California with total annual revenues exceeding $1 billion. Separately, the Climate-Related Financial Risk Act requires biennial disclosure of climate-related financial risks in accordance with the recommended framework and disclosures published by the Task Force on Climate-Related Financial Disclosures, as well as the measures adopted to reduce and adapt to the disclosed climate-related financial risks. Ms. Crovitz discussed the various challenges that have been asserted as to both California statutes, including a lawsuit filed by the U.S. Chamber of Commerce contending that the statutes violate the First Amendment by compelling businesses to engage in subjective speech. In addition to the legal challenges, she discussed how certain budgetary constraints may delay the implementation of California's legislation.

Europe versus the United States. Ms. Crovitz provided an overview of the most significant differences between the European and U.S. jurisdictions as it relates to ESG-related requirements, such as the required disclosure of GHG emissions (including Scope 3) in the former. Mr. Dulski touched on the key differences between the EU's Sustainable Finance Disclosure Regulation (SFDR) and the United Kingdom's Sustainability Disclosure Requirements (SDR), noting his expectation that SFDR will continue to evolve to be more similar to SDR over time, including an increase in required fund and product labels. In addition to regulators taking different approaches across jurisdictions, he noted that differing views as to the appropriate way to design and implement ESG policies and practices may lead to differing approaches. Mr. Littenberg agreed, commenting that problems can arise when there is turnover within a given ESG team, requiring new team members to consider the approach adopted by an older team.

U.S.: Blue States versus Red States. Ms. Donohue turned the panel's attention to the differences in ESG investing implementation and acceptance within the U.S. In particular, Ms. Crovitz discussed how a growing number of states have enacted legislation that impacts asset managers, including statutes requiring asset managers of public pension plans to certify that they are not using "non-pecuniary factors" like ESG factors in making investment decisions. Certain states have also implemented "anti-boycott" statutes, with some asset managers finding themselves on a given state's restricted company list preventing pension plans from placing money with those managers or funds. She also noted that there have been a number of red states' attorneys general offices making civil investigative demands, which have the same legal force and effect as a subpoena, to numerous managers regarding their proxy voting on ESG-related proposals, and their participation in climate-related initiatives.

Ms. Crovitz discussed certain pending civil lawsuits, including SIFMA's complaint challenging two Missouri Securities Division rules that went into effect on July 30, 2023. The rules make it a dishonest or unethical business practice in Missouri for firms, before providing investment advice to any client, to fail to disclose to the client that the firm "incorporates a social objective or other nonfinancial objective" into the investment advice it provides. She explained how the rules also require

a broker-dealer or investment adviser to obtain from each client (i) a written consent to the broker-dealer or investment adviser incorporating a social objective or other nonfinancial objective into any discretionary investment decision and (ii) a written acknowledgement that incorporating a social objective or other nonfinancial objective into investment decisions means that the decision is not solely focused on maximizing a financial return. In rejecting Missouri's motion to dismiss, the court held that SIFMA had adequately alleged that, while the National Securities Markets Improvement Act of 1996 (NSMIA) allows states to "license, register, or otherwise qualify any investment adviser representative," Missouri's new rules may go beyond the permitted scope. More specifically, the court held that SIFMA adequately alleged that the rules regulate what investment adviser representatives must disclose to their clients, which is distinct from NSMIA-permitted licensing, registering or qualifying of investment adviser representatives. The court also rejected the defendants' assertion that NSMIA preemption did not apply "because the Rules regulate firms and people, not covered securities," holding that SIFMA had adequately alleged that the rules are preempted by NSMIA because they "indirectly impose merit-based conditions on the sale of securities" and "impose an extra hurdle before certain covered securities can be offered to Missouri investors, based on the substantive characteristics of those securities."

Finally, Ms. Crovitz addressed a lawsuit filed by the state of Tennessee against BlackRock under the Tennessee Consumer Protection Act, which alleges that BlackRock misled investors in its disclosures about the degree to which ESG factors are considered in making investment decisions for both its non-ESG funds and its ESG-focused funds. The complaint asserts that BlackRock understated its consideration of ESG factors in non-ESG funds given its membership in certain climate-related initiatives, and alleged commitments with those organizations, and overstated the degree to which ESG factors have a positive impact on the financial performance of its ESG-focused funds. Mr. Littenberg discussed the recent retreat of certain asset managers from climate-related initiatives (in particular, Climate Action 100+) and the need to consider a number of factors when determining whether to become a signatory to these memberships that have climate-related goals and/or pledges in light of this type of state law pushback.

Session A: Navigating the Regulatory Rapids: A Survival Guide for CCOs

Moderator: Philip S. Wellman, Chief Compliance Officer, MassMutual Funds

Panelists: Deidre A. Downes, Funds/Adviser Chief Compliance Officer, Morgan Stanley

Michael Gozzillo, Chief Compliance Officer, Van Eck Associates

Mary Ann Picciotto, Managing Director, Global Chief Compliance Officer, Lord, Abbett & Co.

The panel focused on how fund and adviser CCOs can respond to the recent flurry of rulemaking and enforcement, while continuing to manage ongoing compliance programs for rules already in effect. The panelists discussed navigating this course by providing case studies on the steps taken in response to new rule requirements, with one case study focused on the implementation of Rule 18f-4, for which the compliance date has already occurred. Another case study focused on the implementation of amendments to Rule 2a-7, for which the staggered compliance dates for some, but not all, portions of the amendments have passed. The final case study focused on the implementation of the names rule, for which the compliance date is still some time away (December 2025).

Mr. Gozzillo reviewed the implementation of Rule 18f-4. He explained that the first step involved educating the members of the compliance team to understand what would be required of funds and advisers in terms of investment limitations, portfolio monitoring and board reporting. The next step was to identify the people on the business side of the firm who would take ownership of implementation. He identified business team ownership as particularly critical for rules such as Rule 18f-4 for which the technical expertise for compliance (e.g., calculating value-at-risk) necessarily resides with the portfolio management team. He said that the compliance team can help to facilitate business ownership of a rule by engaging principals early, sharing educational resources and encouraging the formation of a working group.

Ms. Downes discussed the implementation of the 2023 amendments to Rule 2a-7. She discussed the need for a phased compliance approach given the various compliance deadlines. Like Mr. Gozzillo, she emphasized the importance of early identification of, and buy-in from, the appropriate business owners, noting that portfolio managers and technology solutions may play a critical role in compliance (e.g., in the case of Rule 2a-7, in making liquidity determinations).

Ms. Picciotto addressed the implementation of the 2023 amendments to Rule 35d-1. She noted that, even in the case of rules for which the compliance date seems far off, the time for implementation may not actually be as great as it seems when one backs out the various steps (e.g., a minimum of 60 days' notice to shareholders for 80% policy amendments) that must take place in advance of the compliance deadline. Using the portfolio-testing requirements for new or amended 80% policies as an example, she underscored that rule implementation cannot be the exclusive responsibility of the compliance department and, instead, requires transparency and socialization throughout the organization to build a culture of regulatory change management.

The panelists discussed the fund board reporting requirements that new or amended rules often entail. Mr. Gozzillo said that, for new reporting requirements, he likes to draft the template for the subject matter experts – the business owners, who then populate the template. Given that rules often allow flexibility in the design of

board reporting, Ms. Downes noted the benefits of peer discussions and industry benchmarking, and Ms. Picciotto stressed the importance of interaction among internal legal and compliance teams and fund and board counsel.

The panelists discussed how they plan their work on new rule requirements without compromising their ongoing review and periodic reporting requirements under Rules 206(4)-7 and 38a-1. The panelists all acknowledged the value of maintaining a matrix to track proposed and final rulemaking, identify owners and monitor progress. They also agreed on the need to take a risk-based approach, using the SEC's risk alerts, sweep letters and enforcement actions to inform decisions about where to focus resources and how often testing must occur. In such a busy time, they said, operational efficiency is key, and CCOs should not be wed to existing technology or processes if more efficient solutions are available.

Session B: Key Developments in the Unlisted Closed-End Fund Market

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

Panelists: Lance Christofferson, Director, SS&C Technologies

Christian Clayton, Executive Vice President, Strategist, PIMCO

Joshua Deringer, Partner, Faegre Drinker Biddle & Reath

Nadeea Zakaria, Partner, Dechert

Background. Mr. Fang discussed the recent growth of alternative products, noting that alternative products are now a majority of closed-end fund assets, and that retail alternative funds had achieved 200% growth over the last four years. Mr. Clayton discussed some of the reasons for growth, which began with the low interest rate environment following the 2008 financial crisis, as alternative products were able to provide returns and yield unavailable in traditional products. That growth has continued because the products provide yield, have delivered performance, and are generally less volatile than traditional products. He also noted that many clients prefer interval funds and similar products that can be acquired without subscription documents. Mr. Clayton also said that many investment managers are looking to broaden the distribution of their capabilities, with alternative managers seeking retail distribution and traditional managers seeking to offer alternative products.

Mr. Deringer discussed some of the important features of alternative retail products, which are typically closed-end registered investment companies. Many are similar to a mutual fund in that they may be purchased every business day, but they do not offer daily liquidity. They are typically "regulated investment companies" (RICs) under Subchapter M of the Internal Revenue Code.

Asset Classes. Mr. Deringer indicated that the most common asset classes offered in retail alternative products are private equity, private credit and real estate.

Offering Process. Mr. Deringer explained that both interval funds and tender offer funds can be publicly offered or privately placed. Most interval funds register their shares under the 1933 Act. Many tender offer funds do so as well, but a good number are "1940 Act only" in that they do not register their shares under the 1933 Act. Interval funds can register an unlimited number of shares like a mutual fund. In contrast, tender offer funds have a shelf registration statement that registers a specific number of shares.

Liquidity. Interval funds are required to have a fundamental policy to repurchase of 5 to 25% of their shares every three, six or 12 months. Mr. Deringer said the overwhelming majority of interval funds offer to repurchase 5% of their shares each quarter. Tender offer funds do not promise liquidity, but they typically disclose an expectation of periodic tender offers, subject to board approval. Like interval funds, tender offer funds typically offer to repurchase 5% of their shares each quarter.

Fund of Private Funds Limit. Mr. Deringer also discussed the SEC staff position that a registered fund that invests 15% or more of its assets in private funds must limit its shareholders to "accredited investors."

