SEI Trust Company Quarterly Update
December 31, 2023

LEGAL/REGULATORY UPDATE

In an effort to keep you updated on changing regulations, requirements and/or 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.

LEGAL UPDATE

U.S. House of Representatives Passes Measure Permitting 403(b) Plans to Invest in CITs

On March 8, 2024, the U.S. House of Representatives passed H.R. 2799, *Expanding Access to Capital Act of 2023,* a bill that would allow collective investment trusts (CIT) to be included as menu options in 403(b) plans. "Today, there is no rational basis why CITs are not available in 403(b) plans and accessible to teachers, hospital workers, charity, and non-profit employees." Said Reps. Josh Gottheimer, D-N.J., Bill Foster D-Ill. and Frank Lucas, R-Okla., in a "Dear Colleague" notice to members on the Tuesday prior to the vote, asking the representatives to vote to support the amendment.[1]

Currently, 403(b) plans[2] cannot offer CITs to their participants, as the U.S. federal securities laws were not amended to permit 403(b) plans to be commingled with other retirement plan assets and have the resulting asset pool exempt from federal securities law registration, including registration as a mutual fund under the Investment Company Act of 1940, as amended.

The bill now moves to the Senate. SEI Trust Company will continue to monitor this matter and provide updates as they become available.

The DOL Proposes New Fiduciary Rule

The Department of Labor ("DOL") announced on October 31, 2023, their proposal for the "Retirement Security Rule" ("Proposed Rule") which redefines the regulatory definition of an investment fiduciary under the Employee Retirement Income Security Act ("ERISA"). This marks the DOL's fourth attempt since 2010 to reframe the meaning of "investment advice fiduciary". The Proposed Rule[3] is part of the Biden Administration's attempt to eliminate "junk" fees in the consumer financial market. The list of proposed changes includes modifications to several prohibited transaction exemptions ("PTEs") as well as amending the current framework for the "five-part test" determining whether a person is an investment advice fiduciary.

For over 50 years the current five-part test has determined who is deemed to provide ERISA fiduciary investment advice. The five elements that must be met under the five-part test include the following: 1) the

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[1] *See*, "Updated: House Approves Legislation to Allow CITs in 403(b) Plans", National Association of Plan Advisors, available at https://www.napa-net.org/news-info/daily-news/updated-house-approves-legislation-allow-cits-403b-plans.

[2] Other than 403(b) Church Plans, which are a small sub-set of 403(b) plans.

[3] The "Proposed Rule" actually includes several amendments to current DOL guidance, from amending the DOL regulation as to the definition of fiduciary investment advice to various amendment to long standing prohibited transaction exemptions that are widely used by the financial services industry today, including PTE 77-4, 86-128 and 84-24. The DOL is attempting to move the financial services industry to use the PTE 2002-20, which is also being amended by the proposals.

person or entity renders advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property, (2) on a regular basis, 3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary, 4) that the advice will serve as a primary basis for investment decisions regarding plan assets and that 5) the advice will be individualized based on the needs of a particular plan. It is the DOL's position that the five-part test fails to consider circumstances in which investors believe they are being provided advice from a fiduciary.

If the Proposed Rule is adopted the five-part test will be replaced in its entirety with a new test which the DOL believes more accurately reflects the current climate as it relates to ERISA. The new test would consider a person or entity (referred to as "person" below) making investment recommendations a "fiduciary" under ERISA (and therefore subject of ERISA's requirements, including avoiding non-exempt prohibited transactions) if any of the following are met:

1) The person either directly or indirectly has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;

2) The person either directly or indirectly makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances of the retirement investor and may be relied upon by the retirement investor or as a basis for investment decisions that are in the retirement investor's best interest; or

3) The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.

The key differentiators between the existing five-part test and the recently proposed framework surrounds the interpretations of "regular basis" and "mutual agreement, arrangement or understanding". The DOL asserts that current interpretation of the "regular basis" requirement excludes one-time advice from being considered fiduciary investment advice which may lead to confusion and uncertainty for investors. Instead the Proposed Rule would accomplish the goal of classifying one-time investment advice as covered by the fiduciary standard. Additionally, by replacing the mutual agreement, arrangement or understanding qualification the DOL expands the scope of fiduciary status and ultimately limits the ability for financial professionals to rely on fiduciary status disclaimers.

Along with the revised parameters of who is considered an investment fiduciary, the DOL has proposed amendments to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128. These amendments would effectively remove fiduciary investment advice transactions from the transactions covered under those PTEs. Furthermore, all investment advice fiduciaries would be required to uphold the same standards of conduct in administrative PTEs as only PTEs 2020-02 and 84-24 would be available for transactions in which the fiduciary would receive compensation that would otherwise be prohibited. It is important to note that the DOL has also proposed to amend PTEs 2020-02 and 84-24.

