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Supreme Court Limits Private Rescission Claims Under the Investment Company Act

Go-To Guide

- The U.S. Supreme Court held that ICA §47(b) does not create an implied private right of action for rescission.
- The ruling narrows one path for federal challenges to fund governance measures, while leaving SEC enforcement and other express or state-law claims intact.
- Boards and sponsors should consider focusing on board process, disclosure alignment, and a well-developed governance record.

On June 11, 2026, the U.S. Supreme Court ruled that Section 47(b) of the Investment Company Act of 1940 (ICA) does not create an implied private right of action for rescission. Reversing the Second Circuit's decision, the Court held that §47(b) addresses remedies available to a court in a proper case; it does not authorize private parties to sue in the first instance.[1] The decision narrows one federal litigation path that activists and other private plaintiffs sought to use to challenge fund governance measures. It also underscores that the real exposure may now be elsewhere: SEC enforcement, expressly authorized private

[1] *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.*, No. 24-345, slip op. (U.S. June 11, 2026).

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claims such as §36(b), state-law fiduciary and contract theories, and careful board process and disclosure around governance measures that bear on voting rights and shareholder activism.

Background

FS Credit Opportunities Corp. v. Saba Capital Master Fund arose from governance measures adopted by Maryland closed-end funds in response to activism and control-share concerns. The funds had opted into the Maryland Control Share Acquisition Act (MCSAA), which limits the voting rights of shareholders who acquire significant positions unless the remaining shareholders approve those rights. Saba challenged the measures in June 2023, arguing they violated ICA §18's equal-voting-rights requirement and seeking rescission-based relief under §47(b). The district court agreed, and the Second Circuit summarily affirmed. The Supreme Court granted certiorari to resolve a circuit split over whether §47(b) contains an implied private right of action and held that it does not itself give private litigants a cause of action to seek rescission for an alleged ICA violation.

Reasoning

The Court's reasoning follows its modern implied-rights framework: Congress decides who may enforce federal law, and private rights of action are not inferred absent clear rights-creating text. Against that backdrop, the majority treated §47 as a remedial provision directed to courts, not as a source of private standing. Section 47(a) bars contractual waivers of ICA compliance; §47(b)(1) addresses the enforceability of contracts that violate the ICA; and §47(b)(2) provides that a court may not deny rescission of a performed contract "at the instance of any party" unless doing so is consistent with equity and the ICA's purposes. In the Court's view, that language presupposes a properly presented case; it does not answer the logically prior question of who may bring one.

The Court reasoned that the broader statutory scheme points in the same direction. The ICA assigns primary enforcement authority to the SEC under §42 and creates only two express private remedies: §36(b) fiduciary-duty claims by security holders and the short-swing-profit remedy incorporated through §30(h). The Court was unwilling to read §47(b) as an unspoken catchall that would allow private plaintiffs to enforce large portions of the statute indirectly.

The Court likewise rejected the argument that *Transamerica Mortgage Advisors* or the pre-1980 text compelled a different result.[2] For the majority, those revisions confirmed that §47(b) is remedial, not rights-creating. Even if *Transamerica* remains good law in the context of the Advisers Act, the Court made clear that it does not justify implying a comparable private rescission remedy under the ICA's different text.

The dissents read the amended text and history differently, but the controlling rule states that §47(b) does not supply an implied private cause of action for rescission under the ICA.

Board Governance Implications

For boards, the decision may remove one litigation theory, but it heightens the importance of process, fiduciary discipline, and regulatory positioning. If §47(b) is no longer available as a standalone federal

[2] In *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), a seminal case under the Investment Advisers Act of 1940 (Advisers Act), the Court held that although the Advisers Act does not imply a general private damages remedy, its contract-invalidity provision supports a limited private action for rescission and related equitable relief. Although §47(b) once tracked the Advisers Act's "shall be void" language, Congress amended the provision in 1980 to remove that formulation, emphasize the court's remedial role, and distinguish between unenforceability and rescission.

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rescission hook, challenges to governance measures may be framed through SEC scrutiny, express federal claims, and state-law fiduciary theories. That makes the quality of the board record even more important.

Boards may wish to evaluate governance measures that affect shareholder voting (control-share provisions, voting thresholds, classified boards, advance-notice bylaws, and rights plans, etc.) with a sharper focus on SEC scrutiny, available express federal claims, and state-law fiduciary and contract theories. The Court's emphasis on SEC primacy suggests that staff attention and enforcement risk may become relatively more important where equal-voting-rights or similar ICA provisions are implicated.

Boards should consider confirming that their materials continue to reflect a disciplined record: the statutory purposes at issue, the equitable considerations relevant to the measure, and the board's rationale for concluding that the action serves long-term shareholder interests and remains consistent with the ICA. They may also wish to verify that minutes and supporting memoranda contemporaneously map the board's deliberations to ICA requirements and the fund's disclosures, articulate the problem the measure addresses (e.g., rapid control shifts, unequal voting effects), consider alternatives, and show a record of advice from independent counsel. This may be particularly important for closed-end funds incorporating state control-share statutes or adopting rights plans, and for business development companies (BDCs) with parallel considerations.

