

**MEMO# 34180**

June 13, 2022

# **ICI Sues California Department of Financial Products and Innovation Over Unlawful Notice Filing Fee Increase**

[34180]

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TO: ICI Members

Operations Committee

SEC Rules Committee

Transfer Agent Advisory Committee SUBJECTS: Compliance

Operations

State Issues

Transfer Agency RE: ICI Sues California Department of Financial Products and Innovation Over Unlawful Notice Filing Fee Increase

Last week the Institute filed a Complaint for Declaratory and Injunctive Relief against California's Department of Financial Protection and Innovation, which administers California's Blue Sky Law.[\[1\]](#) The suit challenges the Department's authority to change the manner in which it assesses notice filing fees on investment companies. The Institute's suit is in response to the Department advising investment companies earlier this year that notice filing fees are to be paid at the series/portfolio level rather than at the fund/trust level.

As noted in the lawsuit, prior to the enactment of National Securities Markets Improvement Act of 1996 (NSMIA), to register their securities for sale in California, investment companies paid fees at the fund/trust level. Post-NSMIA, California changed its law to require investment companies to make notice filings with the Department and to pay notice filing fees, which were assessed on the same basis as the registration fees were assessed pre-NSMIA - i.e., at the fund/trust level. Since these changes were made to California law in 1998, there has been no change to the fee provisions in California law.

Notwithstanding this, earlier this year the Department sent notices to investment companies claiming that there has been a "misunderstanding" among filers regarding California's notice filing fees. To resolve this alleged misunderstanding, the Department notified filers that it was "clarifying" the fee and, as a result of this "clarification," fees are to be paid at the series/trust level and not at the fund/trust level. As all filers know, this "clarification" was, in fact, a fee increase, and a significant fee increase.

The Department's attempt to impose this fee increase through a notice to filers is in clear violation of California's Administrative Procedures Act and, therefore, unlawful. While the Institute tried to resolve this matter informally by educating the Department on California's law and its long-standing interpretation of the notice filing fee provisions, the Department remained steadfast in its position that this was not a fee increase but a fee "clarification." This left the Institute no option but to sue the Department to enjoin the fee increase.

The Institute's suit seeks to enjoin the Department from continuing to assess this unlawful fee increase and, instead, restore fees to the series/portfolio level. The Institute's suit includes, as a Third Cause of Action, a Writ of Mandamus. If granted, this Writ would, in addition to compelling the Department to comply with the law, require it to "take all necessary steps to remedy the past and continuing effects of Defendants' unlawful action" including "identifying and notifying all investment companies that paid notice filing fees at the series level" and "providing such investment companies the opportunity to request a refund of any notice filing fees paid in excess of those the investment companies would have owed at the fund level."

We will keep members informed of developments in this case.

Tamara K. Salmon  
Associate General Counsel

#### **endnotes**

[\[1\]](#) See Investment Company Institute vs. Clothilde V. Hewlett, in her capacity as the Commissioner of the Department of Financial Protection and Innovation for the State of California, the Department of Financial Protection and Innovation for the State of California, Does 1-20 (Superior Court of California For the County of Orange), which was filed on June 10, 2022.