The Investment Lawyer
Covering Legal and Regulatory Issues of Asset Management
VOL. 23, NO. 4 • APRIL 2016

The Changing Role of Independent Directors of Mutual Funds

By Matthew P. Fink and Jacqueline Edwards

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.
>
> — Oliver Wendell Holmes, Jr.

Holmes was discussing the common law, which develops over time through judicial decisions. His observation also applies to administrative law, which develops over time largely through decisions made by government agencies. This can be illustrated by considering the positions taken by the Securities and Exchange Commission (SEC) over the past 76 years regarding the role of independent directors of mutual funds. As the SEC has adopted new priorities in fund regulation to meet new theories it has repeatedly changed its views regarding the role of independent directors.

Background—Federal Regulation of Mutual Funds

Investment companies – companies that invest in securities of other companies to earn dividends, interest, and capital appreciation – became popular in the United States during the 1920s. The vast majority of these investment companies were what today we would call "closed-end funds." A closed-end fund issues its own shares to the public and uses the proceeds to acquire a portfolio of securities. Thereafter, the fund's shares trade in the market at prices that can be greater or less than the value of the portfolio. Mutual funds, investment companies that issue redeemable shares (shares which are continuously issued and repurchased by the fund at prices based on the current value of the fund's portfolio), began in 1924. By 1929, closed-end funds accounted for 95 percent of the assets of managed investment companies, with mutual funds holding just 5 percent.[1]

During the 1920s, many closed-end fund managers engaged in questionable practices, including using complicated pyramidal capital structures, employing extreme leverage, and selling securities they owned or were underwriting to their funds. Most funds were organized as corporations with boards of directors. Fund directors earned a reputation for representing the interests of management rather than shareholders; one law review article described fund directors as "directors who do not direct."[2] Observers pointed out these problems, but no action was taken by state or federal authorities. After the 1929 crash, when the stock market and mutual funds went down about 80 percent,

Copyright © 2016 by CCH Incorporated. All Rights Reserved.

closed-end funds fared far worse due to the effects of reverse leverage and large premiums over portfolio values turning into deep discounts.

As a result of the crash, revelations of abuse, and the onset of the Great Depression, there now was a desire to regulate the securities markets, including investment companies. In 1935 Congress directed the SEC to study the investment company industry and make recommendations to Congress. In March 1940, a bill prepared by the SEC was introduced in both houses of Congress.

It was widely predicted that investment companies would oppose the bill and that it would not be enacted; however, investment companies surprised observers and supported the bill with modifications. In August 1940, a revised bill drafted by the SEC and industry representatives, the Investment Company Act of 1940, was passed unanimously by both houses of Congress and signed into law by President Roosevelt.

1940—Independent Directors as Checks on Management

The Act was designed to prevent a repetition of the abuses of the 1920s. It employed a variety of techniques to achieve this result, including requiring public disclosure of certain matters, creating a schedule of filings to be made with the SEC, mandating that investment companies follow specified practices, prohibiting enumerated practices, granting the SEC authority to prohibit other practices, and requiring fund shareholders to approve various matters.

The 1940 Act Gave Directors Few Powers

The SEC's bill gave fund directors only three powers – annual renewal of the advisory and underwriting contracts and annual selection of the fund's principal accounting officer.[3] After negotiations between the SEC and industry representatives, the final Act gave directors two additional powers – selection of the fund's independent public accountant and valuation of securities without readily available market prices. *Thus, the Act gave fund directors only five powers—annual renewal of the advisory and underwriting contracts, annual selection of the principal accounting officer and independent public accountant, and fair valuation.* Renewals of the two contracts and selection of the independent public accountants had to be approved both by the board and by a majority of independent directors.

In short, due to the prevailing pro-regulatory mood and fund directors' poor record during the 1920s, the Act granted directors little specific authority in addition to their role under state law. The Act gave directors so few powers that contemporaries who wrote about the Act barely mentioned its few provisions that involved directors.[4] Drafters of the Act stressed the fact that directors' powers derived principally from state law, rather than from the Act.[5]

The SEC Viewed Independent Directors as Checks on Management

The drafters of the Act made it clear that independent directors were not to manage the fund.

