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Litigation Against 403(b) Plan Fiduciaries

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A spate of lawsuits brought against sponsors and named fiduciaries under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, connected to plans established under 403(b) of the Internal Revenue Code of 1986 (Code), as amended, should remind employers, their advisers, and providers that these plans can be subject to ERISA. Thus, with regard to these plans, fiduciaries are required to comply with ERISA in their management and administration. Notably, these lawsuits challenge the manner in which these plans have been designed, managed, and operated over many years. The purpose of this article is to provide a brief overview of 403(b) plans, discuss when such plans are subject to ERISA, review the key allegations raised in ERISA breach of fiduciary duty lawsuits, and discuss the status of these cases.

Overview of 403(b) Plans

A 403(b) arrangement is an annuity contract purchased for (i) employees of public educational institutions, (ii) employees of non-profit organizations established under section 501(c)(3) of the Code that are exempt from tax under section 501(a) of the Code, and (iii) a minister described in section 414(e)(5)(A) of the Code by the minister or an employer.[1] The 403(b) arrangement includes an annuity, which is issued by an insurance company. Payments are made by the employee, employer, or both and such payments are used to pay premiums to the insurance company. Traditionally, the annuity is a variable annuity. The premium payments are allocated to an account under which the participant may direct the investment of his or her account balance into one or more investment options including separate accounts that include mutual funds. The premiums may also be used to pay for a fixed annuity or other insurance. The terms of the contract will allow for the payment of benefits in the form of a lump sum or an annuity.

Additionally, section 403(b)(7) to the Code permits 403(b) plans to include a custodial account that satisfies the requirements of section 401(f)(2) of the Code and allows for payments under the contract to be held in such account to be invested in the stock of a domestic regulated investment company described in section 851(a) of the Code, that is, mutual funds. The use of a custodial account in a 403(b) arrangement is similar to a trust platform available to participant-directed defined contribution plans and self-directed IRAs.

Application of ERISA to 403(b) Arrangements

Some employers and their advisers may be under the impression that ERISA does not apply to 403(b) arrangements. Rather, they view each contract as a separate arrangement akin to an individual retirement account under section 408(a) of the Code or an individual retirement annuity under section 408(b) (IRAs). Indeed, ERISA only applies to an employee benefit plan established or maintained by an employer as set forth in ERISA. Further, such a plan may be excluded from ERISA's fiduciary duty and prohibited transactions. Therefore, if a 403(b) arrangement is not an employee benefit plan established or maintained by an employer or if the arrangement is an "employee benefit plan," but excluded, ERISA does not apply to the management and administration of the arrangement. However, if the arrangement is an "employee benefit plan" and not exempt, the ERISA fiduciary duty and prohibited transaction provisions, as well as other provisions of Title I or ERISA, for example, reporting and disclosure, do apply.

An "employee benefit plan" under ERISA means, as applicable here, an "employee pension benefit plan."[2] An "employee pension benefit plan" is (i) any plan, fund, or program (ii) established or maintained (iii) by an employer, employer association, or both that (iv) provides retirement income or that results in deferral of income for employees until termination of employment or beyond.[3] A 403(b) arrangement, like an IRA, may not be an "employee pension benefit plan" if it is not "established or maintained by an employer." A 403(b) arrangement may be made available to employees in a way that the arrangement will not be established or maintained by the employer.

By regulation, the Department established a safe harbor pursuant to which an employer will not be deemed to "establish or maintain" a 403(b) arrangement.[4] The "safe harbor" requires that the 403(b) plan only be funded with employee salary reductions or agreements to forgo an increase in salary or wages from the employer, that is, no employer contributions. Furthermore, the following general conditions must be met: (i) employee participation in the arrangement is completely voluntary, (ii) all rights under the annuity contract or custodial account are enforceable solely by the employee or the employee's beneficiary, (iii) the employer's involvement in the arrangement is limited to certain specified activities, and (iv) the employer receives no direct or indirect consideration or compensation in cash or otherwise, other than reasonable reimbursement to cover expenses properly and actually incurred in performing the employer's duties pursuant to the salary reduction agreements. The employer involvement is effectively limited to helping the provider of the arrangement, for example, an insurance company, with facilitating the operation of the IRA, for example, withholding and transmitting payroll reductions and permitting employees' access to the provider's representatives.[5] The employer cannot promote the arrangement. If a 403(b) arrangement is offered under these circumstances, it is not treated as an employee benefit plan for purposes of ERISA and so is not subject to ERISA.

