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SEC IM Division Director William Birdthistle's Mutual Fund Views Revealed in His Book

By Gary Cohen

William A. Birdthistle, recently named¹ Director of the Securities and Exchange Commission's (SEC or Commission) Division of Investment Management (IM Division), authored a 2016 book² (Book) that set out his views on mutual funds, as follows:

- There are “powerful advantages of investing through [mutual] funds,”³ including the “trinity of benefits”⁴ of “Instant Diversification,”⁵ “Professional Money Management,”⁶ and “Easy Redemption.”⁷ “Mutual funds are—and, in large part, ought to be—the overwhelmingly popular choice for most American families.”⁸
- At the same time, “ordinary investors are largely unaware of their complexity and peril” and do not “appreciate their hidden dangers.”⁹
- “The organizational blueprint of even a standard mutual fund can resemble an angry baby’s adventure with knitting yarn, and the architects of this chaos have little incentive to untangle it for us.”¹⁰ Mutual funds “remain a curious species of financial instrument whose inner workings are alien to many Americans.”¹¹
- “A typical fund prospectus can easily run to forty, fifty, or more pages in length, bloated with legalistic scrapple.”¹²
- “[F]und trustees are expected to police the interests of the fund’s shareholders,” but “our tour of malfeasance . . . will demonstrate [that] some

trustees have performed that role better than others.”¹³

- The SEC “probably” should “revise the regulations governing mutual funds,” because “a number of the rules in place are perplexing” and “some of them are just silly.”¹⁴
- The SEC “could and should” bring an excessive fee lawsuit “against outlier advisers that charge the most outrageous fees.”¹⁵

Book's Views

The views listed above and others set out in his Book represent Director Birdthistle’s “effort to teach investors how to use our new investing technology safely” and enable investors to “learn the structural vulnerabilities of investing on their own and the dangers to avoid in mutual funds.”¹⁶

It is certainly possible that Director Birdthistle’s views expressed in his Book are not his current views. His views may have changed over the six years since his Book was published. Furthermore, the mutual fund industry may have adopted best practices, or the SEC may have taken or proposed corrective action,¹⁷ that may have mooted some of his complaints or calls to action.

Moreover, this article does not cover all of Director Birdthistle’s views. Rather, it addresses only certain of his views of mutual funds, investment advisers, and the SEC that may signal his

areas of focus as Director of the SEC's Division of Investment Management.

It follows that this article runs the risk of presenting a distorted representation of Director Birdthistle's views, particularly an impression that he harbors an overly negative opinion of mutual funds and their investment advisers. This article does not mean to leave such an impression and, to that end, includes quotations¹⁸ from his book that express his fundamental view that mutual funds have powerful advantages for investors and ought to be the overwhelmingly popular choice for most US families.

Mutual Fund "Experiment"

Director Birdthistle launches his book with the premise that "[o]ver the past 30 years, America has embarked on a grand experiment—perhaps the richest and riskiest in our financial history—to change the way we save money."¹⁹

He explains that "[t]oday, the benefits of Social Security and pensions look alarmingly inadequate,"²⁰ and "[w]e as a nation have chosen to entrust our savings . . . to the smaller, individual accounts . . . such as 401(k)s."²¹ He then observes that "[t]he rise of these individual accounts has, in turn, funneled massive amounts of retirement savings . . . into one of the most popular investment options in personal accounts: the mutual fund."²²

"The primary consequences of our new approach," he asserts, "are that ordinary Americans now find themselves responsible for deciding whether to enroll in an investment account, what amount of each paycheck to contribute to that account, and how to invest those savings successfully for up to forty years of a career and for decades more in retirement."²³ He believes that "[t]hrough the rhetoric of individual choice may appeal greatly to the American psyche, this change also brings personal liability for getting any of these difficult decisions wrong."²⁴

He bemoans that, so far in the experiment, "we are getting them wrong," pointing out that "approximately one-third of US households currently have no

retirement savings at all" and "those who have accumulated nest eggs have enthusiastically vouchsafed them to the mutual fund[s]" which "suffer from a number of problems."²⁵ He identifies the "problems" as "the structural vulnerabilities in mutual funds, the perverse incentives of fund managers, and the litany of scandals that have bedeviled the investment industry."²⁶

Director Birdthistle concludes that "[t]o negotiate our new investing paradigm successfully, Americans will need a greater understanding of mutual funds, more transparency from the financial firms that manage them, and stronger enforcement by prosecutors of the regulations that govern funds."²⁷

