

Quarterly Update December 31, 2021

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.

Accounting Update

- **Change to Certain Accounting Rules May Require Additional Inquires by Plan Administrators to their Plan’s Custodians and/or Plan Trustees**

There are upcoming changes to audit requirements that may impact the audit of a tax-qualified plan for those plans who intend to rely on Section 103(a)(3)(c) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) to perform a more limited audit of the plan’s holdings (which was formerly known as a “limited scope audit”). These changes will be effective for plan year’s ended December 15, 2021 and thereafter.

The benefit to the plan and the plan administrator from relying on Section 103(a)(3)(c) of ERISA is that the auditor does not need to perform its full audit procedures on the plan’s assets. It is the plan administrator’s responsibility to determine whether the conditions of this audit exemption have been satisfied.

Under updated AICPA guidance, EBP SAS No. 136¹, there are proscribed changes regarding reliance on the certification for audit procedures, the audit opinion and plan management representation for ERISA Section 103(a)(3)(C) audits. This document provides additional guidance on which institutions may provide certification and clarifies the plan administrator and auditor’s responsibilities to determine the acceptability of the certification for limited scope audit purposes. If the criteria are not met, a full scope audit will be required, which is more time consuming and more costly to perform. In order to perform an ERISA section 103(a)(3)(C) audit, a “proper certification” of the assets must be obtained from qualified institutions as defined in the DOL 29 CFR 2520.103-5. Certifications should be obtained from entities with specific agreements in place for those services and assets, such as the plan’s trustee or the plan’s custodian.

For a CIT, the plan trustee is the holder of the units of the CIT held by the plan, and may provide proper certification under the applicable DOL regulations. The trustee of the CIT itself is not the appropriate entity to provide this certification. As SEI Trust Company does not provide trustee and/or custodial services to any retirement plan client directly, it is not an appropriate entity to provide any such certifications for the audit of the plan’s investments.

Any questions on this update should be directed to the respective plan’s audit provider.

¹ <https://us.aicpa.org/content/dam/aicpa/research/standards/auditattest/downloadabledocuments/sas-136.pdf>

Regulatory Update

- **The EBSA of the DOL issues an RFI on climate change and its impact on retirement plan investing and administration**

Following the proposed revised rules regarding ESG and shareholder activism and the impact of each on retirement plan investments that was issued by the Employee Benefits Security Administration (EBSA) of the U.S. Department of Labor (DOL) in the fall 2021,² on February 14, 2022, the EBSA issued Request for Information (RFI), in furtherance of the Executive Order on Climate-Related Financial Risk, to solicit public input on EBSA's future work relating to retirement savings and climate related financial risk.³ EBSA's efforts will focus on "agency actions that can be taken under the Employee Retirement Income Security Act of 1974 (ERISA), the Federal Employees' Retirement System Act of 1986 (FERSA), and any other relevant laws, to protect the life savings and pensions of U.S. workers and families from the threats of climate-related financial risk."

For example, the DOL is looking for responses to questions like the following:

Please provide your views on how EBSA should address and implement the action items set forth for EBSA in Executive Order 14030 on Climate-Related Financial Risk. Specifically, what agency actions can be taken under ERISA, FERSA, and any other relevant laws to protect the lifesavings and pensions of U.S. workers and families from the threats of climate-related financial risk?

Executive Order 14030 uses the phrase "climate-related financial risk" to encompass a wide variety of risks under two broad categories: physical risks and transition risks. What are the most significant climate-related financial risks to retirement savings and why?

Should EBSA collect data on climate-related financial risk for plans?

Should EBSA use Form 5500 Annual Return/Report ("Form 5500") to collect data on climate-related financial risk to pension plans?

Changes in the financial markets, particularly an increased number of metrics and tools allowing for additional analyses of investments, give ERISA plan fiduciaries more information on which to make decisions on climate-related financial risk factors in evaluating the merits of competing investment choices. Some private sector sources are developing structured ESG research data for evaluating corporate performance. What are the best sources of information for plan fiduciaries to utilize in evaluating such risks with respect to plan investments?

Is there a need to educate participants, especially those responsible for making their own investment decisions in participant-directed individual account plans, about climate-related financial risks?

This is just a sample of the questions posed in the RFI. There are 21 in total, and the responses to which may guide the EBSA of the DOL in issuing further guidance relating to climate issues that specifically deal with retirement plan investment and other issues. The RFI's comment period will be open for 90 days following its publication in the Federal Register, which was on February 14, 2022.

- **U.S. Securities & Exchange Commission (SEC), the Office of the Comptroller of the Currency (OCC) and DOL set out regulatory agenda which included agenda which may be relevant for collective investment trusts**

The DOL released its "Agency Rule List - Fall 2021". Noteworthy items for fiduciaries of plan asset funds like a bank maintained collective investment trust include notices of proposed rulemakings regarding:

- Definition of the Term "Fiduciary"

² <https://www.federalregister.gov/documents/2021/10/14/2021-22263/prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights>. See STC Quarterly Update as of September 30, 2021.

