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Overtaking Mutual Funds: The Hidden Rise and Risk of Collective Investment Trusts

ABSTRACT. The retirement security of millions of American workers is increasingly tied to an investment vehicle that most have never even heard of, and whose dramatic rise has received almost no regulatory scrutiny in recent decades. With nearly seven trillion dollars in assets, "collective investment trusts" (CITs) are rapidly replacing mutual funds on the investment menus of employer-sponsored retirement plans. Individuals who once had staked their retirement nest eggs on the returns from mutual funds have had more and more of their savings transferred into bank-sponsored CITs, which now hold nearly thirty percent of all assets in defined-contribution plans, up from just thirteen percent a decade ago. Legislation to expand access to CITs is currently pending in Congress. Yet despite such dramatic growth and economic significance, CITs—which look and act a lot like mutual funds but are sponsored by banks and subject to oversight by the Comptroller of the Currency—have been largely overlooked, with almost no critical analysis of CITs as investment funds, as institutional investors, and as increasingly important participants in an interconnected financial system.

This Essay tells the story of a century-old bank product seizing on regulatory gaps and exploding in popularity among retirement plans seeking cheaper investment options for individual participants. The dramatic growth of CITs raises new and critical questions about the tradeoffs associated with CITs: in particular, the benefits of lower fees versus the individual and systemic risks that may stem from lower transparency, fragmented regulatory oversight, fewer restrictions on permitted investments, and centralized control in the hands of bank trustees. In identifying these tradeoffs, this Essay shines a light on the policy implications for retirement savers and builds the foundation for future scholarship to improve our understanding of this behemoth investment vehicle, whose growth and impact have gone largely unexamined over the last four decades.

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INTRODUCTION

The retirement security of millions of American workers increasingly depends on a little-known investment vehicle whose dramatic spread across retirement-plan portfolios has received almost no regulatory scrutiny over the last four decades.[1] With nearly seven trillion dollars in assets, "collective investment trusts" (CITs)[2] are rapidly replacing mutual funds on the investment menus of employer-sponsored retirement plans in both the private and public sectors.[3] Individuals who once had staked their retirement nest eggs on the returns from mutual funds have had more and more of their savings transferred into bank-sponsored CITs, which now hold nearly thirty percent of all assets in defined-contribution plans, up from just thirteen percent a decade ago.[4] With trillions of dollars in assets and with pending legislation that would expand their reach

1. *See* Elizabeth O'Brien, *These Sneaky Trusts Are Hiding in Your 401(k)*, MONEY (June 21, 2017), https://money.com/money/4807790/low-fee-401k-choices [https://perma.cc/SJ4P-TES6] ("There's a stealth investment vehicle that's making its way into more 401(k) plans: the collective investment trust (CIT). You might own one or more, especially if you work for a large company, and not even know it."); Robert S. De Leon, *A Primer on Collective Investment Trusts*, 41 SEC. REGUL. L.J. 5, 5 (2013) ("[T]o most Americans, and many securities lawyers, CITs remain a mystery." (footnote omitted)); Robert Steyer, *Collective Investment Trusts No Longer Just for Big Dogs*, PENSIONS & INVS. (July 18, 2022, 12:00 AM), https://www.pionline.com/defined-contribution/collective-investment-trusts-no-longer-just-big-defined-contribution-plans [https://perma.cc/X8XU-8Z97] (reporting that "[o]nce the province of the biggest of the big defined contribution plans, collective investment trusts have been showing up in merely large plans, midsize plans and small plans" and noting that "the CIT market share has increased every year"); Jane Hodges, *Cheaper Choice in 401(k)s*, WALL ST. J. (Aug. 2, 2010, 12:01 AM ET), https://www.wsj.com/articles/SB10001424052748704198004575310551356374466 [https://perma.cc/K5PH-S9V5] ("An increasing number of 401(k) plans offer investment options that look a lot like the typical mutual funds. But they're actually a whole different animal—and investors would be smart to know the difference.").

2. Collective investment trusts (CITs) are also known as "collective investment funds" (CIFs), which is the term commonly used by bank regulators. *See* discussion *infra* Part I.

3. Gary Gensler, Chair, Sec. & Exch. Comm'n, "Bear in the Woods" Remarks Before the Investment Company Institute (May 25, 2023), https://www.sec.gov/newsroom/speeches-statements/gensler-remarks-investment-company-institute-05252023 [https://perma.cc/T8JT-WR9H] ("Collective investment funds are estimated to be $7 trillion, $5 trillion at the federal level and $2 trillion at the state bank level."). In addition to the estimated $7 trillion in CITs, Gary Gensler also noted that there is over $300 billion in short-term investment funds (STIFs), which are CITs that are functionally similar to money-market mutual funds. *Id.* Like money-market funds, STIFs invest in instruments with short maturity duration. *Id.*

4. *See* Lia Mitchell, *2023 Retirement Plan Landscape Report: An In-Depth Look at the Trends and Forces Reshaping U.S. Retirement Plans*, MORNINGSTAR 24 (Apr. 2023), https://assets.contentstack.io/v3/assets/blt4eb669caa7dc65b2/blt08a2763a905290f6/641e129c67e4e0582e837c85/Morningstar_Retirement-Landscape-Report-2023_Update.pdf [https://perma.cc/LBN7-6P9U].

further, CITs are also growing in size and power, not only as retirement-savings vehicles, but also as institutional investors acting without the accountability or transparency requirements applicable to mutual funds.[5]

What are CITs? Given the lack of familiarity with the term, CITs are commonly defined by reference to or by comparison with the very thing that they are replacing: the mutual fund.[6] For example, they have been described as "the functional equivalent" of mutual funds,[7] as investments that "look and feel a lot like a mutual fund,"[8] and as "the biggest competitive threat" to mutual funds in the defined-contribution market.[9]

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5. *See, e.g.*, Clara Hudson, *Disney, Apple Investors May Vote on AI Proposals, SEC Says*, BLOOMBERG L. (Jan. 4, 2024, 3:17 PM EST), https://news.bloomberglaw.com/esg/disney-apple-shareholders-may-vote-on-ai-proposals-sec-says [https://perma.cc/2RNS-DBTL] (describing the shareholder proposals submitted to Apple and Disney by "AFL-CIO Equity Index Funds, a collective investment trust for union members' pension plans"). The BNY Mellon AFL-CIO Index Strategies offer "competitively priced, low cost solutions" and "[p]roxies are voted in accordance with AFL-CIO Proxy Voting Guidelines." *See BNY Mellon AFL-CIO Index Strategies*, BNY MELLON INV. MGMT. [1] (2022), https://aflcio-itc.com/wp-content/uploads/2022/09/AFL-CIO-Index-Funds-Handout.pdf [https://perma.cc/EJ8G-CUHV]. The Bank of New York Mellon serves as trustee and discretionary investment manager for the fund. *See id.* at [2].

6. For an overview of the history and structure of mutual funds, see generally WILLIAM A. BIRDTHISTLE, EMPIRE OF THE FUND: THE WAY WE SAVE NOW (2016). William A. Birdthistle describes mutual funds as follows:

> A mutual fund is a financial tool that gathers money from several different investors and uses the combined pool of assets to buy a portfolio of stocks, bonds, or other investments. If the portfolio is successful and generates financial gains, each of the investors in the fund will enjoy a proportional share of those positive returns. If, on the other hand, the portfolio declines, then the investors must share in the losses—as well as in the transaction costs incurred by working jointly through a mutual fund.

Id. at 19. As of 2023, U.S. mutual-fund holdings totaled approximately $25.5 trillion. *2024 Investment Company Fact Book: A Review of Trends and Activities in the Investment Company Industry*, INV. CO. INST. 43 (2024), https://www.icifactbook.org/pdf/2024-factbook.pdf [https://perma.cc/D76A-4CHC].

7. William P. Wade, *Bank-Sponsored Collective Investment Funds: An Analysis of Applicable Federal Banking and Securities Laws*, 35 BUS. LAW. 361, 370 (1980); *see also* Erach Desai & Jason Dauwen, *Collective Investment Trusts—A Perfect Storm*, DST SYS. 6 (Mar. 2017), https://contentz.mkt2225.com/lp/1186/214031/AM-WP-CollectiveInvestmentTrustsAPerfectStorm-030317.pdf [https://perma.cc/RTV4-T63N] ("CITs are essentially a functional equivalent of mutual funds—basically another comingled investment vehicle." (emphasis omitted)).

8. O'Brien, *supra* note 1 ("[A] trust could track the S&P 500 stock index, just like an index mutual fund. There are also target-date trusts: Some plans might offer the Vanguard Target Retirement 2030 Fund, and others, the Vanguard Target Retirement 2030 Trust.").

9. Hannah Glover, *Collective Investment Trusts Muscle in on DC Market*, FIN. TIMES (Sept. 13, 2009), https://www.ft.com/content/f8232374-9eff-11de-8013-00144feabdco [https://perma.cc/2DM2-CM4C] (quoting an analyst with Cerulli Associates).

But CITs are not mutual funds. Although the two are "functionally similar"—both offer pooled investment vehicles that combine assets from eligible investors into a single fund with a specific investment strategy—mutual funds and CITs are subject to very different governance and oversight regimes.[10] While mutual funds are set up by investment-management companies,[11] widely available to the general public, and regulated by the Securities and Exchange Commission (SEC),[12] CITs are set up by banks or trust companies,[13] available to individuals only through employer-sponsored retirement plans,[14] and regulated primarily by the Office of the Comptroller of the Currency (OCC) and, in some cases, by the Department of Labor (DOL).[15]

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10. Div. of Inv. Mgmt., *Protecting Investors: A Half Century of Investment Company Regulation*, U.S. SEC. & EXCH. COMM'N 119 (1992), https://www.sec.gov/divisions/investment/guidance/icreg50-92.pdf [https://perma.cc/CW4S-W3HU].

11. John Morley, *The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation*, 123 YALE L.J. 1228, 1238 (2014) (explaining that investment funds, including mutual funds, "begin life through the efforts of management companies").

12. *See* OFF. OF INV. EDUC. & ADVOC., U.S. SEC. & EXCH. COMM'N, SEC. PUB. 182 (12/16), MUTUAL FUNDS AND ETFS: A GUIDE FOR INVESTORS 4, https://www.sec.gov/investor/pubs/sec-guide-to-mutual-funds.pdf [https://perma.cc/68TR-D8FW] ("A mutual fund is an SEC-registered open-end investment company that pools money from many investors and invests the money in stocks, bonds, short-term money-market instruments, other securities or assets, or some combination of these investments.").

13. CITs may be established by trust companies or banks under state law or by national banks under federal law. The Office of the Comptroller of the Currency (OCC), which uses the term "collective investment funds" to refer to CITs, notes that such funds "are offered not only by national banks but also by insured state member and nonmember banks, thrifts, and state-chartered uninsured trust companies." *Collective Investment Funds: Risk Management Elements: Collective Investment Funds and Outsourced Arrangements*, OFF. COMPTROLLER CURRENCY (Mar. 29, 2011), https://www.occ.gov/news-issuances/bulletins/2011/bulletin-2011-11.html [https://perma.cc/UL2R-ZA7L]. OCC regulations permit a "national bank" to invest assets that it holds as fiduciary in "collective investment funds." 12 C.F.R. § 9.18(a) (2024). OCC explains that "[a] collective investment fund (CIF) is a bank-administered trust that holds commingled assets that meet specific criteria established by 12 CFR 9.18. The bank acts as a fiduciary for the CIF and holds legal title to the fund's assets." *Collective Investment Funds*, OFF. COMPTROLLER CURRENCY, https://www.occ.treas.gov/topics/supervision-and-examination/capital-markets/asset-management/collective-investment-funds/index-collective-investment-funds.html [https://perma.cc/9Y3T-SWTK].

14. Whereas mutual funds are marketed and available to retail or individual participants, CITs are only available to individuals through employer-sponsored retirement plans. Desai & Dauwen, *supra* note 7, at 8. Only certain types of retirement plans (such as 401(k) plans, 457(b) plans, qualified profit-sharing plans, qualified pension plans, and Taft-Hartley plans) are currently allowed to participate in CITs. *Id.* at 10.

15. *See infra* Part II. When CITs are established by federally chartered banks or trust companies, the CITs are regulated by OCC. *See* Kristin O'Donnell, Ryan Mullaney & Tom Peattie, *Why Collective Investment Trusts Are Gaining Traction Within DC Retirement Plans*, WELLINGTON

Relative to mutual funds, CITs face fewer restrictions on the types and composition of permissible investments[16] and fewer registration and reporting requirements.[17] The Investment Company Act of 1940 and the Securities Act of 1933 exempt CITs and CIT interests from registration with SEC and from substantive requirements under those laws.[18] Since they are normally exempt from SEC registration, CITs do not need a registration statement or a prospectus for prospective purchasers.[19] Accordingly, there are no registration fees to be paid to SEC and no registration statement subject to SEC review.[20] Similarly, although

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MGMT. (Aug. 2022), https://www.wellington.com/en/insights/collective-investment-trusts-dc-retirement-plans [https://perma.cc/7KHP-V4UA]. State authorities regulate CITs sponsored by state-chartered banks or trust companies. *Id.* The Department of Labor (DOL) also has authority over some CITs through its oversight of the retirement plans that invest in CITs. *Id.* If a plan that is subject to the Employee Retirement Income Security Act (ERISA) of 1974 includes a CIT as an investment option for the plan, the CIT trustee is considered an ERISA fiduciary and its conduct in managing the CIT must comply with ERISA's fiduciary standards. *Id.* The trustee of a mutual fund, in contrast, would not be required to comply with these ERISA standards. *Id.*; *see also* Noah Zuss, *CITs Have Different Fiduciary Implications than Mutual Funds*, PLANADVISER (Mar. 30, 2022), https://www.planadviser.com/cits-different-fiduciary-implications-mutual-funds [https://perma.cc/74CU-B4GC] ("CITs are plan asset vehicles for ERISA purposes, which means that ERISA standards of prudence and loyalty apply to those who manage and exercise discretionary authority over a plan's assets . . . . Therefore, trustee banks responsible for managing CIT assets are subject to ERISA's fiduciary standard.").

16. For example, unlike mutual funds, CITs may invest in futures and commodities, commercial real estate, and private-equity interests without regulatory restrictions on the amount of such investments. *See* De Leon, *supra* note 1, at 5. CIT providers emphasize the availability of "innovative investment strategies." *See, e.g.*, *Collective Investment Trust Solutions*, STATE ST., https://www.statestreet.com/us/en/asset-owner/solutions/collective-investment-trust-solutions [https://perma.cc/P7HP-7HMR] (noting that "CITs can offer strategies with broader flexibility of investment options than 1940 Act structures," including but not limited to "derivatives, bank debt, ETFs, private equity and real estate," and emphasizing that "CITs are not constrained by an illiquidity cap found in other investment vehicles"); Alex Ortolani, *Fidelity Launches CITs with Alternative Investment Exposure*, PLANADVISER (Nov. 1, 2023), https://www.planadviser.com/fidelity-launches-cits-alternative-investment-exposure [https://perma.cc/L4JL-VRTM] ("Nation's largest recordkeeper seeks to bring direct real estate investing to plan participants.").

17. *See, e.g.*, Thomas Roberts & James E. Bowlus, *Collective Investment Trusts and Good Governance Considerations*, WILMINGTON TR. 1 (2022), https://www.wilmingtontrust.com/content/dam/wtb-web/pdfs/cit-whitepaper-2022.pdf [https://perma.cc/U3FK-U5D5] ("[T]he exemptions from registration under the federal securities laws available to CITs may afford them cost advantages relative to their mutual fund counterparts, because CITs can avoid the expenses associated with mutual fund registration, prospectus, and annual report updating and mailing, and the like.").