Fees and Asset Classes. Mr. Deringer reported that management fees for alternative products range from 1 to 4% of net assets. Alternative retail funds can charge a performance fee on income, and if they limit their investors to "qualified clients" under the Advisers Act, they can also charge an incentive fee on capital gains.

Ms. Zakaria discussed business development companies (BDCs), which are closed-end investment companies that are "regulated" but not "registered" under the 1940 Act. BDCs are typically RICs for tax purposes. She said there are three primary BDC types: listed (i.e., exchange traded) BDCs, unlisted private BDCs and unlisted (non-traded) public BDCs. BDCs are required to register under the 1934 Act, and so they file 10-Ks, 10-Qs and similar public company reports. They can charge incentive fees on both income and capital gains without having to impose a "qualified client" eligibility requirement.

Non-traded BDCs must go through the state "blue sky" registration process – not just a filing process, which can be long and involved. Many large financial intermediaries will require the BDC to qualify in all 50 states. Non-traded BDCs that offer their shares under the 1933 Act can obtain exemptive relief to permit them to offer multiple share classes. However, the SEC will not grant such "multi-class" relief to private BDCs. Unlisted public BDCs, like interval funds and tender offer funds, typically offer to repurchase 5% of their shares each quarter. Private BDCs have a much wider range of liquidity options.

Ms. Zakaria explained that interval funds can hold many types of assets, but mostly hold loans. Tender offer funds tend to hold more illiquid debt instruments, more private equity and interests in private funds. BDCs typically engage in direct lending strategies in which they make loans to smaller companies. She described some of the

favorable trends powering the growth of BDCs, noting that they have been able to fill gaps in the lending markets as banks have pulled back. Investors are interested in private lending strategies and the portfolio diversification benefits they provide, and BDCs provide a tax-efficient structure for these investments. In addition, BDCs typically provide greater liquidity than private credit funds. Mr. Clayton added that although the market tends to consider tender offer funds as appropriate for less liquid assets, he does not agree fully, noting that both interval funds and tender offer funds offer similar liquidity and, for both, liquidity has to be carefully managed.

Mr. Deringer added that interval funds are required to value their shares weekly and daily for the five business days preceding a repurchase request deadline. However, if a fund intends to offer its shares through NSCC with daily sales, it will need to strike a daily NAV.

Mr. Clayton discussed product development, which for his firm focuses on (i) whether the product represents a core competency, (ii) client need and (iii) market opportunity. He also indicated that there is a "first mover" advantage and that copycat products may have difficulty scaling. He stressed the importance of a long-term commitment to the space, the education of platforms, end clients and financial advisers, and having good distribution. He discussed market trends, noting that real estate funds were more popular until they began to face redemptions. The flows then went to private credit, which typically invests in floating rate loans and thus benefited from rising interest rates. He believes that private equity, infrastructure and asset-based lending are underrepresented in the market.

Related Topics. The panel discussed other topics, such as interval funds investing in real estate, "conglomerate" vehicles which avoid 1940 Act registration entirely and restructuring existing private funds in a *Guidestone*-type transaction. The panel also discussed the importance of product seeding and the need to consider whether Section 17(d) (co-investment) relief will be required. The panel discussed product distribution, noting that approximately one-third of interval funds limit their investor base to accredited investors, while approximately 75% of tender offer funds do so. Some discrepancy arises from the fact that tender offer funds are more likely than interval funds to invest more than 15% of their assets in private funds and, therefore, are subject to the SEC staff position noted earlier. The difference may also be driven by the desire for a performance fee or channel preferences. Mr. Christofferson noted that imposing an accredited investor standard will make it more difficult to offer daily purchases through the NSCC; for example, the fund will not be placed on Fundserv, the DTCC's fund share processing system. He discussed the responsibility for determining accredited investor status, noting that sometimes the distribution partner will do so, but other times it is the sponsor's responsibility. Mr. Christofferson discussed operational challenges. He said interval funds tend to be the easiest to launch operationally, especially if the fund will strike a daily NAV, because it can be offered through Fundserv. He said that some distributors do not like tender offer funds because of the ability to skip a tender and the operational difficulties of not being on Fundserv. He cited the difficulties of having paper records and multiple systems to interact with when a fund is not on Fundserv. Mr. Christofferson added that the operational challenges for BDCs are similar to those for tender offer funds. Most BDCs strike a monthly NAV and/or a delayed NAV. Because they are not on Fundserv, the transfer agent/administrator must deal with different data channels that are not standardized.

The panel discussed additional regulatory issues, noting that multi-class share relief can be obtained on an expedited basis, but the SEC will not grant the relief to private BDCs. It was noted that interval funds can obtain exemptive relief for more frequent repurchases than quarterly, as well as that most BDCs have Section17 (d) (co-investment) relief. The process and conditions are standardized, and the SEC will ask for a blackline against a recent application. It was noted that board approval of co-investment transactions is one of the conditions.

The panel noted that the SEC staff is becoming more focused on *Guidestone*-type transactions, including the conditions and intent of the letter. Mr. Deringer said the SEC staff is becoming unwilling to allow any deviation and may revisit the letter more generally. The panel additionally discussed the time period that tender offer funds have to pay the purchase price of repurchased shares. Operating companies have five days, and the staff will insist on five days unless the fund invests in private assets.

Session C: Current Issues in Retirement Savings

Moderator: Elena Chism, Deputy General Counsel, Retirement Policy, Investment Company Institute

Panelists: Robert Holcomb, Vice President, Empower Retirement

Adam McMahon, Partner, Davis & Hartman

Aliya Robinson, Managing Legal Counsel, T. Rowe Price Associates

Ms. Chism summarized the topics to be addressed during her panel. She noted that the panelists would address proposed changes to the Department of Labor (DOL) Fiduciary Rule, changes to the Qualified Professional Asset Manager (QPAM) Exemption, implementation of the SECURE 2.0 Act and the outlook for future legislation.

DOL Fiduciary Rule – Investment Advice. Ms. Robinson summarized the proposal, noting that it was first published in November 2023 with comments due on January 2, 2024, and that the final rule is expected sometime in May. She highlighted two main aspects of the proposed changes: (i) the definition of investment advice and (ii) the types of transactions that are prohibited under the rule. Ms. Robinson explained that the policy underlying the rule is to address perceived conflicts of interest and, consequently, the proposed amendments should be evaluated through that

lens. She also noted, however, that the proposals are very broad and, as a result, many elements are both confusing and concerning. With respect to the definition of investment advice, Mr. Robinson explained that if adopted as proposed, activities not previously considered "fiduciary" in nature would now be encompassed by the rule. With respect to the prohibited transaction changes, she noted that they would eliminate several existing exemptions that are helpful to the industry and impose heightened compliance conditions.

Ms. Chism asked about the timing of the proposal and the length of the comment period. Ms. Robinson remarked that issuing a proposal in October, which ran into various holidays and allowed only 60 days for comments, made it difficult for industry participants to respond. But respond they did. She highlighted that during the 60-day period, the DOL held hearings. Mr. McMahon confirmed that the comment process was compressed and challenging.

Panelists delved into specific aspects of the proposed changes and practical implications associated with the changes. Mr. McMahon indicated that there are real concerns about retail and rollover advice. For example, he noted that conversations between wholesalers or product manufacturers and financial advisers could now be considered fiduciary advice, which could lead to fiduciary liability. He explained that it is natural for wholesalers and others to want to explain to financial advisers why a particular product might be good for the adviser's clients. However, if these communications are considered fiduciary advice, many such communications would not happen. With reduced ability to discuss products, one possible outcome is that fewer products are manufactured. Another possibility, he noted, is that, with increased potential liability, products could be more expensive.

Mr. Holcomb agreed with this assessment, noting that even RFP responses could be encompassed by the proposed changes. This, he stated, would also make it much harder to offer products to financial advisers. He added that he did not believe that these types of interactions involved the conflicts of interest that the rule was originally intended to address. Ms. Robinson questioned whether the DOL really was aware of the practical business implications of its proposed changes, even when the industry responded with many comment letters. Mr. Holcomb remarked that the proposed changes to the definition of investment advice also are ambiguous. As a result, he explained that there is a good deal of confusion about what type of disclosures can be provided to consumers and how recommendations can be made without being considered investment advice.

The panel discussed potential challenges to the revised rule. Mr. McMahon noted that the rule is likely to be challenged in court as soon as it is adopted. He also noted that, depending on when it is adopted, Congress could vote to invalidate it under the Congressional Review Act, which allows Congress to void regulatory changes that are adopted near the end of a president's term.

QPAM Exemption. Mr. McMahon explained that generally, the QPAM exemption permits parties who are related to plans to engage in transactions with the plan under certain conditions. He noted that the changes were proposed in 2022 and would eliminate transactions between a retirement plan and "parties-in-interest." Mr. McMahon focused on the fact that the definition of a "party in interest" is broad because it includes service providers and, therefore, would greatly curtail the transactions that are currently permissible. As an example, he cited a transaction in which an adviser manages a pool of assets for many clients, each of which has its own service providers. He noted that, if there is a broker involved in an investment transaction and that broker also provides custody services for one of the adviser's clients, that would be a prohibited transaction. Mr. McMahon also explained that the proposed changes suggest that any differential compensation to an adviser regarding their investment recommendations would be impermissible. He noted that since advisers often negotiate different client contracts and can charge different rates, ensuring uniform compensation would be a challenge for the industry.

SECURE 2.0 Act Implementation. Mr. Holcomb summarized recent developments related to implementation of the Act. He noted that some preliminary guidance has been released, and that it is still early in the implementation process. He also explained that technical corrections remain to be made to the Act, and that certain securities laws amendments were needed so that certain accounts could invest in CITs. Mr. Holcomb also highlighted that this legislation was a true bipartisan effort, which bodes well for implementation.

Future Legislation. The panel briefly discussed the outlook for future legislation. Mr. Holcomb speculated on the likelihood of a SECURE 3.0 Act, which panelists agreed would likely come to pass as a bipartisan effort. Ms. Chism explained that likely aspects of such legislation would include auto-enrollment and a lower age for participant eligibility. Ms. Chism also identified a number of possible anti-ESG bills, which she highlighted would represent partisan efforts, and also noted the possible creation of a mandatory retirement savings program.

