SEI Trust Company Quarterly Update 4th Quarter 2024

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.

REGULATORY UPDATE

Understanding the Regulatory Freeze Pending Review

Immediately following the inauguration of President Donald Trump on January 20, 2025, a directive was issued by President Trump instituting a regulatory freeze on federal rulemaking[1]. The executive memorandum directs all executive departments and agencies to halt the proposal and issuance of new rules[2] until they have been reviewed and approved by a department agency head appointed by the President. The department or agency head may delegate the power of the review and approval process to any other person appointed by the President. The Director or Acting Director of the Office of Management and Budget ("OMB") could exempt any rule that they deem necessary to address emergency situations. The goal of the regulatory freeze is to ensure that all regulatory actions align with the new administration's fundamental policies.

Additionally, any rules that have been sent to the Office of the Federal Register, but have not yet been published, should be withdrawn for review and approval. This directive also impacts rules that have been published in the Federal Register or issued but are not yet effective. The President has asked that the executive departments and agencies consider postponing the effective date of any rules published but not yet effective for 60 days. When appropriate during this 60-day period, the memorandum encourages opening a comment period to allow all interested parties to provide comments as they relate to issues surrounding fact, law, and policy.

Following the 60-day postponement, no further action is needed for rules that do not raise any substantial questions. Alternatively, the memorandum instructs agencies to notify and consult with the OMB in the case that any rules have been subject to substantial questioning.

403(b) Advocates Reject Recent Industry Criticism/New 403(b) Legislation Introduced in Congress for 2025

Proponents of the legislation that would permit 403(b) plans to invest in collective investment trusts (CITs)

[1] See "Regulatory Freeze Pending Review" available at Regulatory Freeze Pending Review – The White House

[2] "Rule" has the definition set forth in section 551(4), title 5, United States Code. It also includes any "regulatory action," as defined in section 3(e) of Executive Order 12866 of September 30, 1993, as amended, and any "guidance document" as defined in section 2(b) of Executive Order 13891 of October 9, 2019 (Promoting the Rule of Law Through Improved Agency Guidance Documents), when that order was in effect.

have issued a strong rebuttal to a letter from critics urging Congress to dismiss the bill. Amongst those advocates is the American Retirement Association. This rebuttal letter is one of the most recent developments in a long-lasting effort by lawmakers and industry participants to push legislation past the finish line that would allow 403(b) plans, including plans for the benefit of health care and education employees, access to CITs.

Congress received the letter on November 13, 2024, authored by several consumer advocacy organizations in opposition to the proposed 403(b) plan proposal. The letter urges Congress to oppose the bill under the guise that allowing 403(b) plan participants to invest in CITs it would "severely threaten the transparency, integrity, and accountability of U.S. securities markets, placing millions of investors at risk and undermining the broader economy."[3] More specifically, the letter further argues that "this section [of the bill] would allow unregistered securities to be sold to 403(b) retirement plans, including those used by public school teachers. By eliminating the SEC's regulatory oversight, the bill would open the door to unregistered financial products with hidden risks and costs being sold to some of the most vulnerable retirement workers."[4]

Supporters of the bill believe the authors of the letter sent to Congress have woefully missed the mark. Supporters such as the American Retirement Association, note that not only are CITs highly regulated by the Office of the Comptroller of the Currency and the U.S. Department of Labor, but they consistently offer investors lower investment fees compared to mutual funds. Those in favour of the 403(b) plan proposal, including the American Retirement Association, argue that the bill would address unnecessary restrictions in the securities laws that limit the investment options available to 403(b) plans. Supporters of this bill also emphasise that the bill would promote greater consistency and equity among retirement plan programs. Notably, 401(k) plans, 475(b) plans, and federal Thrift Savings Plans can all invest in CITs. Under the proposal, a fiduciary would need to approve the inclusion of CITs in any non-ERISA 403(b) plans, indicating there is no rationale for prohibiting 403(b) plans from including CITs as part of their investment offerings.

The letter issued to Congress neglected to address the numerous benefits of allowing 403(b) plans to invest in CITs. Most notably, the letter failed to mention the lower CIT administration, marketing, and distribution costs in comparison to mutual funds. With roughly 14.5 million non-profit and governmental sector American workers participating in 403(b) plans, the proposed bill could significantly increase the number of Americans that could access lower-cost CITs.

While the proposed 403(b) plan legislation failed to pass in Congress in 2024, supporters of the change have already re-introduced legislation into Congress requesting the same change. Legislation that would allow 403(b) plans to include collective investment trusts (CIT) as part of their investment menu options was reintroduced on February 5, 2025, The House version of the bill, H.R. 1013, was introduced soon after the Senate version on the same day. The Retirement Fairness for Charities and Educational Institutions Act (S. 424) is the latest attempt to pass the 403(b)/CIT legislation after Congress was unable to enact a previous version introduced last year. Those who support the legislation are called upon to have entities that sponsor 403(b) plan show support for the legislation, with a hope that with sufficient plan sponsor support that the measure will pass in 2025.