18. *See infra* Sections I.B, II.B.3.

19. *See infra* Section II.B.3.

20. *See infra* Section II.B.3.

CITs, like mutual funds, hold shares of public companies and exercise the corporate voting rights afforded to such shares, CITs are not subject to the securities-law requirements to disclose their voting records publicly or give fund investors "voice" in fund governance.[21] Instead, CITs entrust management responsibility to the bank trustees, who cast votes on behalf of the trusts.[22] As a result, "it is faster and cheaper to create and launch a CIT than a comparable mutual fund."[23]

The lower compliance and marketing costs are credited as a key reason for CITs having lower fees than comparable mutual funds.[24] Morningstar, the investment research firm whose subsidiary provides advisory services to CITs, reports that "[w]hen comparing the net expense ratio of CIT tiers and mutual fund share classes of the same strategy, CITs are cheaper 88% of the time; and considering only the least-expensive CIT tier and mutual fund share class, CITs are cheaper 92% of the time."[25] According to Morningstar calculations, "[a]cross all investment strategies, as of year-end 2020, the average passive CIT costs less

21. *See, e.g.*, Jeff Sommer, *Want a Bigger Say on Corporate Behavior? Move Your Money*, N.Y. TIMES (Dec. 12, 2019), https://www.nytimes.com/2019/12/12/business/corporate-behavior-move-your-money.html [https://perma.cc/3YH5-F9C3] (arguing that "[m]illions of people have a stake in corporate America through mutual funds" and reporting on Morningstar's analysis of "every proxy vote cast by the big mutual fund companies in 2019"). The analysis described in the article is possible because registered investment funds (e.g., mutual funds) are subject to disclosure requirements under the Investment Company Act (ICA) of 1940. *See* Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, 68 Fed. Reg. 6564, 6564 (Feb. 7, 2003) (interpreting "the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940 to require registered management investment companies to provide disclosure about how they vote proxies relating to portfolio securities they hold").

22. *See infra* Section II.B.

23. De Leon, *supra* note 1, at 7.

24. Mitchell, *supra* note 4, at 25 ("This difference in costs is mostly because CITs are not marketed nor regulated in the way that mutual funds are."). Industry publications provide statistics on the cost savings associated with CITs. *See, e.g.*, *What's New? Even Lower Costs and a New Retirement Income Option*, VANGUARD (Sept. 28, 2021), https://institutional.vanguard.com/insights-and-research/perspective/whats-new-even-lower-costs-and-a-new-retirement-income-option.html [https://perma.cc/NMY2-HUFS]; O'Donnell et al., *supra* note 15 ("[F]ees for CITs may be between 10 and 30 basis points (bps) lower than for mutual funds of similar composition.").

25. Mitchell, *supra* note 4, at 25. Morningstar also reports that "[t]he asset-weighted average expense ratios of both active and passive CITs are less than half those of their mutual fund counterparts." *Id.* These calculations draw on Morningstar's investment database, which, in the case of CITs, is voluntary for the asset managers. *See How Does Morningstar Gather Separate Account/Collective Investment Trust Data?*, MORNINGSTAR OFF. (2023), https://awgmain.morningstar.com/webhelp/FAQs/gather_SA_CIT_data_FAQ.htm [https://perma.cc/Q892-5SMP]; *infra* note 143.

than the average passive mutual fund. Similarly, the average active CIT costs 60% less than the average active mutual fund."[26]

These cost differences matter because even seemingly small differences are compounded over decades.[27] In an environment where retirement-plan sponsors (that is, employers) have faced significant litigation risk over excessive retirement-plan fees,[28] the existence of lower-fee options that offer the same or similar investment strategies to those offered by mutual funds has precipitated the exodus from mutual funds into CITs. Importantly, the management companies most commonly associated with mutual funds—including Fidelity, Vanguard, and State Street—have all started to offer CITs through affiliated trust companies or banks.[29]

The growth of CITs over the last decade has outpaced predictions,[30] with CITs now "a standard part of the largest plans in the U.S." and increasingly

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26. Mitchell, *supra* note 4, at 25.

27. As the Department of Labor has warned, over thirty-five years, a "1 percent difference in fees and expenses [reduces an] account balance at retirement by 28 percent." *A Look at 401(k) Plan Fees*, U.S. Dep't of Lab. 2 (Sept. 2019), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/a-look-at-401k-plan-fees.pdf [https://perma.cc/LB6B-XD86].

28. *See* Natalya Shnitser, *The 401(k) Conundrum in Corporate Law*, 13 Harv. Bus. L. Rev. 289, 317 (2023) (describing the nearly 800 fee-litigation cases brought against plan sponsors over the last fifteen years).

29. *See* Tim McLaughlin, *U.S. Mutual Funds Cut Expenses by Shifting Billions to Trusts*, Reuters (Mar. 4, 2015 1:00 AM EST), https://www.reuters.com/article/idUSL1NoW51V8 [https://perma.cc/35MV-KK6Q] ("Mutual fund companies, including No. 2 Fidelity Investments, have slashed fees on their most popular funds by shifting billions of dollars into collective trusts not regulated by the U.S. Securities and Exchange Commission."); Robert Steyer, *Among Target-Date Funds, CITs Are Now Bigger than Mutual Funds: Morningstar*, Pensions & Invs. (Aug. 9, 2024), https://www.pionline.com/defined-contribution/collective-investment-trust-target-date-funds-now-have-more-assets-mutual-fund [https://perma.cc/XVS2-CZ8C] (reporting that Vanguard Target Retirement is "the largest CIT target-date series").

30. *See, e.g.*, De Leon, *supra* note 1, at 5 (writing in 2013 that "[a]ssets in collective investment trusts ('CITs') are projected to reach $1.4 trillion, or roughly 20% of the defined contribution market, in 2020"); McLaughlin, *supra* note 29 ("In recent years, research firms have estimated that CIT assets would top $2 trillion in 2015. But a Reuters analysis of disclosures by trust banks, including ones operated by BlackRock Inc, State Street Inc and Wellington Management, reveal that figure was easily surpassed in 2014.").

present in plans of all sizes[31] in both the public and private sectors.[32] Plan menus that once included primarily mutual funds now increasingly offer CITs. Target-date funds, which have been particularly popular on retirement-plan investment menus, are now offered through CIT vehicles rather than through mutual funds.[33] The same is true for equity, debt, and alternative investment strategies. Consider, for example, the Facebook/Meta Platforms Inc. 401(k) Plan. In 2009, nearly all the assets in the plan were invested in mutual funds.[34] By 2021, nearly all the assets in the plan were invested in CITs.[35]

According to Morningstar, "[t]he largest plans in the U.S. started to abandon mutual funds 10 years ago," and CITs have grown from thirteen percent of assets

31. Mitchell, *supra* note 4, at 4, 23 (noting that "[t]he largest plans in the U.S. . . . today hold nearly 88% of all the collective investment trust, or CIT, assets" and emphasizing that "CITs have doubled their share of the pie among the largest plans from 17% of assets in 2012 to 36% in 2021"). Lia Mitchell also notes that "[u]sage among plans with fewer than $500 million in assets grew by more than 10% in 2020 and 2021, suggesting CITs may finally break the smaller plan barrier soon." *Id.* at 30.

32. For examples of CITs in both public and private plans, including the federal-government Thrift Savings Plan, see *Employee Benefits Security Administration: Performance Audit of Thrift Savings Plan Investment Management Operations*, KPMG, at I.14 (Sept. 4, 2020), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/reports/thrift-savings-plan-audit/investment-management-operations-2020.pdf [https://perma.cc/WJF6-R7UY], which references BlackRock's TSF Fund Series and Collective Trust Funds; *Fund Fact Sheets: CalPERS 457 Plan*, CalPERS 11, 14, 17, 20, 23, 26 (June 30, 2024), https://calpers-sip.com/PDF_InvestmentOps/CalPERS_FFS.pdf [https://perma.cc/B8XE-L4KQ], which describes the investment options as CITs; and Press Release, AFL-CIO, AFL-CIO Teams Up with Wilmington Trust and BNY Mellon to Expand Retirement Planning Options for Millions of Americans (Mar. 22, 2021), https://aflcio.org/press/releases/afl-cio-teams-wilmington-trust-and-bny-mellon-expand-retirement-planning-options [https://perma.cc/N4YE-XT64], which announces "a groundbreaking collaboration . . . to distribute 12 new target date collective investment trust (CIT) funds, expanding retirement planning options for its 56 unions and 12.5 million members" and notes that "[v]oting proxies for each fund conform with the AFL-CIO's Proxy Voting Guidelines, per an independent proxy voting fiduciary."

33. A target-date fund adjusts the mix of underlying investments based on the anticipated retirement date of the retirement-plan participant. Megan Pacholok, *CITs Dethrone Mutual Funds as the Most Popular Target-Date Vehicle*, Morningstar (Aug. 8, 2024), https://www.morningstar.com/funds/cits-dethrone-mutual-funds-most-popular-target-date-vehicle [https://perma.cc/RR8Q-P4ER] (reporting that "as of June 2024, CITs inched past mutual funds" with "50.5% . . . of target-date assets").

34. *See* Facebook, Inc., Annual Return/Report of Employee Benefit Plan (Form 5500) 15-18 (Oct. 5, 2010) (listing the plan investments in Schedule H, with all plan assets held in mutual funds and one money-market fund).

35. *See* Meta Platforms, Inc., Annual Return/Report of Employee Benefit Plan (Form 5500) 160-63 (July 7, 2022) (listing the plan investments in Schedule H, with nearly all the assets held in one of seventeen CITs, one mutual fund, and one money-market fund).

in defined-contribution plans in 2012 to twenty-eight percent of assets in 2021.[36] The growth of assets in CITs has dramatically outpaced the growth of assets in retirement plans generally and the growth of assets in mutual funds.[37] Even smaller employers have begun to add CIT options on plan menus,[38] while CIT sponsors and industry advocates have been lobbying Congress to make CITs available to retirement plans in the nonprofit and education sectors, which have not been allowed to participate in CITs to date.[39] Legislation to expand access to CITs was reintroduced in Congress in 2025.[40]

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36. Mitchell, *supra* note 4, at 23-24.

37. O'Donnell et al., *supra* note 15, ("From 2015 to 2020, total 401(k) plan assets grew by roughly 62%, while 401(k) assets held in CITs saw growth of 138%."). Morningstar reports that from 2012 to 2021, "[defined-contribution] plan CIT assets more than quadrupled from $463 billion to $2.25 trillion, while [defined-contribution] plan mutual fund assets merely doubled from $1.52 trillion to $3.25 trillion." Mitchell, *supra* note 4, at 24.

38. Mitchell, *supra* note 4, at 30. A recent Fidelity survey revealed that the "the percentage of sponsors beginning to offer CITs had a 10% annual growth rate from 2018 to 2023," with 29% of sponsors surveyed "considering offering CITs for the first time" and 28% of sponsors surveyed considering "increasing the number of CITs." Brian Anderson, *4 Key Findings from Fidelity's Plan Sponsor Attitudes Survey*, 401kSpecialist (Aug. 28, 2023), https://401kspecialistmag.com/4-key-findings-from-fidelitys-plan-sponsor-attitudes-survey [https://perma.cc/T4VP-3NK8].

39. Desai & Dauwen, *supra* note 7, at 9 (stating that "403(b) plans for non-profit organizations" are not eligible to invest in CITs). In 2020 Senate hearings focused on "Investigating Challenges to American Retirement Security," the President of Retirement Plans for Nationwide stated that they "are excited about the opportunity to make collective investment trusts available to 403(b) plans to help more American workers save, especially those in education, health care, and charitable organizations." *Investigating Challenges to American Retirement Security: Hearing Before the Subcomm. on Soc. Sec., Pensions, & Fam. Pol'y of the S. Comm. on Fin.*, 116th Cong. 10 (2020) (statement of Eric Stevenson, President, Retirement Plans, Nationwide, Columbus, OH); *see also* Jasmin Sethi, Lia Mitchell & Aron Szapiro, *CITs: A Welcome Addition to 403(b) Plans*, Morningstar 1-2 (June 2020), https://assets.contentstack.io/v3/assets/blt4eb669caa7dc65b2/blt2c1dd8bcdf62c0c9/61e735e574b241531110d688/403b_CIT_WP.pdf [https://perma.cc/7YS6-LLLF] (expressing support for legislation to allow "403(b) plans to invest in CITs" but recommending changes to the proposed legislation to incorporate "additional protections for 403(b) plan participants"); Remy Samuels, *Bill to Allow CITs in 403(b) Plans Introduced in Senate*, plansponsor (Aug. 1, 2024), https://www.plansponsor.com/bill-to-allow-cits-in-403b-plans-introduced-in-senate [https://perma.cc/WS6P-9PYX] (reporting the introduction of the bill, which would allow 403(b) plans to include CITs).

40. Press Release, Sen. Katie Britt, U.S. Senators Katie Britt, Raphael Warnock, Bill Cassidy, Gary Peters: Americans Deserve Level Playing Field on Retirement Savings Opportunities (Feb. 6, 2025), https://www.britt.senate.gov/news/press-releases/u-s-senators-katie-britt-raphael-warnock-bill-cassidy-gary-peters-americans-deserve-level-playing-field-on-retirement-savings-opportunities [https://perma.cc/CS7E-FUBS] (announcing the reintroduction of the Retirement Fairness for Charities and Educational Institutions Act). This legislation was previously introduced in 2023 and 2024. Brian Croce, *House Committee Advances Bill Allowing*

The dramatic rise of CITs has not been accompanied by a corresponding increase in scholarly or regulatory analysis. Indeed, although CITs were the subject of robust congressional and scholarly examination in their early years and through the 1970s, they have received scant scholarly or regulatory attention over the last four decades.[41] This Essay begins to fill the gap and makes the case that CITs—although not squarely within the domain of any one academic discipline—should be of interest to scholars of banking law, corporate law, securities law, and employee-benefits law. Indeed, their interdisciplinary nature makes CITs an important case study in financial instruments operating at regulatory crossroads and taking advantage of the challenges of interagency coordination.

403(b) Plans to Offer CITs, PENSIONS & INVS. (May 25, 2023, 2:13 PM), https://www.pionline.com/defined-contribution/house-committee-advances-bill-allowing-403b-plans-offer-cits [https://perma.cc/6VQY-SKN4] (noting that the bill "would amend federal securities law to authorize the use of CITs . . . within 403(b) plans" and reporting Vanguard's support for it); Press Release, Sen. Katie Britt, U.S. Senators Katie Britt, Raphael Warnock, Bill Cassidy, Gary Peters Introduce Retirement Fairness Legislation for Non-Profit Employees (Aug. 1, 2024), https://www.britt.senate.gov/news/press-releases/u-s-senators-katie-britt-raphael-warnock-bill-cassidy-gary-peters-introduce-retirement-fairness-legislation-for-non-profit-employees [https://perma.cc/GTS2-MK9Z].

