SEI Trust Company Quarterly Update Third Quarter 2025

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.

REGULTORY UPDATE

Department of Labor to Address ESG Rule Through Rulemaking Process

In late April the U.S. Court of Appeals for the Fifth Circuit provided the Department of Labor ("DOL") with 30 days to establish next steps regarding the Biden-era environmental, social, and governance ("ESG") rule. The DOL had originally requested an indefinite and complete pause of the proceedings. Following the Fifth Circuit Court's decision, the DOL has provided an update noting that they intend to push onward in rescinding and/or changing the existing ESG regulation. The DOL plans to do so through a formal regulatory notice and comment period. This rule making effort was added to the spring regulatory agenda, but as of the date this update was issued, there is no updated rule available.

The final ESG rule[1] implemented by the DOL under President Joe Biden, allowed for plan fiduciaries to consider climate change and other environmental, social and governance factors when selecting retirement investments and exercising shareholder rights. Days before the final rule was set to take effect, a coalition formed up of 24 states filed suit to halt the implementation of the final ESG rule. Many opponents of the rule, such as Attorney General Paxton of Texas, believe that the rule "undermines key protections for retirement savings of 152 million workers-approximately two-thirds of the U.S. adult population and totalling $12 trillion in assets – in the name of promoting environmental, social and governance factors in investing including the Biden Administration's stated desire to address climate change."[2]

Ultimately, Judge Matthew Kacsmaryk of the U.S. District Court for the Eastern District of Texas, disagreed with the claims brought by the 24-state coalition. He concluded that "the 2022 Rule does not permit a fiduciary to act for other interests than the beneficiaries' or for other purposes than the beneficiaries' financial benefit. For that reason, under the Loper Bright standard, it is not contrary to [the] law."[3] Given the recent announcement made by the DOL, many anticipate that the upcoming iteration of the ESG regulation will most likely closely mirror the 2020 Rule, which require much more stringent requirements to be met before ESG considerations can be used in making investment decisions for ERISA plans and plan asset funds like CITs.[4]

[1] See "Fiduciaries May, But Not Must Consider ESG: DOL" available at BREAKING NEWS: Fiduciaries May, But Not Must Consider ESG: DOL
[2] See "Red State Coalition Sues to Stop ESG Rule" available at Breaking News: Red State Coalition Sues to Stop ESG Rule
[3] See "Trump-led DOL to Address ESG Rule Through Rulemaking Process" available at Breaking News: Red State Coalition Sues to Stop ESG Rule
[4] "DOL Finalizes Financial Factors ERISA Regulation" available at DOL Finalizes 'Financial Factors' ERISA Regulation – Publications

House Panel Approves Legislation Allowing CITs in 403(b) Plans

Participants in 403(b) plans currently lack access to the same investment opportunities available to those in other plans, such as 401(k) plans, 457(b) plans, and the federal Thrift Savings Plan. While mutual funds and ETFs are required to register with the Securities and Exchange Commission, collective investment trusts ("CITs") fall under the regulation of the Office of the Comptroller of the Currency or a state banking regulator. Because CITs are exempt from SEC registration requirements they can most often be offered in a lower fee CIT as compared to mutual funds.

Legislation permitting 403(b) plans to incorporate CITs into their investment options has been approved by the House Financial Services Committee (the "Committee"). The Committee approved an "amendment in the nature of a substitute"[5] to H.R. 1013, the Retirement Fairness for Charities and Educational Institutions Act of 2025, with a vote of 43-8. H.R. 1013 was reintroduced to the Committee on February 5, 2025. This legislation amends Federal securities laws to allow 403(b) plans to invest in collective investment trusts and unregistered insurance contracts. Proponents argue that this will create a more equitable investment environment for all workers by allowing 403(b) plans to access CITs ("CITs"). "On May 20, the House Financial Services Committee approved by bipartisan a vote of 43-8 H.R. 1013, which as amended, would allow certain Section 403(b) plans to include CITs among the investment options offered to their participants: (i) 403(b) plans subject to Title I of ERISA; (ii) governmental plans; and (iii) plans sponsored by employers acting as fiduciaries, provided that—in the case of a government plan—either the employer, its representative, or a fiduciary of the plan reviews and approves each investment alternative under the plan, prior to the investment being offered to participants in the plan."[6]

The bill was initially introduced during the previous Congress and approved on a bipartisan basis as part of a larger financial services package. However, it was not considered by the Senate before the year's end, necessitating its reintroduction into a new Congress. Previously, the SECURE 2.0 Act amended the Internal Revenue Code to permit 403(b) plans to invest in CITs, but additional changes required under the securities law were not included in the final bill enacted in December 2022. The American Retirement Association ("ARA"), a long-time advocate for allowing 403(b) plans to invest in CITs, has recently expressed its support for this legislation. The ARA believes that these changes will enhance retirement savings for employees in non-profit organizations, such as hospitals and universities. Brian Graff, CEO of ARA, stated, "Under the bill, 15 million workers at these organizations throughout the country will now have access in their retirement plan - called a 403(b) plan - to the same lower-cost investments that are available to 401(k) participants."