Keynote Conversation

Eric Pan, President and CEO, Investment Company Institute

The Hon. Hester Peirce, Commissioner, Securities and Exchange Commission

Rulemaking Agenda. After Mr. Pan introduced Commissioner Peirce, he focused on the SEC's rulemaking agenda, noting that it was very broad, and asked her whether the SEC had done an appropriate job of identifying problems that need to be solved. Commissioner Peirce said that finding market failures is crucial for a market regulator, but she had concerns that in recent years the SEC had strayed from its mission to focus on areas that were higher salience but, perhaps, not areas where there were clear market failures. In response to a question regarding

what Mr. Pan characterized as a "rush" to put out rules, Commissioner Peirce noted that SEC Chairs often want to complete as much of their agenda as they can as quickly as possible. Nonetheless, in Commissioner Peirce's view, the SEC would be better served by utilizing more roundtables and concept releases, even if it may slow the agenda.

Mr. Pan asked about what he called a "troubling pattern from the Commission" in which an expansive proposal is issued, which is then followed by a relatively short comment period. He noted this may lead to situations where interested parties may only comment on the most important or controversial issues given resource constraints, while lower-profile important issues may be ignored only to cause problems in the future. Commissioner Peirce agreed with the concern, noting that the approach the SEC had taken in recent years often does not involve proposing what SEC staff believes to be the best way to address an issue. She noted this pattern was followed in the recent money market rule reforms, which had included swing pricing in the proposal and replaced the swing pricing with an anti-dilution approach that was not deeply analyzed in the proposing release. Commissioner Peirce noted that in such instances, the public does not have much sense of how the final rules will look prior to their adoption. Commissioner Peirce also expressed concerns that short comment periods may dissuade the investing public and smaller companies from commenting on important or complex rules.

Noting that the SEC is facing more litigation about its rulemaking agenda today than in the past, Mr. Pan asked whether this would affect the SEC on a going-forward basis, and if such litigation against SEC rulemaking would be typical in the future. Commissioner Peirce expressed her hope that this will not be a permanent change and that a more reasonable pace of rulemaking and a narrower scope of proposals will make future Commissions less likely to be sued. Citing the change to the definition of "dealer" and the private fund adviser rulemaking as examples, she noted that the rulemakings facing litigation in recent years have been so significant and would cause such fundamental changes that lawsuits on these rules were seemingly inevitable.

Predictive Data Analytics, *Technology*, and *Crypto*. Mr. Pan asked Commissioner Peirce to discuss her views on the predictive data analytics proposal, noting that the ICI is "not a fan of the rule." Commissioner Peirce noted that, consistent with their earlier discussion, the predictive data analytics proposal was another proposal of significant scope without a clear problem for the SEC to solve. She also noted concerns that the rule appears to move away from the SEC's historical disclosure-based approach to conflicts of interest. She noted that, while she is reserving judgment on the rule until she had the opportunity to vote on the adopting release, she has significant concerns, including those relating to the SEC's statutory authority to adopt the rules.

Mr. Pan asked if the predictive data analytics proposal was indicative of the SEC's approach to technology overall, noting that the SEC's recent approach to crypto assets has not pleased many people. Commissioner Peirce said it was useful to think about crypto and predictive data analytics similarly, noting that the SEC's approach to both was rushed and one-size-fits-all rulemaking with subsequent enforcement poorly considered. She suggested that for these areas, the SEC should instead continue to rely on existing rules and obligations that apply to advisers and broker-dealers (e.g., Regulation Best Interest, adviser fiduciary duties and the anti-fraud rules) in the first instance, adding that if specific issues that necessitate rulemaking emerge later, the SEC could engage in rulemaking at that point.

Mr. Pan asked if the SEC has enough technology expertise on staff to justify the rulemakings. Commissioner Peirce said that she does not think the SEC should be "outgunned" technologically. She noted that everyone in the room, whether in the private or public sector, has an interest in having a well-functioning regulator, and everyone should be working together to solve these issues such that the SEC can leverage private knowledge. She noted, however, that there are areas (specifically noting fund operations and fixed income markets) in which the SEC could have deeper expertise on staff. She also expressed a desire to allow SEC staff to use novel technologies in similar ways to those done in the private sector.

The SEC, International Regulators, and Systemic Regulation. Mr. Pan noted that central banks and other prudential regulators appear to be particularly worried about asset managers, noting that they have a new term of art ("non-bank financial institutions") that captures asset managers. He noted that it seems that their concerns have affected the SEC's agenda recently. Commissioner Peirce noted her agreement and said that part of this concern comes from pressure from international regulators, many of whom do not separate their prudential regulatory bodies from market regulators. Commissioner Peirce expressed her support for the American-style system of market regulation and expressed her disapproval of treating asset managers like banks, noting that systemic risk regulation would make the industry much less dynamic and harder for new firms to enter.

Mr. Pan focused on the SEC's approach at international meetings and asked Commissioner Peirce if she is concerned about what the Chair or personnel from the Chair's office say at those meetings. Commissioner Peirce stated that the SEC's Office of International Affairs is a "great office" that has done a good job representing the SEC in these meetings. She also noted that, at times, other Commissioners attend these meeting on behalf of the SEC, and when she had attended meetings under the tenure of SEC Chair Jay Clayton, she always came back with a greater appreciation for the American style of regulation and its relative dynamism. This last remark was met with enthusiastic applause from the audience.

SEC Engagement with Industry. Mr. Pan noted increased concerns that the private sector has in engaging with SEC staff, noting that Chair Gensler has cited interaction with industry participants in March 2020 as justification for certain rulemakings, including the money market fund reforms.

He noted this may chill future engagement, and he asked Commissioner Peirce what engagement by the ICI and its members would look like in an "ideal world." Commissioner Peirce agreed with Mr. Pan's concerns, saying that in periods of market stress like March 2020, the private sector should feel confident it can share market information with the SEC without fear of reprisal. Commissioner Peirce indicated that there may be other concerns underlying rulemakings like the money market fund rules beyond what was shared by the private sector, and she stated she hopes the ICI and others will keep an open mind and understand that the SEC continues to want to hear from them and their investors.

Future Agenda. In response to an audience question about what would be on the SEC's agenda in ideal circumstances, Commissioner Peirce noted that the SEC should be engaged in more measured, deliberate, consultative and gradual rulemakings with reasonable implementation periods. She said the SEC should treat each rulemaking as an individually important project that gets due attention and ensures that the rulemaking leads to very clear benefits. She noted that, in particular, the rules relating to transfer agents need updating. She also noted that the SEC could be doing more to advance the goal of capital formation to ensure that product innovation continues to occur.

Advice to Young Professionals. Mr. Pan asked Commissioner Peirce about her advice to those who are beginning their careers. Commissioner Peirce noted that her career path did not go the way she anticipated in law school, and her lesson from that is that people should be open to new experiences. She also noted the importance of being trained by intelligent people who take an interest in development. In her view, if an opportunity is a good place to work and there is an opportunity to learn, young professionals should take the opportunity instead of staying on a pre-defined track.

Session D: Fund Board Perspectives on Regulation, Governance, and Industry Developments

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

Panelists: Christopher R. Bohane, Senior Vice President and Deputy General Counsel, MFS Investment Management

Ndenisarya M. Meekins, Partner, K&L Gates

Vanessa C. L. Chang, Independent Director, American Funds

Mr. Kim led a discussion delving into key topics and issues for fund directors, including SEC rulemaking activity, the impact of technology and innovation in the marketplace and governance best practices.

Regulatory Developments. Ms. Chang noted the striking volume of the SEC's recent rulemaking activity. She highlighted the importance of management engaging early with fund boards to address regulatory changes, but cautioned management about providing too much information to the board before a final rule is adopted. Mr. Bohane emphasized the need to distinguish between proposed and final rules in board reporting and to engage with the board on potential pain points and impacts to the funds. He also noted that management and counsel should ensure they are aligned and tell the board a consistent story with respect to how a rule will impact the funds.

Ms. Meekins identified the names rule, tailored shareholder reports and the swing pricing proposal as paramount for boards. She also emphasized the growing regulatory focus on cybersecurity and AI in fund operations, stressing the importance for boards understanding of these risks. She said it was a matter of "when, not if" a management company would have to address a cybersecurity incident, and that it is important for boards to understand how advisers prepare and monitor for these risks and when and how the advisers will respond. Ms. Chang added that directors' oversight of cybersecurity should also include looking at what they themselves are doing in terms of use of personal communications to make sure directors' cyber-hygiene does not impact the management company or the funds.

Mr. Kim asked the panelists to comment on approaches to ensure that independent directors are up to speed on important topics. Mr. Bohane said that, in addition to a quarterly reporting dashboard and regulatory timeline, his firm does deeper dives focused on particularly impactful rules and holds educational sessions for directors to understand without getting too deeply into the weeds. Ms. Meekins added that boards should understand there is not an expectation that they be experts on a given topic; boards can rely on management and counsel for their respective expertise, but boards should be sure that they get the opportunity to ask questions.

Mr. Kim asked about boards' working relationships with fund CCOs. Ms. Meekins highlighted the critical role of the CCO in supporting the board, particularly in light of the rapid pace of regulatory changes. She emphasized the importance of regular interaction between a fund's board and the CCO and the need for the CCO to have a seat at the table in management's discussions about implementing controls in response to new regulations. She said that the board should be able to rely on the CCO to be its "eyes and ears" within the management organization.

Ms. Chang noted that her board met with compliance personnel of the funds' transfer agent and distributor, as well as the CCOs of the adviser and the funds, and discussed how these meetings were arranged with the funds' "cluster board" organization in mind.

Governance. Mr. Kim and the panelists discussed the evolving role of boards and the importance of transparency and communication between management and independent directors. They highlighted the shift to virtual meetings and the need to maintain trust through open dialogue with management. Ms. Chang noted that relationships between management and independent directors have improved over the years, leading to more transparency and communication. Mr. Bohane also

highlighted the benefits of technology, which helps his firm meet with the board quickly to address time-sensitive matters. He noted, however, the continuing importance of social aspects to in-person board meetings.

Ms. Chang and Mr. Bohane discussed the process and considerations for recruiting new board members. Mr. Bohane noted that, from a governance perspective, the sophistication of directors has grown dramatically in recent years and that there are more former industry employees on boards. He highlighted the importance of a director balancing oversight and interactions with management.

Ms. Chang recommended that directors – both new and tenured – take opportunities to meet with management outside of board meetings to help rebuild social capital that may have been lost to the pandemic years. Ms. Meekins underscored that point, noting that boards were able to effectively shift to virtual interactions because of strong, long-standing relationships already in place.