Even if a 403(b) arrangement is an employee pension benefit plan, ERISA provides that certain plans are exempt from ERISA. A plan that is a "governmental plan,"[6] as defined in section 3(32) of ERISA, or a "church plan,"[7] as defined in section 3(33) of ERISA, is not subject to Title I of ERISA. More often than not, an annuity purchased for employees of a public educational institution that is an employee pension benefit plan established or maintained by the institution will be a governmental plan excluded from Title I. Similarly, a 403(b) plan established or maintained by a church covering a minister will likely be a church plan excluded from Title I.

However, plans established or maintained by non-profit organizations that are not governmental or church plans are subject to ERISA. Indeed, the recent lawsuits discussed in this article are brought against the fiduciaries of 403(b) plans that are established or maintained by a private university to which the governmental and church plan exceptions do not apply.

Requirements under ERISA

If a 403(b) arrangement is a plan subject to ERISA, a person who is a fiduciary with regard to the plan must comply with the fiduciary provisions of ERISA section 404(a) and the prohibited transaction provisions of ERISA sections 406(a) and 406(b). A person is a fiduciary to the extent he or she (i) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) renders investment advice for a fee with respect to a plan's assets or has any authority or responsibility to do so, or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan.[8]

As discussed below, in the suits brought against the fiduciaries of 403(b) plans, the focus has been on compliance with the duties of prudence and loyalty. ERISA's fiduciary duty requirements mandate that the fiduciary discharge his or her duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims," that is, a duty of prudence.[9] They also require that the fiduciary discharge his or her duties with respect to the plan solely in the interest of the participants and beneficiaries for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of the plan, that is, duty of loyalty.[10]

The plaintiffs in these cases also allege violations of the "party in interest" prohibited transaction provisions in ERISA section 406(a). ERISA's prohibited transaction provisions provide, among other things, that a fiduciary may not cause a plan to engage in a transaction involving the (i) sale or exchange, or leasing, of any property between the plan and a party in interest,[11] (ii) furnishing of goods, services, or facilities between the plan and a party in interest,[12] and (iii) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.[13] A "party in interest" includes a fiduciary to the plan and a provider of services to the plan.[14]

403(b) Plan Design and Management

In many ways, 403(b) plans are like 401(k) plans. Participants may elect to make pretax deferrals to the plan and may receive employer matching or nonelective contributions. Participants often have the right to direct how assets allocated in their account may be invested among a number of different investment options.

However, unlike many 401(k) plans, it is not uncommon for a 403(b) plan to have dozens or even hundreds of investment options. Additionally, such plans often have more than one recordkeeper, which is almost never the case in a 401(k) plan. The reason for the large number of investment options and multiple recordkeepers is that a plan often includes multiple annuity providers. Each of those providers issue an annuity contract and each has its own set of investment options, some of which may be duplicative across the providers' platforms and some of which may not be duplicative. The annuity provider often serves as the recordkeeper with regard to its own annuity contract, but not that of another provider. There may be good reasons for having multiple annuity contracts. For example, over time, the plan's fiduciaries may have recognized the addition of a different annuity provider was appropriate, but the grandfathering of the old provider's contract was also appropriate. Additionally, the plan may also include a custodial account through which participants can invest in mutual funds outside of the annuity contract (akin to a trust platform in a 401(k) plan).