The SEC's initial bill required that a majority of fund directors be independent of management. However, the SEC readily abandoned this approach and the final Act required that only 40 percent of directors be independent. The SEC explained this change:

> "the argument was made that it is difficult for a person or firm to undertake the management of an investment company, give advice, when the majority of the board may repudiate that advice. It was urged that if a person is buying management of a particular person and a majority of the board can repudiate his advice, then in effect, you are depriving stockholders of that person's advice.
>
> Now, that made sense to us. If the stockholders want A's management, then A should have the right to impose his investment advice on that company. *However, we felt that there should be some check on the*

Copyright © 2016 by CCH Incorporated. All Rights Reserved.

> *management and that is why the provision for 40 percent independents was inserted."*[6]

As discussed below, independent directors' powers have expanded dramatically over the years, principally through the adoption of numerous SEC rules. However, for 76 years one constant has been independent directors acting as "checks on management." As one counsel to independent directors, James Storey, has told them:

> The shareholder is at a distance; you are on the scene – at board meetings and talking to management between meetings. The shareholder can make his decisions based on funds' major features and parameters, but he cannot know what's taking place on a smaller scale, what's happening "at the margins." He depends on you to guard the gates against marginal – but significant – incursions by management.[7]

1970—Independent Directors as Rate-Makers

In 1940 the drafters of the Act intentionally did *not* seek to regulate the level of management fees paid by funds to their advisers. As a result courts held that shareholders who challenged management fees had the burden of proving that the fees were so excessive that they constituted a "waste" of fund assets.

The SEC's Proposal to Have Courts Set Fees

In 1958 the SEC asked the Wharton School to prepare a report addressing increased fund size; subsequently the SEC also asked Wharton to study the activities of fund advisers. By the early 1960s consumerism was in the air. Wharton's 1962 report stated that "the more important current problems appear to be those which involve potential conflicts of interest between fund management and shareowners, the possible absence of arm's-length bargaining between fund management and investment advisers."[8] In 1966 the SEC issued its own report, which maintained that advisers were not sharing economies of scale with funds and that existing restraints on management compensation, such as disclosure of fees, approval of advisory contracts by shareholders and independent directors, and litigation, were not effective.[9]

Therefore, the SEC proposed that the Act be amended to require that management compensation be "reasonable" and to provide that the SEC or fund shareholders could sue in federal court to enforce this standard. The fund industry strongly opposed what it viewed as an attempt to turn courts into rate-makers who were to apply a "reasonableness" standard to management fees.

The 1970 Amendments

After three years of Congressional hearings and negotiations between SEC and industry representatives, Congress enacted Section 36(b) of the Act. It provided that fund advisers have a "fiduciary duty with respect to compensation" they receive from the fund and that the SEC or any shareholder can bring suit for an action for breach of this duty. They also added Section 15(c) requiring fund directors to request from the adviser and to evaluate such information as may be reasonably be necessary to evaluate the advisory contract.

In essence these new statutory provisions turned independent directors into rate-makers, who are to apply a "fiduciary duty" standard in setting management fees.

Consequences of the 1970 Amendments

The 1970 amendments to the Act have spawned numerous shareholder suits challenging fees, but these suits have had little success. Yet litigation continues with plaintiffs' attorneys, usually singling out fund groups having the largest assets (and hence the largest potential recoveries), rather than those with the highest fees. Total costs borne by fund shareholders have declined precipitously in recent

Copyright © 2016 by CCH Incorporated. All Rights Reserved.

years but this appears to be largely the result of the replacement of front-end sales loads with annual 12b-1 fees, economies of scale gained through asset growth, and shareholder movement to lower cost funds rather than a consequence of the 1970 amendments.[10]

Due to the 1970 amendments many independent directors appear to believe that their most important responsibility is setting management fees and that their other responsibilities can be reduced or eliminated. An independent director of a large mutual fund complex declared, "I'd say 95 percent of the job [of an independent director] either is having some influence on investment management results or on costs. That's where we trustees can be most effective. Hopefully, with all of the compliance mechanisms now in place, we need not spend more time than is necessary on compliance."[11]

Because of the problems created by the 1970 amendments, a wide range of experts including the SEC Staff, law professors, and leading 1940 Act attorneys have called for legislation that would permit advisers to create funds that would be free from rate regulation by independent directors or that would have no directors at all.[12]

Late 1970s—Independent Directors as Offsets to Deregulation

As discussed above, in an attempt to prevent a repetition of the abuses of the 1920s, the Act laid down a series of very specific do's and don'ts. This approach was successful in outlawing abuse and in enumerating permissible activities, but by setting forth extremely detailed standards the Act easily could have stifled change and innovation in the fund industry. To counteract this tendency, the Act gave the SEC broad authority to grant exemptions from statutory requirements to specific funds by order or across the board by rule. One of the drafters of the Act warned that unless the SEC utilized its exemptive power wisely, "the Act would be unworkable, restrictive, and would cause unnecessary hardships."[13]

In the first four decades of its administration of the Act, the SEC was hesitant to make wide use of its authority to adopt exemptive rules. Moreover, the industry believed that the SEC Staff was too involved in day-to-day matters and conversely the SEC believed that the industry was too reliant on guidance from the SEC Staff.

