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Supreme Court Holds That Section 47(b) of the Investment Company Act Does Not Create a Private Right of Action

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On June 11, 2026, the United States Supreme Court issued its decision in *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.*, holding that Section 47(b) of the Investment Company Act of 1940, as amended (the "1940 Act" or "Act"), does not provide an implied private right of action. In a 6-3 decision, the Supreme Court reversed the Second Circuit's contrary ruling, resolving the circuit split discussed in our prior alert.

Background

The dispute arose from a challenge by Saba Capital Management L.P. ("Saba") to the bylaws adopted by several Maryland closed-end funds limiting the voting rights of certain shareholders by opting into the Maryland Control Share Acquisition Act ("MCSAA"). Under the MCSAA, a shareholder who acquires shares sufficient to control at least 10% of the voting power cannot vote those shares above the 10% threshold unless a super-majority of the remaining shareholders affirmatively approves. Saba argued the bylaws were contrary to Section 18(i) of the 1940 Act, which requires that "every share of stock" of an investment company "shall be a voting stock and have equal voting rights with every other outstanding voting stock." Alleging that the bylaws violated the 1940 Act by creating unequal voting rights among shareholders and that the control-share provisions adopted by the funds constituted "contracts," Saba sought rescission of these contracts under Section 47(b), which provides that contracts made or performed in violation of the Act are unenforceable and that, where such contracts have been performed, courts generally may not deny rescission "at the instance of any party" absent equitable considerations. The lower courts concluded that Section 47(b) permitted shareholders to sue to rescind allegedly unlawful fund contracts, presenting the question whether the provision creates an implied private right of action. This case and other related lower-court proceedings have been closely watched by industry participants, given the recent rise in shareholder lawsuits by investors pursuing an activist approach.

The Court's Reasoning

The Court concluded that Section 47(b) does not create a private right of action but instead addresses the circumstances under which courts may grant rescission as a remedy. Focusing on the phrase "rescission at the instance of any party," the Court held that the provision presupposes that parties are already properly before the court and governs when rescission may be granted. As a result, a party cannot rely on Section 47(b) as a basis for bringing suit, although rescission remains available as a remedy in a suit properly brought under another cause of action or as a defense.

The Court found further support in the structure of the 1940 Act. It emphasized that the SEC bears primary responsibility for enforcing the Act and that Congress expressly created private rights of action elsewhere in the statute, including shareholder suits under Section 36(b) for breach of fiduciary duty and an express right of action incorporated from Section 16(b) of the Securities Exchange Act of 1934 allowing shareholders to seek recovery of certain short-swing insider profits. In the Court's view, those provisions demonstrate that when Congress intended to authorize private enforcement under the 1940 Act, it did so expressly.

Finally, the Court distinguished its decision in *Transamerica Mortgage Advisors, Inc. v. Lewis ("TAMA")*, which recognized a limited private right of action under Section 215 of the Investment Advisers Act of 1940. The Court explained that *TAMA* relied on statutory text providing that certain contracts "shall be void," a formulation that necessarily implies that parties may invoke the courts to determine whether a contract is void under the statute. Because Congress amended Section 47(b) in 1980 to remove comparable language and replace it with language directed to courts' remedial authority, the Court concluded that *TAMA* did not control the analysis.[1]

Looking Ahead

FS Credit Opportunities removes a tool that activist investors had used to challenge fund-level contracts and governance provisions.[2] Going forward, parties seeking to void contracts as violative of the 1940 Act generally will need to identify an independent cause of action, and investors pursuing activist strategies are expected to shift toward other theories, such as breach of fiduciary duty, disclosure, and governance-related claims.

The decision also reinforces the SEC's role as the principal enforcer of the 1940 Act, underscoring the importance of strong compliance programs for funds and advisers. At the same time, the Court was careful to distinguish between a cause of action and a remedy. Accordingly, the decision does not appear to foreclose shareholder suits brought under Section 36(b) of the 1940 Act that seek rescission under Section 47(b) as a remedy.

More broadly, *FS Credit Opportunities* continues the Court's longstanding reluctance to imply private rights of action absent clear congressional authorization. For funds and their advisers — particularly externally managed funds, which operate almost entirely through contracts — the decision provides greater certainty that fund contracts and governance provisions will not be subject to shareholder challenges based solely on Section 47(b), strengthening anti-takeover defenses.

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[1] The decision also revealed a sharp divide among the Justices over the role of legislative history in statutory interpretation. The majority characterized reliance on legislative history as resting on a "fictional premise" that legislators share a unified view of how a statute should apply, while the dissent defended the practice as a "time-honored tradition." Justice Kagan took a middle position, suggesting that legislative history may be useful when statutory language is "stubbornly ambiguous."

[2] The Court resolved only the private-right-of-action question and did not decide whether the bylaws violated Section 18(i), and thus the underlying validity of those control-share provisions remains undecided. Questions therefore remain about how funds and their boards should evaluate state control-share statutes going forward; the SEC has also refrained from taking a formal position on whether closed-end funds' use of such statutes complies with Section 18(i), though staff guidance stating that use of these provisions violates the 1940 Act has been withdrawn. Accordingly, funds should continue to monitor SEC guidance and enforcement in this area.

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