Industry/Product Developments. Mr. Kim asked the panelists to comment on how deeply directors should understand the economy, markets and fund industry as a whole. Ms. Meekins explained that directors need to have a broader perspective than just regulations that affect funds. They also should understand regulations that apply to advisers or that might impose a strain on the adviser. In addition, the directors should be informed of market conditions and trends. Ms. Meekins also highlighted the need for directors to understand the competitive landscape of industry, fund flows generally, fee structures, distribution challenges and product innovation.

Ms. Chang echoed Ms. Meekins's remarks, noting the 15(c) process as an example where adviser profitability is a factor that boards must consider in approving the funds' advisory agreements. She noted the importance of being comfortable that the management company can be resilient through all market cycles.

Mr. Kim and the panelists discussed the ICI's 1940 Act modernization initiative and key areas where boards should be focused, such as ETFs. Mr. Kim remarked on the governance practices studies published by the ICI and IDC and noted certain trends with respect to term limits, diversity and policies regarding directors' continuing education and ownership of shares.

Ms. Chang discussed the importance of board succession planning, noting that she supported term and age limits because of the benefits of having fresh eyes and new perspectives. Mr. Bohane emphasized the importance of transparency, communication and trust in the relationship between management and the board.

Ms. Meekins thanked the IDC for what it has done for boards in terms of education opportunities, peer networking and thought leadership.

Session E: Updated More than Annually: Disclosure Trends and Frequent Comments from the SEC

Moderator: Kevin Ercoline, Assistant General Counsel, Securities Regulation, Investment Company Institute

Panelists: Anthony Coletta, Assistant General Counsel, The Vanguard Group, Inc.

Marissa Johnson, Counsel, Brown Advisory LLC

Andrea Ottomanelli Magovern, Assistant Director, Disclosure Review and Accounting Office, Division of Investment Management, Securities and Exchange Commission

Morgan Willard, Associate, Dechert

Erica Zong Evenson, Associate, Morgan, Lewis & Bockius

This panel discussion focused on disclosure changes that may be necessary in response to the amended names rule, other common disclosure comments from the SEC staff and practices regarding disclosure related to current or macro events.

Names Rule. The panelists discussed a number of trigger words and other aspects of disclosure related to Section 35(d) and Rule 35d-1. Ms. Magovern said that the staff is not yet providing comments about the amended names rule. Some panelists observed that through the comment/review process, there has been some helpful discussion with the staff about newly covered terms in a fund's name (e.g., growth), and that some funds are already adopting policies that are intended to comply with the amended rule. Ms. Magovern also pointed out that comments are occasionally provided with respect to Section 35(d) even if a term is not expressly covered by Rule 35d-1. The panel discussed the following specific terms and circumstances implicated by the amended names rule:

- The term "leaders" drew a comment for one issuer. Ms. Magovern indicated that this was likely triggered by Section 35(d), and not by Rule 35d-1.
- The term "dividend" drew comments for some issuers. The panelists viewed this term as more properly covered under the amended names rule rather than the current rule.
- The term "merger" recently drew a comment, which was defined to mean stocks of companies that have publicly announced that they will be participating in a merger.
- Complexity that arises when more than one word in a name falls under the new rule. In this regard, Ms. Magovern recounted the guidance in the adopting release, noting that if a covered word is paired with an uncovered word, an 80% test is needed with respect to the covered word (e.g., technology & real return). The panelists acknowledged that where the word "and" is not used, additional complexity ensues (e.g., "core impact").

- Potential challenges in updating pre- and post-trade compliance testing systems and third-party service provider systems to implement rules to pick up new terms covered by the rule, particularly where definitions could be complicated or where they can vary by issuer or even by fund (e.g., growth).

The panelists did not believe there was a blanket rule regarding whether a change to a Rule 35d-1 policy in response to the amended names rule could be made in a Rule 485(b) filing, adding that it may depend on the nature of the change.

When asked by the audience, the panelists did not identify a clear answer to whether "core equity" is covered by the amended names rule, but there was a consensus that different funds, or sleeves of a single multi-manager fund, could define market capitalization categories differently.

Common Disclosure Comments. The following common issues were identified relating to index providers:

- The panelists agreed that comments about index providers and methodologies continue to be a major focus of the disclosure staff, with a focus on describing the securities selection and inclusion process, the rebalancing process or the weighting methodology. For ESG index funds, comments have focused on defining and explaining the criteria used by the index provider. Ms. Magovern explained that these comments are generally issued for two main reasons. First, the staff wants to ensure that funds that state that they are index funds are in fact index funds. And second, the staff wants to ensure that index providers are not providing investment advice.
- The panelists discussed receiving comments about ESG data providers and how third-party data is used. The panelists noted that most funds they work with have pushed back against comments requesting that ESG data vendors be named, but some have included names in their filings. Ms. Magovern indicated that these comments are given because the staff often believes that, without additional disclosure about who a third party is or how the information from a third party is used, shareholders have an incomplete picture if that information is "integral" to what the fund is doing.
- Ms. Magovern added that she expects the staff to focus on reviewing tailored shareholder reports for disclosure compliance for at least six months after the rule is effective. She also said that the staff will continue to issue comments when it seems that shareholders might be waiving rights under the federal securities laws, although comments to amend organizational documents are mostly reserved for new funds as opposed to existing funds.

Material Current Events Disclosure. The panelists observed the benefits of including evergreen disclosure that is not overly narrow thereby requiring frequent amendments, adding that it can be difficult to determine when to update current events disclosure but that it should always be driven by maintaining accuracy (e.g., updating disclosures that refer to historically low interest rates). The panelists also acknowledged the importance of using fresh eyes each year to ensure that disclosure is not outdated, including looking beyond the legal group to identify macro or current developments that could affect the funds and merit new or revised disclosures.

The Future of Diversity and Inclusion: A Conversation with Legal and DE&I Practitioners

Moderator: Kate Fuentes, General Counsel, SunAmerica Asset Management, Deputy General Counsel, Corebridge Financial

Panelists: Rodrigo Castilleja, Head of Diversity, Equity, and Inclusion, DWS Investment Management Americas

Ken Gladney, Executive Director, Global Head of Diversity, Equity and Inclusion, J.P. Morgan Asset Management

This panel focused on the evolution of DE&I efforts in the asset management industry over the past five years. The panelists characterized the focus as having shifted during that period to include not just having diverse individuals at the table but also ensuring equity and inclusion for all employees. They also observed an increasing linkage between DE&I efforts and firms' growth strategies, likening a DE&I initiative in the U.S. to a growth strategy for international expansion.

In response to Ms. Fuentes' questions as to whether there had been a retrenchment in the wake of political pressure, recessionary forces and the Supreme Court's affirmative action decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College and University of North Carolina*, Messrs. Castilleja and Gladney both observed that there has been a change in messaging but not a retrenchment. They said that DE&I initiatives are increasingly framed not as a narrow way to promote diversity but as establishing an equitable process to ensure getting the best people for every opportunity. They highlighted studies showing that graduates will take 15% less pay to work at an organization that allows them to be themselves. For organizations looking to stay the course on their commitment to DE&I amid the pushback, they suggested focusing on DE&I as a human right and emphasizing the power of allyship, as well as opening employee resource groups to everyone looking to participate and learn.

The panel discussed structural ways that a firm's leadership can create an environment dedicated to DE&I. These include (i) aligning the DE&I team with the human resources team so that each has access to the other's data and having DE&I objectives that can influence hiring and promotion, (ii) tying decisions on RFPs to responses to DE&I questions and (iii) ensuring that the head of DE&I has direct reporting and access to the firm's CEO or COO. Regarding how smaller advisers with fewer resources can still express their commitment to DE&I, Messrs. Castilleja and Gladney both said that, ultimately, it comes down to leading by example and finding champions within the organization.

The Art of Perception: See What Matters

Amy E. Herman, Founder and President, The Art of Perception

Ms. Herman, a lawyer, art historian and author, explained how her presentation uses works of art to enhance observation, perception, communication and problem-solving skills. Her goal was to enable attendees to bring things that are moving quickly into focus. Using an interesting and thought-provoking presentation, including audience participation, she aimed to improve the audience's observational and communications skills by focusing on what is important, relevant and manageable.

Beginning with a focus on language, Ms. Herman provided a number of ways to better analyze information. For example, Ms. Herman suggested that professionals stop using "obviously" and "clearly" in communications because things are not always obvious and clear to many observers. Instead, she recommended saying "it appears to be the case of X because of Y and Z" to link observation with explanation.

Ms. Herman also suggested that professionals could all benefit from getting better at prioritizing information in order to see the big picture without getting lost in the details. To emphasize this point, she had the audience conduct a series of observation exercises, suggesting the audience take the time to slow down to learn how to speed up our perception. She advised that the audience look not only for what is there, but also what is not – the pertinent negatives – pointing to the example of a patient presenting at an emergency room with only two of the three symptoms of pneumonia strongly suggests that the patient does not have pneumonia and the doctor should look for other causes of the symptoms.

With respect to communication, Ms. Herman stated that, while many things are outside of an individual's control, one can always control the words chosen to describe a situation or convey a message. She noted that things will always go wrong, so it is important to understand the consequences of one's observations. Instead of acting immediately, she suggested stepping back. Because fixing everything is not possible, she suggested focusing on an analysis of what is fixable, so that professionals can devote their limited resources, including their time and attention, to the best purposes.

Keynote Address - "Another Century of Progress: How ICI Is Advocating for Investors and Against Over-Regulation"

Eric J. Pan, President and CEO, Investment Company Institute

Mr. Pan began his speech by describing the ICI's mission, which is to strengthen the asset management industry for the benefit of the long-term individual investor. He noted that it has been one hundred years since the first mutual fund was established in the U.S., and, since then, mutual funds and more recently ETFs have given Americans the opportunity to achieve their long-term financial goals. He added that 100 million Americans rely on mutual funds and ETFs to save for education, retirement and other financial goals.

Mr. Pan noted that, in 1924, the notion of building a nest egg with money to spare for leisure and retirement was a concept only for the wealthy, but now it is a reality for millions of Americans. He added that mutual funds have democratized investing. He explained that the ICI will continue to work to remove barriers to accessing financial services and increase education, access and affordability. He added that technology makes it possible to open accounts and invest at any time, and competition has lowered fees.