"Bundling" is also more common in the 403(b) marketplace than we see in the 401(k) space, where many large plans and recordkeepers have moved to a more "open architecture" construct over the past 15 to 20 years. Additionally, 403(b) plans are "tax sheltered annuities" and historically have been served by insurance companies, which can write annuity contracts. As such, the plans include insurance products that provide benefits that would not typically be available in a 401(k) plan, for example, annuity distribution options and fixed-rate annuities, and include insurance-related expenses and charges that may not be seen in a typical 401(k) plan, for example, expense charges and liquidity charges.

Allegations against 403(b) Plan Fiduciaries

In the last two years, 403(b) plans sponsored by approximately 16 private universities have been the subject of lawsuits in which plan participants allege fiduciaries of the plans violated their fiduciary duties in their management or administration of the plans.[15] Importantly, the subject plans are very large with at least $1 billion in assets and thousands of participants. Many of the allegations are comparable to what we have seen in suits brought against fiduciaries of large 401(k) plans. Such 401(k) suits are euphemistically known as the "401(k) fee" cases. On the other hand, other allegations challenge some of the above-discussed fundamental design aspects of 403(b) plans. In general, all of the allegations summarized below (or permutations thereof) are found in every complaint filed within the last two years against 403(b) plans.

Excessive Fees

Just like in the 401(k) fee cases, the plaintiffs in these cases allege that the plan fiduciaries breached their fiduciary duty of prudence by allowing the plan to pay excessive fees. They state that the plan fiduciaries failed to use the bargaining power of the plan, that is, the large asset size, to negotiate lower recordkeeping, administrative, and management fees. The plaintiffs point to a failure of the fiduciaries to engage in a prudent process to determine if the fees paid by the plan are appropriate including a failure to enter into a competitive bidding process for purposes of assuring that a recordkeeper charges the lowest fees. In one case, the plaintiffs allege that the 403(b) plan should not have been charged more than $30 per participant for recordkeeping services based upon what plans of a similar size pay, but the plan paid from $100 to $145 per participant between two recordkeepers.[16] In some cases, the plaintiffs challenged the use of a "revenue sharing" model rather than a flat dollar, per participant charge for paying plan expenses.[17]

Failure to Include Institutional Share Classes

Plaintiffs sometimes allege that the plan fiduciaries failed to include a lower cost share class, for example, institutional class, even though the plan based upon its asset size would qualify for such classes.[18] This is a common allegation in the 401(k) fee cases. Plaintiffs allege that the fiduciary's process was deficient and, thus, the fiduciaries made no effort to consider whether such share classes would be offered. Additionally, plaintiffs claim that the inclusion of multiple recordkeepers and numerous investment options in the same plan resulted in the plan not qualifying for these share classes or other types of fee breaks.

Passive vs. Active

In some of the complaints, plaintiffs claim that the fiduciary acted imprudently by including actively managed funds in the plan when less expensive, passively managed investment options were available.[19] This is also a common allegation in the 401(k) fee cases.

Underperforming Investments

According to plaintiffs, the fiduciaries imprudently retained investment options that were more expensive and realized lower returns than the option's benchmark and/or comparable investment options managed by other providers.[20]

Too Many Investment Options

Plaintiffs also allege that the inclusion of too many investment options is a breach of the duty of prudence. They claim that by offering too many options in the aggregate, in an asset class, or within a particular investment style, plan participants become confused and "decision paralysis" results.[21] Further, as discussed, the inclusion of numerous, duplicative investment options prohibits fiduciaries from leveraging the scale of the plan to receive lower fee share classes, waivers, and discounts.[22] Also as discussed, a large number of investment options is a common feature of 403(b) plans.

Multiple Recordkeepers

The plaintiffs claim that a breach of fiduciary duty occurs when multiple recordkeepers provide services for the plan. They state that most defined contribution plans of similar size use a single recordkeeper because placing all of the assets with one recordkeeper gives the plan more bargaining power to lower fees. Additionally, doing so creates efficiencies such as eliminating the need for additional personnel and payroll data feeds, reducing electronic fund transfers and avoiding duplication of services.[23] Large 403(b) plans often have more than one recordkeeper depending on the plan's investment offerings.