Boards may also wish to sharpen engagement planning. They should consider preparing activist-response protocols, communications scripts, and escalation paths in advance and may wish to design them to reinforce that the board is acting from a fiduciary and regulatory perspective, not out of entrenchment concerns. Where voting-rights changes are under consideration, investor relations and disclosure teams should consider reflecting external messaging that is aligned with the board record.

Fund Formation and Structuring Implications

For fund sponsors and counsel, the decision is less about rewriting the rulebook than about recalibrating drafting and risk assessment. When making structuring decisions, teams may wish to proceed on the idea that §47(b) guides judicial remedies; it does not arm private litigants with a free-standing rescission claim.

1. **Vehicle Choice.** For closed-end funds, ETFs, interval funds, money market funds, and BDCs, teams may wish to factor activism and governance sensitivity into jurisdiction of incorporation, control-share availability, and bylaws. For open-end funds, teams should consider less direct activism pressure but maintain advisory-contract and fee-oversight protocols in light of remaining express claims.

2. **Charters and Bylaws.** Stakeholders may wish to draft with clarity around voting-rights architecture, control-share treatment where state law permits, and board authorities, aligning with ICA provisions and the fund's investor profile. Because private §47(b) rescission suits are foreclosed, remedies-framing should avoid assuming federal rescission will be litigated by private parties; instead, they should consider referencing forum, severability, and equitable-relief concepts under applicable state law, consistent with §47(a)'s prohibition on waiving ICA compliance.

3. **Disclosure.** When drafting prospectuses, statements of additional information, and shareholder reports, stakeholders may wish to describe governance measures and their rationales, articulate potential SEC and litigation risks that remain, and avoid implying a private rescission remedy

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under §47(b). They should also consider tying disclosures to §18 considerations where equal voting is implicated and explaining how measures comport with ICA purposes.

4. **Compliance Programs.** Funds may wish to craft policies and testing around governance decisions that interact with ICA requirements, including advisory-contract processes, fee oversight (§36(b) context), affiliated-transaction controls, and shareholder-meeting mechanics. They should also consider embedding triggers for legal review when adopting or modifying voting-rights provisions or control-share elections.

5. **Contracting.** For advisory, distribution, and service contracts, funds should consider reinforcing representations, covenants, and termination provisions keyed to ICA compliance, recognizing that while private §47(b) rescission is not a standalone federal cause of action, courts retain equitable power and §47(b) directs remedial choices when parties are before the court. Remedies and dispute-resolution clauses may benefit from specifying governing law and forum and acknowledging that equitable remedies may be available "consistent with equity and the purposes" of the ICA, without purporting to waive statutory protections barred by §47(a).

Litigation and Enforcement

The decision may narrow, but does not eliminate, litigation risk. Private suits that seek to use §47(b) as an implied cause of action for rescission of ICA-implicating contracts may now be considered less viable. Plaintiffs are foreclosed from basing a federal claim solely on §47(b) to unwind contracts allegedly violating the ICA.

SEC enforcement under §42 remains. Shareholders may still sue under §36(b) for alleged breaches of fiduciary duty with respect to compensation, subject to the statute's limits, and issuers may still pursue short-swing-profit recovery through the Exchange Act remedy incorporated by §30(h). State-law fiduciary-duty and contract claims, whether derivative or direct as permitted, may also remain available, particularly in the fund's state of incorporation. Other federal securities claims may likewise remain available if their elements can be met.

From a defense perspective, §47(b)-based rescission claims may now be vulnerable to early dismissal. However, plaintiffs may not retreat; instead, they may pivot to §36(b), other federal securities claims where available, and state-law fiduciary and contract theories. Accordingly, funds should consider strengthening board records, preserving the rationale for governance decisions, and considering whether proactive engagement with SEC staff may reduce enforcement risk when governance measures are adopted or revised.

Stakeholders may wish to update their prospectus and shareholder-report risk factors to reflect that private §47(b) rescission suits are not available, while noting ongoing risks from SEC enforcement, express private actions, and state-law challenges to governance measures that affect voting rights or control dynamics.

Takeaways

The Court did not bless contested governance measures; it simply held that private plaintiffs cannot use §47(b) as a standalone federal rescission vehicle. Activism will continue, SEC scrutiny may become more consequential, and challenges may migrate to express federal and state-law theories. In that environment, strong process, disciplined disclosure, and a well-developed board record may help to mitigate and manage risk.

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Considerations for Boards

In line with the Court's decision, boards may wish to conduct a focused review of control-share, voting-rights, and rights-plan provisions against ICA requirements and disclosures; refresh minutes templates to capture ICA-purpose and equitable-factor analyses; and adopt an activism engagement protocol aligned with fiduciary and regulatory expectations.

Considerations for Sponsors and Counsel

Those supporting boards may wish to review and update charters/bylaws, advisory and service agreements, and offering documents to reflect the current remedies landscape; enhance compliance testing for governance-sensitive changes; and align dispute-resolution and remedies clauses with §47(a)-(b) realities while preserving equitable relief where appropriate. They should also consider coordinating with regulatory counsel to assess whether prospective governance actions would benefit from pre-filing SEC engagement or other risk-mitigation steps, recognizing the SEC's central role in ICA enforcement. The Court ruled that §47(b) does not create an implied private right of action for rescission under the ICA.

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