The 1970s ushered in a general desire for deregulation and the SEC joined in. In May 1978, SEC Chairman Harold M. Williams announced that the SEC was forming a Staff task force to conduct a systematic review of the Act, rules, and interpretive positions with a view to creating "a regulatory system which relies primarily on funds and their managers to discharge their duties properly … but which preserves a strong oversight function for the Commission."[14]

Specifically, Williams wanted to reduce the SEC Staff's day-to-day involvement and to fill the gap resulting from this deregulation by having independent directors assume additional responsibilities:

> The Investment Company Act exists to exert a force to counter the conflicts of interest inherent in the mutual fund structure. Heretofore, that force has been embodied by the Commission staff, i.e., it has been an external force …. It is now time for appropriate internal forces to be brought to bear. I believe that the independent directors, supported and prodded by an appropriate internal structure, by the courts and by the Commission, are the appropriate source of that force.[15]

Williams expected that the SEC would adopt rules modeled on "the provisions of the Act which already provide that a majority of the independent directors must approve the fund's advisory and underwriting contracts and select the fund's independent accountant."[16] The leader of the SEC's reform effort was Sydney Mendelsohn, a career SEC employee who knew how to get things done at the

Copyright © 2016 by CCH Incorporated. All Rights Reserved.

SEC and who could not be accused of being soft on the industry.

The reform efforts succeeded. In 1980, Chairman Williams was able to report:

> To date, the Commission has adopted or proposed more than 25 rules as part of this program. Many of these rules remove the Commission from the prior approval of business transactions, and instead state standards of conduct for fiduciaries and leave it to each investment company's directors to determine the appropriate process for their company to meet these standards.[17]

Many of these new rules codified SEC exemptive orders previously given to individual funds or Staff interpretive positions. However, some of these rules broke entirely new ground, notably Rule 12b-1, which for the first time explicitly permitted funds, with the approval of their independent directors, to pay for the distribution of fund shares to investors.

1990s—Independent Directors as Complements to SEC Regulation

The numerous SEC rules adopted in the late 1970s and early 1980s relieved the SEC Staff of some of its day to day work, notably granting duplicative exemptive orders and issuing interpretive advice to individual funds. However, the SEC and its Staff remained fully responsible for developing and implementing regulatory policies, inspecting the fund industry, and bringing enforcement actions.

During the 1980s and 1990s, the mutual fund industry experienced unprecedented change and growth. From 1982 to 2000, the number of households owning fund shares soared from 10 million to 47 million, the number of funds grew from 857 to 8,155, and total fund assets increased from $297 billion to over $6.9 trillion. This phenomenal growth was principally due to extremely strong securities markets, but new fund products and new SEC rules in the areas of advertising and distribution also played important roles.[18]

The change in mutual funds from a small cottage industry to the largest financial industry in the world obviously necessitated an increase in SEC resources. Registration fees paid by mutual funds to the SEC sky-rocketed due to the industry's explosive growth, but Congress permitted the SEC to retain only a small portion of these fees, with the vast majority used for other federal spending. The net result was that the SEC lacked adequate resources to oversee the modern fund industry. For example, from 1982 to 1992, the number of investment companies increased by 133 percent and their assets increased by 344 percent, but the SEC Staff devoted to investment company regulation increased by only 74 percent.[19]

The SEC worried about gaps in regulation and sought out other means to provide oversight of mutual funds. One solution was to utilize fund directors. In a 1995 speech to fund directors, SEC Chairman Arthur Levitt described his view of the relationship between the SEC and fund directors:

> I would characterize the relationship between the SEC and fund directors as *a partnership* in the public interest. *Your supervision complements our oversight*—in fact, the SEC's abilities as a watchdog pales in comparison with yours. You're in an ideal position to monitor new developments and trouble-shoot problems as they arise.[20]

Whereas in the late 1970s the SEC sought to reduce its Staff's involvement and concomitantly increase the role of independent directors, the SEC now sought to maintain the existing balance between SEC Staff and directors, but to increase directors' independence by reducing management's influence over the board. In 1999, the SEC held a roundtable on the role of independent directors that concluded with Chairman Levitt challenging the industry and the SEC Staff to offer recommendations. Both the fund industry and the SEC Staff responded.