Layers of Expenses

Plaintiffs argue that a breach occurs by reason of the plan including investment options that include "layers of fees." They point to variable annuities that include a number of different fees like an administrative expense charge, distribution expense charge, mortality and expense risk charge, and an investment advisory expense charge.[24] Similar allegations are raised in connection with insurance company pooled separate account investment options.[25]

"Lock-in" Arrangements

Plaintiffs take the position that the fiduciaries acted imprudently when they accepted conditions imposed by service providers that certain proprietary products of the service provider be offered. For example, according to plaintiffs, the plan must include certain investment options in the plan in order to meet certain revenue targets, and the fiduciaries agreed to this without considering whether offering such options met the prudence requirement.[26] Additionally, recordkeeping service providers also state they will provide recordkeeping services only to their own products. Plaintiffs style these conditions as "lock-in" arrangements and allege they are imprudent.

Loyalty Claims

Alongside their breach of fiduciary duty claims, plaintiffs also allege a breach of the duty of loyalty. Plaintiffs claim that the fiduciaries' payment of the excessive fees to providers, agreement to "lock-in" requirements, and other actions described above are not in the interest of the plan participants, but rather in the interests of the service providers who benefit from the arrangements agreed to by the fiduciaries. As such, the fiduciaries' decisions were not made exclusively in the interest of the participants.

Prohibited Transactions

Plaintiffs also allege violations of the party in interest prohibited transactions found in section 406(a)(1)(A), (C) and (D) of ERISA. They claim, by agreeing to the plan's payment of excessive compensation to a party in interest, for example, the recordkeeper and the fiduciaries, directly or indirectly, allowed the transfer of plan assets to the party in interest in violation of section 406(a)(1)(A), the provision of services to the plan by a party in interest in violation of section 406(a)(1)(C), and the use of plan assets by a party in interest in violation of section 406(a)(1)(D).[27]

Status of 403(b) Cases

The actions brought against 403(b) plan fiduciaries continue to wind their way through the federal court system. Several courts have granted motions to dismiss with regard to some of the plaintiffs' claims, but not all claims.[28] Only one court dismissed all of plaintiffs' claims.[29]

Note that the courts' decisions were made at the motion to dismiss stage, also known as the "judgment on the pleadings" stage, of the litigation.[30] With regard to the claims dismissed, this means the courts concluded that based upon the allegations in the complaint, accepting those allegations as true and without considering any evidence outside of the compliant, the plaintiffs failed to state a claim upon which relief under ERISA could be granted. In other words, even if the allegation is accepted as true, the plaintiffs could not demonstrate a breach of the duties of loyalty or prudence or a violation of the prohibited transaction rules. With regard to those claims that were not dismissed, the parties will enter the discovery phase of the litigation, which means evidence will be gathered by the plaintiffs to prove their claims and the defendants to prove a breach of fiduciary duty or prohibited transaction did not occur. Of course, the parties may agree to settle the litigation during the proceedings. The following is an overview of how the courts have ruled to date.

Duty of Loyalty and Prohibited Transaction Provisions

Courts generally reject claims by plaintiffs that the payment of excessive fees, entry into lock-in arrangements, and other activities discussed above resulted in a breach of the duty of loyalty. The courts state that the plaintiffs conflated their allegations of breach of the duty of loyalty and breach of the duty of prudence by simply alleging that all of the activity that gave rise to imprudent activity resulted in a failure to act solely in the interest of the plan participants. In so holding, the courts pointed to the language of ERISA section 404(a)(1)(A), which provides the fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and … for the *exclusive purpose of* … providing benefits to participants and their beneficiaries" (emphasis added). The plaintiffs failed to state a claim because they did not demonstrate that the plan fiduciaries took these actions "for the purpose" of benefiting themselves, the providers, or another party other than the participants.[31] They also did not allege that the fiduciaries withheld information from plan participants about how providers are paid.[32] Thus, the claims were dismissed.

