

Via Electronic Mail

December 28, 2018

CFA Institute
Global Investment Performance Standards
915 East High Street
Charlottesville, VA 22902

Re: Exposure Draft of the 2020 Global Investment Performance Standards (August 31, 2018).

To Whom It May Concern:

The American Bankers Association¹ (ABA) appreciates this opportunity to comment on the CFA Institute's proposed changes to the Global Investment Performance Standards (GIPS), known as "GIPS 2020 Exposure Draft" or "GIPS 2020." GIPS is a voluntary regime for the disclosure and representation of investment results by investment managers. ABA represents the interests of banks, savings associations, and trust companies (collectively, banks) of all sizes and business models, including banks and their affiliates that comply with GIPS. The GIPS disclosure provided by some of these banks and their affiliates covers the investment performance of bank-sponsored collective investment funds (CIFs). ABA is commenting with respect to the potential treatment of CIFs under the GIPS 2020 Exposure Draft.

Background on GIPS

The CFA Institute created the GIPS disclosure regime to provide investors the ability to compare performance results across various investment managers. To claim GIPS compliance, a firm must adhere to certain requirements on input data, calculation methodology, construction of investment composites,² as well as the disclosure, presentation and reporting of information. Under current standards, the reporting firm produces a "Compliant Presentation" with a description of the composite performance of the particular strategy and other relevant information, such as fees and

¹ The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits, and extend nearly \$10 trillion in loans.

² Composites are categories of investment strategies that the investment manager offers to clients.

benchmarks. In the Exposure Draft,³ among other things, the CFA Institute proposes replacing the “Compliant Presentation” with three reporting options: GIPS Composite Report, GIPS Pooled Fund Report, and GIPS Asset Owner Report.

The GIPS 2020 divides pooled investment vehicles into “limited distribution pooled funds” (characterized as being sold to investors in “one-on-one presentations” and “often not highly regulated”) and “broad distribution pooled funds” (characterized as being “sold to the general public” and “typically highly regulated”). A firm would be required to provide a separate GIPS Pooled Fund Report for each “limited distribution” fund, and may voluntarily, but is not required to, do so for “broad distribution” funds. In other words, GIPS-compliant firms that share the investment performance of “limited distribution” funds incur substantial additional disclosure obligations under GIPS 2020.

Background on Bank-Sponsored Collective Investment Funds

Banks with fiduciary powers may establish and offer two general categories of CIFs, commonly referred to as A1 and A2 funds due to the authority conveyed under 12 CFR 9.18(a)(1) and (a)(2). A1 funds, also known as common trust funds, are those made available for the collective investment of fiduciary accounts by the bank acting as trustee, executor, administrator, guardian, or custodian under a Uniform Gifts to Minors Act. These funds are exempt from taxation under Internal Revenue Code (IRC) 584 and exempt from the definition of “investment company” under Section 3(c)(3) of the Investment Company Act of 1940 (1940 Act). CIFs are regulated under several regimes, including federal and/or state banking laws and regulations, state trust law, as well as the Office of the Comptroller of the Currency’s (OCC) requirements in 12 CFR 9.18.⁴

A2 funds are those made available to eligible investors, such as qualified retirement, pension, and employee benefit trusts. CIFs are tax-exempt under Section 501(a) of the IRC and IRS Revenue Ruling 81-100, as amended, and are exempt under Section 3(c)(11) of the 1940 Act. These CIFs must be bank-maintained and are subject to federal and/or state banking laws and regulations, state trust law, and the Employee Retirement Income Security Act of 1974 (ERISA), as well as 12 CFR 9.18.

³ CFA Institute, *Exposure Draft of the 2020 Global Investment Performance Standards*, available at https://www.gipsstandards.org/standards/Documents/gips_2020_exposure_draft.pdf.

⁴ OCC regulations apply to national banks and CIFs sponsored by national banks, however, with respect to rules governing CIFs, the FDIC, Federal Reserve and state bank regulators defer to 12 CFR 9.18 as the industry standard for CIFs sponsored by state chartered banks.