³ <https://www.federalregister.gov/documents/2022/02/14/2022-02798/request-for-information-on-possible-agency-actions-to-protect-life-savings-and-pensions-from-threats>

- Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (as noted above, this rulemaking proposal, which, among other things, would enable fiduciaries to take into account ESG factors when making investment decisions and exercising proxy voting rights on behalf of plan participants, has already been published, but the comment period had not expired at the time the agenda was released); and

- Prohibited Transaction Exemption Procedures

The DOL also noted that Pension Benefit Statements-Lifetime Income Illustrations and Adoption of Amended and Restated Voluntary Fiduciary Correction Program continue to appear in the final rule stage, which indicates that DOL intends to publish final rules on these topics within the next 12 months.

The U.S. Treasury Department, which encompasses the OCC, released its “Agency Rule List - Fall 2021”. Of particular note is that Collective Investment Funds: Prior Notice Period for Withdrawal, which was adopted as a temporary final rule in August 2020, and appeared in the final rule stage in the spring 2021 regulatory agenda, no longer appears on the fall 2021 regulatory agenda. It is unclear as to what this change means for purposes of the proposal at this stage.

Finally the SEC also released its “Agency Rule List - Fall 2021”. Of particular interest to registered investment companies and investment advisers are notices of proposed rulemakings regarding:

- Amendments to Fund Names Rule
- Amendments to Form PF
- Money Market Fund Reforms
- Rules Related to Investment Companies and Investment Advisers to Address Matters Relating to Environmental, Social and Governance Factors
- Electronic Submission of Applications for Orders Under the Advisers Act, Confidential Treatment Requests for Filings on Form 13F, and ADV-NR
- Open-End Fund Liquidity and Dilution Management
- Updates to Rules Related to Private Fund Advisers

Of special note is the line item on “Amendments to Fund Names Rule”, which is something that investment advisers to CITS and registered investment companies may need to harmonize, depending on what the terms of any final amendment may require.

Legal Update

- **Court Rejects Natixis Motion to Dismiss in Case Alleging 401(k) Plan Mismanagement**

In *Waldner v. Natixis Investment Managers LP et al.*,⁴ filed in the U.S. District Court for the District of Massachusetts, a federal judge refused to grant the motion of Natixis Investment Managers LP (“Natixis”) to dismiss the case in December of 2021. Plaintiff plan participants filed the lawsuit as a proposed class action alleging, of violating ERISA and federal benefits law. Plaintiffs claimed Natixis subjected its \$440 million 401(k) plan to poorly performing mutual funds and excessive plan-related fees. The suit, filed in February 2021, includes more than 1,500 retirement plan participants. The primary allegations in the suit involve the mismanagement of employees’ 401(k) retirement plan, the breach of fiduciary duty under the ERISA, and self-dealing through the act of offering more expensive proprietary funds to participants. The suit also contains allegations that about 60% of the fund options were proprietary funds, which performed poorly and were more expensive than other nonproprietary options.

⁴ <https://dockets.justia.com/docket/massachusetts/madce/1:2021cv10273/230771>

U.S. District Judge Leo T. Sorokin’s said the lead plaintiff had made a plausible claim that Natixis “selected and managed the funds in the plan with imprudence and disloyalty” in violation of federal law. “The court finds that the plaintiffs sufficiently state a claim for breach of the duties of prudence and loyalty to survive defendants’ motion to dismiss,” Judge Sorokin wrote.

Natixis filed a motion to dismiss the case, denying allegations that the company had managed its retirement plan to facilitate the promotion of its own mutual fund business. Natixis also claimed that the plaintiffs’ underperformance claims were related to a small subset of funds offered to retirees during a short period. The company also accused the plaintiffs of using incorrect estimations of plan fees. Judge Sorokin rejected these claims and found that the plaintiffs had met their burden of proof to survive a motion to dismiss the case, even while acknowledging that the plaintiffs had provided incorrect estimations of the fees involved.

About SEI’s Investment Manager Services Division

SEI’s Investment Manager Services Division supplies investment organizations of all types with the advanced operating infrastructure they must have to evolve and compete in a landscape of escalating business challenges. SEI’s award-winning global operating platform provides investment managers and asset owners with customized and integrated capabilities across a wide range of investment vehicles, strategies and jurisdictions. Our services enable users to gain scale and efficiency, keep pace with marketplace demands, and run their businesses more strategically. SEI partners with more than 550 traditional and alternative asset managers, as well as sovereign wealth funds and family offices, representing nearly \$30 trillion in assets, including 49 of the top 100 asset managers worldwide*. For more information, visit seic.com/ims.

*Based on Pensions & Investments’ “Largest Money Managers” 2019 ranking.

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 Dec. 31, 2021, SEI manages, advises, or administers approximately \$1.3 trillion in assets.