41. A literature review reveals a robust regulatory debate, and academic coverage thereof, through the 1970s but very limited academic coverage of CITs in the years since then. For academic and regulatory analysis of CITs prior to 1980, see Wade, *supra* note 7, at 363-67; Note, *The Legality of Bank-Sponsored Investment Services*, 84 YALE L.J. 1477, 1492-93 (1975); Louis J. Marin, *Common Trust Funds—Development and Federal Regulation*, 83 BANKING L.J. 565, 567, 579, 592 (1966); John Micheal Webb, Comment, *Of Banks and Mutual Funds: The Collective Investment Trust*, 20 SW. L.J. 334, 337 (1966); Note, *Commingled Trust Funds and Variable Annuities: Uniform Federal Regulation of Investment Funds Operated by Banks and Insurance Companies*, 82 HARV. L. REV. 435, 436 (1968); James J. Saxon & Dean E. Miller, *Common Trust Funds*, 53 GEO. L.J. 994, 994-1003 (1965); John W. Church, Jr. & Richard B. Seidel, *The Entrance of Banks into the Field of Mutual Funds*, 13 B.C. INDUS. & COM. L. REV. 1175, 1177 (1972); John W. Erickson, Comment, *The Expanding Jurisdiction of the Securities and Exchange Commission: Variable Annuities and Bank Collective Investment Funds*, 62 MICH. L. REV. 1398, 1406-09 (1964); and Martin E. Lybecker, *Bank-Sponsored Investment Management Services: Consideration of the Regulatory Problems, and Suggested Legislative and Statutory Interpretive Responses*, 1977 DUKE L.J. 983, 988-89. Since 1980, there have been only a few academic pieces that address or even mention CITs. *See, e.g.*, Harvey L. Pitt & Julie L. Williams, *The Convergence of Commercial and Investment Banking: New Directions in the Financial Services Industry*, 5 J. COMPAR. BUS. & CAP. MKT. L. 137, 138 (1983) (describing the early efforts of banking institutions to "enter the securities field"); Howell E. Jackson, *A System of Fiduciary Protections for Mutual Funds*, *in* FIDUCIARY OBLIGATIONS IN BUSINESS 132, 146-48 (Arthur B. Laby & Jacob Hale Russell eds., 2021) (identifying CITs as an example of "contexts in which mutual fund shares are distributed to retail investors through pooled vehicles not directly subject to mutual fund regulation"); David H. Webber, *Reforming Pensions While Retaining Shareholder Voice*, 99 B.U. L. REV. 1001, 1017-21 (2019) (considering CITs' potential to preserve "shareholder voice"); Edwin J. Elton, Martin J. Gruber & Christopher R. Blake, *The Performance of Separate Accounts and Collective Investment Trusts*, 18 REV. FIN. 1717, 1717, 1734-47 (2014) (assessing the performance and account characteristics of CITs).

Part I traces the evolution of CITs in the United States, with a particular focus on the dramatic growth of CITs in defined-contribution retirement plans. It shows how over the last hundred years, a type of bank trust originally intended for the fiduciary administration of small accounts has evolved and exploded into a powerful industry managing seven trillion dollars of retirement savings belonging to American workers. The recent exodus of assets from mutual funds into CITs can be explained by three key drivers. First, employer interest in cheaper investment options for plan menus, driven in part by increased retirement-fee litigation, has bolstered demand for CITs.[42] At the same time, the competition for the business of managing retirement assets has encouraged not only banks but also mutual-fund management companies to ramp up their CIT offerings. The management companies that once lobbied intensely against CITs have set up trust subsidiaries and affiliated banks to establish their own CITs. Once in the CIT business, the financial institutions have likely come to appreciate certain regulatory differences, such as the ability to cast contentious or politically fraught proxy votes without having to report their voting records to the public.[43] In fact, CIT providers have been lobbying Congress to expand access to CIT products.[44]

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42. *See, e.g.*, O'Brien, *supra* note 1 (reporting the growing popularity of CITs and noting that "[r]ecent lawsuits filed by retirement-plan participants accusing companies of having excessive 401(k) fees have put a spotlight on what savers pay").

43. *See, e.g.*, Justin Worland, *Larry Fink Takes on ESG Backlash*, TIME (June 29, 2023, 1:45 PM EDT), https://time.com/6291317/larry-fink-esg-climate-action [https://perma.cc/XS2N-WY2G] ("As the backlash to ESG has grown over the last year, business leaders have changed the way they talk about their climate work to tiptoe around the political faultlines."); Tony Owusu, *BlackRock, Vanguard ESG Policies Get Political Pushback*, THESTREET (Dec. 12, 2022, 2:24 PM EST), https://www.thestreet.com/investors/blackrock-vanguard-esg-policies-get-political-pushback [https://perma.cc/H7U2-T9RQ] (describing instances of state-government pushback against the environmental, social, and governance policies of some large asset managers).

44. *See, e.g.*, Press Release, Inv. Co. Inst., ICI Welcomes Senate Bill Introduction to Help Retirement Savers (Aug. 1, 2024), https://www.ici.org/news-release/24-bill-help-retirement-savers [https://perma.cc/8QDV-CNRA] (expressing support for the Retirement Fairness for Charities and Educational Institutions Act, which would allow 403(b) plans to invest in CITs, and expressing hope that "the Senate will join the House and swiftly pass this legislation"). The Investment Company Institute "is the leading association representing the asset management industry in service of individual investors. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions." *About the Investment Company Institute*, INV. CO. INST., https://www.ici.org/about-ici [https://perma.cc/Y36G-FP6L]. ICI also "represents its members in their capacity as investment advisers to collective investment trusts (CITs)." *Id.* In describing its own history, ICI explains that "[m]ost recently, ICI has begun working with its members who also maintain collective investment trusts and separately managed accounts." *History of the Investment Company Institute*, INV. CO. INST., https://www.ici.org/ici-history [https://perma.cc/385G-J5EG].

After describing the evolution of CITs, the Essay turns to the current state of the CIT market. Part II first synthesizes available data on the prevalence of CITs, their sponsors, and the underlying investments. It then reviews the unique regulatory framework for CITs and shows that what has made CITs attractive to industry participants may also explain the lack of regulatory and academic attention to these investment vehicles. Next, Part II revives the debate about "functional regulation" and the question whether financial instruments that perform similar functions should be regulated similarly. This debate, which featured CITs quite prominently in the 1960s and 1970s, has waned in the ensuing decades. The recent dramatic growth of CITs merits reopening the discussion.

The Essay then evaluates the impact of CITs, which, in the absence of "functional regulation," are subject to a regulatory regime that is strikingly different from the one applicable to mutual funds. Part III situates CITs in the theoretical framework for investment funds and shows that employers play an outsize role in protecting the interests of individual investors in CITs. It examines CITs' growing shareholder activism, brings to light the lack of proxy-vote disclosure requirements, and explores the risks of "financial fires" stemming from regulatory gaps in an interconnected financial system.[45]

Part IV then turns to the benefits and costs of CITs as a retirement-savings vehicle. It emphasizes that the regulatory framework for CITs predates the rise of defined-contribution retirement plans in which individual participants bear the investment and longevity risks. Although lower fees in retirement plans are an important and attractive feature, the lower fees currently come at the expense of transparency and disclosure, including public disclosure about CIT fees. In the absence of robust public disclosure and public familiarity with CITs, there is increased pressure on plan sponsors (that is, employers) to negotiate and monitor custom fee arrangements with bank trustees. At the same time, the relatively limited public disclosure reduces monitoring by third parties and makes it more difficult for plaintiffs to bring litigation challenging the inclusion of CITs on retirement-plan menus. The Essay concludes with a call for closer examination of the tradeoffs in the recent embrace and potential expansion of CITs.

45. *See* Gensler, *supra* note 3 (making the case for additional "liquidity, pricing, and plumbing" rules for mutual funds and lamenting that rules for CITs and short-term investment funds "lack limits on illiquid investments and minimum levels of liquid assets" and that "[t]here is no limit on leverage, requirement for regular reporting on holdings to investors, or requirement for an independent board").

I. THE ORIGINS AND EVOLUTION OF COLLECTIVE INVESTMENT TRUSTS

CITs have been around for over a century, although the 2025 and 1925 versions look quite different. The century-old story of CITs reflects the longstanding battle between banks and other financial institutions to manage Americans' savings. The story proceeds in four parts: the rise of collective bank trusts for narrow purposes in the 1920s; the expansion of bank trusts for retirement-plan assets in the 1950s; the growth of defined-contribution plans and the decline of traditional defined-benefit pension plans starting in the 1980s; and, since 2000, a variety of CIT adaptations to compete with mutual funds.

A. The First Collective Bank Trusts, the 1929 Crash, and the Defining Decades for Banking and Securities Regulation: 1920-1940

The story of CITs begins in the 1920s, when regulators permitted banks to serve as fiduciaries, which allowed the banks to retain and manage the balances of customers following their death and to engage in certain business that was of a "trust nature."[46] Because such accounts were relatively small at the time, regulators allowed banks to commingle and invest "small accounts" held in a fiduciary capacity.[47] The Board of Governors of the Federal Reserve, however, required that such trusts be maintained "primarily to facilitate fiduciary account administration, and not as vehicles for investment by the general public."[48]

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46. Carl Zollmann, *Fiduciary Powers of National Banks Under the Federal Reserve System*, 11 MARQ. L. REV. 39, 39 (1926). The Federal Reserve Act of 1913 had authorized the Federal Reserve Board "[t]o grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe." Federal Reserve Act, ch. 6, § 11(k), 38 Stat. 251, 262 (1913).

47. In the 1920s, after "various states enacted legislation authorizing the establishment of common trust funds," the Board of Governors of the Federal Reserve enacted a series of exceptions to the prior prohibition on the commingling of trust funds. Wade, *supra* note 7, at 363-64. Favorable tax treatment bolstered the popularity of the common trust fund for small accounts. *See id.* at 364. Common trust funds were conferred tax-exempt status by the Revenue Act of 1936, a decision that was based in part on congressional recognition that common trust funds "'serve a good social purpose' by providing investment safety and diversification for accounts 'that are small in amount.'" *Id.* (quoting S. REP. NO. 74-2156, at 20 (1936)).

48. *Id.*; *see also* Church & Seidel, *supra* note 41, at 1175-76 (noting that the Board of Governors restricted the use of common trust funds as a means for banks to enter the mutual-fund business). The Federal Reserve Board's regulations mandated that common trust funds be operated in furtherance of a "bona fide fiduciary purpose" and not solely as vehicles for investment purposes. Regulation F, 2 Fed. Reg. 2976, 2976 (Dec. 30, 1937). In a 1940 regulation, the

Such limitations on bank-sponsored trusts reflected the "general public dismay over the role played by banks in the stock market debacle of the late 1920s and early 1930s."[49] In the decades preceding the crash of 1929, banks and trust companies had emerged as competitors in the financial-services industry. To compete with trust companies, which could "underwrite or deal in equity as well as debt securities and participate in potentially huge profits (or losses) from speculation," the national banks, which did not have the power to deal in equity securities directly, began to charter "security affiliates" under state law to accomplish their objectives indirectly.[50] The security affiliates used so-called "investment trusts" to enable bank shareholders to engage in "speculative investment activities."[51] Despite warnings of potential abuses, security affiliates were allowed to grow throughout the 1920s.[52] Congressional investigations following the 1929 crash revealed that the security-affiliate system was beset by conflicts and abuses stemming from the financial ties between many banks and their security affiliates.[53]

Board clarified that it had intended that common trust funds should not be operated to "enable a trust institution to operate a common trust fund as an investment trust attracting money seeking investment alone and to embark upon what would be in effect the sale of participations in a common trust fund to the public as investments." Erickson, *supra* note 41, at 1400 n.12 (quoting *From a Legal Standpoint*, 26 FED. RSRV. BULL. 390, 393 (1940)).

49. Wade, *supra* note 7, at 365.

50. *Id.* at 373 ("The typical security affiliate was completely owned and operated by and for the sponsoring bank and performed a wide range of underwriting and investment functions on the bank's behalf."); *see also* Pitt & Williams, *supra* note 41, at 138-39 (describing the use of "'securities affiliates', chartered under state law, to engage in the securities activities that national banks were prohibited from conducting directly").

51. Wade, *supra* note 7, at 373; *see also* Church & Seidel, *supra* note 41, at 1182-83 ("[T]he Glass-Steagall Act was enacted in response to abuses flowing from the use by banks of 'securities affiliates' in order to engage in the underwriting of speculative securities.").

52. Wade, *supra* note 7, at 373-74; *see also* ARTHUR E. WILMARTH JR., TAMING THE MEGABANKS: WHY WE NEED A NEW GLASS-STEAGALL ACT 28 (2020) ("Securities affiliates received extensive financial support from their sponsoring banks and thereby exposed the banks' depositors to serious losses.").

53. Thomas J. Schoenbaum, *Bank Securities Activities and the Need to Separate Trust Departments from Large Commercial Banks*, 10 U. MICH. J.L. REFORM 1, 3-4 (1976) (noting that "banks often abused their loan powers by financing for their customers the purchase of securities underwritten by affiliates, by making loans to affiliates to finance their underwriting activities, and by making loans to corporations who agreed to use bank affiliates as underwriters," all of which then "contributed significantly to the widespread failures of commercial banks"); *see also* Wade, *supra* note 7, at 374 ("When either the bank or the affiliate experienced financial difficulties, one would be tempted to, and sometimes did, act imprudently to preserve the stability and reputation of the other."). In the 1971 *Investment Company Institute v. Camp* decision, the Supreme Court described the abuses that had plagued securities affiliates. 401 U.S. 617, 630 (1971) (enumerating the direct and indirect "hazards" associated with securities affiliates).

The congressional response came, in part, in the form of the Glass-Steagall Act of 1933.[54] The Glass-Steagall Act sought to prevent a recurrence of the abuses of the bank security affiliates, which were blamed for the stock market crash of 1929 and the "failure of thousands of U.S. banks."[55] Through the Act, Congress aimed to achieve the "complete divorcement of commercial banking from investment banking."[56] Notably, however, the Act did not prohibit the exercise of fiduciary powers granted to banks earlier under the Federal Reserve Act.[57]

The Great Depression also prompted broader financial regulation and securities-law reforms to ensure the stability of the U.S. financial system and capital markets. In addition to the Glass-Steagall Act of 1933, the key reforms included the Securities Act of 1933[58] and the Investment Company Act (ICA) in 1940.[59] Like the Glass-Steagall Act, these securities laws also included carve-outs for collective trusts.

The Securities Act aimed to curb abuse in a largely unregulated securities market. The Act sought investor protection through disclosure and the imposition of penalties for fraud or misrepresentation in the disclosure process.[60] SEC deemed a participating interest in a "common trust" to be a security, which was defined under the Act to include any "investment contract."[61] However, the Act provided an exemption from the registration requirements for securities involved in a transaction "by an issuer . . . not involving any public offering."[62] SEC considered this exemption to apply to interests in common trust funds.[63]

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54. Banking (Glass-Steagall) Act of 1933, ch. 89, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.); WILMARTH, *supra* note 52, at 34-35 ("A large number of investment trusts organized by investment and commercial banks collapsed after the crash of 1929 and inflicted heavy losses on investors.").

55. Pitt & Williams, *supra* note 41, at 139.

56. Wade, *supra* note 7, at 372 (quoting S. REP. NO. 73-1455, at 185 (1934)).

57. A 1939 Securities and Exchange Commission (SEC) survey of sixteen common trust funds found that such funds suffered "an aggregate capital loss on total investments of approximately 18% during the period 1927-35." *Id.* at 365 n.26 (citing SEC. & EXCH. COMM'N, COMMINGLED OR COMMON TRUST FUNDS ADMINISTERED BY BANKS AND TRUST COMPANIES, H.R. DOC. NO. 76-476, at 20 n.52 (1939)).

58. Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa).

59. Investment Company Act of 1940, ch. 686, 54 Stat. 789 (codified as amended at 15 U.S.C. §§ 80a-1 to -64); *see also* Wade, *supra* note 7, at 376 (describing the legislative history of the ICA).