Mr. Pan stated that we need a regulatory system that is sound, smart and grounded in facts and data. He noted that regulators do not always follow these rules, which requires the ICI to be "vigilant against regulatory initiatives based on rumor, fear and misunderstanding." As an example, he noted that Chair Gensler has asserted that mutual funds "begged for a government rescue" in March 2020, but the SEC has failed to provide any evidence of such requests, and this assertion has been used to justify what Mr. Pan characterized as sweeping regulations that will alter how the industry works.

Mr. Pan cited another claim that America's retirement system is troubled, which has been used to justify proposals to curtail the tax incentives for retirement plans. Citing data, he noted that the typical retiree maintains "more than 90% of the average spendable income they enjoyed when they were between 55 and 59 years of age."

Mr. Pan also noted that some have claimed that the failures of Silicon Valley Bank and Signature Bank and other banking problems were caused by money market funds drawing deposits away from banks and preventing them from lending more. He explained that an analysis by ICI's research team found little evidence that money market funds are preventing increased lending. He suggested that, rather than engaging with financial services firms and investors, regulators are setting up barriers between financial firms and their clients.

Mr. Pan stated that the SEC is trying to do too much, too fast, without paying attention to how investors and markets would be affected. Recalling his 2022 assertion that the

SEC had embraced an academic approach—which Mr. Pan termed "regulation by hypothesis"—without weighing the real-world effects of their regulations, he noted that the ICI has pointed out that the high cost of these regulations could harm U.S. capital markets and investors with little benefit. Related to this is the view of central banks and prudential regulators that asset managers are a principal source of risk to the global financial system.

Mr. Pan explained that despite the ICI's longstanding relationship with the SEC, he feels compelled to speak out about the costs and consequences of the SEC's current agenda and the deleterious effects the myriad rules will have on markets and investors. Noting that the SEC's "many mandates are built on unrealistic assumptions that make them unworkable," the ICI has urged the SEC to reconsider its proposals and provided alternative approaches and ideas. Specifically, the ICI explained to the SEC that the wide range of interconnected rule proposals have not been analyzed holistically, are substantively flawed and have a variety of serious procedural deficiencies, including that the SEC "failed to consider the effect of interconnected and interdependent proposals in its cost-benefit analyses."

Noting that the fund industry has supported regulations that serve investors, Mr. Pan stated that "massive, one-size-fits-all mandates" will harm investors while failing to provide the promised benefits. Addressing the SEC's adopted money market fund reforms, which Mr. Pan noted helpfully abandoned swing pricing in the final rule, he explained that imposing expensive and complex mandatory redemption fees was unprecedented and represented an eleventh-hour change that deprived the public of the ability to comment. He added that "trust in the regulatory process depends on transparency and the regulator's good faith effort to understand real-world impacts."

Mr. Pan ran through a number of rules he finds problematic, starting with the names rule, which sweeps up three-quarters of all U.S. funds without justification and at enormous cost to investors. He noted that the rule will require firms to modify their systems and spend significant resources on compliance—up to $5 billion in the SEC's estimation—for a "solution to a problem that doesn't exist."

With respect to the SEC's liquidity, swing pricing and hard close proposal, Mr. Pan observed that the proposals would "fundamentally alter how funds are managed, priced, bought and sold" and that funds would be less transparent and less able to meet their objectives. He asserted that the SEC lacks data to support its proposal but has no interest in the real-world feasibility of its rulemaking.

Mr. Pan discussed the proposed rules on predictive data analytics, which seek to address risks associated with AI and other emerging technologies. While he agreed that AI is worthy of further study, he stated that these proposed rules are not the answer, especially given that the SEC has not adequately explained why existing legal standards cannot address any concerns. He added, "[l]ike the other policies . . . it has all the hallmarks of an academic theory that ignores the reality of markets and the needs of investors." Characterizing the predictive data analytics proposal as "an assault on the innovation that investors deserve," he noted that the proposal would limit investors' ability to access technology that facilitates affordable advice and funds they rely on. He cautioned that if the rules are adopted as proposed, technological advancement will suffer due to advisers' fear of significant compliance costs and risks of enforcement. He added that the proposed rules are so broad that old technologies and even spreadsheets and retirement planning calculators could be impacted, and the ICI estimates that the rules will cost over $30 billion in their first ten years. He implored the SEC to withdraw the proposed rules and start over.

Mr. Pan noted that the ICI has significant concerns about numerous other SEC proposals that will directly impact funds and advisers, including ESG, outsourcing, custody, cybersecurity and market structure rules. However, he focused instead on the threat to investors from the DOL's proposed definition of "fiduciary" for retirement investment advice, which will impair the ability of retirement savers to receive financial advice, reduce investor choice and cost billions of dollars. He noted that the ICI is engaging with the DOL and encouraging them to withdraw the proposal immediately.

Mr. Pan concluded by explaining why the ICI is expressing its concerns with all of these regulations so forcefully and directly, noting that "the stakes are too high to stay in the shadows." He added that the regulations send conflicting messages and have overlapping effects, which will lead to greater uncertainty regarding implementation, and ultimately to higher costs and worse outcomes for investors.

General Session – The Rise of the Courts and the Regulatory Process

Moderator: Susan M. Olson, General Counsel, Investment Company Institute

Panelists: Dane H. Butswinkas, Partner, Williams & Connolly

Amir C. Tayrani, Partner, Gibson, Dunn & Crutcher

Noel J. Francisco, Partner, Jones Day

The panel discussed pending litigation that may affect the current regulatory environment and the administrative process for regulations recently adopted and proposed by federal regulatory agencies, such as the SEC. Mr. Butswinkas reviewed the requirements for regulatory agencies to promulgate new regulations properly under the APA, including providing effective notice and an opportunity for public comment. He commented on the potential bases to challenge regulations for failure to follow proper administrative procedure, including regulations that may be arbitrary and capricious or regulations that exceed an agency's delegated authority or are inconsistent with the U.S. Constitution. He noted the importance to any successful challenge of having the claim heard in a forum that may be receptive to the claim. He explained that even parties in favor of a regulation may file a claim challenging some portion of it if only to increase the likelihood that the consolidated

challenges to the regulation are heard in a jurisdiction that may make the challenging party's desired outcome more likely. Mr. Francisco described the importance of commenting on proposed regulations during the comment period and explained that a regulator's failure to address substantively a significant comment may support a claim that the regulation (or an aspect of it) is arbitrary or capricious.

Mr. Butswinkas reviewed pending challenges to the existing Chevron doctrine, noting that courts have interpreted the doctrine as requiring them to defer to a federal agency's interpretation of an ambiguous statute, if the interpretation is reasonable. He stated that the case establishing the doctrine was likely to be overturned, though it is unclear what standard or rubric will replace it. He additionally explained the major questions doctrine, which courts have historically interpreted as requiring a narrow reading of grants of authority to regulatory agencies when the interpretive issues at stake involve matters of economic or political significance or extraordinary regulatory authority.

Mr. Tayrani reviewed the key constitutional constraints on regulatory authority and related cases currently pending. He stated that a case currently pending asserts that the SEC's use of administrative law judges violates the right to a jury trial provided in the Seventh Amendment to the U.S. Constitution. He stated that pending claims also assert that the SEC's use of administrative law judges represents an impermissible delegation of authority to a regulatory agency under the U.S. Constitution because Congress failed to establish restraints on the SEC's discretion to bring enforcement actions in that forum. He noted that other pending challenges include claims that the SEC's administrative law judges and Commissioners are not subject to removal by the president in a manner that would be consistent with the Constitution. He noted the potential that the resolution of these challenges may substantially change the regulatory and enforcement environment for the SEC and companies the SEC regulates, with the SEC likely to become more selective in bringing cases it brings if the cases must be brought in the federal courts.

Mr. Francisco reviewed pending First Amendment-based challenges to existing and proposed regulations. He stated that the First Amendment protects free speech, but also protects against the government compelling certain speech. He explained that certain required disclosures can violate the First Amendment when the required disclosures go beyond factual and uncontroversial statements about a company's business. He noted the trend toward regulators requiring disclosure aimed at social goals, which he explained may be vulnerable to challenge on First Amendment grounds. Mr. Francisco noted, as an example, the SEC's attempts to compel disclosure around the use of conflict minerals. He observed that some ESG-focused disclosure requirements and disclosure requirements related to the rationale for stock repurchases may also be vulnerable to similar challenges. In the case of stock repurchases, he noted that the required disclosure appeared to compel disclosure regarding a firm's opinion rather than an uncontroversial factual statement.

Mr. Tayrani commented on cases currently pending that explore whether restraints on federal agencies, such as the SEC, apply to self-regulatory organizations (SROs), such as FINRA and NASDAQ, because federal agencies oversee SROs and must approve the SROs' substantive rules. He commented on the state of existing case law finding that such SROs are generally not subject to the same restraints as the agencies that oversee and regulate them. He explained a prior challenge to NASDAQ's ability to require disclosure regarding board diversity of listed companies and, where applicable, why an issuer does not have two diverse members. He stated that the Court of Appeals found NASDAQ was a private party and not subject to the same restraints as the SEC. He then commented on other pending challenges, including cases asserting that the Equal Protection Clause of the Fourteenth Amendment should apply to SROs, which the Fifth Circuit Court of Appeals is scheduled to re-hear en banc.

General Session – Asset Management Trends: The (Not So Distant) Past, Present, and Future

Moderator: Shelly Antoniewicz, Deputy Chief Economist, Investment Company Institute

Panelists: Kristina Hooper, Global Market Strategist, Invesco

Ben Johnson, Head of Client Solutions, Asset Management, Morningstar

Daniel Shapiro, Director of Product Development, Cerulli Associates

Exchange-Traded Funds. Ms. Antoniewicz highlighted the meteoric rise in ETFs, noting that 15 years ago ETFs had only about $500 billion in assets and now they have approximately $8 trillion. She also highlighted that most of the increase is attributable to asset flows as opposed to market appreciation. Finally, she noted that most of the asset flow and growth has been in equity ETFs, while fixed income funds continue to attract assets and, therefore, compete much more effectively with fixed income ETFs.

Ms. Hooper explained that the trends highlighted by Ms. Antoniewicz match what she sees at her firm. She also noted that she is seeing much of the current asset flow going into technology-related ETFs. In speculating as to why equity ETFs have raised such significant assets, Ms. Hooper stated that a key driver is the focus of financial advisers on tactical allocations. Mr. Shapiro also speculated that part of the asset growth of ETFs could be related to the higher profit margin for advisers associated with passive vs. active products. In addition, he noted that the performance challenges of active managers have likely contributed to ETF flows, since passive ETFs have been highly effective at meeting their stated performance goals. With respect to fixed income, He observed that the popular perception is that mutual funds continue to add value through active management and, consequently, ETF flows in the fixed income space have not been as dramatic as they have been in the equity space.