LEGAL UPDATE

American Airlines 401(k) ESG Lawsuit – Not a Win for ESG Advocates

A federal judge ruled against American Airlines ("American" or the "Company") in a class-action lawsuit regarding the Company's retirement plans' environmental, social and corporate governance considerations ("ESG"). The lawsuit was originally filed against American in August 2023, by pilot Bryan Spence. Spence alleged that American violated its fiduciary duties by failing to monitor proxy voting of its investment

[3] "CIT/403(b) Advocated Rejects Recent Criticism, CiteBenefits" available at CIT/403(b) Advocates Reject Recent Criticism, Cite Benefits
[4] *Id*.

managers[5]. His complaint also alleged that the Company failed to keep its' corporate interest separate from its fiduciary duties. Spence argued that American ran afoul of its fiduciary duty of prudence to its plan participants by failing to monitor the proxy voting decisions made by investment advisers providing investment management services to the fund, such as BlackRock, and that the ESG goals established by American created a "corporate conflict of interest"[6] when combined with the ESG considerations made by BlackRock.[7]

The Company argued that the claims against them should be dismissed as Spence was not able to provide any evidence that the 401(k) plan had underperformed. Judge Reed O'Connor denied the motion to dismiss and ultimately presided over a four-day non-jury trial. During the course of the trial, it was revealed that American fiduciaries had not received quarterly reports from BlackRock as it relates to proxy voting attestations. Moreover, some of the reports would have included guidelines that incorporate ESG considerations. Judge O'Connor ultimately ruled against the Company stating that American was in direct violation of its fiduciary duty to loyalty by failing to keep its corporate interests separate from its fiduciary responsibilities. Judge O'Connor stated that he would decide at a future date whether class members suffered any financial harms that must be remedied by American.

The ruling was met with backlash from American and industry members. A spokesperson for the Company commented adding that "American has never offered ESG investment options in our 401(k) plan. In fact, the committee that considers investments for our plan has expressly rejected ESG investments."[8] Legal experts and investment managers have also spoken out against the ruling expressing concerns that this ruling could potentially open the door to more lawsuits inquiring about corporations' fiduciary duties with respect to ESG. Others, such as Andrea Poreda, senior analyst for Sage Advisory, expressed concern that the bar is being lowered for what constitutes as a fiduciary duty violation. Furthermore, she added that "plan sponsors should be concerned" in the case this ruling holds up on the Court of Appeals. The overall ruling of the case has opened the flood gates, identifying a "bigger political question about arguments over what impacts the bottom line for a company"[9] according to the Victor Flatt, Case Western Reserve University's environmental law chair.

Excessive Fee Complaints

On December 10, 2024, the United States Court of Appeals for the Second Circuit upheld a lower court's decision to dismiss and deny leave to file an amended complaint in *Singh v. Deloitte LLP*[10] Singh revolved around allegations that the fiduciaries of Deloitte's retirement plan (the "Plan") breached their duty of prudence by permitting the Plan to incur excessive recordkeeping fees. The plaintiffs in this case contended that between 2010 and 2015, plan participants paid revenue sharing expenses, which included direct and indirect payments, ranging from $59.59 to $70.31 per participant. They compared these fees to the 2019 direct costs of six similarly sized plans, where participants paid between $21.00 to $34.00 per participant.

The court found that the plaintiffs failed to provide an adequate "apples-to-apples" comparison between the Plan's recordkeeping fees and those of the other plans. The original complaint compared the Plan's direct and indirect recordkeeping costs to only the direct recordkeeping costs of comparable plans. The amended complaint further deviated from the apples-to-apples comparison by only comparing the direct expenses of the Plan to the comparable plans and completely omitted the comparison between the indirect costs.

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[5] See "Federal judge rules against American Airlines in 401(k) ESG lawsuit" available at Federal judge rules against American Airlines in 401(k) ESG lawsuit | ESG Dive
[6] *Id.*
[7] *Id.*
[8] See "Federal judge rules against American Airlines in 401(k) ESG lawsuit" available at Federal judge rules against American Airlines in 401(k) ESG lawsuit | ESG Dive
[9] See "Federal judge rules against American Airlines in 401(k) ESG lawsuit" available at Federal judge rules against American Airlines in 401(k) ESG lawsuit | ESG Dive
[10] Singh v. Deloitte LLP, 123 F.4th 88 (2d Cir. 2024) available at https://www.bloomberglaw.com/product/blaw/document/X196RTF4G000N?criteria_id=f4afe582d5bfd67f9d6448e137c42b45&searchGuid=aacdcc97-6280-4fb6-9182-2d799ef0adf9&search32=xK1NKtz2BQ_SK8Yo7vLbjA==r7vZc5XPouowDcIckFCc2hQPvVd5feoJdJIGFn3dg-6lbt5E_3F8F8-rLZQ72jnB1rIUOutoQwenxKXee2vm1Q==

The complaint also lacked information regarding the recordkeeping services being provided. The plaintiff merely compared fees without providing any background on the types of services being performed for either the Plan or the comparable plans. Ultimately, the Second Circuit reaffirmed that the plaintiffs did not sufficiently demonstrate a violation of the duty of prudence. This case establishes important "apples-to-apples" framework for the requirements in place for those looking to plead their case as it relates to complaints regarding excessive fees.