The Biden Administration maintains that the Proposed Rule is aimed at "leveling the playing field" for workers and retirees. These proposed amendments have certainly been met with their fair share of mixed reviews. Some believe that the Proposed Rule is eerily similar to the DOL's 2016 fiduciary rule proposal which was ultimately abandoned in 2018 after the DOL lost a case in the 5th Circuit Court of Appeals that claimed that the rules were an "arbitrary and capricious" use of the DOL's rulemaking authority, and many critics of the rule expect that there will be subject to similar legal challenges.[4]

Industry Response: Critics of the Proposed Rule believe that these new parameters will ultimately harm retirement plans and retirees stating that the Proposed Rule will make investing more difficult for those who

[4] *Chamber of Commerce v. U.S. Department of Labor* case represented a major victory for industry participants who raised concerns that the rule had unintended collateral effects that would render investment and retirement services more costly and potentially inaccessible for certain individual investors. See, *Chamber of Commerce v. DOL*, https://www.ca5.uscourts.gov/opinions/pub/17/17-10238-cv0.pdf

are in a lower to middle income earning bracket to find investment services as reasonable prices. Further, industry critics have described the Proposed Rule as a solution in search of a problem.

Again, the DOL received a large number of wide-ranging comments that could generally be bucketed into two categories: (1) support for the Proposed Rule from consumers and consumer groups and (2) objections on the Proposed Rule from banks, insurance companies, law firms focused on the financial services sectors and industry groups.[5] Additionally, the DOL took the unusual step of holding two days' worth of hearings on the matter on December 13th and 14th, 2023, which was prior to the close of the comment period (making it impossible for the all of the presenters to ensure that their comments fully covered all of the comments as filed with the DOL).

The proposals have also been met with criticism from certain relevant members of Congress. The Proposed Rule was met with criticism by Republicans. House Education & the Workforce Committee Chair Virginia Foxx (R-NC) said in a statement, "This latest proposal is just new lipstick on the same old pig, and it will harm retirement plans, retirees, and savers." Senate HELP Committee Ranking Member Dr. Bill Cassidy (R-LA) said in a statement, [The Proposed Rule] "imposes burdensome regulations that have already proven to make investing more difficult, especially for those who are lower- and middle-income."

Why does the DOL appear to be rushing this rule through to final stage? As we near the end of the Biden Administration's first term in office, and a Presidential and Congressional election in 2024 (the likely and possible results of which are currently up for debate, the DOL is keenly aware of the Congressional Review Act, which allows Congress to review and overturn certain rules finalized within 60 legislative days prior to a change of administration. This means that the DOL is expecting to finalize the rule by no later than the 2nd quarter of 2024, to avoid a subsequent Congressional review. See important update below.

Important Update: As anticipated, in an attempt to push the Proposed Rule to a final rule before the end of the second quarter of 2024, on March 8, 2024, DOL submitted a final version of the Proposed Rule to the Office of Management and Budget ("OMB") for review.[6] OMB review is typically the final stage of the regulatory process before the publication of a final rule and can take anywhere from a few days to several months. Assuming a normal review process, it is expected the Fiduciary Rule to be released by the end of May, which would be before the end of the second quarter of 2024. The text of the final rule will not be publicly available until it is released by DOL or published in the Federal Register following approval by the OMB. The OMB does have the authority to send a rule back to the regulatory agency for additional follow up, but does not utilize that authority on a regular basis.

FinCEN Proposes Sweeping AML Requirements for Registered Investment Advisers

The Financial Crimes Enforcement Network (FinCEN) has proposed a new rule that if adopted would subject almost all investment advisers to regulatory requirements aimed at reducing the risk of investment of illicit funds.[7] Notably the rule was published following the publication of the Department of Treasury's 2024 Investment Adviser Risk Assessment[8], within which contained indications that in certain situations investment advisers can actually act as an "entry point into the US Market for illicit proceeds associated with foreign corruption, fraud and tax evasion". The Investment Adviser Risk Assessment also included that certain advisers and their funds, such as venture capital funds, are being wrongly abused by foreign states to "access certain technology and services with long-term national security implications through investments in early-stage companies".

While some investment advisers are already subject to the jurisdiction of the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("RFB"), the Federal Deposit

[5] The comment letters can be found here: https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02

[6] *See*, DOL Sends Final Fiduciary Rule to OMB, March 9, 2024 available at https://www.groom.com/resources/dol-sends-final-fiduciary-rule-to-omb/?utm_source=vuture&utm_medium=email&utm_campaign=retirement

[7] Federal Register, Vol. 89, No. 32 (15 February 2024), p. 12116, available at: https://www.govinfo.gov/content/pkg/FR-2024-02-15/pdf/2024-02854.pdf.

[8] U.S. Department of the Treasury, 2024 National Money Laundering Risk Assessment (February 2024) available at: https://home.treasury.gov/system/files/136/2024-National-Money-Laundering-Risk-Assessment.pdf.

Insurance Corporation ("FIDC") and the National Credit Union Administration ("NCUA") many are not subject to the same anti-money laundering ("AML") and countering the financing ("CFT") requirements. Some advisers have voluntarily developed and implemented AML and CFT programs, but others have not.