Additionally, the Committee voted down an amendment that would have required CITs to only be included in 403(b) plans that are covered by ERISA. Rep Stephen Lynch of Massachusetts introduced this amendment noting the amendment would ensure genuine equality in safeguarding the interests of retirees. Nonetheless, a number of members, such as Rep. Lucas, challenged that argument, emphasising that CITs are governed by rigorous regulatory oversight and that the bill contains substantial foundational safeguards.

While subject to continued "broad bi-partisan support", as noted by most industry groups, the CIT legislation continues to lack sponsors in Congress who will actively push for its implementation, and with a Congress that continues to be split on many of the marquee matters of the day, this CIT legislation, which should be a slam dunk, continues to flounder, looking for someone with the right criteria to get it across the finish line. Given that there is no legitimate reason why 401(k) plans can access CITs, but similar 403(b) plans cannot, participants in 403(b) plans continue to be excluded from the fee relief that CITs can provide.

STC remains committed to continue to monitor this matter for the benefit of its collective investment trusts

[5] "House Panel Approves Legislation Allowing CITs in 403(b) Plans" available at Breaking: House Panel Approves Legislation Allowing CITs in 403(b) Plans

[6] Broader Investment Options on the Horizon for Section 403(b) Retirement Plans, Mayer Brown, available at https://www.mayerbrown.com/en/insights/publications/2025/07/broader-investment-options-on-the-horizon-for-section-403b-retirement-plans

and advisers.

House GOP Targets EBSA Enforcement Activity, Interest Agreements

Late last year, the Department of Labor's Employee Benefits Security Administration ("EBSA") came under scrutiny for its involvement in sharing information with plaintiffs' counsel in connection with a Common Interest Agreement ("CIA") during an ERISA litigation involving employee stock ownership plans ("ESOP"). Common Interest Agreements are intended to facilitate the exchange of information that the DOL has acquired through its investigative authority, particularly in cases where parties share a mutual legal interest.

It was discovered during an investigation of an employer's ESOP, the information exchanged under the CIA included detailed summaries of interviews conducted by the DOL, as well as a formal legal demand letter issued by the DOL to both a trustee of the ESOP and one of the named defendants. At the time, Representative Virginia Foxx, then Chair of the House Education and Workforce Committee, formally raised concerns regarding the propriety of the DOL's actions. Representative Foxx called upon the Department of Labor's Office of Inspector General ("IG") to initiate a thorough investigation into the practice, contending that the DOL was potentially overstepping its authority by "secretly sharing confidential information with a plaintiffs' attorney for use against plan fiduciaries."[7]

In January 2025, upon assuming the Chair position from Representative Foxx, Representative Tim Walberg renewed the request to the DOL's IG. Representative Walberg specifically urged the IG to pursue an investigation into the allegations that the DOL was "improperly sharing" confidential and sensitive information with plaintiffs' attorneys for use in ongoing litigation. In response to ongoing concerns, two members of the House Education and Workforce Committee have introduced legislative measures designed to increase transparency and accountability within the agency. Among these proposals is the EBSA Investigations Transparency Act, which would impose new annual reporting obligations on the EBSA.

Under the provisions of the proposed legislation, the Secretary of Labor would be mandated to submit a comprehensive report to Congress no later than December 31st of each calendar year. This annual report would be required to provide detailed status updates on all pending and ongoing EBSA investigations, as well as enforcement cases where the Secretary has exercised investigative authority or initiated targeted compliance monitoring activities, as outlined in Section 504(a) of ERISA. The report would encompass not only investigations that remain active but also those cases in which the Secretary has asserted authority to investigate or has engaged in focused compliance initiatives.

The annual report would require information indicating which regional or district EBSA office opened each investigation, including the date the investigation was opened and the date the Secretary of Labor first requested documents. Additionally, the report must also include whether the investigation has concluded within 36 months, and if not, an explanation would be required with an estimated date of conclusion. The report should not include information identifying any party involved, such as plan sponsors, fiduciaries, service providers, employees, or participants.