60. *See Statutes and Regulations*, U.S. SEC. & EXCH. COMM'N (Oct. 1, 2013), https://www.sec.gov/rules-regulations/statutes-regulations [https://perma.cc/3N4W-MN7F].

61. Securities Act of 1933 § 2(1), 48 Stat. at 74; *see* Wade, *supra* note 7, at 378.

62. Securities Act of 1933 § 4(1), 48 Stat. at 77.

63. Wade, *supra* note 7, at 378.

In 1940, Congress passed the ICA. Congressional action had been spurred by an SEC study completed in the late 1930s.[64] The "massive study"[65] dealt with two kinds of entities: investment trusts (established by bank security affiliates) and investment companies (established by commercial and investment-banking concerns).[66] The study found that both were often used to enrich the sponsoring institutions at the expense of investors.[67] The ICA ultimately included extensive requirements regulating the organization, management structure, capital requirements, and the accounting, recordkeeping, sales, and disclosure practices of *investment companies*.[68]

Importantly, in the period when the ICA was being considered, "common trust funds were recognized as investment vehicles similar to investment companies."[69] However, common trust funds were still in their "early stages" and SEC's "limited" investigation did not study in depth the potential conflicts or abuses in common trust funds.[70] Accordingly, the ICA excluded "common trusts" from the definition of an "investment company."[71] The exclusion was likely premised on the idea that common-trust-fund interests could not be sold as investments to the general public, as well as on "notions of avoiding

64. *Id.* at 376 (discussing SEC. & EXCH. COMM'N, INVESTMENT TRUSTS AND INVESTMENT COMPANIES (PART I), H.R. DOC. NO. 75-707 (1939); SEC. & EXCH. COMM'N, INVESTMENT TRUSTS AND INVESTMENT COMPANIES (PART II), H.R. DOC. NO. 76-70 (1939); SEC. & EXCH. COMM'N, INVESTMENT TRUSTS AND INVESTMENT COMPANIES (PART III), H.R. DOC. NO. 76-279 (1940-1942)); *see also* John Morley, *Collective Branding and the Origins of Investment Fund Regulation*, 6 VA. L. & BUS. REV. 341, 366-94 (2011) (describing the role of industry in shaping the ICA).

65. Lybecker, *supra* note 41, at 989.

66. Wade, *supra* note 7, at 376.

67. *Id.*

68. *See Statutes and Regulations*, *supra* note 60.

69. *Id.*; *accord* SEC. & EXCH. COMM'N, COMMINGLED OR COMMON TRUST FUNDS ADMINISTERED BY BANKS AND TRUST COMPANIES, H.R. DOC. NO. 76-476, at 1 (1939).

70. Wade, *supra* note 7, at 376; SEC. & EXCH. COMM'N, COMMINGLED OR COMMON TRUST FUNDS ADMINISTERED BY BANKS AND TRUST COMPANIES, H.R. DOC. NO. 76-476, at 1 ("This report . . . is of limited coverage, and merely indicates the nature, growth, magnitude, and the present status of the regulation, both federal and state, of common trust funds.").

71. Wade, *supra* note 7, at 376-77. Specifically, Section 3(c)(3) of the ICA excludes "any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank in its capacity as a trustee, executor, administrator, or guardian." Investment Company Act of 1940, ch. 686, § 3(c)(3), 54 Stat. 789, 798 (codified as amended at 15 U.S.C. § 80a-3(c)(3)).

'duplication of supervision'" insofar as common trust funds were already subject to supervision and regulation by the Federal Reserve Board.[72]

B. The Growth of Pooled Bank Trusts for Pension Plans and the Ensuing Interagency Conflict: 1950s-1970s

The spate of legislative developments in the 1930s largely left the oversight of bank-sponsored common trusts to the Federal Reserve Board. By the 1950s, common trust funds were a "firmly established fiduciary banking practice," but their growth was constrained by the Board's "fiduciary purpose" requirement.[73] Developments in pension law would soon transform the fate and future of bank-sponsored trusts.

In the post-World War II era, many U.S. companies established employer-sponsored retirement plans.[74] Such plans were tax-qualified employee-benefit plans that were structured as defined-benefit pensions.[75] In other words, employers promised employees a certain monthly pension benefit upon retirement (and the satisfaction of vesting conditions), and employers bore the investment and longevity risks associated with such pension programs.[76]

In 1955, the Federal Reserve Board authorized the establishment of pooled investment funds, which permitted, for the first time, banks to pool retirement trusts for investment purposes.[77] In what came to be an important development for CITs, the Board did not subject the pooled investment funds to the restrictions preventing the use of common trust funds primarily as investment vehicles.[78] SEC then took two consequential positions: first, that such pooled

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72. Wade, *supra* note 7, at 377; Lybecker, *supra* note 41, at 990 (quoting *Investment Trusts and Investment Companies: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking & Currency, Part 2*, 76th Cong. 925 (1940)).

73. Wade, *supra* note 7, at 365.

74. *See* John H. Langbein, *ERISA's Role in the Demise of Defined Benefit Pension Plans in the United States*, 31 ELDER L.J. 1, 13 (2023).

75. *Id.* at 4-9.

76. *Id.*

77. Collective Investment of Trust Funds, 20 Fed. Reg. 3305, 3305 (May 14, 1955) (to be codified at 12 C.F.R. pt. 206). The 1955 regulation permitted the collective investment of a "trust which forms part of a pension, profit-sharing, or stock bonus plan of an employer for the exclusive benefit of his employees or their beneficiaries and which is exempt from Federal income taxes under the Internal Revenue Code" if the instrument creating the trust authorized such collective investment. *Id.*

78. Wade, *supra* note 7, at 365-66. In addition to the "true fiduciary purpose" requirement discussed earlier, common trust funds were not to be advertised as investment vehicles. *Id.* at 366 n.30 (citing *Law Department*, 42 FED. RSRV. BULL. 228, 228 (1956)). Moreover, individual

investment funds would not be considered investment companies under the ICA;[79] and second, that although an interest in a pooled investment fund would be considered a "security," SEC would not impose the registration requirements on the assumption that transactions in pooled fund interests did not involve a "public offering."[80] These positions and the agency's hands-off approach likely reflected the relative sophistication of the retirement-plan sponsors, the existing prohibition on advertising pooled investment funds, the policy interest in promoting pension plans, and the concern about "overlapping jurisdiction between the bank regulations and the SEC."[81] Following these regulatory developments, bank-sponsored pooled investment funds for retirement assets—that is, CITs—grew at a dramatic rate.[82]

The growth of CITs, now flush with retirement-plan money—and certain regulatory developments in the 1960s—sparked pushback from the securities industry and a broader debate about the different regulatory regimes for CITs and mutual funds. The debate came to a head in 1962, when Congress allowed a new kind of tax-qualified retirement trust for self-employed individuals (known as H.R. 10 or Keogh plan trusts).[83] These plans removed the employer intermediaries that traditionally stood between individuals and retirement-plan investments. The banking industry viewed these new individual plans as an exciting opportunity that, with appropriate advertising, could reach "potentially huge investor markets."[84]

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account participations were limited to $100,000 or less, a limit that was "the last vestige of the original Federal Reserve Board policy that common trust funds be used primarily to aid in the administration of small fiduciary accounts." *Id.*

79. "The SEC took the position that section 3(c)(13) of the [ICA] (a predecessor to the current section 3(c)(11)), which excluded 'any employees' stock bonus, pension, or profit-sharing trust which meets the conditions of section 165 (now section 401) of the Internal Revenue Code' from the definition of 'investment company,' extended also to pooled investment funds." *Id.* at 377 (quoting Robert H. Mundheim & Gordon D. Henderson, *Applicability of the Federal Securities Laws to Pension and Profit-Sharing Plans*, 29 LAW & CONTEMP. PROBS. 795, 815 (1964)); *see also* Pitt & Williams, *supra* note 41, at 143 (describing the SEC administrative "no-action" positions concerning collective investment funds for employer-sponsored retirement plans).

80. Wade, *supra* note 7, at 378. The antifraud provisions of the Securities Act were thought still to apply. *Id.* at 379.

81. *Id.* at 377-79; Pitt & Williams, *supra* note 41, at 143.

82. Frank L. Voorheis, *Investment Policy and Performance of Bank-Administered Pooled Equity Funds for Employee Benefit Plans*, 22 J. FIN. 492, 492-93 (1967).

83. Self-Employed Individuals Tax Retirement Act of 1962, Pub. L. No. 87-792, § 2, 76 Stat. 809, 809 (codified as amended in scattered sections of I.R.C.); *see also* Leslie M. Rapp, *The Self-Employed Individuals Tax Retirement Act of 1962*, 18 TAX L. REV. 351, 351 (1963) (describing the enactment of the "Keogh Bill (H.R. 10)").

84. Wade, *supra* note 7, at 366.

SEC and the securities industry took a less favorable view of these developments and suggested that some of its earlier justifications for a hands-off approach would no longer apply. At congressional hearings in 1963 and 1966, SEC asserted that distribution of interests in pooled funds for H.R. 10 plan trusts involved a public offering of securities requiring registration under the Securities Act.[85] Notably, SEC raised concerns that "a large number of relatively unsophisticated investors would have neither the protective disclosure requirements of the Securities Act, nor the individualized, personal contact generally viewed as an integral part of traditional fiduciary services, to rely on."[86]

SEC's position provoked strong disagreement from OCC, which in 1962 had been given supervisory authority over the trust powers of national banks from the Federal Reserve Board.[87] The Comptroller maintained at the time that "the inspection and regulation conducted by the banking agencies was more than adequate to protect investors."[88]

Over the next two decades, the dispute between the banking and securities industries[89] and their government regulators played out in congressional hearings, litigation, and legislation. Although the Supreme Court in *Investment Co. Institute v. Camp* limited the banks' ability to operate certain investment funds open to the general public,[90] and Congress clarified that CITs pooling H.R. 10

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85. Erickson, *supra* note 41, at 1398.

86. Wade, *supra* note 7, at 396.

87. Act of Sept. 28, 1962, Pub. L. No. 87-722, § 1, 76 Stat. 668, 668-69. Scholars have noted that the transfer of regulatory authority to the Comptroller of the Currency reflected a "successful banking industry effort." Church & Seidel, *supra* note 41, at 1176. The Comptroller then promulgated new regulatory guidance that eliminated the "true fiduciary purpose" requirement for accounts participating in common trust funds and authorized the establishment of collective investment funds for managing agency accounts. Trust Powers of National Banks, 28 Fed. Reg. 1111, 1113-15 (proposed Feb. 5, 1963) (to be codified at 12 C.F.R. pt. 9). The provision permitting commingled agency funds was later invalidated by the Supreme Court in *Investment Co. Institute v. Camp*, 401 U.S. 617, 620 (1971).

88. Webb, *supra* note 41, at 343. SEC, meanwhile, insisted that securities laws provided protections that inspection and regulation by banking regulators could not. *Id.* at 340.

89. The disputes about CITs were part of a broader set of jurisdictional skirmishes between SEC and bank regulators throughout this period and into the 1980s. While CITs were seen as part of the banks' efforts to enter the securities business, the introduction of money-market mutual funds, which "claimed to be as safe as bank accounts but notably more remunerative for their investors," was seen by some as the creation of "shadow banks." BIRDTHISTLE, *supra* note 6, at 193; *see* Mark Perlow, *Money Market Funds—Preserving Systemic Benefits, Minimizing Systemic Risks*, 8 BERKELEY BUS. L.J. 74, 75 (2011).

90. *Camp*, 401 U.S. at 618. The case "involve[d] a double-barreled assault upon the efforts of a national bank to go into the business of operating a mutual investment fund" and reached the Supreme Court in 1971. *Id. Camp* clarified that the Glass-Steagall Act prohibits national banks

plans could not avail themselves of all the securities-law exemptions available to other CITs,[91] the banks were otherwise permitted to continue their growing collective-trust business.

Still, the securities industry continued its "vigorous campaign to secure legislation restricting the scope of bank activities."[92] In 1979, the Investment Company Institute (ICI) distributed to members of Congress a publication entitled *Misadventures in Banking: Bank Promotions of Pooled Investment Funds*.[93] In the report, the ICI argued that "[t]he operation of bank pooled investment funds solely to provide investment management services for retirement plans constitutes a clear violation of the Glass-Steagall Act."[94] The ICI insisted that the interests in pooled funds constituted securities for the purpose of securities laws, and that by marketing these interests aggressively to employee-benefit funds, banks were competing in the investment-banking business and thus violating the Glass-Steagall Act and the guidance in *Camp*.[95] The ICI asked Congress to clarify "that commercial banks and their affiliates are totally prohibited from sponsoring, organizing, controlling and advising every type of pooled investment fund other than traditional bank common trust funds."[96]

Despite such pushback from the securities industry and various efforts to resolve the difficult questions of law and policy raised by increasing bank

from operating a so-called "agency account," which the Court found to be "virtually indistinguishable from a mutual fund." Pitt & Williams, *supra* note 41, at 142. In other words, the Glass-Steagall Act prohibits national banks from operating investment funds that offer customers opportunities to invest in stock funds created and maintained by banks. Wade, *supra* note 7, at 394-95. The decision did not impact the banks' offering of fiduciary services or pooled retirement trusts for investment purposes, as permitted by the Comptroller. 12 C.F.R. § 9.18(a) (2024).

91. The Investment Company Amendments Act of 1970 clarified that interests in bank trusts used to fund employee pension plans, other than the H.R. 10 self-employed plans, are exempted from the registration provisions of both the 1933 and the 1934 Acts. Investment Company Amendments Act of 1970, Pub. L. No. 91-547, §§ 27(b), 28(a), 84 Stat. 1413, 1434-35 (codified as amended in scattered sections of 15 U.S.C.). Interests in collective H.R. 10 plans are similarly exempted as to the 1934 Act, but not as to the 1933 Act, except as the Commission provides otherwise by rule or order. *Id.* § 27(b), 84 Stat. at 1434. Congress also amended the ICA to clarify that any employee's stock bonus, pension, or profit-sharing trust that meets the requirements for qualification under Section 401 of the Internal Revenue Code would not be considered an investment company subject to ICA rules, nor would any collective trust fund maintained by a bank consisting solely of the assets of such trusts. *Id.* § 3(b)(5), 84 Stat. at 1415.

92. Wade, *supra* note 7, at 395 n.193.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

involvement in investment-management activities, the questions remained largely unanswered, and the regulatory framework for CITs remained unchanged. Ultimately, as discussed further in Section I.D, the securities industry decided to take the "if you can't beat them, join them" approach. Rather than continuing to try to fight bank activity in the CIT space, asset managers simply decided to set up banks and trust companies to offer their own CITs.

C. The New Era of Defined-Contribution Retirement Plans: 1980s-Present

Whereas the bulk of retirement plans established in the post-World War II period were traditional "defined benefit" plans, employers in the 1980s began to shift to "defined contribution" plans for their employees.[97] The change came after Congress amended Section 401 of the Internal Revenue Code in 1978 to create the 401(k) plan, now the most common type of defined-contribution plan.[98]

Defined-contribution plans and defined-benefit plans differ in several key ways. In a defined-benefit plan, employers promise their employees a specific monthly benefit to be paid from retirement until death.[99] Employers also manage the plans' investments and bear the associated investment risk.[100] Furthermore, the Employee Retirement Income Security Act (ERISA) of 1974, the law that governs private-sector retirement plans in the United States, was drafted specifically for defined-benefit plans and imposed numerous substantive requirements to protect the interests of plan participants.[101]

In a typical defined-contribution plan, an employee participant may elect to contribute a portion of earnings to the participant's account, and the employer

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97. Langbein, *supra* note 74, at 13 (observing that defined-benefit plans became prevalent in the post-World War II period); Div. of Inv. Mgmt., *supra* note 10, at 136-39; *see also* Alicia H. Munnell, *Private Sector Defined Benefit Plans Are Really Disappearing*, CTR. FOR RET. RSCH. B.C. (Dec. 26, 2011), https://crr.bc.edu/private-sector-defined-benefit-plans-are-really-disappearing [https://perma.cc/37L2-9BHH] (observing the decline of defined-benefit plans in the private sector).

