

Collective Investment Trust Muddle

December 15, 2020

SEC Divided on Securities Law Exemptions

SEC Commissioner Hester Peirce in October published an explanation of her dissent from an SEC enforcement action concerning certain collective investment vehicles established by a banking institution. The SEC alleged, among other things, that collective investment trusts (CITs) in which a large number of pension plans invested were not “maintained by” the bank.

CITs have been gaining in popularity for many years, in large measure because of exemptions that the Securities Act of 1933 and the Investment Company Act of 1940 afford to such entities. Those exemptions, however, are contingent upon the CIT being “maintained by a bank.” For decades it has been generally understood that, although this requirement does not preclude a bank from retaining the services of an investment adviser in connection with a CIT’s investments, the bank must exercise a substantial degree of responsibility for investment decisions.

The SEC staff in years past has sometimes indicated that it was giving serious consideration to what types of CIT investment adviser arrangements should be regarded as inconsistent with the “maintained by a bank” requirement, and the staff presumably has been aware that banks have implemented a variety of adviser arrangements while relying on those exemptions. Nevertheless, the SEC and its staff have given scant guidance in this regard, and Commissioner Peirce would not have used an enforcement action as the vehicle for establishing policy in this area.

Instead, Peirce wrote that she would have preferred to work with relevant bank regulatory authorities to develop an interpretation that would appropriately delineate when the securities law exemptions would be unavailable and when, rather, the regulation of CITs would be left wholly to the bank regulators. It remains to be seen whether the SEC will pursue any such dialogue with the bank regulators.

In the meantime, banks and plan sponsors should be aware that the SEC may be taking a heightened interest in potentially difficult and fact-intensive questions affecting the securities law exemptions on which their CITs may be relying.

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