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RECENT DEVELOPMENTS REGARDING BOOKS AND RECORDS DEMANDS TO MUTUAL FUNDS

Shareholders of mutual funds have with increasing frequency made demands to inspect their fund's books and records, demands that typically are opposed by fund directors and management. In this article, the authors address such conflicts. After an introduction, they discuss, in detail, shareholders' inspection rights to fund records under the laws of Delaware and Massachusetts, and the cases decided under each. After each discussion, they give key takeaways and observations. They close with a comparison of inspection rights under the laws of the two states.

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Over the last several years, shareholders considering potential claims against mutual fund directors or fund service providers have been making demands to inspect the funds' books and records with much greater frequency. Plaintiffs' lawyers have used these inspection rights to determine whether a meritorious claim exists, and also to bolster the allegations that they make in initial pleadings in an effort to increase their chances of surviving an initial motion to dismiss. Many of these so-called books and records demands have ended in a compromise over the scope of records to be turned over to the demanding shareholders. Some of these books and records requests have been litigated and inevitably more of these inspection demands will find their way into the courts. This article explores many of the issues that may guide the decision of defense counsel in deciding the proper scope of a records demand, and what defenses may be asserted in court to avoid an overly broad and burdensome request.

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I. GOVERNANCE, STRUCTURE, ORGANIZATION, AND GENERAL OBLIGATIONS OF MUTUAL FUNDS

In the United States, investment companies can be open-end mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts.¹ Mutual funds are a nearly \$30 trillion industry, a fact not lost on the plaintiffs' bar.² Certain federal laws and regulations govern mutual funds, including federal securities laws.³

¹ Investment Company Institute, *2021 Investment Company Fact Book: A Review of Trends and Activities in the Investment Company Industry* (61st ed.) at 40, 283.

² *Id.* at 40.

³ *Id.* at 282 (listing four principal federal laws governing investment companies — namely, (1) Investment Company Act of 1940; (2) Investment Advisers Act of 1940; (3) Securities Exchange Act of 1934; and (4) Securities Act of 1933).

FORTHCOMING

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