Mr. Shapiro discussed the fact that more than 80% of ETF assets are owned through retail channels. He also remarked that the 80% has grown over time, so that flows are increasingly coming through retail channels. Citing results of a survey conducted by Cerulli, he explained that 90% of the ETF flows from retail channels are being directed by financial advisers as opposed to individuals. Addressing this trend, Mr. Johnson noted that most new dollars are not going to traditional open-end funds. He speculated that the trend is driven by a fundamental compatibility of ETFs with the way financial advisers are creating client portfolios. Mr. Johnson explained that model portfolios are now the template for a larger number of advisers, and that ETFs are far more compatible with that structure than traditional mutual funds. Ms. Hooper added that, as a result of these dynamics, sponsors of mutual funds and ETFs are launching strategies that are "wrapper agnostic." That is, at an asset management firm, strategies can exist in separately managed accounts (SMAs), open-end funds, CITs and ETFs. Finally, she noted that the desire to be tactical is not as prevalent in the fixed income space as it has been in the retail space. This, she noted, also explains why assets in bond mutual funds have not migrated to ETFs in a meaningful way.

The panel explored why institutional channels have not directed more assets to ETFs. Mr. Shapiro stated that those channels have access to cost-effective alternatives like CITs and less-liquid vehicles like BDCs, which is where their assets have flowed. He also speculated that future growth in ETFs is likely to be in fixed income strategies. He noted that, while many believe the industry is saturated with products, there are many strategies offered in open-end funds that are not yet represented in ETFs.

The panel discussed the numerous exemptive applications seeking SEC relief for mutual fund and ETF share classes in the same vehicle. They noted that, if the SEC grants the requested relief, the relief would likely drive significant flows to the ETF share classes. Mr. Johnson highlighted that a fund with an ETF share class may forfeit its right to close to new investments. In that respect, he observed, traditional mutual funds will continue to have a critical advantage over ETFs because they will be able to address capacity constraints.

Separately Managed Accounts. The panel explored the attractive features of retail SMAs. Mr. Johnson stated that the underlying technology of the SMA ecosystem is much more efficient than it used to be, so that the threshold for access is lower today than it has ever been. He explained that fractional shares and zero commissions also have helped. Nonetheless, Mr. Shapiro observed that SMAs typically make sense for ultra high net worth or high net worth individuals. He also noted that the tax advantages of SMAs, which can be another attractive feature, are often limited in scale. As a result, Mr. Shapiro noted that while SMAs will continue to have an important role in the asset management industry, they have limitations even when they are more broadly accessible.

Retirement Savers. The panel explored the role of retirement savers in the growth of assets. Ms. Hooper discussed the popularity of target date funds, reflecting on the flows generated by these products. Mr. Johnson noted that continued growth from these savers will depend on the offerings that are available. He speculated that less liquid choices will become more popular because such products are highly compatible with the investment horizon of retirement savers. Mr. Shapiro stated that registered fund flows from retirement savers could be muted to the extent that 401(k) plans continue to expand their investments in CITs. He noted that he believes CITs will continue to be popular because they allow ERISA fiduciaries to negotiate fees, and those vehicles have lower compliance and marketing costs.

Interest Rates. Ms. Antoniewicz stated that investors have been pouring money into money market funds. She highlighted that over $800 billion have been added to these funds since early 2022. Ms. Hooper stated that she is not surprised, explaining that 2022 was an historically difficult year because both equities and fixed income markets disappointed. At the same time, she explained, the Fed surprised with a dramatic series of rate hikes. She stated that she anticipates money market fund outflows as interest rates start to come down. Ms. Hooper further noted her view that bonds are again popular. She stated that the yield environment has improved and that bond products are far more attractive than before. Mr. Shapiro added that, in addition to investment fundamentals, there are other systemic drivers, like the demographics of an aging population, that will push flows to bond products.

Alternatives. The panel concluded by discussing the role of alternatives in attracting flows to the fund industry. Mr. Shapiro observed that recent years have witnessed the democratization of alternatives. He also noted, however, that distribution of these strategies is highly complex. He stated that advisers have to spend extra time with clients explaining these products. They are also more expensive, and often can only be accessed by accredited investors. On the other hand, He stated that the products are attractive because the extra time that financial advisers spend with clients on alternative products allows a financial adviser to develop deeper client relationships. Further, he noted that the products offer something different. In this regard, he highlighted the increasing role of credit products.

Session F: Advisers in the SEC Spotlight: Takeaways for Retail SMA Programs

Moderator: Mitra Surrell, Associate General Counsel, Investment Company Institute

Panelists: Vadim Avdeychik, Partner, Clifford Chance

Michael Benedetto, Head of Global SMA Platform, T. Rowe Price

Christyn Rossman, Assistant General Counsel, The Vanguard Group

Ms. Surrell outlined the focus of the panel as (i) describing various types of retail SMAs, (ii) explaining their rise in

popularity as vehicles for customized advice to individual investors, (iii) discussing regulatory considerations most pressing to SMAs and (iv) forecasting key challenges and trends for the coming years. Mr. Avdeychik explained that there is no standardized understanding for the term "retail SMA," though generally this product can be described as a non-pooled vehicle that offers to individuals a specific investment experience based on their goals and objectives, potentially including further services such as tax optimization. Types of SMAs include (i) direct and customized indexing, (ii) unified managed accounts (UMAs), which act as aggregators of separately managed sleeves, (iii) model delivery and (iv) wrap accounts. He explained that traditional discretionary SMAs can be either "single contract," where the discretionary investment adviser engages primarily with an intermediary/sponsor, or "dual contract," where the adviser has contractual privity both with the intermediary/sponsor and with the end client, typically a higher net worth individual. While SMA programs at most firms initially were derived from an established mutual fund or flagship program, Mr. Benedetto said he now sees significant SMA product innovation. The panelists agreed that one objective in structuring SMA programs is to meet individual investors or their advisers (depending on the structure) "where they are" through customization and personalization.

Reasons for the Rise of SMAs. Ms. Rossman highlighted the importance of technology in the growth of SMAs in recent years. She noted that technology facilitates complex client arrangements for advisory firms, enabling firms to have scalable systems to customize portfolios for vast numbers of smaller clients. Technological developments also foster AUM growth by educating investors and encouraging them to look for automated solutions. Mr. Benedetto emphasized the advent of the UMAs as a driver of significant growth, citing 2013 to 2022 industry data showing the growth of UMAs from $304 billion (out of U.S. industry total managed account assets of $3.5 trillion) to $2.1 trillion (out of a total of $9.6 trillion). He also observed trends toward significant growth in direct indexing. Mr. Benedetto expects that ancillary services offered by SMA managers, such as personalization of investment restrictions and tax management services, will become increasingly important to consumers. Although one source shows that fewer than 5% of clients currently take advantage of customization options, he thinks this figure will grow significantly in the future.

Regulatory Framework for SMAs. Mr. Avdeychik said that the regulatory framework for SMAs centers on fiduciary considerations. In explicating the SMA manager's duty of care and duty of loyalty, Mr. Avdeychik emphasized obligations to (i) act in the best interest of the client, (ii) seek best execution and (iii) provide ongoing monitoring and advice. He pointed to the SEC's 2024 examination priorities as placing a focus on the duty of care associated with monitoring each client account over the course of the advisory relationship. He also noted that the SEC's examination priorities target the role of AI, automated/robo-advice and other technology in the SMA space. Mr. Avdeychik highlighted an April 2023 enforcement action against robo-adviser Betterment for (among other things) failing to disclose a change in its tax loss-harvesting (TLH) software related to its scanning frequency, failing to disclose a programming constraint affecting certain clients and two computer coding errors that prevented its TLH system from harvesting losses for some clients. Ms. Rossman discussed the customization expectations on retail SMA programs that seek to satisfy the exemption in Rule 3a-4 under the 1940 Act. She observed that her firm uses its Rule 3a-4 questionnaire as a tool to check in with clients on how they are doing in their lives (e.g., asking about life changes, whether the clients are married), thereby augmenting the client-relationship experience.

Conflicts of Interest. Mr. Avdeychik discussed the complexities of addressing conflicts of interest in the management of SMAs. He noted the importance of (i) monitoring for, identifying and mitigating conflicts, (ii) disclosure of conflicts and (iii) documentation of the conflicts that are found and how they are mitigated. He highlighted a recent enforcement action fining a model portfolio provider for failing to disclose arrangements to receive payments from the manager of ETFs in exchange for incorporating those ETFs into its model portfolios. He cited statements by Chair Gensler indicating that the SEC is looking at SMAs, looking at technology and looking for conflicts of interest. Mr. Avdeychik's view on the SEC's predictive data analytics proposal is that there is no need for a new rule in relation to retail SMAs, as existing mechanisms for disclosure of conflicts of interest linked to technology are generally sufficient. He noted that, according to a recent SEC Staff Bulletin, there may be instances where disclosure may be insufficient for purposes of obtaining informed consent of retail SMA clients.

Vendor Management and Third-Party Technology Platforms. The panel answered several audience questions around vendor management and the use of third-party systems. Mr. Benedetto said that many new vendors are coming into the space, offering services such as tracking-error monitoring, ESG analysis, restrictions monitoring and tax optimization. He observed a trend that there will be fewer managers building their own solutions, but will be more partnering with solutions providers, which in turn increases the importance of maintaining robust vendor oversight processes. In the approach to due diligence on providers, Ms. Rossman focused on the vendors' access to confidential information and what walls managers erect to protect that information. Mr. Benedetto discussed the risks of relying on third-party technology platforms, noting that certain areas lack abundant choice of credible vendors, and said that a key to maintaining a strong diligence program is keeping an up-to-date list of back-up options for switching vendors if things go downhill. Mr. Avdeychik suggested that, if a manager is heavily reliant on a single service provider, the manager might consider disclosing the related downside risk and should think carefully about business continuity planning.