"Structural Conflict"

Director Birdthistle states that the "anatomy of mutual funds is complicated and counterintuitive" and the "structure" of mutual funds is "sufficiently complicated to confuse even a number of well-briefed Supreme Court justices."²⁸

"[P]erhaps the most striking overall characteristic of a mutual fund," he states, "is its remarkably passive helplessness."²⁹ He explains that "[f]unds are the financial equivalent of patients in a vegetative state, kept alive only by a complex array of external machines and doctors"³⁰ including investment advisers, distributors, custodians, transfer agents, administrators, and other service providers.³¹

He does not believe that investors appreciate the "structural conflict between investment advisers and fund investors" that "legally, if not practically, advisers are business entities separate from the funds they manage,"³² and "how much an adviser dominates both its funds and their boards."³³

"Perverse Incentives"

Director Birdthistle states that "the structure and economics of mutual funds" described above, reveal "a number of surprises for ordinary investors," including "incentives that are structural and

perverse,” as well as “more direct threats to the wealth and welfare of fund investors.”³⁴ He lays out what he calls “Diseases and Disorders,” “the startling array of ploys,” and “inventory of misbehavior.”³⁵

He hastens to add that these “are not intended to be an indictment of the mutual fund industry but, rather, to provide a map for ordinary investors of where be the dragons.”³⁶ He explains that “[o]utright burgling is rare, but mutual funds are the way we save now, so we must confront their foibles if we are to enjoy their fortes.”³⁷

“[T]he level or magnitude of fees,” he says, “is the most direct source of peril for the fund investor.”³⁸

First, “[f]iguring out what is too much, however, is a somewhat more complicated project than it appears.”³⁹ Indeed, Director Birdthistle accepts the view that “competition did not have salutary effects in this setting”⁴⁰ and that “if fund advisers charged all ordinary investors artificially high rates, a comparison of those rates would be an unhelpful check on inflated fees.”⁴¹ Second, he argues that “barriers stymie this breezy notion” that “mutual fund investors . . . can simply hop out of funds” with high fees, noting that “[t]heir options may be narrowed to just the limited array of funds within their retirement plan” and “[t]rading in and out of funds could impose significant tax liabilities.”⁴²

Director Birdthistle then proclaims that “[i]n the world of mutual funds, perhaps the most perplexing and troubling fee that investors pay is the [Rule 12b-1] distribution fee”⁴³ that causes investors to “pay for the cost of marketing, advertising, and distributing the shares in a fund.”⁴⁴

First, he states that the justification of the fee in causing a fund to grow “sufficiently large” to “accrue greater bargaining power and enjoy economies of scale”⁴⁵ is controverted by an SEC study finding “that savings do not make their way to investors and are simply pocketed by the fund firms.”⁴⁶ Second, he questions the use of Rule 12b-1 fees for the “pay-to-play practice of paying for shelf space” through “[r]evenue [s]haring,” which he characterizes as “redolent of kickbacks and bribery.”⁴⁷

The third perverse incentive that Director Birdthistle questions is soft dollars earned from paying up for research. He readily acknowledges that the practice is legal under Section 28(e) of the Securities Exchange Act of 1934,⁴⁸ although critics say they “resemble kickbacks.”⁴⁹

First, he notes that the SEC has “found investment advisers using [soft dollars] to pay for travel, airfare, hotels, meals, employee salaries, and cellphone bills,” thereby “paddling well outside the Section 28(e) safe harbor.”⁵⁰ Second, he questions the impact of soft dollars on the “fiduciary principle requiring a money manager to seek the ‘best execution’ when trading securities for a client.”⁵¹ Finally, he complains that “fund investors will have a difficult time policing them to discern potentially beneficial transactions from the actually harmful ones,”⁵² because “[n]owhere in the compendious disclosure documents required of fund firms are soft dollars reported or their number and uses disclosed.”⁵³

“Gauntlet of Abuses”

Director Birdthistle discusses in detail the “alarming gauntlet of abuses” in the mutual fund industry that “could certainly cool an investor’s ardor for entrusting all her savings to mutual funds.”⁵⁴ But he presents a balanced picture, emphasizing that “we must bear in mind that this murderers’ row is not, nor is it intended to be, fair proof that the mutual fund itself is irredeemably flawed.”⁵⁵