Additionally, the courts in large part have rejected the claims that the fiduciaries' actions were transactions that violated the *per se* "party in interest" prohibited transaction provisions in ERISA sections 406(a)(1)(A), 406(a)(1)(C), and 406(a)(1)(D). The courts based their decisions on a number of technical grounds. The courts have concluded that there is no transfer of plan property to a party in interest as set forth in section 406(a)(1)(A) or use of plan assets by a party in interest as set forth in section 406(a)(1)(D) because the allegations involve the receipt of revenue-sharing payments from mutual funds, which are not property of the plan or plan assets.[33] In another case, the court concluded that a "transaction" does not occur under section 406(a)(1) every time compensation is paid to a "party in interest," even if the initial decision to enter into an agreement may have been a "transaction" for purposes of the "party in interest" prohibited transaction provisions.[34] However, some courts did not dismiss all of the "party in interest" prohibited transaction claims.[35]

Too Many Investment Options and Multiple Recordkeepers

Courts in general do not appear to be convinced that the inclusion of too many investment options results in a breach of ERISA's duty of prudence. Indeed, several of such courts have rejected a theory of "decision paralysis." They pointed to the fact that while ERISA imposes a duty to monitor the plan's investment options and that ERISA does not require a limitation on the number of investment options, even if doing so would result in the plan qualifying for lower cost share classes or fee breaks.[36] The courts have also noted that the plaintiffs do not point to any harm suffered by them because they were so overwhelmed by the number of investment choices.[37]

Furthermore, some of the courts that have issued rulings rejected plaintiffs' claims that the inclusion of multiple recordkeepers resulted in a breach. One court pointed out that it is common in the retirement industry and other industries to "bundle" services such that the buyer of such services may be in a position where it purchases some services it does not need because the services in the aggregate are appropriate.[38] As such, the plan fiduciaries do not violate ERISA merely because they include in the plan multiple recordkeepers that require that they provide recordkeeping services only with respect to their own products.[39] However, some courts believed that such allegations survived the motion to dismiss and thus the plan fiduciaries must demonstrate why the inclusion of multiple recordkeepers was prudent notwithstanding allegations that doing so increased the administrative costs of the plan.[40]

Payment of Excessive Recordkeeping and Other Fees

Most of the courts that have issued rulings on motions to dismiss concluded that plaintiffs' allegations of the payment of excessive fees, if true, were sufficient to establish that the plan fiduciaries breached their fiduciary duty of prudence. These courts were persuaded by allegations that the fees paid by the plan were higher than fees paid by comparably-sized plans and that the named fiduciaries had not engaged in a process, for example, competitive bidding and review of revenue sharing arrangements, to establish whether the fees paid by the plans were appropriate.[41] Additionally, at least some of the courts were persuaded by allegations that the fiduciaries did not consider inclusion of different share classes or similar measures to reduce costs.[42] However, some of the courts rejected plaintiffs' premise that the "layering" of fees was per se violative of ERISA. Rather, the appropriate inquiry was whether in the aggregate the fees were unreasonable.

Retention of Underperforming, Expensive Investment Options

Most of the courts that have issued rulings on motions to dismiss concluded plaintiffs' allegations, if true, that the plan fiduciaries' retention of underperforming funds that charged high fees relative to comparable investment options in the marketplace were sufficient to establish a breach of the duty of prudence and, thus, were not dismissed. The courts recognized plaintiffs' inclusion of specific performance and expense information of the challenged investment options versus such information with regard to allegedly comparable funds and the performance of such options versus an alleged benchmark.[43]

Impact of 403(b) Plan Litigation on Plan Fiduciaries

The above-discussed cases are still in their infancy with regard to the litigation process. Plaintiffs will pursue those claims not dismissed and, possibly, seek leave to amend their complaints with hope that the court will reinstate some of the dismissed claims. With the exception of one case, the plaintiffs and defendants will begin the expensive and time-consuming process of gathering evidence sufficient to prove or disprove, as applicable, the alleged ERISA violations that remain before the courts. After this process is complete, the courts will determine if a violation of ERISA occurred, which is not certain and will likely hinge on the fiduciary's ability to prove procedural or substantive prudence. In any case, at some point during this process, the parties might enter into a settlement agreement.