As a part of their oversight, federal and state bank supervisors conduct periodic on-site bank examinations, during which they review and test the bank's policies, procedures, systems, and risk management. If the bank engages in fiduciary activities such as offering CIFs, these examinations cover a bank's compliance with the applicable banking and other laws and regulations governing those activities.

GIPS 2020 Should Acknowledge Existing Disclosure Regimes for CIFs

As noted above, GIPS 2020, as proposed, would impose a significant amount of additional disclosure requirements on managers of limited distribution pooled funds.⁵ ABA is concerned that some bank-sponsored CIFs may be categorized as limited distribution pooled funds even though they are subject to significant disclosure requirements under banking regulations and/or ERISA. The proposed disclosure in GIPS 2020 would be burdensome and potentially duplicative of and/or inconsistent with disclosure requirements to which CIFs are already subject without providing potential investors with materially different information.

ABA, therefore, urges the CFA Institute to consider all funds, including collective investment funds that are subject to comprehensive disclosure requirements that relate to investment performance and fees, as "broad distribution pooled funds." In particular, we suggest amending the definition of broad distribution pooled funds as follows:

A POOLED FUND that is publicly available to multiple investors, for which the typical marketing practice involves no or minimal personal contact between the FIRM managing the POOLED FUND and the POOLED FUND PROSPECTIVE INVESTOR or a POOLED FUND that is subject to analogous disclosure requirements under existing regulatory or statutory regimes. These funds are typically sold to the general public and/or are highly regulated.

Alternatively, we suggest creating a new definition for "DISCLOSURE-REGULATED POOLED FUND" that would be treated like broad distribution pooled funds and not mandated to provide an individual GIPS Pooled Fund Report. We suggest the following definition:

A POOLED FUND that is subject to disclosure requirements under existing regulatory or statutory regimes, which requirements are analogous to those that apply to broad distribution pooled funds. These funds are typically highly regulated.

⁵ *Exposure Draft*, p. 113, defines a limited distribution pooled fund as "not publicly available to multiple investors and for which the typical marketing practice involves contact between the FIRM managing the POOLED FUND and the POOLED FUND PROSPECTIVE INVESTOR. LIMITED DISTRIBUTION POOLED FUNDS are often referred to as 'private funds.' These funds are typically sold in one-on-one presentations and may not be highly regulated."

Bank Regulatory Disclosure Requirements for CIFs

Banking regulations require that all CIFs be subject to an annual audit conducted by an independent auditor responsible only to the board of directors of the bank. This audit is “principally a financial statement audit that confirms the existence and values of the CIF’s holdings.”⁶ “The purpose of these audits is to determine whether the financial statements fairly present the financial position, results of operations, and cash flows as of a certain date or for a period ending on that date. [Independent public accountants] perform this type of audit primarily to render an opinion about whether the financial statements are presented fairly and in accordance with GAAP.”⁷

The bank must prepare an annual financial report based on the independent public accountant audit that discloses the CIF fees and expenses.⁸ In addition, this financial report “must contain a list of investments in the fund showing the cost and current market value of each investment, and a statement covering the period after the previous report showing the following (organized by type of investment):

- (A) A summary of purchases (with costs);
- (B) A summary of sales (with profit or loss and any other investment changes);
- (C) Income and disbursements; and
- (D) An appropriate notation of any investments in default.

Banks are required to provide a copy of the financial report, or notice that a copy of the report is available without charge, to each investing plan sponsor. Banks may also provide copies of the financial report to prospective investors in the CIF.⁹

In addition, the bank’s internal audits of fiduciary activity should cover compliance with regulations that apply to sponsored CIFs and the bank’s management of the CIFs, including whether the CIFs are managed according to their respective investment guidelines.¹⁰

⁶ OCC, Internal and External Audits 109.

⁷ Id. At 108.