In the area of “fair valuation,” he warns that “[a]n unscrupulous adviser” can “earn greater revenues” by reporting “the value of the securities in a fund’s portfolio . . . to be greater than it actually is.”⁵⁶ Overvaluation can result from “find[ing] some investments whose prices are difficult to determine and rarely reported”⁵⁷ or failing to “reflect drops in value.”⁵⁸

He sees the remedy to be “a best practice of conscientious boards of trustees . . . to obtain the expertise of third-party vendors who specialize in providing values for investments that have no readily available market price” and “regularly

back-test these estimated values by comparing them to the next actual trades of the illiquid securities.”⁵⁹ He adds that disclosure of “the margin of error between the values a board uses and the next actual market prices” “might be illuminating” to investors.⁶⁰

Director Birdthistle also warns against “late trading” that “directly enriches the illicit traders by taking money from long-term fund investors.”⁶¹ Late trading allows “preferred customers” of fund sponsors to place buy or sell orders after the 4:00 p.m. deadline to take advantage of “good news” or “bad news” that develops after the deadline.⁶²

In one instance of late trading, a fund sponsor permitted “preferred customers” to place buy or sell orders for fund shares after the 4:00 p.m. deadline “that would be backdated” to the deadline.⁶³ In another instance, a fund sponsor accepted “a variety of ‘proposed’ fund trades . . . prior to the 4:00 p.m. deadline so that they could be time-stamped appropriately,”⁶⁴ but would permit non-profitable orders to be “tossed out”⁶⁵ after “evaluating market movements after the close of business.”⁶⁶

Director Birdthistle further warns against “market timing” based on time zone arbitrage, where “knowledgeable” investors like “hedge funds” can arbitrage “the inefficiencies in stock exchanges across different time zones.”⁶⁷ He explains that time-zone arbitrage involving large buy and sell amounts can harm both “[l]ong-term ordinary investors in a mutual fund”⁶⁸ and “the fund’s own portfolio manager.”⁶⁹

Although “market timing is not illegal per se,” he notes that “many fund managers voluntarily converted [it] from a legal practice into an illegal one”⁷⁰ by disclosing that market timing is against fund policy. Nevertheless, after “the SEC roused itself belatedly,” it “turned up” cases where investment adviser personnel “market timed [their] own funds.”⁷¹ In other cases, investment advisers permitted market timers in return for their placing large amounts of “sticky assets” with the investment advisers.⁷²

Fund Variations

Director Birdthistle examines “several variations of funds . . . that avoid some of the most dangerous elements” described above, “while preserving the most powerful advantages of investing through funds.”⁷³ In addition to describing the positive aspects of these funds, he identifies some negatives noted below.

Regarding target-date funds, he discusses a number of “potential issue[s]”:⁷⁴

- an investor may need a “through” fund with a “glide-path” that “attempt[s] to carry its investors *through* their retirement date and closer to the real finishing line”;⁷⁵
- target date funds often invest in “underlying funds almost always . . . managed by the same investment adviser,”⁷⁶ thus “generating advisory fees at two levels”;⁷⁷
- “[i]f target-date funds sufficiently lull an entire generation of investors into not having to worry about how markets work, then many investors may not bother to learn”;⁷⁸
- target-date funds “are intended to serve as a complete portfolio for their investors,” but “many investors today have some of their savings in a target-date fund and the rest in an incoherent mess of other funds”;⁷⁹ and
- the “entire theoretical foundation of target-based funds may rest on a dangerous fault line,” namely the “premise . . . that bonds are safe.”⁸⁰

Regarding exchange-traded funds (ETFs), he describes a number of “drawbacks in the hands of most investors”:⁸¹

- “[m]ost ETFs suffer from a degree of divergence between the performance of their shares and the performance of the index the ETF is attempting to mimic” known as a “tracking error” which,

“in periods of market volatility, . . . can expand to a significant disparity”;⁸² and

- “[a]s ETFs have colonized and exhausted the supply of reasonable indices, they have expanded into unreasonable ones” that “are narrow, risky, and poor choices for retail investors.”⁸³

Regarding money market funds, he refers to the “one money market fund [that] did break the buck” and others that were “near-misses”⁸⁴ and the 2008 “run” on money market funds.⁸⁵ He warns that “the recent history of money market funds should chasten ordinary investors,” because “they could fail at such a critical moment,”⁸⁶ despite subsequently adopted “SEC’s rules.”⁸⁷

