SEI Trust Company Quarterly Update September 30, 2022

REGULATORY/LEGAL UPDATE

In an effort to keep you updated on changing regulations, requirements and litigation that may affect our industry, we are providing you with a summary of recent legislation, legal decisions and/or regulatory guidance that may impact collective investment trusts ("CITs") and their service providers, such as banks and investment managers.

Regulatory Update

SEC Cautions Advisers from Overstating Performance in Ads

Among the many new requirements and provisions of the new SEC Marketing Rule[1], the US Securities & Exchange Commission ("SEC") announced that will be examining performance based advertising and whether the advisers have a "reasonable belief" to make certain claims based on rules.[2] In these examinations, registered investment advisers will be required to substantiate material statements of fact in advertisements to the SEC. However, if an adviser is unable to substantiate the material claims of fact made in an advertisement when the SEC requires it, the SEC will presume that the adviser did not have a reasonable basis for its belief.

Performance advertising requirements prohibit the use of the following:

- Mention of gross performance, unless net performance is also included.
- Mention of any performance results without indicating specific periods of time.
- Inclusion of performance results of a subset investment from a portfolio without providing or offering to provide the performance results of the entire portfolio.
- Stating hypothetical performance, unless the adviser executes the proper processes to verify that the performance advertised is relevant to the financial and investment objectives of the target audience.
- Inclusion of predecessor performance results, unless the personnel responsible for the previous performance results and the current advertising adviser can confirm that the accounts meet the requirement of sufficient similarity.

Advisers participating in performance based advertising will be held to a high standard to demonstrate the basis for their beliefs and to substantiate material facts of such advertisements. The SEC has outlined methods in which advisers can meet the requirement of "reasonable belief". This includes creating a record of information providing a strong foundation of the belief, or instituting procedures and policies to address how these requirements have been met.

[1] See SECURITIES AND EXCHANGE COMMISSION, 17 CFR Part 275 and 279, effective May 4, 2021 at https://www.sec.gov/rules/final/2020/ia-5653.pdf
[2] See, https://www.napa-net.org/news-info/daily-news/sec-cautions-advisers-overstating-performance-ads

As of November 4, 2022, advertisements created and circulated by investment advisers that are registered or required to be registered will need to be in compliance with the Marketing Rule. The SEC suggests advisers review their current policies and practices and implement any processes needed to ensure compliance is met.

Senate Confirms Lisa Gomez as Employee Benefits Security Administration Leader at the US Department of Labor:

Fourteen months post nomination, Lisa Gomez has been confirmed by the Senate as Assistant Secretary of Labor for the Employee Benefits Security Administration ("EBSA") which has authority, among other things, for promulgating rules pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), which govern most, if not all, bank maintained collective investment trusts in addition to approximately 142 million employees as well as 730,000 employer-sponsored plans.[3] Ms. Gomez was nominated by President Joe Biden back in July of 2021. Despite a lengthy confirmation process, Ms. Gomez has been confirmed with a 49-36 vote.

Ms. Gomez has extensive background and experience specializing in employee benefits. Since 1994, Ms. Gomez has worked at a private law firm where she represented various plans and plan sponsors in the multiemployer plan community. She brings with her a background in advising plans on plan design and administration, fiduciary issues, benefit claims, delinquency collection, service provider agreements and qualified domestic relations orders. She has also represented them in numerous types of litigation. Notably she is recognized for her diligent work on Taft-Hartley and single-employer plans in both the private sector and federal employee health benefit plans.

Having just finalized its ESG guidance in the past few weeks, there are other matters awaiting Ms. Gomez's oversight, including:

- Fiduciary guidance. EBSA's regulatory agenda still shows plans to revisit the definition of fiduciary, which would amend the regulatory definition of the term fiduciary to "more appropriately define when persons who render investment advice for a fee to employee benefit plans and IRAs are fiduciaries within the meaning of Section 3(21) of ERISA and section 4975(e)(3) of the Internal Revenue Code."
- Lifetime income illustrations. Interim final regulations took effect in September 2021 and sponsors of participant-directed DC plans were required to provide lifetime income illustrations to participants in their plans no later than with the second quarterly benefit statements of 2022. Additional guidance from the DOL is expected on this matter.
- Crypto Currency Guidance. Ms. Gomez also will likely step into the current debate surrounding the cryptocurrency following the DOL's warnings again using cryptocurrency in DC plans issued in March 2022.

DOL Eases Independence Rules for Employee Benefit Plan Accountants

The US Department of Labor recently loosened restrictions ensuring the independence of accountants performing employee benefit plan audits for the annual Form 5500 filings.[4] Effective immediately, this new guidance will allow plan administrators to hire qualified public accounts holding the plan sponsor's publicly traded securities during the plan year covered by the audit if the accountant divests those securities before starting the engagement.