Copyright © 2016 by CCH Incorporated. All Rights Reserved.

The Investment Company Institute appointed a blue ribbon committee that recommended a series of best practices, including proposals providing that at least two-thirds of directors be independent, new independent directors be selected by incumbent independent directors, independent directors be represented by their own legal counsel, audit committees be comprised entirely of independent directors, and one or more "lead" independent directors coordinate the activities of independent directors.[21] The SEC responded by amending a number of rules to require that independent directors constitute a majority of the board, new independent directors be selected by incumbent independent directors, and any legal counsel for independent directors be "sufficiently independent."

Perhaps the most important measure to increase the effectiveness of independent directors came about from a speech Chairman Levitt delivered in 1993. In that speech he asked whether the lack of SEC resources could be offset by the creation of a self-regulatory organization for the mutual fund industry. The ICI responded with a proposal that the SEC mandate a system of self-regulation *at the individual fund level* by requiring each fund to have compliance standards and procedures and a senior compliance officer reporting to the fund's independent directors and board.[22] It took 10 years, but in 2003, as a response to the mutual fund trading scandals, the SEC finally adopted such a compliance rule, Investment Company Act Rule 38a-1.

2000s—Independent Directors as Overseers of Business Risks

From 1940 until this century, throughout all of the different regulatory periods discussed above, the SEC sought to have independent directors concentrate on situations where there are conflicts of interest between funds and their advisers. In fact, in 1992 the SEC Staff expressly warned against involving independent directors in non-conflict matters:

> we believe that independent directors perform best when required to exercise their judgment in conflict of interest situations—for example, when they review advisory contracts under sections 15(c) and 36(b) or review the use of affiliated brokers under rule 17e-1. We believe that independent directors are unnecessarily burdened, however, when required to make determinations that call for a high level of involvement in day-to-day activities. Rules that impose specific duties and responsibilities on the independent directors should not require them to "micro-manage" operational matters. To the extent possible, operational matters that do not present a conflict between the interests of advisers and the investment companies they advise should be handled primarily or exclusively by the investment adviser.[23]

The SEC's reaction to events in the early years of this century have brought this historic view of the role of independent directors into question. The September 11, 2001 terror attacks produced SEC interest in business continuity and disaster recovery. There were a series of high profile cyber breaches at major American corporations that led the SEC to focus on corporate cyber security programs. The 2007-2008 financial crisis demonstrated the fragility of the financial system. Bank regulators with their emphasis on safety and soundness wanted to displace the SEC as the regulator of the asset management industry. In response to these developments, the SEC recently has sought to involve fund independent directors in a number of *non-conflict* areas including business continuity and disaster recovery, cybersecurity, portfolio liquidity, and fund investment in derivatives.

Neither the Act nor the rules thereunder expressly require fund directors to become involved in matters such as business continuity, disaster recovery, and cybersecurity. The SEC, the fund industry, and the mutual fund bar generally have assumed that these areas are implicitly part of fund directors' general oversight responsibilities.[24] Last year the

Copyright © 2016 by CCH Incorporated. All Rights Reserved.

SEC proposed rules that would make fund directors responsible for oversight of portfolio liquidity and fund investment in derivatives.[25]

These developments constitute a major departure from independent directors' traditional focus on conflicts of interest involving funds and their advisers. It is too early to tell how successful directors will be in overseeing functions that require highly specialized expertise and that do not involve intrinsic conflicts of interest between funds and advisers.

Conclusion

Articles on mutual fund regulation often extol the drafters of the Investment Company Act of 1940 for having created a strong system of independent directors to serve as "watchdogs" looking out for the interests of fund shareholders. In fact, due to the pro-regulatory mood of the late 1930s and directors' dismal record during the 1920s, the drafters of the Act intentionally granted independent directors little specific authority beyond their role under state law.