Stronger SEC Enforcement

Director Birdthistle believes that “[p]robably” “we [should] revise the regulations governing mutual funds” and “should probably tinker with many rules governing mutual funds,” opining that “a number of the rules in place are perplexing . . . [a]nd some of them are just silly.”⁸⁸ He gives the example of the SEC’s allowance of soft dollar practices that “in other contexts would be derided as kickbacks.”⁸⁹ He also complains that “disclosure can be farcical” with “fund prospectuses and SAIs now run[ning] to dozens or even a hundred pages in length, bloated with regurgitated boilerplate” and “squirreled away on obscure websites visited by only a handful of investors and understood by fewer.”⁹⁰

But he hastens to say that rulemaking is “technical microsurgery” and the “average investor is more likely to appreciate—and to benefit from—not a revision of our rules but a greater effort to enforce them.”⁹¹ He complains that “[o]ur current enforcement efforts come in two dominant strains: misplaced private lawsuits and feeble public ones.”⁹²

As for private lawsuits, he says that the excessive fee cases under Section 36(b) of the 1940 Act have not “proved to be very salutary to mutual fund investors for the simple reason that they rarely target

the worst offenders.”⁹³ Instead, private lawsuits have been brought “against the biggest mutual fund families with the most investors because the large net asset values in those cases tend to product larger settlements.”⁹⁴

As for SEC lawsuits, Director Birdthistle claims that “the SEC has been disappointing” in its “inaction.”⁹⁵ He points out that “until very recently, the SEC had never brought an excessive fee case.”⁹⁶ He recognizes that “[p]erhaps the SEC’s inaction meant only that the legal standard for proving excessive fees is too cumbersome and unwinnable,” because “no plaintiff has ever prevailed under the *Gartenberg* standard.”⁹⁷ Nevertheless, “he argues, the SEC has “a corps of the nation’s elite attorneys” and “unique abilities” and “should bring suit to determine the precise contours of the *Jones v. Harris* standard and to challenge truly stratospheric fees.”⁹⁸ He insists that an SEC lawsuit “could and should be brought against outlier advisers that charge the most outrageous fees.”⁹⁹

He further points out that “state attorneys general, not the SEC, began the investigations that uncovered the widespread abuses of market timing and late trading.”¹⁰⁰ He concludes that the “mere presence of an active SEC could ensure greater compliance by financial firms that manage mutual funds.”¹⁰¹

“Financial Licenses”

Finally, Director Birdthistle believes that one of the “important impediments [that] stand[s] in the way of reforming how we save” is “the financial literacy of our citizens.”¹⁰²

He proposes a bold solution for the low level of investor financial literacy. “[A]dministrators” of tax-advantaged plans select for investors “default investments”¹⁰³ consisting of least risky funds “such as target-date funds and other broad-based index funds.”¹⁰⁴ Plan participants would be subject to a “modest licensing regime” requiring “individuals who wish to invest savings held in tax-advantaged

accounts using investments outside of the default settings to first obtain a license to do so.”¹⁰⁵ “To obtain the license, individual investors should have to take lessons and to pass a test.”¹⁰⁶

“Investors who fail the test or decline to take it can, via those default investments, still enjoy automatic enrollment in an individual account, automatic contributions into that account, and automatic investments into” the default investments.¹⁰⁷ “[F]or many investors, such an approach is a comparatively prudent way to husband their savings.”¹⁰⁸

Conclusion

Director Birdthistle is in a position to implement his views on rulemaking and enforcement action by causing his Division of Investment Management to make recommendations to the Commission. The fact that Director Birdthistle’s views are generally similar to those that Chair Gensler expressed in his book¹⁰⁹ enhance the possibility that the Commission could accept any such recommendation.

At the same time, certain of the abuses¹¹⁰ that Director Birdthistle addresses appear to have been substantially ameliorated, if not eliminated, prior to the publication of his book. Other problems that he identifies have been addressed by the SEC¹¹¹ since the publication of his book. Although Director Birdthistle believes that the SEC “[p]robably” “should . . . revise the regulations governing mutual funds,” characterizing some of them as “perplexing” and “silly,”¹¹² he does not cite any specific rule.