98. The 1978 "amendment exempted from taxation certain profit-sharing and stock bonus plans that allowed employees to elect to receive . . . or, instead, defer receipt of" a portion of their compensation. Div. of Inv. Mgmt., *supra* note 10, at 134 (citing Revenue Act of 1978, Pub. L. No. 95-600, § 135, 92 Stat. 2763, 2785-87 (codified as amended at I.R.C. § 401(k))). As a result, "[i]f the employee elected to defer receipt of the contribution, it would be invested in a trust." *Id.* The "contributions and the earnings thereon would accumulate tax-free until disbursed." *Id.*

99. *Id.* at 119.

100. *Id.*

101. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.); *see also* Natalya Shnitser, *Trusts No More: Rethinking the Regulation of Retirement Savings in the United States*, 2016 BYU L. REV. 629, 642-43 (describing the aims of and key requirements under ERISA).

may also make a specified contribution to the account for the employee's benefit.[102] Therefore, benefits upon retirement are not specified; instead, they depend on the contributions made to the individual account, as well as the investment performance of the account's assets.[103] In a defined-contribution plan, an employee participant will be entitled to the nonforfeitable accrued balance in the participant's individual account, which is determined by the contribution, as well as the investment gains or losses.[104] Defined-contribution plans require employee participants to select investments for their individual accounts from a menu of options curated by the plan sponsor.[105] In so doing, defined-contribution plans shift the investment-management risk and responsibility onto individual employees.[106] Plan administrators are subject to fiduciary obligations and must exercise prudence in selecting and monitoring the investment options offered to individual participants.[107] They are not obligated, however, to ensure that individual participants choose suitable investments from the menu of choices.[108]

The shift to defined-contribution plans prompted regulators to reconsider the disparate treatment of mutual funds and CITs, and to question whether the securities-law exemptions were still justified given the changing retirement-plan landscape. In a 1992 report, SEC's Division of Investment Management observed that changes in the U.S. retirement system "eviscerate[d] the original rationale for the exemptions from securities disclosure requirements for pooled investment vehicles—that large employers, making the investment decisions and bearing the investment risks, could obtain needed information without disclosure requirements."[109] SEC rejected the argument that changes to the securities-law exemptions were unnecessary given federal laws and regulations already applicable to retirement plans and CITs. Specifically, because ERISA disclosure requirements focused primarily on the "plan itself and not on the investments that underlie the plans," participants in plans that included CITs on their investment menus would have access to less information than participants in plans with mutual funds on the menu.[110] Moreover, SEC maintained the position that existing bank regulation was not a substitute for the investor protections of the federal

102. Shnitser, *supra* note 101, at 644.

103. Langbein, *supra* note 74, at 17.

104. Shnitser, *supra* note 101, at 632 n.8

105. Langbein, *supra* note 74, at 17.

106. Div. of Inv. Mgmt., *supra* note 10, at 120.

107. *Id.*

108. *Id.*

109. *Id.* at 144-45.

110. *Id.* at 120.

securities laws because "banking regulation was concerned primarily with controlling the flow of credit, maintaining an effective banking structure, and protecting depositors" and "[b]anking regulation does not address investors' need for information."[111]

Based on its analysis, the Division of Investment Management made recommendations that would bifurcate the securities-law treatment for CITs based on whether the CIT held defined-benefit or defined-contribution plan assets. Specifically, the Division urged the Commission to send Congress legislation that would (1) "remove the current exemption from registration [in Section 3(a)(2) of the Securities Act of 1933] for interests in pooled funding vehicles for participant-directed defined contribution plans"; (2) "amend[] the federal securities laws to require the delivery of prospectuses to plan participants who direct their investments"; and (3) "amend[] the Securities Exchange Act of 1934 to require the delivery of semiannual and annual shareholder reports for the underlying investment vehicles (other than registered investment companies) to these plan participants."[112] The Division advised retaining in its current form the Securities Act exemption "for interests in pooled investment vehicles for defined benefit plans and defined contribution plans that do not provide for participant direction."[113]

Notwithstanding the recommendations from SEC's Division of Investment Management and certain proposals from Treasury to better align the regulation of CITs and investment companies, no major changes to the regulatory

111. *Id.* at 128.

112. *Id.* at xxv.

113. *Id.* at 121.

framework for CITs were enacted.[114] Instead, SEC,[115] DOL,[116] and OCC[117] all promulgated regulatory guidance that further integrated CITs into the existing financial ecosystem. Still, because CITs lacked the familiarity and operational ease of mutual funds, plan sponsors were somewhat reluctant to embrace them as a substitute. The next two decades would see industry efforts to eliminate some of the barriers to the adoption of CITs and, correspondingly, both greater convergence and competition with mutual funds.

D. Intensifying Convergence and Competition with Mutual Funds: 2000-Present

Since the early 2000s, industry actors have pushed to eliminate or minimize "the historical disadvantages" and barriers to adoption facing CITs.[118] Together with the pressure on plan sponsors to avoid litigation over plan fees, there has been "a perfect storm"[119] of forces in favor of CITs. As noted earlier, the exodus out of mutual funds has accelerated in recent years and appears to be reaching all segments of the retirement-plan market, including smaller plans that did not previously have CITs on their investment menus.[120]

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114. As part of its proposal to "modernize" the financial system, the Department of the Treasury addressed "[f]unctional regulation" pursuant to which "[f]inancial activities would generally be regulated by function, rather than by institution." U.S. DEP'T OF THE TREASURY, MODERNIZING THE FINANCIAL SYSTEM: RECOMMENDATIONS FOR SAFER, MORE COMPETITIVE BANKS 59 (1991). In this vein, Treasury recommended regulating "[b]anks' pooled investment activities . . . in a manner more similar to investment companies." *Id.*

115. In 1981, SEC adopted Rule 180, which "conditionally exempts an interest in a Keogh plan, and the plan's interest in a pooled investment vehicle, from Securities Act registration." Div. of Inv. Mgmt., *supra* note 10, at 135. The exemption is available on the basis of the "knowledge and experience" of the employer or the employer's solicitation of advice from an expert that meets certain independence criteria. Exemption from Registration of Interests and Participations Issued in Connection with Certain H.R. 10 Plans, 46 Fed. Reg. 58287, 58291 (Dec. 1, 1981) (to be codified at 17 C.F.R. pt. 230).

116. Prohibited Transaction Class Exemption 91-38, issued by DOL in 1991, provides certain exemptions to facilitate the use of CITs by employer-sponsored retirement plans. Amendment to Prohibited Transaction Exemption (PTE) 80-51 Involving Bank Collective Investment Funds, 56 Fed. Reg. 31966, 31967 (July 12, 1991).

117. In 1997, OCC amended its regulations of commingled funds, including CITs. *See Trust Examination Manual: Section 7 - Compliance - Pooled Investment Vehicles*, FED. DEPOSIT INS. CORP. (Apr. 19, 2024), https://www.fdic.gov/bank-examinations/section-7-compliance-pooled-investment-vehicles [https://perma.cc/328E-SS64].

118. Desai & Dauwen, *supra* note 7, at 3. The changes streamline purchase, redemption, and exchange transactions and allow investors to access real-time information about contributions, distributions, and other activities. *Id.* at 5.

119. *Id.* at 3.

120. Steyer, *supra* note 1.

Four key developments have made CITs more appealing to plan sponsors. First, starting in 2000, the National Securities Clearing Corporation (NSCC) began to include CITs on its mutual-fund trading platform.[121] While mutual funds remain more transparent than CITs, in recent years, database vendors such as Morningstar, which closely track mutual funds, have expanded their coverage of CITs. Some industry estimates suggest that "Morningstar currently covers upwards of 95% of the CITs being offered," although Morningstar itself provides no such estimates and does not have information about the number of CITs not in its database.[122] Although CITs, unlike mutual funds, are not obligated to provide daily pricing to investors, more and more are doing so.[123]

At the same time, plan-sponsor demand for CITs has also increased. The increased demand is a function of several regulatory, litigation, and market developments, some of which have played out in tandem over the last two decades. In 2006, the Pension Protection Act required retirement-plan sponsors to invest automatically contributions for which participants had not specified an investment preference into so-called "qualified default investment alternatives" (QDIAs).[124] QDIAs came to be dominated by target-date funds (TDFs), which offer in a single fund a mix of stocks, bonds, and short-term investments, the balance of which is adjusted automatically based on the investor's age.[125] The ability of CITs to hold different kind of securities has made CITs particularly well

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121. Desai & Dauwen, *supra* note 7, at 5.

122. *Id.* at 12, 16. Morningstar indicates that "CITs (as all other funds) are added to our database at the request of fund companies and/or at the request of third-party clients with the fund company's permission. We do not have access to the CITs (or the number of CITs) that are not included in our database." Email from Arthur K., Morningstar Direct Support, to author (Jan. 20, 2024, 12:15 AM ET) (on file with author). Because the Morningstar CIT database is "voluntary," Morningstar notes that it has to "constantly recruit and constantly ask[] the money managers to keep supplying data." *See How Does Morningstar Gather Separate Account/Collective Investment Trust Data?*, *supra* note 25.

123. Desai & Dauwen, *supra* note 7, at 12. One industry report suggests that the vast majority of CITs trade and price daily. *See Collective Investment Trusts*, COAL. OF COLLECTIVE INV. TRS. 8 (2015), https://www.seic.com/sites/default/files/2022-05/SEI-STC-CCIT-WhitePaper.pdf [https://perma.cc/6V8K-CCYD].

124. Pension Protection Act of 2006, Pub. L. No. 109-280, § 624, 120 Stat. 780, 980. In its final regulations, DOL provided protection from fiduciary liability for plan sponsors that select "qualified default investment alternatives" as the default investment product for the retirement plan. Fiduciary Relief for Investments in Qualified Default Investment Alternatives, 29 C.F.R. § 2550.404c-5 (2023).

125. *See* Emp. Benefits Sec. Admin., *Target Date Retirement Funds - Tips for ERISA Plan Fiduciaries*, U.S. DEP'T OF LAB. 1 (Feb. 2013), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/target-date-retirement-funds-erisa-plan-fiduciaries-tips.pdf [https://perma.cc/F47H-AZ3B].

suited for the TDF space. The use of both TDFs and TDFs structured as CITs has grown dramatically over the last ten years.[126]

Just as plan sponsors were adjusting to the QDIA requirements, DOL also finalized several rules to improve fee disclosure and facilitate comparison across retirement-plan investment options. In particular, in its 2012 rule, DOL sought to "ensure that employee benefit plan fiduciaries, as well as plan participants and beneficiaries, obtain comprehensive information about the services that are provided to employee benefit plans, and the cost of those services."[127] The DOL rule specified the disclosures that must be provided to plan fiduciaries in order for a "contract or arrangement for plan services" to be "reasonable," as required by ERISA.[128] The rule enhanced and standardized the information that financial institutions, including those managing CITs, would have to provide to plan administrators, thereby reducing some of the disclosure gaps between CITs and mutual funds.[129]

The last, and arguably the most significant, driver of the shift to CITs has been ERISA litigation. Specifically, over the last fifteen years, retirement-plan sponsors—and the individuals deemed to be ERISA fiduciaries—have faced heightened litigation risk over their administration and management of company retirement plans.[130] The bulk of such lawsuits have been "excessive fee" cases challenging the selection of service providers and investment options for plans.[131] Plaintiffs have alleged that plan sponsors and the individuals who serve

126. *See Target-Date Strategy Landscape: 2023*, MORNINGSTAR 2 (2023), https://institutional.vanguard.com/content/dam/inst/iig-transformation/insights/pdf/2023/Morningstar-Report-Target-Date-Landscape-March-2023.pdf [https://perma.cc/5L2V-QKUM]. According to Morningstar, "[t]arget-date strategies raked in $153 billion in net assets in 2022; collective investment trusts led the way, absorbing $121 billion—or 79%—of the year's net inflows." *Id.* at 1. As of 2022, CITs made up 47% of target-date assets. *Id.* By 2024, CITs held 50.5% of target-date assets. Pacholok, *supra* note 33.

127. Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 77 Fed. Reg. 5632, 5632 (July 1, 2012) (to be codified at 29 C.F.R. pt. 2550).

128. *Id.*

129. Emp. Benefits Sec. Admin., *Fact Sheet: Final Regulation Relating to Service Provider Disclosures Under Section 408(b)(2)*, U.S. DEP'T OF LAB. [1] (Feb. 2012), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/fact-sheet-service-provider-disclosure-regulation.pdf [https://perma.cc/ZH4V-7NEK] ("This final rule establishes, for the first time, specific disclosure obligations for plan service providers to ensure that responsible plan fiduciaries are provided the information they need to make better decisions when selecting and monitoring service providers for their plans.").

130. Shnitser, *supra* note 28, at 317.

131. *Id.* at 318.

on plan committees have breached their fiduciary obligations in "the selection and retention of allegedly overpriced and underperforming investments."[132]

The number of lawsuits, the settlement amounts, and the subsequent increases in fiduciary insurance costs have raised concern among industry participants about heightened legal exposure.[133] CITs have emerged—and have been marketed[134]—as a direct response to concerns about fee litigation, while also offering greater flexibility on the use of alternative investments in retirement plans.[135] As Part IV shows, however, while CITs satisfy some of the concerns raised by plaintiffs in the "excessive fee" cases, the use of CITs also makes further monitoring of retirement-plan menus by plaintiffs' attorneys considerably more difficult.

II. A PRIMER ON COLLECTIVE INVESTMENT TRUSTS TODAY

There is, strikingly, no single or comprehensive source of information on the size and characteristics of the current CIT market.[136] This Part begins by

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132. *Id.*

133. *See id.* at 317; *ERISA & Excessive Fee Litigation by the Numbers*, SOMPO INT'L 1 (2023), https://www.sompo-intl.com/wp-content/uploads/Fiduciary-lines-Excessive-Fee-Litigation-0323.pdf [https://perma.cc/V3VK-5QCK] (suggesting that total damages from excessive-fee litigation between 2010 and 2022 exceeded $1 billion); *Excessive Litigation over Excessive Plan Fees*, CHUBB (2021), https://www.chubb.com/content/dam/chubb-sites/chubb-com/us-en/business-insurance/fiduciary-liability-educational-materials/documents/pdf/2021-09-15_Excessive_Litigation_over_Excessive_Fees.pdf [https://perma.cc/YE4W-TWGX] ("The average excessive fee settlement was approximately $14.5 million in 2020.").

134. *See, e.g.*, Jennifer DeLong, *What's Old Is New Again: Collective Investment Trusts Reduce DC Plan Costs*, ALLIANCEBERNSTEIN [2] (2020), https://www.alliancebernstein.com/content/dam/global/insights/insights-whitepapers/OldAreNewAgain.pdf [https://perma.cc/Y9MH-43S2] (characterizing CITs as "transparent and lower-cost option[s] for plan sponsors" given "more scrutiny on plan fees recently and a big surge in litigation").