A second bill, the Balance the Scales Act (H.R. 2958), was introduced on April 17 by Representative Mike Rulli (R-Ohio), proposes amendments to ERISA that would require the EBSA to submit an annual report to Congress detailing its use of CIAs, also referred to in the bill as "adverse interest agreements." The legislation defines "adverse assistance" as providing assistance or advice—including the disclosure of information obtained through DOL investigations—specifically to attorneys for potential use in ERISA civil actions. Under the proposed requirements, the DOL would be obligated to enter into a written agreement outlining the nature and scope of such assistance and to furnish a copy to any employer, plan sponsor, or fiduciary directly affected. An annual Congressional report would summarize all CIAs entered into over the previous year. Both this bill and related measures have been referred to the House Education and Workforce Committee for further consideration.

[7] See "House GOP Targets EBSA Enforcement Agency, Interest Agreements" available at House GOP Targets EBSA Enforcement Activity, Interest Agreements

EBSA Takes a Big Hit from Staff Resignations

The Department of Labor's Employee Benefits Security Administration (EBSA) is facing significant challenges in fulfilling its mission following a major reduction in staff. Recent reports indicate that approximately 200 EBSA employees have either resigned or retired after accepting voluntary separation offers. For fiscal year 2024, EBSA's staffing level stood at roughly 889 full-time employees (FTE).[8]

This reduction is part of a broader trend across the Department of Labor (DOL), with around 2,700 out of 14,578 employees accepting similar offers. In early April, the DOL extended Voluntary Early Retirement Authority (VERA) and the Deferred Resignation Program (DRP) to eligible employees. The DRP allows participants to remain on administrative leave and continue receiving pay through September. The deadline to participate in either program was April 18.

Of EBSA's 889 FTEs in 2024, 120 positions were supported by supplemental funding from the No Surprises Act for the implementation of its provisions. This temporary funding expired in March, further constraining EBSA's operational capacity. The departure of 200 staff members is expected to intensify the anticipated impact of the No Surprises Act funding shortfall, leading to a reduction in labor-intensive services.

Key EBSA functions include the help hotline, the issuance of guidance and regulations for SECURE 2.0, completion of the lost and found database, and provision of technical assistance on future ERISA-related legislation may be significantly curtailed as a result of these staffing losses.

The agency's investigative functions are also likely to be affected. Previously, EBSA maintained approximately one investigator for every 14,000 health, retirement, and other benefit plans. With the current staffing reductions, this ratio will increase, placing additional pressure on the agency's oversight capabilities.

Josh Oppenheimer, Senior Director of Federal Legislative Affairs at the American Retirement Association and former Senior Policy Advisor to the EBSA Assistant Secretary during the Biden-Harris Administration, highlighted the challenge: "It's hard to fathom how an agency whose size is soon to be smaller than my high school graduating class can effectively educate and assist the over 150 million workers, retirees, and their families who participate in employer-sponsored benefit plans,"[9] Oppenheimer observed. He noted that EBSA, already operating with limited staff and resources, will face even greater difficulties in meeting its responsibilities following these departures.

Revocation of Biden Administration's Cryptocurrency Guidance/Guidance Expected on Alternative Assets in 401(k) Plans.

There has been an about face with respect to the DOL's prior position on cryptocurrency. The reversal comes in several parts.

First, on March 10, 2025, the DOL released Compliance Assistance Bulletin 2025-01[10], which rescinded in full the Biden administration's guidance on 401(k) plan's investment in cryptocurrencies. While the prior guidance had guarded fiduciaries to take "extreme care" before adding a cryptocurrency investment option to a plan's line up, the current DOL has decided to go back to a neutral approach to investment options involving cryptocurrencies, and does not endorse or disapprove of such options. The guidance now directs plan investment fiduciaries to make a decision as to whether such an option is appropriate for the 401(k) plan in question.

Then on August 7, 2025, the White House issued a Presidential Action titled "*Democratizing Access to Alternative Assets For 401(k) Plan Investors*", whereby the presidential administration announced its intention to work to permit alterative assets in 401(k) plans by "reliey[ing] the regulatory burdens and

[8] See EBSA Takes a Big Hit from Staff Resignations" available at EBSA Takes a Big Hit from Staff Resignations
[9] Id.
[10] Available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2025-01

litigation risk that impede American workers' retirement accounts from achieving the competitive returns and asset diversification necessary to secure a dignified, comfortable retirement."[11]

The announcement directed the Secretary of the DOL to work to make "private assets" available to participants in asset allocation fund that is offered to participants, and to come up a process where fiduciaries can make decisions to use such funds and offer them including how to asses the higher fees that these products come with and how to mitigate the litigation risk for fiduciaries for doing so. The directive also told the DOL to consult with the SEC and other Federal agencies as applicable, in order to effectuate the objectives of the order. Further, the announcement defined private assets as:

> "(i) private market investments, including direct and indirect interests in equity, debt, or other financial instruments that are not traded on public exchanges, including those where the managers of such investments, if applicable, seek to take an active role in the management of such companies;
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> (ii) direct and indirect interests in real estate, including debt instruments secured by direct or indirect interests in real estate;
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> (iii) holdings in actively managed investment vehicles that are investing in digital assets;
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> (iv) direct and indirect investments in commodities;
>
> (v) direct and indirect interests in projects financing infrastructure development; and
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> (vi) lifetime income investment strategies including longevity risk-sharing pool."