Moreover, Director Birdthistle and Chair Gensler could find it difficult to convince the Commission to overturn precedent by, for example, bringing excessive fee lawsuits against mutual fund investment advisers.¹¹³ The Commission traditionally has taken the position that its limited resources are better spent on direct regulation rather than time-consuming litigation.¹¹⁴

on the Staff of the SEC’s IM Division, ultimately serving as assistant chief counsel, and has dealt with the Division as a private practitioner for more than 50 years. Mr. Cohen has served on *The Investment Lawyer’s* Editorial Board since the outset of the publication and has published numerous articles in this publication over many years. He thanks his colleagues Ann B. Furman and Thomas C. Lauerman and his firm’s librarian, Nicole Warren, for reviewing and contributing to this article. The views expressed are those of Mr. Cohen and do not necessarily reflect the views of his firm, its lawyers or its clients.

NOTES

- ¹ Press Release, SEC, William Birdthistle Named Director of Division of Investment Management (Dec. 21, 2021), available at <https://www.sec.gov/news/press-release/2021-268>. The Press Release provides the following information:

Mr. Birdthistle joined the faculty at Chicago-Kent College of Law in 2006, and he earned the school’s Excellence in Teaching Award in 2010. He also has served as a visiting professor of law at the University of Chicago Law School, where he won the Award for Teaching Excellence in 2019 for teaching securities regulation. His research explores investment funds, securities regulation, and corporate governance, and he has served as counsel of record on multiple amicus briefs to the U.S. Supreme Court. Prior to academia, he practiced law at Ropes & Gray in Boston for five years as a corporate associate in the firm’s investment management practice. Mr. Birdthistle received his J.D. from Harvard Law School, where he served as managing editor of the *Harvard Law Review*, and received a B.A. summa cum laude in English and psychology from Duke University in 1995.

- ² William A. Birdthistle, “Empire of the Fund” (2016) [hereinafter Book]. The 250-page Book is subtitled “The Way We Save Now.” Director Birdthistle has

Mr. Cohen is of counsel at Carlton Fields, P.A., in Washington, DC. Mr. Cohen spent five years

produced an advertisement for the Book in the form of a rap video with the following passage: “Problem the first:/ the way mutual funds work/ They’re not the worst/ though some are run by jerks./ They’ve got a real thirst/ for assets but they shirk./ And when the Dow bursts/ they’re still eating at Le Cirque,” available at <https://www.youtube.com/watch?v=F3WxNAAgTMI>. This article speaks as of January 31, 2022.

The author of this article also wrote an article on SEC Chair Gary Gensler’s views on mutual funds as expressed in Gensler’s 2002 book titled “The Great Mutual Fund Trap” [hereinafter Chair Gensler’s Book]. Gary O. Cohen, “SEC Chair Gensler’s Mutual Fund Views Revealed in His Book,” *The Investment Lawyer*, Vol. 28, No. 11, at 21 (Nov. 2021). For a broader perspective on how IM works, see Gary O. Cohen, “Going Public by Norm Champ: A Tell-Some Expose of ‘Bureaucratic Warfare,’ ‘Bizarro Decisions’ and ‘Political Hit Jobs,’ by a Former Director of the SEC’s Division of Investment Management,” *The Investment Lawyer*, Vol. 24, No. 9, at 10 (2017).

3 Book, *supra* n.2 at 139.

4 *Id.* at 24.

5 *Id.* “Mutual funds are, in essence, the Las Vegas buffets of the financial world,” delivering to investors the benefits of “instant diversification at lower proportional transaction costs.” *Id.* at 25.

6 *Id.* at 26.

7 *Id.* at 27.

8 *Id.* at 18 (footnote omitted).

9 *Id.* at 17. Mutual funds “can carry hidden dangers.” *Id.* at 9.

10 *Id.* at 30.

11 *Id.* (footnote omitted).

12 *Id.* at 56.

13 *Id.* at 37.

14 *Id.* at 215.

15 *Id.* at 216.

16 *Id.* at 15.

17 See *infra* nn.110-111 and accompanying text.

18 See *supra* nn. 3-8 and *infra* 36-37, 55, 73 and accompanying text.

19 *Id.* at 1.

20 *Id.*

21 *Id.* at 2.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.* (emphasis in original) (footnote omitted).

26 *Id.*

27 *Id.* Regarding Director Birdthistle’s views on the “need” for “greater understanding of mutual funds,” see the section below titled “Financial Licenses.” Regarding Director Birdthistle’s views on the “need” for “stronger enforcement by prosecutors of the regulations that govern funds,” see the section below titled “Stronger SEC Enforcement.”

28 *Id.* at 29 (footnote omitted).