135. Unlike mutual funds subject to the ICA, CITs have more flexibility to invest in "alternatives like Treasury Inflation Protected Securities (TIPS), real estate, commodities, high-yield bonds and hedge funds." Lee Barney, *Collective Investment Trusts Versus Mutual Funds*, PLANADVISER (Feb. 8, 2017), https://www.planadviser.com/collective-investment-trusts-versus-mutual-funds [https://perma.cc/M9DP-4YH3]. The CIT structure also permits fixed and indexed annuities to be incorporated in certain target-date funds for "timing optimal cash flow during the required minimum distribution (RMD) phase." Desai & Dauwen, *supra* note 7, at 21.

136. The lack of comprehensive data reflects the regulatory fragmentation described in Section II.B and exacerbates the systemic-risk concerns described in Part III. The seven-trillion-dollar figure cited by SEC reflects "[e]stimates . . . based on SEC staff analysis of data from FFIEC Call Reports, Morningstar, Brightscope, and other industry reporting." Gensler, *supra* note 3, at n.27. The Financial Stability Oversight Council has observed that "there are limited data on the size of the entire [collective investment fund] industry." Fin. Stability Oversight Council,

describing and synthesizing the available data to show the reach of CITs and the role of different asset managers in this market. Next, it reviews the regulatory regimes—and the regulatory bodies—that oversee CITs today.

A. The Current State of the CIT Market

Data from DOL and from the Morningstar Direct database shed light on the prevalence of CITs in employer-sponsored plans, as well as on the largest managers of CIT assets.[137] DOL reports that as of 2021, there were 95,028 private-sector retirement plans with 100 or more participants, including 6,715 defined-benefit plans and 88,313 defined-contribution plans.[138] Some 30,540 plans had assets invested in one or more of the 5,088 CITs, which in the aggregate held over $4.7 trillion.[139] Of the total assets, more than half ($2.5 trillion) was held in common stock, while the rest was distributed across a variety of other investments.[140] Morningstar Direct data is consistent with these findings. While various investment strategies—including commodities, alternatives, and money markets—are represented, over half of CIT assets are invested in various equity strategies.[141]

Who manages the CIT assets across the various investment strategies? Table 1 draws on data in the Morningstar Direct database to compile the ten largest CIT managers. At the very top are Vanguard and BlackRock, each with over $1 trillion in CIT assets. State Street and T. Rowe Price follow, each with over $700 billion in CIT assets. Northern Trust rounds out the top five, managing over

Annual Report 2023, U.S. DEP'T OF THE TREASURY 67 (2023), https://home.treasury.gov/system/files/261/FSOC2023AnnualReport.pdf [https://perma.cc/6TBH-UXXH].

137. Morningstar Direct is a "global investment analysis platform that combines Morningstar data and research with analytics, data science, and productivity tools." *Morningstar Direct*, MORNINGSTAR (2024), https://www.morningstar.com/business/products [https://perma.cc/3DUD-BU8S].

138. Emp. Benefits Sec. Admin., *Private Pension Plan Bulletin Historical Tables and Graphs 1975-2022*, U.S. DEP'T OF LAB. 4 tbl.E3 (Sept. 2024), https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf [https://perma.cc/VN5E-6KP2]. The DOL reports cover only private-sector plans subject to its regulatory oversight.

139. Emp. Benefits Sec. Admin., *Form 5500 Direct Filing Entity Bulletin*, U.S. DEP'T. OF LAB. 5 tbl.1 (Sept. 2023), https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/form-5500-direct-filing-entity-bulletin-abstract-of-form-5500-2021-preliminary-annual-report.pdf [https://perma.cc/JS7P-UZEP].

140. *Id.* at 6 tbl.2.

141. An analysis of the Morningstar Direct United States Collective Investment Trusts dataset classification of the primary asset class orientation as of November 2024 showed 51.9% of assets in "Equity," 30.4% of assets in "Allocation," 13.3% in "Fixed Income," 1.3% in "Money Market," and the rest spread across "Alternative," "Commodities," "Convertibles," and "Miscellaneous."

$600 billion in CIT assets. Table 1 shows that the "Big Three" asset managers (BlackRock, Vanguard, and State Street)[142] have extensive CIT business lines. The next Section describes the different organizational structures used to offer CITs to retirement-plan clients.

TABLE 1. LARGEST CIT ASSET MANAGERS[143]

	CIT Assets ($Bil)	Share of Assets in Morningstar CIT Database (%)
Vanguard[144]	1,365	20.15
BlackRock[145]	1,036	15.29
State Street[146]	734	10.83
T. Rowe Price[147]	724	10.69
Northern Trust[148]	668	9.86
Fidelity[149]	465	6.86

142. Dorothy S. Lund & Adriana Z. Robertson, *Giant Asset Managers, the Big Three, and Index Investing*, *in* Board-Shareholder Dialogue: Policy Debate, Legal Constraints and Best Practices 158, 158 (Luca Enriques & Giovanni Strampelli eds., 2024).

143. Data in this table is compiled from the Morningstar Direct United States Collective Investment Trusts database as of November 2024, which at the time included 8,923 entries. For each entry, the Morningstar dataset identifies a "Management Company," which is defined by Morningstar as "[t]he company that executes the investment approach for a particular strategy." For each entry, Morningstar also identifies the "Tier Level Assets," which is "the total amount of money attributed to the tier or share class." Table 1 aggregates Tier Level Assets by Management Company as described in footnotes 144-152.

144. This entry includes "Vanguard" and "Vanguard Group, Inc."

145. This entry includes "BlackRock Institutional Trust Company NA," "BlackRock," "Blackrock, Inc.," "BlackRock Fund Advisors," and "BlackRock Investment Management LLC."

146. This entry includes "State Street Bank and Trust Company," "State Street Global Advisors," "State Street Global Advisors (Chicago)," and "State Street Global Advisors Ltd."

147. This entry includes "T. Rowe Price," "T. Rowe Price Associates, Inc.," and "T. Rowe Price Hong Kong Limited."

148. This entry includes "Northern Trust" and "Northern Trust Asset Management."

149. This entry includes "Fidelity Management Trust Company," "Fidelity Institutional Asset Management," "Fidelity Management & Research Company LLC," and "Fidelity Management and Research Company."

	CIT Assets ($Bil)	Share of Assets in Morningstar CIT Database (%)
Geode Capital Management, LLC	255	3.76
JP Morgan[150]	184	2.71
Mellon[151]	144	2.12
Principal[152]	88	1.30
Total	**5,662**	**83.57**

B. CIT Organization, Governance, and Oversight

In examining the organization, governance, and oversight of CITs, it is helpful to consider an example showing how CITs describe themselves. The following excerpt comes from a BlackRock CIT fact sheet:

> The fund described herein is a bank-maintained collective investment fund **maintained and managed** by BlackRock Institutional Trust Company, N.A. ("BTC"). BTC is a **national banking association** organized under the laws of the United States and operates as a limited purpose trust company.
>
> In reliance upon an **exemption from the registration requirements of the federal securities laws**, investments in the fund are not registered with the Securities and Exchange Commission ("SEC") or any state securities commission. Likewise, in reliance upon an **exclusion from the definition of an investment company in the Investment Company Act of 1940**, as amended (the "Company Act"); the fund is not registered with the SEC as an investment company under the Company Act. The **Office of the Comptroller of the Currency** is responsible for ensuring that fiduciary powers are exercised in a manner consistent with the best interests of BTC's clients and sound fiduciary principles.

150. This entry includes "JPMorgan Chase Bank," "JPMorgan Chase Bank N.A.," "JPMorgan Asset Management Inc.," "JPMorgan Chase Bank NA," and "JPMorgan Chase Bank, N.A."

151. This entry includes "Mellon Investments Corporation" and "Mellon Capital Management Corp."

152. This entry includes "Principal Asset Management Co., Ltd," "Principal Global Equities," "Principal Global Fixed Income," "Principal Global Investors Trust Company," "Principal Global Investors LLC," "Principal Portfolio Strategies," and "Principal Real Estate Investors."

> The fund is offered to defined contribution plans ("Plans") that are qualified under Section 401(a) of the Internal Revenue Code of 1986, as amended ("IRC"), and governmental Plans, such as state and municipal government Plans that are described in IRC Section 818(a)(6), such as governmental IRC Section 457(b) Plans. The fund is established and governed by a trust instrument, the Plan of BlackRock Institutional Trust Company, N.A. Investment Funds for Employee Benefit Trusts (the "Plan Document"), which sets forth BTC's powers, authority and responsibilities regarding the administration, investment and operation of the fund. Plans investing in the fund become subject to the terms and conditions of the Plan Document.[153]

While BlackRock relies on a national banking association, other CITs and CIT providers are organized differently. For example, Vanguard CITs are maintained by the Vanguard Fiduciary Trust Company, a Pennsylvania nondepository trust company that is a wholly owned subsidiary of The Vanguard Group, Inc.[154] In 2016, State Street Bank and Trust Company established State Street Global Advisors Trust Company (SSGA Trust), a limited-purpose trust company operating pursuant to the laws of the Commonwealth of Massachusetts.[155] The T. Rowe Price Collective Investment Trusts are established by T. Rowe Price Trust Company under Maryland banking law.[156] Fidelity CITs, meanwhile, are maintained by the Fidelity Institutional Asset Management Trust Company, a trust company organized under the laws of the State of New Hampshire.[157]

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153. Morningstar Inv. Profiles, *BlackRock: Equity Index Fund J*, MORNINGSTAR, INC. (Dec. 31, 2023) (emphasis added) (on file with author). The CIT trustee and manager may or may not be the same entity. *See* De Leon, *supra* note 1, at 8. In general, the trustee selects the manager or subadvisor for the CIT. *Id.*

154. *Target-Date Funds*, VANGUARD, https://institutional.vanguard.com/investment/solutions/target-date-funds.html [https://perma.cc/H4FF-JU8L]. The Vanguard Fiduciary Trust Company was founded in 1981. *Serving Investors for Nearly Five Decades*, VANGUARD, https://corporate.vanguard.com/content/corporatesite/us/en/corp/who-we-are/sets-us-apart/our-history.html [https://perma.cc/HBB9-SKEX].

155. *Establishment of State Street Global Advisors Trust Company a Limited Purpose Trust Company by State Street Bank and Trust Company*, MASS.GOV (Sept. 23, 2016), https://www.mass.gov/decision/establishment-of-state-street-global-advisors-trust-company-a-limited-purpose-trust-company-by-state-street-bank-and-trust-company [https://perma.cc/CK9M-DZ5A].

156. Since 1984, T. Rowe Price Trust Company has offered CITs "to provide institutional investors an attractive alternative to mutual funds and separate accounts." *The Advantages of T. Rowe Price Collective Investment Trusts*, T. ROWE PRICE [2] (Nov. 2023), https://www.troweprice.com/content/dam/fai/Investments/CIT/literature/cit-brochure.pdf [https://perma.cc/4FEA-76LP].

157. *Fidelity Freedom Plus Commingled Pools*, FIDELITY, https://institutional.fidelity.com/app/item/RD_9907809/freedom-plus-strategy.html [https://perma.cc/LP7B-7E24].

The organization, governance, and oversight of CITs differ in material ways from those of mutual funds. Table 2 below summarizes the key differences, and the paragraphs that follow describe the differences in more detail. The regulatory structure is important both because of its impact on retirement savings and the U.S. capital markets and because it is directly tied to the cost savings and additional flexibility that CITs claim to offer to retirement plans.[158] Indeed, industry participants have identified regulatory risk—that is, "unforeseen regulatory challenges and documentation requirements at the hands of regulators"—as "the biggest risk" to the market opportunity for CITs.[159]

TABLE 2. COMPARING CITS AND MUTUAL FUNDS

	Collective Investment Trusts	Mutual Funds
Type of investment vehicle	Pooled: the trusts are established and maintained by banks or trust companies.	Pooled: the funds are set up as separate entities by management companies.
Governance structure	Banks or trust companies, which serve as trustees, maintain CITs. Trustees may engage subadvisors so long as the trustees retain final decision-making authority.[160] Individual investors or retirement plan-sponsors have no governance role.	Management companies provide asset management for the fund, and the ICA regulates a mutual fund's relationship with its adviser. Under the ICA, fund shareholders elect mutual-fund directors and vote on certain governance matters for the fund.
Who can invest?	Only qualified retirement plans, such as 401(k) plans, 457(b) plans, qualified profit-sharing plans, qualified pension plans, and Taft-Hartley plans, can invest. Individual retirement account (IRA) investors and individual investors may not invest.	All investors can invest in the fund.

158. *See, e.g.*, Desai & Dauwen, *supra* note 7, at 18.

159. *Id.* at 25.

160. 12 C.F.R. § 9.18(a)(2)(i), (b)(2) (2024); *see infra* Sections II.B.1, II.B.3.

	Collective Investment Trusts	Mutual Funds
Fee structure & transparency	Banks or trust companies negotiate custom fee structures with the retirement-plan sponsor; no requirement for public disclosure.	Asset managers set fees that are disclosed in the publicly available prospectus.
Permissible investments	CITs have no regulatory limits on the amount or percentage of illiquid or alternative assets they can hold; CITs can hold real estate, timber, or private-equity interests, among others.	Mutual funds are restricted from owning certain types of assets.
Governing documents	Declaration of Trust and Participation Agreement.	Prospectus and additional filings.
Trading	Most can trade via NSCC.	Trade via NSCC.
Valuation	Daily valuation is not required; OCC requires valuation at least quarterly.	Daily valuation.
Admissions & withdrawals	Daily purchases and sales of interests are not required; must be specified in written plan.	Daily purchases and sales.
Financial reporting	Audited financial statements; Form 5500 is optional but usually filed by the trustee.	Annual report; Form 5500 is required.
Proxy vote reporting	Not required.	Required by SEC.
Portability	Must be liquidated to roll over.	Possible to roll over seamlessly.
Key oversight & regulation	OCC or state banking authorities. DOL for plans subject to ERISA. Fund trustees are subject to ERISA standards if the underlying retirement plan is subject to ERISA. Typically structured to avoid registration with SEC.	SEC. Managers are not held to ERISA standards.

As Table 2 shows, the regulatory framework for CITs is both complex and fractured. The following Sections review the regulatory structure by addressing each of the relevant regulatory agencies in turn.

1. *State and Federal Banking Regulators*

CITs established by national banks fall under OCC oversight and supervision. CITs sponsored by state-chartered institutions, meanwhile, are subject to state banking regulation[161] and supervision by various federal bank regulators.[162] At the outset then, the regulatory framework for CITs is not uniform. For CITs established by national banks, the bank serves as a fiduciary for the fund and has legal title to assets in the fund.[163] Participants, in turn, are the beneficial owners. As OCC notes, "While each participant owns an undivided interest in the aggregate assets of a [CIT], a participant does not directly own any specific asset held by a [CIT]."[164] OCC also clarifies that "[p]articipating interests in a [CIT] are not insured by the Federal Deposit Insurance Corporation and are not subject to potential claims by a bank's creditors."[165]

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161. Although state law controls, many states rely on and borrow from OCC guidance. *See Recent SEC Enforcement Raises Questions for Bank Collective Trust Funds*, EVERSHEDS SUTHERLAND (Oct. 6, 2020), https://us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts/235939/Recent-SEC-enforcement-raises-questions-for-bank-collective-trust-funds [https://perma.cc/WAY6-462U] ("[M]any states apply the OCC's rules either by statute, rule, other guidance, or as best practices in examining state bank collective trust activities.").