The robust system of independent directors we have today came about from a series of SEC actions that occurred decades after 1940:

> —In 1970 the SEC, in the age of consumerism, succeeded in having the Act amended to make independent directors responsible for setting management fees.
>
> —In the late 1970s the SEC, in the age of deregulation, decreased its day-to-day regulation of funds and offset this lessening of regulation by assigning independent directors a series of new responsibilities.
>
> —In the 1990s the SEC, concerned over its lack of resources to regulate the burgeoning fund industry, took steps designed to increase the effectiveness of independent directors as complements to SEC regulation.
>
> —Most recently the SEC, concerned about business risks to investment advisers and the funds they manage, has sought to make independent directors responsible for oversight of those risks.

These developments offer excellent illustrations of Holmes' observations that "The life of the law . . . has been experience," and that experience includes not simply events by themselves, but changing moral and political theories, intuitions about public policy, and prevailing prejudices.

It is inevitable that in the future there will be changes in SEC regulatory policies and hence in its views regarding the role of independent directors.

It is beneficial that generally the SEC can change the role of independent directors without the need for Congress to amend the Act. It is also beneficial that the SEC can correct a particular requirement that is thought to be incorrect or outdated.[26] However, it would be worthwhile every once in a while for the SEC to step back and look at directors' responsibilities *as a whole.* In 1999 the SEC held a roundtable focused on improving fund directors' *independence.* As discussed above, that roundtable helped produce a series of regulatory and voluntary reforms. It would be valuable for the SEC to hold a similar roundtable focused on directors' *responsibilities.* Such a process would indicate areas where adjustments in specific responsibilities are needed or where there are regulatory inconsistencies that should be reconciled. More broadly, the process could highlight areas where independent directors' responsibilities should be expanded, decreased, eliminated, or modified in order to better reflect prevailing views.

Matthew P. Fink is an independent director of the Oppenheimer Funds, former president of the Investment Company Institute, and author of *The Rise of Mutual Fund; An Insider's View*. **Jacqueline Edwards** is an associate in the

Copyright © 2016 by CCH Incorporated. All Rights Reserved.

investment management practice of Kramer Levin Naftalis & Frankel LLP.

NOTES

1 Natalie R. Grow, "The 'Boston-Type Open-End Fund'—Development of a National Financial Institution: 1924-1940," doctoral thesis, Harvard University, 1977, 119.

2 "Notes: Regulation of Investment Companies," *University of Pennsylvania Law Review,* 88, no. 5 (March 1940) 584, 590-92.

3 Sections 15(b)(2), 15(c)(1), and 32(b) of S. 3580, 76th Cong., 3d sess., March 13, 1940.

4 In addition to the article cited in note 2 *supra,* articles dealing with the Investment Company Act that were published in 1940-1942 include: Richard B. Tolins, "The Investment Company Act of 1940," *Cornell Law Review,* 26, no. 1 (1940), 77; "Notes: The Investment Company Act of 1940," *Columbia University Law Review,* 41 (1941), 269; "Federal Legislation: Investment Company Act of 1940," *Georgetown University Law Journal,* 29 (1941), 614; J. Woodrow Thomas, "The Investment Company Act of 1940," *George Washington University Law Review,* 9 (1941), 918; Alfred Jaretzki, Jr., "The Investment Company Act of 1940," *Washington University Law Quarterly,* 26, no. 3 (April 1941), 393; "The Investment Company Act of 1940," *Yale Law Journal,* 50 (1941), 440; Chelcie C. Bosland, "The Investment Company Act of 1940 and its Background I," *Journal of Political Economy,* 49, no. 4 (August 1940), 477; "The Investment Company Act of 1940 and its Background II," *Journal of Political Economy,* 49, no. 5 (October 1941), 687; and Robert G. Reed, "The Investment Company Act of 1940—An Extension of the Administrative Process," *University of Kansas Law Review,* 10 (1942), 165.

5 Alfred Jaretzki, Jr., "Duties and Responsibilities of Directors of Mutual Funds," *Law and Contemporary Problems,* Duke University School of Law (summer 1964), 1, 18.

6 Statement of David Schenker, Chief Counsel, SEC Investment Trust Study, *Investment Trusts and Investment Companies,* Hearings, House Commerce Subcommittee, 76th Cong., 3d sess., 1940, 109-10; emphasis added.

7 James M. Storey and Stuart F. Fross, *The Uneasy Chaperone: A Resource for Independent Directors of Mutual Funds* (Stamford, CT: Management Practice, 3d ed. 2014), 52.

8 Wharton School of Finance and Commerce, *A Study of Mutual Funds,* House Report no. 2274, 87th Cong., 2d sess. (162), 3.

9 US Securities and Exchange Commission, *Report of the US Securities and Exchange Commission on the Public Policy Implications of Investment Company Growth,* House Report no. 2337, 89th Cong., 2d sess. (1966), 13-14.