In the meantime, fiduciaries to ERISA-covered 403(b) plans should continue to follow these cases as they shed some light on how a court might evaluate whether plan fiduciaries comply with ERISA. Furthermore, even though these cases have yet to be finally resolved, they should encourage parties that are associated with 403(b) arrangements to determine whether the 403(b) arrangement is subject to ERISA and, if so, who is a fiduciary with respect to the plan. As discussed, 403(b) arrangements may not be an employee benefit plan established or maintained by an employer or may be excepted from ERISA as a governmental or church plan. Not all parties associated with a 403(b) plan are fiduciaries.

Furthermore, to the extent a party is a fiduciary to such a plan, the fiduciary and its advisers should look to the fiduciary governance structure and fiduciary decision-making process to determine if the fiduciary operates in accordance with ERISA's fiduciary duty and prohibited transactions requirements and if they have taken appropriate measures to limit exposure to fiduciary liability. Notably, some fundamental aspects of 403(b) plan design and management appear to be under attack, for example, use of insurance products, contracting with multiple recordkeepers and other providers, bundled service arrangements, and numerous investment options. Fortunately, it also appears that courts may not be inclined to conclude that these aspects of 403(b) plans are *per se* problematic under ERISA. In any event, these cases highlight the need for fiduciaries and their advisers to revisit their ERISA compliance efforts much as fiduciaries to 401(k) plans did after the 401(k) fee litigation cases progressed through the courts.

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NOTES

1 I.R.C. § 403(b)(1)(A).

2 ERISA § 3(3).

3 ERISA § 3(2)(A).

4 29 C.F.R. 2510.3-2(f).

5 *Id.; see also* DOL Adv. Op. 2012-02A (May 25, 2012) & DOL F.A.B. No. 2007-02 (July 24, 2007).

6 ERISA § 4(b)(1).

7 ERISA § 4(b)(2).

8 ERISA § 3(21).

9 ERISA § 404(a)(1)(B).

10 ERISA § 404(a)(1)(A).

11 ERISA § 406(a)(1)(A).

12 ERISA § 406(a)(1)(C).

13 ERISA § 406(a)(1)(D).

14 ERISA § 3(14)(A) & (B).

15 Jane Doe v. Columbia Univ., No. 1:16-cv-06488 (S.D. N.Y. Aug. 16, 2016); Kelly v. Johns Hopkins Univ., No. 1:16-cv-02835-GLR (N.D. Md. Aug. 11, 2016); Sweda v. Univ. of Pennsylvania, No. 2:16-cv-04329-GEKP (E.D. Pa. Aug. 10, 2016); Cassel v. Vanderbilt Univ., No. 3:16-cv-02086 (M.D. Tenn. Aug. 10, 2016); Winifred v. Univ. of Chicago, No. 1:17-cv-03736 (N.D. Ill. May 18, 2017); Short v. Brown Univ., No. 1:17-cv-00318-M-PAS (D.R.I. July 6, 2017); Davis v. Washington Univ., No. 4:17-cv-01641-RLW (D. Miss. June 8, 2017); Henderson v. Emory Univ., No. 1:16-cv-02920-CAP (N.D. Ga. Aug. 11, 2016); Clark v. Duke Univ., No. 1:16-cv-01044-CCE-LPA (M.D. N.C. Aug. 10, 2016); Tracey v. Massachusetts Inst. of Tech., No. 1:16-cv-11620-NMG (Aug. 9, 2016); Sacerdote v. New York Univ., No. 1:16-cv-06284 (S.D.N.Y. Aug. 9, 2016); Cunningham v. Cornell Univ., No. 1:16-cv-06525-PKC (S.D. N.Y. Aug. 17, 2016); Hughes v. Northwestern Univ., No. 1:16-cv-08157 (N.D. Ill. Aug. 17, 2016); Nicolas v. The Trustees of Princeton Univ., No. 3:17-cv-03695 (D. N.J. May 23, 2017); Vellali v. Yale Univ., No. 3:16-cv-01345 (D. Conn. Aug. 9, 2016); Munro v. Univ. of Southern California, No. 2:16-cv-06191 (C.D. Cal. Aug. 17, 2016).