162. "The [OCC] supervises nationally chartered banks; the Federal Reserve System (FRS) supervises state-chartered, system member banks; and the Federal Deposit Insurance Corporation (FDIC) supervises state-chartered, insured, non-member banks." U.S. GEN. ACCT. OFF., GAO/GGD-86-63, FUNCTIONAL REGULATION: AN ANALYSIS OF TWO TYPES OF POOLED INVESTMENT FUNDS 10 n.2 (1986). For example, State Street reports:

> [State Street Global Advisors (SSGA) Trust Co.] is a Massachusetts-chartered, non-depositary, limited purpose trust company. It is a wholly owned subsidiary of [State Street Bank and Trust Company]. SSGA Trust Co.'s primary regulator is the Massachusetts Division of Banks; as an indirect subsidiary of [State Street Corporation], SSGA Trust Co. is also subject to supervision by the Federal Reserve.

2023 CIDI Plan, STATE ST. BANK & TR. CO. 13 (Dec. 1, 2023), https://investors.statestreet.com/files/doc_downloads/ResolutionPlans/stt-2023-idi-public-public-section.pdf [https://perma.cc/5V6V-G68C]. In 2021, Federal Reserve examiners reported conducting "68 fiduciary examinations of state member banks and non-depository trust companies." *108th Annual Report*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. 34 (2021), https://www.federalreserve.gov/publications/files/2021-annual-report.pdf [https://perma.cc/BH23-W3KF].

163. *See Comptroller's Handbook: Asset Management: Collective Investment Funds*, OFF. OF THE COMPTROLLER OF THE CURRENCY 1 (May 2014) [hereinafter *Comptroller's Handbook*], https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/collective-investment-funds/pub-ch-collective-investment.pdf [https://perma.cc/YNM3-2Y89]. OCC uses the term "collective investment fund" (CIF) rather than "collective investment trust" (CIT).

164. *Id.*

165. *Id.*

The OCC regulations spell out the key governance requirements for CITs.[166] First, OCC defines a CIT as "[a] fund consisting solely of assets of retirement, pension, profit sharing, stock bonus or other trusts that are exempt from Federal income tax."[167] In addition, the OCC regulations require, in key part, that the CIT be established pursuant to a written plan; that the bank sponsoring a CIT have "exclusive management" of the CIT, subject to prudent delegation; that the CIT be valued at least quarterly; that it produce a financial report at least annually; that management fees be "reasonable"; and that the CIT comply with certain risk-management requirements.[168] As other regulators and observers have pointed out, OCC is a bank regulator whose main concern is "ensuring the federal banking system is safe and sound."[169] Accordingly, both its regulatory provisions and its risk-management guidance are geared primarily toward ensuring bank stability.[170]

2. Department of Labor

DOL has oversight over entities and individuals that hold the assets of certain retirement plans covered by ERISA.[171] For CITs that are deemed to hold

166. OCC also has additional regulatory provisions for banks that manage STIFs, including a list of reportable events that banks are required to report to OCC prior to or within one business day after such events. 12 C.F.R § 9.18(b)(4)(iii)(J) (2024); *see Collective Investment Funds*, *supra* note 13.

167. 12 C.F.R. § 9.18(a)(2) (2024). Technically, under § 9.18(a), there are two types of collective funds: A1 funds are established under § 9.18(a)(1), and A2 funds are established under § 9.18(a)(2). Retirement plans participate in the latter.

168. *Id.* § 9.18(b)(1)-(12). The OCC regulations provide that the annual financial report, which "must disclose the fund's fees and expenses" and "must contain a list of investments in the fund showing the cost and current market value of each investment," must be provided to "each person who ordinarily would receive a regular periodic accounting with respect to each participating account." *Id.* § 9.18(b)(6)(ii), (iv). The OCC regulations also provide that "the bank shall provide a copy of the report upon request to any person for a reasonable charge." *Id.* § 9.18(b)(6)(iv). There is no requirement, however, for such reports to be provided to OCC or made publicly available. The limited reporting requirements contribute to the relative lack of transparency for CITs, as discussed in Part IV.

169. *OCC's 160th Anniversary: 160 Years of Safeguarding Trust in Banking: 1863-2023*, OFF. COMPTROLLER CURRENCY, https://www.occ.treas.gov/about/who-we-are/history/160th/160th-anniversary.html [https://perma.cc/8TZM-9VY9].

170. The same argument applies for state banking regulation and the supervision of state-chartered entities provided by federal banking regulators.

171. ERISA does not cover public-sector retirement plans and certain plans sponsored by nonprofit organizations. Accordingly, ERISA's protective provisions described in this Section do not apply to CITs that hold only the assets of non-ERISA plans, a feature that further underscores the fragmented regulatory regime for CITs. *See Collective Investment Funds*, *supra* note 13.

ERISA "plan assets," the trustee of the CIT (i.e., the bank or trust company) and any subadvisors are considered ERISA fiduciaries and must comply with ERISA fiduciary duties in managing the CIT.[172] Fiduciary duties include the duty of loyalty to plan participants, the duty of prudence, the duty of prudent diversification, and the duty to follow plan terms.[173] Breaching fiduciary standards carries the risk of personal liability.[174] Furthermore, under the so-called "prohibited transaction" rules, ERISA fiduciaries may not conduct certain transactions with "parties in interest," a category that includes plan fiduciaries, entities related to the plan, and entities that provide services to the plan.[175]

CIT sponsors must also comply with various reporting and disclosure requirements under ERISA that aim to facilitate information sharing with plan sponsors, plan participants, and DOL.[176] In this regard, DOL generally treats CITs and mutual funds in the same way. The challenge, however, is that mutual funds are subject to considerably greater disclosure and reporting requirements under securities laws. As described below, CITs are generally exempt from such requirements, which greatly reduces the amount of publicly accessible information about CITs.

3. Securities and Exchange Commission

SEC's oversight over CITs is limited by a series of exemptions, which render most of the securities laws inapplicable to CITs. Typically, CITs are structured to comply with the requirements of Section 3(c)(11) of the ICA to avoid being treated as an "investment company."[177] While CIT interests are considered

172. *See* 29 C.F.R. § 2510.3-101(h) (2023).

173. *See* Shnitser, *supra* note 101, at 642-43.

174. *See* Employee Retirement Income Security Act of 1974 § 409, 29 U.S.C. § 1109 (2018).

175. *See* Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications, 89 Fed. Reg. 4662, 4662 (Jan. 24, 2024) (to be codified at 29 C.F.R. pt. 2570); *Comptroller's Handbook*, *supra* note 163, at 5.

176. These requirements include service-provider fee disclosures under 29 C.F.R. § 2550.408b-2(c)(1)(iv) (2023), and investment-related disclosures under 29 C.F.R. § 2550.404a-5 (2023). *Collective Investment Trusts*, *supra* note 123, at 11. In addition, a CIT may, but is not required to, file a separate Form 5500 as a "direct filing entity." Off. of Pol'y & Rsch., *User Guide: 2021 Form 5500 Direct Filing Entity Research File*, U.S. Dep't of Lab. 5 (2023), https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pension-plan-research-file.pdf [https://perma.cc/H7H7-M9WB].

177. Investment Company Act of 1940 § 3(c)(11), 15 U.S.C. § 80a-3(c)(11) (2018) (exempting "[a]ny employee's stock bonus, pension, or profit-sharing trust which meets the requirements for qualification under section 401 of title 26; or any governmental plan described in section 77c(a)(2)(C) of this title; or any collective trust fund *maintained by a bank* consisting solely of

"securities" under the Securities Act and the Securities Exchange Act (and subject to the general antifraud provisions under the Securities Act), they typically qualify for exemptions from registration requirements.[178] Key to these exemptions are the limitations on participating investors (e.g., certain retirement plans) and the requirement that the CITs be "maintained by a bank."[179]

Given these exemptions, CITs do not have to issue prospectuses, which, for mutual funds, require the fund to disclose "information on a fund's investment objective, portfolio managers, fees, services, restrictions, and policies, along with information related to risks, conflicts of interest, and other topics prescribed by

assets of one or more of such trusts, government plans, or church plans, companies or accounts that are excluded from the definition of an investment company under paragraph (14) of this subsection" (emphasis added)).

178. Section 3(a)(2) of the Securities Act of 1933 generally exempts CIT-issued securities from SEC registration requirements. *See* Securities Act of 1933 § 3(a)(2), 15 U.S.C. § 77c(a)(2) (2018) (exempting, in part, "any interest or participation in a single trust fund, or in a collective trust fund *maintained by a bank*, . . . which interest, participation, or security is issued in connection with (A) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of title 26" (emphasis added)). Likewise, Section 3(a)(12) of the Securities Exchange Act of 1934 exempts such securities from the registration requirements of that Act. *See* Securities Exchange Act of 1934 § 3(a)(12), 15 U.S.C. § 78c(a)(12)(A)(iv) (2018).

179. Investment Company Act of 1940 § 3(c)(11), 15 U.S.C. § 80a-3(c)(11) (2018). A "bank" is broadly defined in the ICA as any banking institution or trust company doing business under state or federal law, as long as "a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks . . . and which is supervised and examined" by a state or federal banking regulator and is not operated for the purpose of evading the ICA. *Id.* § 2(a)(5), 15 U.S.C. § 80a-2(a)(5). Accordingly, most banks and trust companies will satisfy the definition of "bank." A bank may hire a "subadvisor" or external adviser to assist it with managing the CIT, but in order to meet the "maintained by a bank" requirement, the bank must retain and exercise "substantial investment responsibility" when managing the collective trust funds. *See* Employee Benefit Plans, Securities Act Release No. 33-6188, 45 Fed. Reg. 8960, 8973 & nn.139-41 (Feb. 11, 1980); *see also* National Bank of Commerce Investment Fund for Qualified Employee Benefit Plans, SEC No-Action Letter, 1986 WL 67280, at *2 (Oct. 10, 1986) (declining to commence an enforcement action when a CIT trustee entered into an arrangement with a registered investment adviser and the trustee "expressly retain[ed] full, final and complete authority over all transactions"). OCC regulations also provide that the bank must have "exclusive management" over the CIT but permit "prudent . . . delegat[ion] [of] responsibilities to others." 12 C.F.R. § 9.18(b)(2) (2024). The use of subadvisors is quite common, as evidenced by the industry's pushback against proposed DOL regulatory guidance that could limit the practice. *See, e.g.*, Coal. of Collective Inv. Trs., Comment Letter on Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption), Z-RIN 1210 ZA07, at 2-3 (Mar. 31, 2023), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07-3/00002.pdf [https://perma.cc/X3WE-XA66] (arguing that the proposed amendment, which limited the exemption to transactions over which the qualified professional asset manager (QPAM) exercised "sole responsibility," was inconsistent with the use of subadvisors by CIT QPAMs).

the SEC."[180] CITs may decide to offer "fact sheets" and must provide certain fee disclosures to plan sponsors (but not to the public) in connection with DOL requirements.[181] CITs are also exempt from requirements to report performance and holdings on at least a semiannual basis, in a standardized manner, as well as to provide quarterly account statements to investors. As noted above, OCC-regulated CITs are only required to issue financial reports on an annual basis, although they may report more frequently.[182] In subregulatory guidance, SEC has further indicated that CITs should not be promoted as an investment vehicle for the public and that there should be no television or radio advertising of CITs.[183]

Finally, because they are not "investment companies," CITs avoid all of the substantive regulation under the ICA, including regulation concerning fund advisers, fund governance, and permissible investments.[184] The ICA "requires mutual funds to give their shareholders a minimum set of control rights," including the right to elect the funds' boards of directors and "to terminate and replace [the funds'] management companies."[185] In contrast, CIT investors have no management rights, and the decision-making authority rests entirely with the bank trustee. Furthermore, as then-SEC Chair Gary Gensler lamented in 2023,

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180. O'Donnell et al., *supra* note 15.

181. *The Advantages of T. Rowe Price Collective Investment Trusts*, *supra* note 156, at [5].

182. *See supra* note 168 and accompanying text.

183. De Leon, *supra* note 1, at 8 & n.26 (citing Huntington Nat'l Bank-Collective Tr. Funds Program, SEC No-Action Letter, 1988 WL 234053 (Mar. 9, 1988); Nat'l Emp. Plan Servs. Inc., SEC No-Action Letter, 1984 WL 48398 (Oct. 16, 1984)).

184. The ICA imposes several requirements and restrictions on mutual-fund advisers. These requirements and restrictions seek to "limit the ways in which the sponsors of investment companies may earn hidden profits for themselves or their affiliates." Paul G. Mahoney & Adriana Z. Robertson, *Advisers by Another Name*, 11 HARV. BUS. L. REV. 311, 332 (2021). "[I]nvestment advisers under the ICA are a subset of the advisers under the [Investment Advisers Act of 1940 (IAA)]," which regulates professionals who directly advise retail and institutional investors and subjects such professionals to a number of significant regulatory requirements. *Id.* at 327. However, the IAA effectively exempts banks and trust companies from regulation as investment advisers unless they are advising an ICA-registered fund. *See* Investment Advisers Act of 1940 §§ 202-203(b), 15 U.S.C. §§ 80b-2(a) to -3(b) (2018). Although neither the ICA nor the IAA provisions applies to the banks or trust companies serving as CIT trustees, some subadvisors hired by the trustees are registered investment advisers under the IAA. *See, e.g.*, *Collective Investment Trusts (CITs)*, ALLIANCEBERNSTEIN, https://www.alliancebernstein.com/us/en-us/investments/retirement-plan-investments/cit.html [https://perma.cc/UC23-393Y] ("Mercer Investment Management, Inc. (MIM) provides sub-advisory services to the AB Multi-Manager Retirement Trusts. MIM is a federally registered investment adviser under the Investment Advisers Act of 1940, as amended, providing nondiscretionary and discretionary investment advice to its clients on an individual basis."). As discussed in Section II.B.2, to the extent that CITs hold ERISA plan assets, both the trustees and the subadvisors are subject to ERISA fiduciary obligations.

185. Morley, *supra* note 11, at 1252.

whereas SEC can and does propose rules to update liquidity and pricing requirements for mutual funds, CITs are subject to none of those same requirements, and SEC lacks authority to impose them on functionally similar investment vehicles.[186]

4. Internal Revenue Service

The tax treatment of CITs is integral to their appeal and growth. In 1936, Congress amended the Internal Revenue Code (IRC) to grant "tax-exempt status to common trust funds maintained by a bank."[187] In 1955, when the Federal Reserve permitted banks to pool retirement trusts for investment purposes, the Internal Revenue Service allowed those trusts to be tax exempt.[188] Today, to maintain tax-exempt status, a CIT that holds retirement-plan assets will seek to qualify as a group trust under Revenue Rulings 81-100 and 2011-1, as well as IRC Section 401(a).[189] Each account in the CIT "must either qualify as a tax-exempt entity under section 401(a) of the IRC or be an entity described in section 818(a)(6) of the IRC."[190] As noted above, exemption from registration under the securities laws and from treatment as an "investment company" under the ICA is available to CITs so long as participation in the fund is limited to certain types of investors, such as a pension or profit-sharing plan qualified under IRC Section 401(a), or a "governmental plan" as defined in IRC Section 414(d).[191] For this reason, retirement plans of nonprofits and education institutions, for example, which are "qualified" under Section 403(b) of the IRC, currently cannot participate in CITs.[192]

5. Regulatory Crossroads and the Functional-Regulation Debate

The discussion in this Section has shown that CITs exist at the intersection of — or perhaps in the chasm between — multiple academic and regulatory fields. They are retirement "products" set up and run by banks and trust companies,

186. Gensler, *supra* note 3 (expressing concern about "financial fires" starting from "regulatory gaps," and noting that SEC is "in discussions with the bank regulators on these topics").