⁸ 12 CFR 9.18(b)(6). For more information about the auditing standards, see American Institute of CPAs (AICPA), Plan Investments in Bank Collective Investment Funds; AICPA, The Importance of Internal Controls in Financial Reporting and Safeguarding Plan Assets.

⁹ OCC, Collective Investment Funds Handbook 48.

¹⁰ Id. At 20.

Disclosure Requirements for CIFs Subject to ERISA

For CIFs made available to qualified employee benefit plans, ERISA and banking regulations require the bank-sponsor (typically also the trustee) of CIFs to provide various disclosures to the fiduciary of each of the plans whose assets are invested in the CIF (individually, plan sponsor; collectively, plan sponsors). These disclosures include the CIF trust instrument and any material amendments, its annual audited financial statements, and any other reports as agreed between the bank and the investing plan sponsor. The bank also provides plan sponsors with information about the CIF's investment strategy, including investment guidelines and investment performance. Lastly, as required under ERISA Section 408(b)(2), the bank provides ERISA plan sponsors with detailed information on the bank's compensation and fees and expenses of the CIF. In addition, a bank provides service provider compensation information to ERISA plan sponsors to facilitate the plans' annual DOL Form 5500 filing.¹¹

Employee benefit plan administrators, or their designee, are required under ERISA regulations to provide certain information to participants in participant-directed individual account plans, which is substantially similar to disclosures found in Securities and Exchange Commission Form N-1A for mutual fund investors.¹² These disclosure requirements may be met, in part, using information provided by the bank offering the CIF that is an investment option in the participant-directed individual account plan. This information may be delivered to the plan participants in a number of ways, including through "fund fact sheets," as part of quarterly plan participant statements, or on a website hosted or maintained by any of the plan's service providers. The DOL-required investment-related information provided to participants must contain the following, among other things:

- **Performance Data:** Participants must be provided specific information about historical investment performance. 1-, 5- and 10-year returns must be provided for investment options, such as mutual funds, that do not have fixed rates of return. For investment options that have a fixed or stated rate of return, the annual rate of return and the term of the investment must be disclosed.
- **Benchmark Information:** For investment options that do not have a fixed rate of return, the name and returns of an appropriate broad-based securities market index over 1-, 5-, and 10-year periods (matching the Performance Data periods) must be provided. Investment options with fixed rates of return are not subject to this requirement.

¹¹ The Form 5500 Series was jointly developed by the DOL, IRS and Pension Benefit Guaranty Corporation.

¹² 29 CFR 2550.404a-5.

- Fee and Expense Information: For investment options that do not have a fixed rate of return, the total annual operating expenses expressed as both a percentage of assets and as a dollar amount for each \$1,000 invested, and any shareholder-type fees or restrictions on the participant's ability to purchase or withdraw from the investment. For investment options that have a fixed rate of return, any shareholder-type fees or restrictions on the participant's ability to purchase or withdraw from the investment.
- Internet Web Site Address: Investment-related information includes an Internet Web site address that is sufficiently specific to provide participants and beneficiaries access to specific additional information about the investment options for workers who want more or more current information.
- Glossary: Investment-related information includes a general glossary of terms to assist participants and beneficiaries in understanding the plan's investment options, or an Internet Web site address that is sufficiently specific to provide access to such a glossary.¹³

Conclusion

As noted above, bank-sponsored CIFs are highly regulated and subject to significant disclosure requirements under banking regulations and/or ERISA. ABA urges the CFA Institute to acknowledge this existing disclosure framework and provide alternative treatment for these funds. Please feel free to reach out to the undersigned if you have any questions about this letter and our suggestion for amendments to GIPS 2020

Sincerely,

/s/

Phoebe A. Papageorgiou

Vice President, Trust Policy

¹³ DOL, *Fact Sheet: Final Rule to Improve Transparency of Fees and Expenses to Workers in 401(k)-Type Retirement Plans* (2012), available at <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/fsparticipantfeerule.pdf>.