Regulatory Changes and Priorities. Mr. Avdeychik observed that several proposed rules on the SEC's regulatory flexibility agenda could have significant repercussions for retail SMAs. He noted that the proposal on safeguarding of assets under the Advisers Act would change managers'

approaches to contractual arrangements, including the flow of information (including confidential information) back and forth with custodians. The SEC's request for comment on index providers might have implications for participants in direct-indexing arrangements. Mr. Avdeychik also pointed to the proposed disclosure requirements for ESG investments as further complicating efforts of SMA managers to develop products amidst an already challenging business environment. He observed that the mutual fund liquidity proposal could be a boon for SMAs, but warned of the broader trend that the SEC has been stepping in more aggressively where there is rapid client-base growth (as in SMA). Ms. Rossman identified the current prescriptive regulatory environment as one of the biggest challenges for SMA businesses. Mr. Benedetto exhorted the industry to frame the potential implications properly to the SEC by asserting how pursuing certain rule changes, in the face of imperfect information, could needlessly stunt industry growth.

Key Opportunities for Retail SMAs. Mr. Avdeychik identified opportunities for SMAs to offer retail investors access to new asset classes such as private markets, REITs and BDCs, which could spark significant innovation and bring additional new entrants (such as alternative managers) into the retail SMA space. Mr. Benedetto foresees a heyday for innovative products offering a range of allocations and vehicle choice, and he highlighted several possible uses for tokenization. He emphasized the potential for the use of fractional shares in SMA accounts, noting that the purpose would be less a desire to cater to small account sizes and more to enhance managers' ability to achieve diverse, bespoke and customized solutions by fine-tuning each client's overall portfolio. Ms. Rossman sees personalization of account types as a rich opportunity. Mr. Avdeychik warned of the challenges of investor education, which only becomes harder as managers develop increasingly innovative products and are further distanced (through intermediation and reliance on third parties) from the end clients.

Predictions for the Years to Come. Mr. Benedetto predicted growth and continued adoption for retail SMA products, which will increasingly allow for more bespoke investment solutions. He said that the market share of UMAs will grow, with the ability to invest using fractional shares being an important engine for that growth. The panel ventured that asset allocation models will evolve, that new types of assets will become available in SMA wrappers and that increased computer power will foster and support continued product innovation.

Session G: Artificial Intelligence and the Fund Industry

Moderator: Julia S. Ulstrup, Executive Vice President and General Counsel, ICI Mutual Insurance Company

Panelists: Mark Diamond, President and CEO, Contoural

Chris Herringshaw, Chief Technology Officer, Janus Henderson Investors

Barton Warner, Senior Vice President, Capital Group

This panel focused on the benefits, risks and challenges related to the rapid rise of AI, particularly focusing on the considerations fund managers face as they decide whether, when and how to deploy AI tools. Mr. Diamond provided a history of AI, explaining that, although its roots date back over 70 years, it is the rise of generative AI within the past few years that is currently commanding headlines.

Mr. Herringshaw observed that this evolution has been dramatic, but AI remains derivative and biased rather than capable of original thought and, therefore, human direction and oversight of AI are required. Mr. Diamond agreed and likened the current state of AI to an intern, capable of aiding but requiring review and correction. As examples of such assistance that AI can offer, Mr. Warner said that his firm presently uses AI to aid with (i) summarizing, (ii) creating first drafts and (iii) enabling more powerful searching. He said that these more assistive uses of AI help to generate buy-in and momentum before tackling programmatic AI, which requires more consideration of implications. Mr. Herringshaw similarly distinguished between AI productivity tools with (i) lower value-add but also fewer risks and (ii) higher value-add but also more challenging considerations in terms of updating and maintaining the underlying model. He said that determining how to deploy AI is equally important to setting boundaries for how it will not be deployed. At his firm, for example, the organization has been clear that AI is not replacing either portfolio managers or traders.

Nonetheless, the panelists recognized the inevitability that AI will shape the workplace. Mr. Diamond offered his view that, in any large organization, it is likely that individuals are already using AI in some way. In such a context, the panelists agreed, it is necessary to engage with AI and set the terms for its use, rather than ignore its development. Mr. Warner suggested that, when confronted with a business interest in deploying AI in some way, a more powerful and practical response is often "yes and" instead of "no but," with the "and" being to set the necessary terms, conditions and guardrails.

Session H: Modernizing the 1940 Act Regulatory Regime

Moderator: Rachel Graham, Assistant General Counsel and Corporate Secretary, Investment Company Institute

Panelists: Christopher P. Harvey, Partner, Dechert

Bruce G. Leto, Partner, Stradley Ronon Stevens & Young

Elizabeth J. Reza, Partner, Ropes & Gray

Ms. Graham described the strategic review of the 1940 Act led by the ICI over the past two years, noting that the guiding thesis of the project was to preserve the elements of the 1940 Act that provide a strong regulatory backdrop, but also to identify areas ripe for modernization. She shared that the goal was to prepare a set of achievable reforms that were the result of collaboration and thoughtful discussion among industry participants that would benefit retail

investors. She acknowledged that taking on this type of project at the same time the industry has had to respond to many proposals and new rules from the SEC had been challenging. She added that the decision to go ahead with the strategic review had been made with the end investors in mind, noting the importance of funds to the savings of U.S. households.

Ms. Graham identified the themes that had emerged during the course of the strategic review, including: leveraging oversight by independent directors, recognizing how investors view and use funds, enabling investors to gain exposure to a broad range of asset classes while having the protection of the 1940 Act, fostering innovation as permitted by the 1940 Act and revisiting requirements that are not necessary to protect investors and may be putting funds at a competitive disadvantage.

Fund Governance. Mr. Leto commented on potential changes to streamline and modernize the shareholder approval process. He noted that the types of changes being considered were limited to situations in which there was strong board oversight and the changes were not material to a fund's investment strategies and risks (e.g., immaterial changes to fundamental investment policies by the board with notice to shareholders). Ms. Reza stated that another shareholder approval-related matter being considered was in the context of exchange-listed closed-end funds where exchange requirements, as opposed to the 1940 Act, had imposed an annual meeting requirement. Mr. Leto commented on the definition of "interested person" under the 1940 Act and potential changes that might be considered to that definition, including situations when it might be narrowed and broadened. He described other areas of consideration, including modernizing the in-person voting requirements imposed by the 1940 Act, as well as the board approval requirements applicable to sub-advisory agreements, especially in the context of fund complexes operated under a "manager of managers" model. Mr. Leto commented on potential changes to the appointment of new directors by current members of a board and the threshold at which shareholder approval is required for these appointments.

Closed-End Funds. Ms. Reza noted that the considerations of the working group considering closed-end funds fell into three categories. The first category includes practical changes that would help reduce operational burdens without lessening the protection of investors, such as modernizing requirements around notices required under Section 19 and codification of certain exemptive orders and the ability of interval and tender offer funds to be operated as a series of an existing trust entity. The second category suggests changes that facilitate innovation while keeping the protections of the 1940 Act, including providing interval funds with greater flexibility on the timing and amounts of their repurchase offers without changing the amount of liquidity offered over the course of a year and explicitly allowing closed-end funds the ability to invest in excess of 15% of assets in certain private funds and clarifications under Section 18 to facilitate uses of indebtedness by closed-end funds. The third category includes changes that help preserve the benefits of closed-end funds, such as empowering boards to utilize state law provisions to protect closed-end funds and revising statutory provisions that permit affiliated private funds, which rely on 1940 Act exemptions to avoid classification as investment companies, to acquire substantial aggregate positions in closed-end funds when such aggregation of positions would not be permitted if the acquiring private funds were classified as investment companies under the 1940 Act. Ms. Reza also commented on recent legislative efforts that were consistent with some of the ideas being considered by the working group.

Disclosure. Mr. Leto commented on considerations around electronic delivery and potential areas where it could be permitted, as well as potential changes to the frequency of shareholder reports.

ETFs. Mr. Harvey discussed themes considered by the working group focused on matters related to ETFs, including the ability of funds to offer an ETF share class, expanding asset classes permitted for semi-transparent ETFs, allowing ETFs to close the creation process temporarily to new purchases and permitting mutual funds the flexibility to price fund shares by class of investor (e.g., potentially permitting seed investors or other significant long-term investors access to lower cost shares in recognition of the scale and liquidity benefits their investments provide to the ETF). He noted that the last of the proposed focus areas would have application outside of the ETF area, as well. He and Ms. Graham commented on some of the concerns raised about this last focus area and the ongoing areas of discussion about this item.

Co-Investments and Cross Trades. Mr. Harvey also discussed several ideas that had been discussed regarding the regulatory framework that applies to co-investments and cross trades involving funds. He stated that the group had considered ways to make the co-investment framework more flexible, noting that this effort, plus consideration of an approach that would allow investments by registered funds and BDCs in affiliated private funds, ultimately would serve to facilitate access by retail investors to alternative asset classes. He also discussed the potential for the restoration of the use of Rule 17a-7 for fixed income cross trades relying on pricing services.

Ms. Graham concluded by noting that the items discussed by the panel continued to be under consideration by industry participants and that there would likely be further developments. She noted that the goal was to ensure that any proposals were thoroughly considered and vetted before the time came to potentially take actions in respect of the proposals.

General Session – Reading the Tea Leaves: Signals from the SEC's Divisions of Exams and Enforcement

Moderator: Matt Chambers, Chief Compliance Officer, Horizon Investments

Panelists: Andrew Dean, Co-Chief, Asset Management Unit, Division of Enforcement, U.S. Securities and Exchange Commission

Amy Doberman, Partner, Wilmer Cutler Pickering Hale and Dorr

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

The panel provided insights from representatives of the SEC's Exams and Enforcement Divisions, as well as an outside counsel's perspective. Ms. Horton first discussed the Exams' priorities for 2025. She said that, consistent with this past year, she expected those priorities to be published this upcoming October. She discussed the drafting of those priorities, noting that they result from a bottom-up process in which staff from the SEC's offices across the country convene to identify common themes. She identified AI and crypto as areas that will likely receive attention in the 2025 exam priorities. With respect to AI specifically, she explained that the focus on the new-age technology should not obscure that the issues at stake implicate age-old principles—to "say what you do and do what you say." Mr. Dean agreed that the rush to embrace the new power of AI can create pressure for managers to overstate what they are doing on this front, inducing "AI-washing" as a concept similar to the ESG-washing that the SEC observed a few years ago. Ms. Doberman added that not only is it important to say what you do and do what you say, but it is also important to document your compliance. Ms. Horton reminded the audience that, although new areas like AI disclosure may be what are spotlighted in the 2025 exam priorities, SEC exams will also continue to focus on areas not referenced in the priorities, giving the example of investment allocation and side-by-side investment as an area that has long been, and remains, of interest to the staff. Ms. Doberman encouraged the audience to carefully read deficiency letters, which she said can indicate shifts in exam priorities. She noted that deficiencies that previously were framed as disclosure issues have increasingly been framed as breaches of an adviser's duty of care.