10 *See* John D. Rea and Brian K. Reid, "Trends in the Ownership Cost of Equity Mutual Funds," *Investment Company Institute Perspective,* 4, no. 3 (November 1998); and "Trends in Expenses and Fees of Mutual Funds, 2013," *ICI Research Perspective,* 20, no. 2, May 2014.

11 "Whose Fund Is It, Anyway? A Practitioner's Guide to Better Mutual Fund Governance," *Directorship,* 32, no. 2 (February 2006): 15 and 13.

12 Division of Investment Management, US Securities and Exchange Commission, *Protecting Investors: A Half Century of Investment Company Regulation* (Washington, DC: Government Printing Office, May 1992), 291-346; Jerry W. Markham, "Mutual Fund Scandals—A Comparative Analysis of the Role of Corporate Governance in the Regulation of Collective Investments," 3 Hastings Business Law Journal, 67 (2006); and Stephen K. West, "Is There a Better Way to Regulate Mutual Funds," Paper presented to the Committee on Investment Management of the New York Bar," March 6, 2008.

13 Jaretzki, "The Investment Company Act of 1940," *George Washington University Law Quarterly,* 344.

14 Harold M. Williams, "A Challenge to Mutual Funds," speech, Investment Company Institute General Membership Meeting, Washington, DC, May 17, 1978, 3.

Copyright © 2016 by CCH Incorporated. All Rights Reserved.

15 *Ibid*, 6.

16 *Ibid*, 5.

17 Harold M. Williams, "Some Further Challenges to Mutual Funds," speech, Investment Company Institute General Membership Meeting, Washington, DC, May 14, 1980, 7.

18 Household statistics are from Sarah Holden and Michael Bogdan, "Trends in the Ownership of Mutual Funds in the United States, 2007," *Research Fundamentals,* 16, no. 5 (November 2007). Other statistics are from Investment Company Institute, *2007 Fact Book,* 93 and 95.

19 Matthew P. Fink, "President's Report," speech, Investment Company Institute General Membership Meeting, May 27, 1993, 12-13.

20 Arthur Levitt, "Mutual Fund Directors as Investor Advocates," speech, Second Annual Symposium for Mutual Fund Trustees and Directors, Washington, DC, April 11, 1995, 1-2.

21 Investment Company Institute, *Report of the Advisory Committee on Best Practices for Fund Directors: Enhancing a Culture of Independence and Effectiveness* (Washington, DC: Investment Company Institute, June 24, 1999).

22 Letter dated November 19, 1993, from Matthew P. Fink, president, Investment Company Institute, to Arthur J. Levitt, Chairman, US Securities and Exchange Commission, in files of the Investment Company Institute.

23 Division of Investment Management, *Protecting Investors,* 266.

24 Luis A. Aguilar, "Boards of Directors, Corporate Governance and Cyber-Risks: Sharpening the Focus," speech, New York Stock Exchange Cyber Risk and the Boardroom Conference, New York, June 10, 2014; Independent Directors Council and Investment Company Institute, *Fund Board Oversight of Risk Management,* September, 2011; and Arthur C. Delibert, Marguerite W. Laurent, and Lori L. Schneider, "Cybersecurity: Could Investment Company Directors Be Liable for a Breach?" *Investment Lawyer* Vol. 22, No. 2 (February 2015).

25 *Open-End Fund Liquidity Risk Management Programs; Swing Pricing; Re-Opening of Comment Period for Investment Company Reporting Modernization Release*, Rel. No. IC-31835, Sept. 22, 2015; *Use of Derivatives by Registered Investment Companies and Business Development Companies*, Rel. No. IC-31933, Dec. 11, 2015.

26 For example, the original version of the SEC rule governing fund use of foreign custodians required directors to make detailed findings with respect to placing assets in particular countries and each arrangement. The SEC amended the rule so that directors may delegate these responsibilities to the fund's adviser or US custodian. See *Custody of Investment Company Assets Outside the United States*, Rel. No. IC-24424, April 27, 2000.

Copyright © 2016 CCH Incorporated. All Rights Reserved
Reprinted from *The Investment Lawyer*, April 2016, Volume 23, Number 4, pages 15–23,
with permission from Wolters Kluwer, New York, NY,
1-800-638-8437, www.wklawbusiness.com

Copyright © 2016 by CCH Incorporated. All Rights Reserved.