Auditors will now have time to offload any holdings of a new plan sponsor client's publicly traded securities before signing a written agreement to audit the plan. In the past, the 1975 interpretive bulletin disqualified auditors at firms that had a financial interest in a plan sponsor during the period covered by the plan's

[3] See https://www.pionline.com/washington/senate-confirms-lisa-gomez-ebsa-leader
[4] See, https://www.mercer.com/our-thinking/law-and-policy-group/dol-eases-independence-rules-for-employee-benefit-plan-accountants.html

financial statements. The DOL believes the old restrictions were potentially limiting to plans' accessing the most qualified accountants and accounting firms.

While the new guidance has definitely shifted restrictions, the DOL limits this new exception to publicly traded securities. The interpretive bulletin further clarifies disqualifying factors including shares held by immediate family members of the auditors, and or shares held by the audit firm employees working in any office where a significant portion of the audit takes place.

LITIGATION UPDATE

Seventh Circuit Affirms Dismissal of Excessive Fee Claims Where Quality and Extent of Services Relating to Fees Were Ignored

A 401(k) plan participant recently filed a claim against his previous employer and other fiduciaries stating that both parties had violated their duty of prudence[5]. This participant alleged that there was a breach in the fiduciary duties required under ERISA. These allegations claim that the plan fiduciaries authorized payment for "unreasonably high" record keeping and administrative fees. The participant provided fee quotes from "comparative plans" and attempted to use these disparities to prove that the investment management fees were significantly and unreasonably higher than the amounts disclosed in the Form 5500s of comparative plans. However the appellate court informed this participant that the Form 5500s that were provided as proof to their argument, did not require plans to disclose exactly where the plans money from revenue sharing were allocated. Because of this the participant did not provide enough evidence that they in fact knew the exact fees being paid out by the comparative plans.

The case was promptly dismissed. The Employee Benefits Institute of America ("EBIA") stated that fiduciaries are expected to systematically and regularly monitor investment fees to make sure that no excessive fees are being paid. However, while investment fees may vary from plan to plan, in order to clearly prove a breach of the fiduciary responsibility you would also need to compare the types of services provided as well as the quality of service in exchange for administrative investment fees. This court's decision can be seen as a win for plan sponsors and fiduciaries, noting that claims in relation to excessive fees require significant and factual proof and mere review of Forms 5500 should not be enough to prevail on the claims.

Goldman Sachs Wins on Summary Judgment in Case Challenging 401(k)'s Investments in Goldman Proprietary Funds

A surprising outcome for Goldman Sachs ("Goldman") was the massive win on a summary judgement in a proposed class action related to ERISA pension litigation. While Goldman Sachs is a large service provider to defined contribution plans, participants in their own plan brought claims against the financial service provider that includes claims alleging:

1. Goldman "only reluctantly and belatedly" removed underperforming Goldman investment funds as investment options in 2017, rather than doing so as early as 2014;
2. Goldman failed to consider lower-cost institutional investment vehicles;
3. Goldman failed to claim "fee rebates" on behalf of the Plan that allegedly were available to other similarly situated retirement plans that invested in the Goldman funds;

Leonid Falberg, who served as lead plaintiff, mentioned a number of other red flags leading participants to believe that Goldman was not working in the best interest of the plan participants. He alleged that majority of the mutual funds retained by the plan were "higher-cost" than other investment options and that the funds consistently underperformed their benchmarks. Lastly the plan didn't have an investment policy statement.

The courts however did not find any credit to these claims and in fact disagreed with the participant's allegations entirely. While experts testified during this case that having an investment policy statement is considered common and "best practice", it is not strictly required under ERISA and the court threw out the

[5] See, https://tax.thomsonreuters.com/blog/seventh-circuit-affirms-dismissal-of-excessive-fee-claims/

allegations that lacking an investment policy is considered imprudence. Additionally, while the court acknowledged that the defendants operated under a conflict of interest with respect to the plan's investments in Goldman proprietary funds, but it ultimately held that a conflict of interest alone is not enough to determine a violation of ERISA's duty of loyalty. The plaintiff would have had to have shown that the plan fiduciaries were influenced in some way by this conflict. Instead no evidence was presented to prove that Goldman acted in any favorable due to a conflict of interest.

About SEI Trust Company
SEI Trust Company (STC) is a non-depository trust company chartered under the laws of the Commonwealth of Pennsylvania that provides trust and administrative services for various collective investment trusts. SEI Trust Company is a wholly-owned subsidiary of SEI Investments Company (SEI). For more information, visit www.seic.com/stc.

About SEI
SEI (NASDAQ:SEIC) delivers technology and investment solutions that connect the financial services industry. With capabilities across investment processing, operations, and asset management, SEI works with corporations, financial institutions and professionals, and ultra-high-net-worth families to solve problems, manage change and help protect assets—for growth today and in the future. As of Sept. 30, 2022, SEI manages, advises, or administers approximately $1.2 trillion in assets.