Ms. Horton discussed the process by which RIAs are selected each year for exam. She said that approximately 15% of RIAs will be examined each year. Factors that can lead an RIA to be selected include language in its or its funds' regulatory filings that could suggest areas of risk—for example, she said, language that indicates that the adviser has custody of client assets or focuses on serving seniors.

In response to a question regarding when an exam results in a referral to Enforcement, Ms. Horton stated that this happens in about 10% of exams. Some common bases for referral include (i) the presence of fraud, (ii) recidivist behavior, (iii) where the conduct resulted in harm to investors, particularly vulnerable investors and particularly where the adviser itself profited, (iv) the frequency of the conduct and (v) the potential for recovery.

Mr. Dean discussed when Enforcement accepts a referral from Exams. He cited as factors (i) whether scienter could be established, (ii) how the conduct was discovered, (iii) the level of cooperation and remediation during the exam and (iv) whether there is individual liability.

Mr. Chambers engaged the panelists in a discussion of recent enforcement actions affecting advisers to registered investment companies. Regarding the February 2024 enforcement matter involving VanEck Associates for violation of Section 15(c) (based on allegedly failing to disclose an influencer's planned involvement in the launch of an ETF and the sliding-scale fee structure of the index licensing fee), Mr. Dean cast this as a reminder of an adviser's fiduciary duty to disclose relevant information, while Ms. Doberman expressed concern that the recital of facts in the order relating to the marketing of the ETF could be interpreted to expand the scope of required Section 15(c) reporting.

Regarding the August 2023 enforcement order against ETF Managers Group LLC for allegedly directing an ETF's service provider arrangements to obtain a benefit for the adviser, Ms. Doberman said that the adviser should have disclosed the conflict to the ETF's independent directors to allow them to play their intended "watchdog" role and determine whether a solution to the conflict could be found.

Concerning the June 2023 enforcement matter involving PIMCO for allegedly failing to waive advisory fees as required by its agreement with a registered fund, Mr. Dean recognized the steps PIMCO had taken to remediate the error, but said that enforcement was still warranted given (i) the amount of money at issue, (ii) the fact that the error had occurred over a long period and (iii) the expectations for a large sophisticated adviser.

Regarding the January 2023 enforcement matter involving a former BlackRock portfolio manager for allegedly failing to disclose a conflict of interest arising from his relationship with a firm in which a fund he managed invested a significant amount, Mr. Dean framed the action as being highly fact-specific, while serving as a more generalizable reminder that conflicts of interest can come in a variety of forms.

General Session – Responsible AI: Navigating AI Governance, Ethics, and Risk in a Changing Regulatory World

Moderator: Jocelyn A. Aqua, Principal, PwC

Panelists: Sean L. McGrane, Partner, Squire Patton Boggs

Susan Rohol, Partner, Willkie Farr & Gallagher

The panel discussed areas of interest relating to the use of artificial intelligence (AI), whether generative or non-generative, and the ethical and professional responsibility implications of the use of AI by both companies and their lawyers.

U.S. and EU Regulation of AI. Ms. Rohol noted that lawyers should be thinking about the regulations and responsibilities they have with respect to AI today, as well as what AI-related law and regulatory frameworks might look like in the near future. She anticipates that every major jurisdiction affecting asset managers will pass new legislation or promulgate new rules relating to AI within the next year or so, with the exception of the U.S. at the federal level. Ms. Rohol noted that in the U.S., most new actions will be taken at the state level, which presents its own challenges.

Ms. Rohol discussed new EU law regarding AI, which she noted would likely be put into effect in all EU member state jurisdictions by May. She noted that the EU framework approaches AI regulation through a framework using risk tiers from AI use, where relative risk is perceived by European regulators and lawmakers. She noted that the highest or riskiest tier, which EU law would prohibit, is unlikely to affect asset managers. However, the tiers relating to generative AI, which Ms. Rohol noted would likely be going into effect in approximately a year, would be particularly relevant to asset managers. Ms. Rohol suggested that lawyers working with asset managers with an EU presence familiarize themselves with the new law.

Mr. McGrane expressed concern regarding the possibility of conflicts of law given the many different actors, including the possibility that many U.S. states could pass varied AI-related laws. Ms. Rohol agreed that there were reasonable concerns surrounding that issue, but noted that there are already hundreds of overlapping laws that arguably are applicable to the use of AI.

Existing Authority and Regulation of AI/Predictive Data Analytics Proposal. Ms. Aqua noted that some regulators are already stepping into the regulation of AI under existing authorities. Ms. Rohol noted that the SEC had, during the course of the conference, announced a settlement with an investment adviser relating to misstatements about the use of AI, and in her view, this settlement drew headlines primarily because of the AI aspect of what was an otherwise relatively straightforward action that the SEC could have brought under existing authority.

Ms. Rohol noted that, even if current U.S. law includes federal authority to properly regulate AI, there would be new regulations coming in 2024 and 2025 relating to AI, as AI safety is a priority of the Biden administration. Mr. McGrane pointed to the SEC's predictive data analytics proposal as evidence of such focus. He noted that there were ethical principles embedded in the proposal that have existed for centuries, noting for example a focus on fiduciary duties around conflicts of interest. Given that those principles and legal requirements already exist, he asked whether the predictive data analytics proposal was necessary at all or whether existing rules and guidance could properly regulate AI in the asset management space. Ms. Rohol noted that, in her view, the specifics of the proposal were far too prescriptive and that it would be next to impossible for an asset manager to determine all the ways that "covered technologies" were used. She expressed hope that the SEC would clarify the proposal, and the other panelists agreed. Mr. McGrane noted that he worried that overly prescriptive rulemakings might dissuade investment firms from using or making investments in AI, potentially taking away the possibility of significant benefits to those firms and their clients.

Lawyers' Ethical Obligations. Ms. Aqua noted that there were various concerns relating to the use of AI that are very similar to concerns implicated by professional responsibility requirements for lawyers, including those relating to accuracy/truthfulness, fairness and avoiding bias. Mr. McGrane noted that there are a host of ABA rules that are implicated by the use of AI, including rules relating to the confidentiality of information. He also suggested that lawyers monitor the rules in the jurisdictions in which they practice and are admitted, noting that states are increasingly adopting AI-specific rules. He noted that Florida had recently issued an opinion that emphasized that AI use, whether generative or non-generative, does not automatically waive attorney-client privilege. He added, however, that lawyers might violate confidentiality obligations and may waive attorney-client privilege by using a generative AI source that does not have built-in confidentiality protections.

Mr. McGrane noted that lawyers have a professional obligation under ABA model rules to supervise the AI tools that they use. He cited Model Rule 1.1, which requires lawyers to keep abreast of developments relating to the technology that they use in their practice. He added that a lawyer does not need to be a technological expert to comply with professional obligations. Ms. Aqua noted that it will fall on legal and compliance teams in larger organizations to initiate trainings to make sure that personnel have adequate awareness of legal obligations relating to AI.

In response to an audience question, Mr. McGrane noted that having an AI tool not connected to the internet is safer, but Ms. Rohol added that there are ways to maintain confidentiality while connecting to the cloud, noting that most companies that use AI use this approach.

Ms. Aqua then discussed "AI hallucinations," noting that there have been high-profile cases where lawyers cited cases that do not exist because of reliance on generative AI. Ms. Rohol likened generative AI to reliance on "thousands of interns," because these systems are instructed to provide answers, and if there are no ready answers, the systems fabricate "appropriate" answers. The panelists noted that these cases have led to sanctions for lawyers who have cited nonexistent cases.

Ms. Aqua also noted that lawyers have a duty to understand the technology they use and asked her co-panelists how to best learn about how AI technology works. She explained that she often recommends that clients establish committees to think about technological governance issues. Ms. Rohol noted that a good first step is for a business to systematically reach out to different groups or employees at

the firm to determine how AI is being used at the company. She noted that siloed groups at larger firms may be using AI on their own without the knowledge of the firm. She noted that asset managers in particular may want to start with a focus on those serving in customer service and portfolio management roles. She also noted that employment is an area of particular risk, as human resources is an area that is susceptible to bias and discrimination that may be exacerbated by AI tools. Mr. McGrane noted that the ABA is particularly focused on issues of bias in AI.

Ms. Aqua thanked everyone for attending the conference and announced that next year's ICI conference would be held March 16-19 in San Diego, California.

Lawyers Who Attended the Conference or Contributed to the Preparation of This Summary

Ed Baer
Counsel, San Francisco
Edward.Baer@ropesgray.com
+1 415 315 6328

Chelsea Childs
Partner, San Francisco
Chelsea.Childs@ropesgray.com
+1 415 315 6374

Michael G. Doherty
Partner, New York
Michael.Doherty@ropesgray.com
+1 212 497 3612

Thomas R. Hiller
Partner, Boston
Thomas.Hiller@ropesgray.com
+1 617 951 7439

Keith MacLeod
Associate, Boston
Keith.Macleod@ropesgray.com
+1 617 235 9764

Jamie McGinnis
Counsel, Washington, DC
James.Mcginnis@ropesgray.com
+ 1 202 508 4839

Paulita Pike
Partner, Chicago
Paulita.Pike@ropesgray.com
+1 312 845 1212

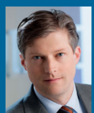
George B. Raine
Partner, Boston
George.Raine@ropesgray.com
+ 1 617 951 7556

Elizabeth J. Reza
Partner, Boston
Elizabeth.Reza@ropesgray.com
+ 1 617 951 7919

Amy D. Roy
Partner, Boston
Amy.Roy@Ropesgray.com
+1 617 951 7445

Adam M. Schlichtmann
Partner, Boston
Adam.Schlichtmann@ropesgray.com
+1 617 951 7114

Jeremy C. Smith
Partner, New York
Jeremy.Smith@ropesgray.com
+ 1 212 596 9858



James E. Thomas
Partner, Boston
James.Thomas@ropesgray.com
+1 617 951 7367

© 2024 Ropes & Gray LLP. All rights reserved. Prior results do not guarantee a similar outcome. Communicating with Ropes & Gray LLP or a Ropes & Gray lawyer does not create a client-lawyer relationship. 24_0713_0419