The proposed rule includes expanding the definition of "financial institution" to include investment advisers registered with the Securities and Exchange Commission ("SEC") as well as those that report to the SEC as an exempt reporting adviser. Ultimately these advisers will be responsible for developing and implementing AML/CFT programs. Those programs would need to include the following: 1) implementing risk basked AML/CFT programs, 2) reporting suspicious financial and transaction activity to FinCEN, maintaining records regarding the transmittal of funds and additional recordkeeping rules already in effect, and 3) any other obligations that are applicable to financial institutions subject to the Bank Secretary Act ("BSA") and FinCEN's regulations. Notably, the proposed rule would not require covered advisers to implement a customer identification program ("CIP"), under which banks and broker-dealers are required to collect and document certain identifying information about customers, nor would it require the collection of beneficial ownership information for legal entity customers. FinCEN proposes to delegate examination authority to the SEC.

The proposed rule also includes "information-sharing" provisions between FinCEN, governmental law enforcement agencies, and financial institutions with investment advisers. Finally, investment advisers would also be subject to requirement put in place by FinCEN relating to Section 311 of the USA Patriot Act allowing the Treasury Department to act accordingly in targeting money laundering and terrorist financing risks.

Investment Advisers will have 12 months from the effective date of the final rule to develop the necessary policies and procedures if adopted. These proposed policies include development and implementation of an AML/CFT program, appointment of controls designed to prevent investment advisers from being targeted as a way to participate in illicit finance activities, conducting independent testing, appointing a designated person responsible for the implementation of the program, training provisions, and implementation of risk-based customer due diligence.

It will be imperative the investment advisers consult with counsel to confirm that the procedures put in place will withstand regulatory examination. If this rule is adopted investment advisers can expect the SEC's Examination Division to hone in on these new requirements during examinations. FinCEn requested comments on the proposed rule by April 15, 2024, and it is expected that there with be a multitude of comments both for and against the proposed regulation. Additionally, the adviser's clients, including banks maintaining CITs with such advisers, may require additional contractual protections dealing with the adviser's compliance with the new AML requirements if and once the final rules go into effect.

REGULATORY UPDATE

Proposed Regulations on Long-Term; Part-Time Employee Rules for 401(k) Plans

The Internal Revenue Service (the "IRS") has proposed regulations to amend the rules surrounding 401(k) plans with respect to long-term, part-time employees.[9] These proposed changes are reflective of statutory changes made by the SECURE Act and the SECURE 2.0 Act.

The proposed regulations would apply for plan years beginning before 2025 and provide a definition for a "long-term part-time employee" as a person who 1) has worked at least 500 hours of service per year for three consecutive years, 2) has turned 21 by the end of the three-year consecutive period, and 3) is not in

[9] Long-Term, Part-Time Employee Rules for Cash or Deferred Arrangements Under Section 401(k) available at https://www.federalregister.gov/documents/2023/11/27/2023-25987/long-term-part-time-employee-rules-for-cash-or-deferred-arrangements-under-section-401k

an excluded class. Notably for plan years starting after December 31, 2024, the consecutive three-year requirement would decrease from three years to two as per the SECURE 2.0 Act.

The proposed regulations specify an employee's initial 12 month period for purposes of determining eligibility to participate as a long-term, part-time employee must be based on the employee's date of hire. However, even in the case the employee does not meet the requirement of 500 hours of service during their initial 12-month period, subsequent 12-month periods can be determined by referencing the first day of the plan year.

Notably the proposed regulations do not include the break-in-service rules for purposes of determining an eligible participant. If an eligible long-term, part-time employee does not meet the minimum requirement of 500 service hours in a 12 month period there would be no change to the participant's eligibility status. Furthermore, in the case a former employee is rehired and was previously considered eligible to participate as long-term, part-time employee, all prior 12 month periods during which they met the minimum 500 service hour requirement would have to be taken into account when determining eligibility status once again as a long-term, part-time employee.

In regards to vesting, long-term, part-time employees would receive one year of vesting service for each 12 month period where they are performing a minimum of 500 hours of service, and incur a one-year-break-in-service when the 500 hour service minimum is not met. The proposed regulation also includes that in determining vesting service for long-term, part-time employees a plan may use any vesting computation period that is used for other employees. Any 12 month periods beginning prior to January 1, 2021 will be disregarded for both vesting and eligibility purposes.

Sponsors of 401(k) plans would still have discretion in deciding whether or not to participate in matching or non-elective contributions on behalf of a long-term, part-time employee, regardless of if these contributions are made to other employees. If it is determined by a plan sponsor to abstain from making matching or non-elective contributions the 401(k) plan would not fail to meet the nondiscrimination or minimum coverage requirements as long as the plan sponsor elects this exclusion. SIMPLE 401(k) arrangements would still require satisfying matching or non-elective contribution requirements and cannot exclude long-term, part-time employees. Long-term, part-time employees are not omitted in the determination of whether a plan is considered a top-heavy plan.