29 *Id.* at 31.

30 *Id.*

31 See *id.* at 32-47.

32 *Id.* at 40.

33 *Id.* at 48.

34 *Id.* at 69.

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.* at 72.

39 *Id.*

40 *Id.* at 75, citing the writings of Richard Posner.

41 *Id.* at 76.

42 *Id.* at 77.

43 *Id.* at 81.

44 *Id.* at 72.

45 *Id.* at 82 (footnote omitted). See also 84.

46 *Id.* at 83, citing, at 82, a 2004 study by Dr. Lori Walsh, a financial economist in the SEC’s Office of Economic Analysis.

47 *Id.* at 86.

48 *Id.* at 94.

49 *Id.* at 97.

50 *Id.*

51 *Id.* at 94 (footnote omitted).

52 *Id.* at 97-98.

53 *Id.* at 98.

54 *Id.* at 139.
 55 *Id.*
 56 *Id.* at 101.
 57 *Id.* at 102.
 58 *Id.* at 106.
 59 *Id.* at 110 (footnote omitted).
 60 *Id.* at 111.
 61 *Id.* at 120.
 62 *Id.* at 117.
 63 *Id.*
 64 *Id.* at 119.
 65 *Id.* at 120.
 66 *Id.* at 119.
 67 *Id.* at 125.
 68 *Id.* at 127.
 69 *Id.* at 129.
 70 *Id.* at 130 (footnote deleted).
 71 *Id.* at 132.
 72 *Id.* at 131.
 73 *Id.* at 139.
 74 *Id.* at 174.
 75 *Id.* at 170 (emphasis in original).
 76 *Id.* at 171.
 77 *Id.* at 172.
 78 *Id.* at 173.
 79 *Id.*
 80 *Id.* at 174.
 81 *Id.* at 187.
 82 *Id.*
 83 *Id.* at 188.
 84 *Id.* at 197.
 85 *Id.* at 199.
 86 *Id.* at 202.
 87 *Id.*
 88 *Id.* at 215.
 89 *Id.*
 90 *Id.*
 91 *Id.*
 92 *Id.*
 93 *Id.*
 94 *Id.* (footnote omitted).
 95 *Id.* at 216.

96 *Id.* (footnote omitted).
 97 *Id.*
 98 *Id.*
 99 *Id.*
 100 *Id.*
 101 *Id.*
 102 *Id.* at 206.
 103 *Id.* at 208.
 104 *Id.*
 105 *Id.* at 207.
 106 *Id.* at 207-208.
 107 *Id.* at 208.
 108 *Id.*
 109 Chair Gensler's Book, *supra* n.2.
 110 For example, late trading, *supra* nn. 61-66, and market timing, *supra* nn.67-72, and accompanying text.
 111 For example, subsequent to the publication of Director Birdthistle's Book in 2016, the SEC proposed mutual fund disclosure reforms in *Tailored Shareholder Reports, Treatment of Annual Prospectus Updates for Existing Investors, and Improved Fee and Risk Disclosure for Mutual Funds and Exchange Traded Funds; Fee Information in Investment Company Advertisements*, Release Nos. 33-10814, 34-89478, IC-33963 (Aug 5, 2020), available at <https://www.sec.gov/rules/proposed/2020/33-10814.pdf>. See Press Release, SEC, SEC Proposes to Improve the Retail Investor Experience through Modernized Fund Shareholder Reports and Disclosures, No. 2020-172 (Aug. 5, 2020), available at <https://www.sec.gov/news/press-release/2020-172>. Also subsequent to the publication of Director Birdthistle's Book, the SEC adopted requirements regarding fund valuation of portfolio securities in *Good Faith Determinations of Fair Value*, Release No. IC-34128 (Dec. 3, 2020), available at <https://www.sec.gov/rules/final/2020/ic-34128.pdf>. See Press Release, SEC, SEC Modernizes Framework for Fund Valuation Practices, No. 2020-302 (Dec. 3, 2020), available at <https://www.sec.gov/news/press-release/2020-302>.
 112 Book, *supra* n.2. at 215.

¹¹³ See *supra* nn. 95-99 and accompanying text.

¹¹⁴ For discussion of a related matter, see Gary O. Cohen, “SEC’s Hesitancy to Intervene in Litigation

to Correct Misstatements Regarding the Federal Securities Laws,” *The Investment Lawyer*, Vol. 27, No. 4 (Apr. 2020).

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