Moving quickly on this directive, the DOL then rescinded its December 2021 supplemental statement warning fiduciaries about using alternative assets in 401(k) plans.[12] This previous statement had reached the conclusion that "most plan fiduciaries would be "not likely suited to evaluate the use of PE investments in designated alternatives in individual account plans."[13] The DOL again reiterated its now current position which "…dictate a neutral, principled-based approach to fiduciary investment decisions, consistent with the requirements of Employee Retirement Income Security Act. When evaluating any particular investment type, a plan fiduciary's decision should consider all relevant facts and circumstances and will necessarily be context specific. The department should not single out particular investments or investment strategies for additional or special scrutiny."[14] This guidance was issued on August 12, 2025, only days after the Presidential Action was released.

On the same day, the President's Council of Economic Advisers (CEA) released a report on the "significant benefits" of the EO's policies for retirement savers and private companies, including small businesses.[15] Additionally, on August 15, the Securities and Exchange Commission (SEC) published new Accounting and Disclosure Information containing updated staff views that are broadly consistent with the EO. In ADI 2025-16, the SEC clarified that registered closed-end funds investing 15% or more of assets in private funds will no longer have to limit access to investors who qualify as "accredited investors" or meet minimum investment requirement, which while not applicable to CITs, is another step to moving towards the loosing of restrictions on investments by more retail investors in private funds.

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[11] Available at https://www.whitehouse.gov/presidential-actions/2025/08/democratizing-access-to-alternative-assets-for-401k-investors/

[12] See *US Department of Labor rescinds 2021 supplemental statement on alternative assets in 401(k) plans* available at https://www.dol.gov/newsroom/releases/ebsa/ebsa20250812

[13] Id.

[14] Id.

[15] *Retail Access to Alternative Investments Via Defined Contribution Plans* available at https://www.whitehouse.gov/research/2025/08/retail-access-to-alternative-investments-via-defined-contribution-plans/

Although such guidance would be helpful to plan fiduciaries who would like to consider these types of products, including CITs with an allocation to one or more private fund, other risks associated with such alternatives – including higher fees, limited liquidity and complex valuation, remain. Asset managers who are interested in these types of funds should consider working with a partner with sufficient knowledge of these matters who can help develop products for the market that make sense and deal with risk in a knowledgeable and thoughtful manner.

DOL Rescinds Guidance on ERISA Plan Sponsor Vendor Diversity Program

In the world of whiplash that is DC these days, another Biden era advisory opinion, this time regarding the DOL's limited endorsement of an ERISA plan fiduciary's practice of considering a plan sponsor's diversity programs when evaluating what asset manager to retain[16] has now also been rescinded. In DOL Advisory Opinion 2025-01A, the prior guidance has now been rescinded, and no longer gives plan sponsors the ability to use diversity as a reason to hire an asset manager for the plan. While the rationale behind the Advisory Opinion is not generally supported by applicable law, as it calls such diversity programs illegal and refers to them as "unlawful discrimination in violation of federal civil rights, the more important part of the guidance is that it clearly informs plan sponsors that the prior guidance is no longer in favor at the DOL, and that it cannot be used or cited in supporting decisions to hire one or more investment managers for an ERISA covered retirement plan. Also plan managers should refrain from using the prior guidance, as it does no longer reflect the views of the current DOL.

LEGAL UPDATE

ERISA Fiduciary Rule Litigation Update

As the DOL is still waiting for a head of the Employee Benefits Security Administration to be confirmed by Congress, the DOL was able to obtain another extension to make a determination as to the next steps in litigation. As of the date of this update, the DOL has to **October 14, 2025** to file a determination with the applicable court to confirm if it intends to continue on with the litigation and appeal or to withdraw and let the last judgment stand. This is particularly important for entities that continue to provide guidance on rollovers to participants in current 401(k) plans, and who are continuing to be confused as to whether compliance with PTE 2020-20 is still required, which is not clear based on the status of the litigation. As although SEC standards under the best interest paradigm continue on, entities that rely on the best interest standard requires the recommendation to consider the investments, services and expenses in the plan and compare them to the IRAs, but does not require the specific consideration of whether it would be better for the participant to leave the money in the plan, which is a component of PTE 2020-20.

[16] See DOL Advisory Opinion 2023-01A.