16 *See, e.g.*, Complaint at 19-20, Cassel v. Vanderbilt Univ.

17 *See, e.g.*, Complaint at 21, Henderson v. Emory Univ.

18 *See, e.g.*, Complaint at 13, Kelly v. Johns Hopkins Univ.

19 *See, e.g.*, Complaint at 32, Sweda v. Univ. of Pennsylvania.

20 *See, e.g.*, Complaint at 66-70, Clark v. Duke Univ.

21 *See, e.g.*, Complaint at 52, Henderson v. Emory Univ.

22 *Id.*

23 *See, e.g.,* Complaint at 12, Kelly v. Johns Hopkins Univ.

24 *See, e.g.,* Complaint at 9, Cunningham v. Cornell Univ.

25 *Id.*

26 *See, e.g.,* Complaint at 63-64, Henderson v. Emory Univ.

27 *See, e.g.*, Complaint at 95-96, Tracey v. Massachusetts Inst. of Tech.

28 Cassel v. Vanderbilt Univ., No. 3:16-cv-02086, 2018 WL 305747 (M.D. Tenn. Jan. 5, 2018); Nicolas v. Trustees of Princeton Univ., No. 17-3695, 2017 WL 4455897 (D.N.J. Sept. 25, 2017); Sacerdote v. New York Univ., No. 16-cv-6284-KBF, 2017 WL 3701482 (S.D. N.Y. Aug. 25, 2017); Daugherty v. Univ. of Chicago, No. 17-C-3736, 2017 WL 4227942 (N.D. Ill. Sept. 22, 2017); Henderson v. Emory Univ., 252 F. Supp. 3d 1344 (N.D. Ga. 2017); Cunningham v. Cornell Univ., No. 16-cv-6525-PKC, 2017 WL 4358769 (S.D. N.Y. Sept. 29, 2017).

29 Sweda v. Univ. of Pennsylvania, No. 16-4329, 2017 WL 4179752 (E.D. Pa. Sept. 21, 2017).

30 Fed. R.Civ. P. Rule 12(b)(6).

31 *See, e.g., Cunningham,* 2017 WL 4358769, at *4; *Sacerdote*, 2017WL 3701482, at *5-6.

32 *Daugherty,* 2017 WL 4227942, at *8-9.

33 *Henderson*, 252 F. Supp. 3d at 1356-1357 (Section 406(a)(1)(D) claim dismissed.).

34 *Cassel,* 2018 WL 305747, at *7-8.

35 *Henderson,* 252 F. Supp. 3d at 1356 (Section 406(a)(1) claims not dismissed to the extent plaintiffs' allegations related to these prohibited transactions did not involve revenue sharing payments from mutual funds).

36 *Sacerdote,* 2017 WL 3701482,*11-12.

37 *Cunningham,* 2017 WL 4358769, at *4.

38 *Sweda*, 2017 WL 4179752, at *8.

39 *Id.*

40 *Henderson*, 252 F. Supp. 3d at 1353; *Cassel*, 2018 WL 305747, at *5.

41 *Cassel,* 2018 WL 305747, at *4-5; *Nicolas*, 2017 WL 4455897, at *4.

42 *See, e.g., Cunningham*, 2017 WL 4358769, at *7-8; *but see* Sacerdote, 2017 WL 3701482,*10-11 (court, pointing to additional liquidity offered by retail class shares, concluded that allegations of including retail class shares over institutional class shares not a breach).

43 *Cunningham*, 2017 WL 4358769, at *6-7; *Daugherty*, 2017 WL 4227942, at *8-9.