187. Wade, *supra* note 7, at 364.

188. *Comptroller's Handbook*, *supra* note 163, at 2-3.

189. *Id.* at 4.

190. *Id.*

191. *See supra* notes 178-179 and accompanying text.

192. Proposed reforms to make CITs available in 403(b) plans include changes to the ICA, the Securities Act, and the Securities Exchange Act to incorporate references to I.R.C. § 403(b). *See, e.g.*, Retirement Fairness for Charities and Educational Institutions Act, S. 4917, 118th Cong. § 2 (2024).

with regulatory oversight from both OCC and DOL. Since CITs are only available to qualified retirement plans, they have not been studied by banking scholars. And as bank-run funds under OCC oversight, they have not garnered much attention from employee-benefits scholars. Such regulatory fragmentation has hampered academic research on CITs in recent years, including both targeted analyses of CITs and more theoretical considerations of "functional" regulation.

Mutual funds and CITs are functionally similar and serve similar purposes in today's financial ecosystem. Yet despite the functional similarities, CITs and mutual funds are subject to strikingly different regulatory regimes. This reality revives a longstanding debate about "functional regulation," a concept that posits that "similar financial products and services" should be subject to "similar regulatory schemes regardless of the historical industry classification" of the institution offering the product or service.[193]

Although the different regulatory regimes for CITs and mutual funds have not been analyzed or questioned in recent years, it is important to acknowledge that there was robust engagement with this issue from the 1960s through the 1980s. As the General Accounting Office reported in 1986, "There has been public debate by federal regulators, trade associations and congressional committees on whether the current federal structure for regulating financial institutions should be changed."[194] Others have referred to this period as characterized by "intense and sometimes bitter controversy between banks and the securities industry over attempts by banks to expand the scope of their collective investment activities."[195] Scholars writing about CITs during this time observed that existing legislation was "inconsistent" with the "efforts of banking institutions to enter the securities field"[196] and noted that "[a] less desirable aspect of collective investment funds . . . is the somewhat illogical and inconsistent statutory framework that governs their establishment and operation."[197]

The functional-regulation debate of the 1960s and 1970s was left unresolved.[198] Developments over the last four decades merit a revival of the key

193. U.S. GEN. ACCT. OFF., *supra* note 162, at 8. For a discussion of the merits of functional regulation, see Heidi Mandanis Schooner, *Regulating Risk Not Function*, 66 U. CIN. L. REV. 441, 459-87 (1998), which examines prior academic support for functional regulation but questions its long-term effectiveness and advocates instead for a risk-focused model of regulation.

194. U.S. GEN. ACCT. OFF., *supra* note 162, at 1.

195. Wade, *supra* note 7, at 362.

196. Pitt & Williams, *supra* note 41, at 182.

197. Wade, *supra* note 7, at 362.

198. Lybecker, *supra* note 41, at 985 (noting in 1977 that "[d]uring the past two decades one of the most controversial subjects among those interested in the regulation of financial institutions as institutional investors has been the offering of bank-sponsored investment management services").

questions. Most importantly, both the regulatory framework for CITs and the legal regime for U.S. retirement plans predate the development of defined-contribution plans, as well as the widespread use of CITs in such plans.[199] That so many Americans' hard-earned retirement savings are invested in CITs — almost certainly without their appreciation — merits closer consideration of whether the existing regulatory framework for CITs is justified and whether the competition between mutual funds and CITs promotes retirement security.[200] Moreover, to the extent that retirement savings play a critical role in U.S. capital markets, further analysis is needed to assess how the shift to CITs may impact the incentives and behavior of asset managers as institutional investors.

III. CORPORATE GOVERNANCE AND SECURITIES-LAW CONSIDERATIONS

This Part sets forth the growing and underappreciated role of CITs in U.S. corporate and investment governance. In so doing, it develops an interdisciplinary research agenda on CITs and invites future scholarship.

A. Institutional-Investor Governance

Without consideration of CITs, existing analyses present an incomplete picture of the institutional-investor landscape, including institutional-shareholder engagement

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199. In 1991, then-SEC Chair Richard C. Breeden observed that "many protections provided by the securities laws are not available to participants in bank sponsored investment companies" and indicated that "we are also considering whether any changes would be appropriate to promote a more functional regulatory approach for the funding vehicles for defined contribution pension plans," which, at the time, represented about thirty percent of private-sector retirement plans. Richard C. Breeden, Chairman, Sec. & Exch. Comm'n, Remarks Before the Annual Meeting of the Investment Company Institute 8 (May 24, 1991), https://www.sechistorical.org/collection/papers/1990/1991_0524_BreedenICIT.pdf [https://perma.cc/XL6J-RQ4G]. As of 2023, some sixty-three percent of American workers had access to a defined-contribution plan. JOHN H. GORMAN, SYLVIA L. BRYAN, JOHN J. TOPOLESKI & ELIZABETH A. MYERS, CONG. RSCH. SERV., R48091, CONTRIBUTIONS TO DEFINED CONTRIBUTION RETIREMENT PLANS [2] (2024).

200. In a 2022 proposed rule, SEC acknowledged and asked for additional feedback on the possibility that the agency's proposed swing-pricing requirement would "cause or incentivize investors to move their assets out of the funds that must implement swing pricing into other investment vehicles that do not use swing pricing, such as . . . collective investment trusts." *See* Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N-PORT Reporting, 87 Fed. Reg. 77172, 77208 (proposed Dec. 16, 2022) (to be codified at 17 C.F.R. pts. 270, 274). For a discussion of the relationship between innovation and regulation more broadly, see, for example, Merton H. Miller, *Financial Innovation: The Last Twenty Years and the Next*, 21 J. FIN. & QUANTITATIVE ANALYSIS 459, 461-63 (1986).

and activism. While there is an extensive body of research on institutional investors, and particularly the so-called "Big Three," the traditional focus has been on the organization, incentives, and agency-cost concerns of mutual funds.[201] More recently, however, scholars have suggested that, in focusing on mutual funds, and on index funds in particular, commentators have overlooked the substantial portion of assets managed by the likes of BlackRock and State Street that are not in mutual funds.[202] CITs fall squarely in that latter category, and their behavior—both as investment intermediaries and as shareholder activists—may challenge traditional narratives on institutional investors.[203]

Unlike mutual funds, CITs are not subject to proxy-voting disclosure, and there is no public accountability for how bank trustees or their subadvisors cast votes.[204] As institutional investors like BlackRock, Vanguard, and State Street have amassed

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201. Lund & Robertson, *supra* note 142, at 158 ("[A] robust scholarly literature has identified the promises and perils of Big Three ownership.").

202. *Id.* at 170, 172 (emphasizing that "index equity mutual funds represent only a portion of assets managed by the Big Three" and noting that, "while the overwhelming majority of the assets managed by Fidelity and Vanguard are in mutual funds, [mutual funds] represent less than a third of the assets managed by State Street, and less than 60 percent of the assets managed by BlackRock").

203. *See, e.g.*, Hudson, *supra* note 5 (describing the shareholder proposals submitted by CITs to Disney and Apple). Recent scholarship has advocated explicitly for the use of CITs as a means of preserving "collective shareholder voice" in a defined-contribution retirement system. *See, e.g.*, Webber, *supra* note 41, at 1019 (suggesting that CITs in the private sector could be "the same as public pension funds are now, retaining the collective shareholder voice, but not guaranteeing workers' fixed payments in retirement").

204. CITs claim to set their own "investment objectives, guidelines, and/or policies that must be accepted as a condition for investment." Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73851 (Dec. 1, 2022) (to be codified at 29 C.F.R. pt. 2550). DOL's 2022 Final Rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights requires that investment managers of pooled investment vehicles reconcile the investment policies of the participating plans and, in the case of proxy voting, "vote (or abstain from voting) relevant proxies to reflect such policies in proportion to each plan's economic interest in the pooled investment vehicle." *Id.* The American Bankers Association had argued that such a requirement "does not accurately reflect industry standard practice." Am. Bankers Ass'n, Comment Letter on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights 8 (Dec. 13, 2021), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AC03/00713.pdf [https://perma.cc/S5W7-C69X]. The Association further raised concerns that the DOL guidance on proxy voting "may be inconsistent with [Office of the Comptroller of the Currency] expectations regarding that bank's treatment of CIF participants." *Id.* at 7 n.21. The final rule permits, as an alternative, the "investment manager of a pooled investment vehicle" to "develop an investment policy statement consistent with Title I of ERISA and this section, and require participating plans to accept the investment manager's investment policy statement, including any proxy voting policy, before they are allowed to invest." Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. at 73886.

more and more shares in U.S. public companies over the last two decades, their voting power has increased and their voting records have come under increasing scrutiny.[205] The attention has intensified as the range of issues subject to precatory shareholder votes has expanded to include proposals on matters such as environmental sustainability, human-capital management, equity and diversity, and corporate political spending. Such scrutiny is possible only because when BlackRock, Vanguard, and State Street cast votes on behalf of mutual funds (and ultimately on behalf of the individual investors), they must publicly report their votes to SEC.[206] While the voting records have landed institutional investors in the crosshairs of various social and political debates, they nevertheless provide an important measure of public accountability and oversight.[207]

The same oversight and accountability are not currently required for the trillions of dollars invested through CITs.[208] Back in 2003, right after SEC finalized new requirements for the disclosure of proxy votes by mutual funds as part of "a government attempt to restore investor confidence after a series of corporate scandals," there was some indication that OCC was "weighing whether to require bank trust departments to disclose how they cast proxy votes on behalf of the clients whose money they manage through investment pools."[209] In fact, mutual funds had complained that the SEC rule had excluded CITs and had thus created "an unlevel playing field."[210]

But OCC never did enact such rules for CITs, and two decades and trillions of dollars later, asset managers are able to "level the playing field" themselves by setting up CITs and encouraging retirement plans to move their assets out of mutual funds and into CITs. To the extent that the considerations that prompted proxy-vote disclosure requirements in the first place are still important, the

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205. Shnitser, *supra* note 28, at 290; *see, e.g.*, John D. Morley, *Too Big to Be Activist*, 92 S. CAL. L. REV. 1407, 1410 (2019) (noting the "tidal wave" of scholarship); Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSPS. 89, 90 (2017).

206. *See* Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, 68 Fed. Reg. 6564, 6564 (Feb. 7, 2003) (to be codified at 17 C.F.R. pts. 239, 249, 270, 274).

207. *See, e.g.*, Jill Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma*, 102 TEX. L. REV. 1, 16-20 (2023) (describing trends in institutional-investor engagement with environmental, social, and governance issues).

208. Some CITs hold equities directly in the trusts. Others may invest some of the trust assets in mutual funds, but the proportion of CIT assets in mutual-fund vehicles is not reported, nor is it possible to calculate from publicly available data.

209. Kathleen Day, *Trusts May Be Next to Get Proxy Rules*, WASH. POST (Jan. 31, 2003), https://www.washingtonpost.com/archive/business/2003/01/31/trusts-may-be-next-to-get-proxy-rules/a5727e48-ec75-44a2-82b0-7fe7635af0c5 [https://perma.cc/8QU3-ZMYS].

210. *Id.*

disclosure requirements for CITs should be reevaluated. Such a reevaluation should account for the reality that bank stability—and not investor confidence in capital markets—is OCC's primary concern.

B. Investment-Fund Governance

Existing theoretical frameworks for the structure of "investment funds" have not considered the case of CITs. Scholars have focused extensively on the governance of different types of investment funds, and particularly mutual funds.[211] A dominant theory in the field suggests that "investment funds (i.e., mutual funds, hedge funds, private-equity funds, and their cousins) are distinguished not by the assets they hold, but by their unique organizational structures, which separate investment assets and management assets into different entities with different owners."[212] In this arrangement, which scholars have said benefits investors, the investments are owned by the funds, while the "management assets belong to 'management companies.'"[213] Although the separation of funds and managers limits the investors' rights to control managers and to share in the profits and liabilities of the managers, given typical investment-fund features, such limitations are efficient. In particular, "powerful investor exit rights substitute for control rights."[214] Under this theoretical framework, the voting rights given to mutual-fund shareholders are not valuable to the shareholders and will not be used.

To the extent that CITs are "functionally" similar to mutual funds (and might be considered to be a kind of investment company but for the statutory exemptions) but are organized and governed differently, they offer an important test case for the application of the "separation of funds and managers" theory.[215] Indeed, in some sense, CITs defy the "separation of funds and managers" framework because the trusts are maintained by the banks and the banks serve as the

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211. *See, e.g.*, Eric D. Roiter, *Disentangling Mutual Fund Governance from Corporate Governance*, 6 HARV. BUS. L. REV. 1, 3 n.4 (2016) (describing scholarship on mutual-fund governance).

212. Morley, *supra* note 11, at 1228.

213. *Id.*

214. *Id.*

215. In the 1960s, SEC and OCC leadership debated the proper characterization of CITs. William L. Cary, who served as SEC Chairman between 1961 and 1964, proposed viewing the CIT or the fund itself as separate from the bank and subject to SEC regulation as an "ectoplasmic investment company." Webb, *supra* note 41, at 341. The Comptroller of the Currency disagreed, arguing that "[t]he fund is the bank—it is the board of directors that is responsible for its operation. There is no such distinction we see whereby the fund becomes a separate creature." *Id.* at 343 (quoting *Common Trust Funds—Overlapping Responsibility and Conflict in Regulation: Hearing Before a Subcomm. of the H. Comm. on Gov't Operations*, 88th Cong. 50 (1963) (statement of James J. Saxon, Comptroller of the Currency)).

trustees.[216] Moreover, in the CIT structure, investors have no voting rights whatsoever and, at the same time, have limited exit rights.[217] The only possible substitute for voice and exit in the CIT context is the intermediation by plan sponsors (i.e., employers) in the initial negotiation of the CIT terms and in the ongoing monitoring of CITs required by ERISA. However, as described below, employers may not be well suited for this role.

Addressing systemic risks requires grappling with the existing regulatory gaps. CITs and mutual funds are subject to different liquidity, pricing, reporting, and redemption rules. SEC has begun to raise concerns, including before the Financial Stability Oversight Council (FSOC), about the risks stemming from such regulatory gaps and the "financial fires" that could spread in the absence of consistent regulation.[218] FSOC has likewise urged state and federal regulators to consider reforms to promote transparency and mitigate risks in the CIT markets, including risks of the sort that contributed to financial-system disruptions in March 2020.[219] Reform would require serious agency coordination as well as agreement on the desired policy goals.

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216. Although the trusts are maintained by the banks, trust assets are not available to the creditors of the bank. *See* Section II.B.1.

217. For a discussion of "lock in" in the mutual-fund context, see generally Anne M. Tucker, *Locked In: The Competitive Disadvantage of Citizen Shareholders*, 125 YALE L.J.F. 163 (2015).

218. Gensler, *supra* note 3; *see also* Gary Gensler, Chair, Sec. & Exch. Comm'n, Prepared Remarks Before the Financial Stability Oversight Council: Annual Report (Dec. 16, 2022), https://www.sec.gov/newsroom/speeches-statements/gensler-remarks-fsoc-annual-report-121622 [https://perma.cc/7T22-4VTC] (noting that SEC was in "discussions with the OCC to consider similar reforms to mitigate possible regulatory arbitrage between these various funds").

219. Fin. Stability Oversight Council, *supra* note 136, at 12 (recommending that "both state and federal regulators consider requirements for greater transparency and more detailed and timely regulatory reporting by collective investment funds (CIFs) that would enable both banks and regulators to better understand market trends and monitor for potential risks" and encouraging "state and federal regulators to consider whether any reforms in the CIF market would be appropriate to mitigate these risks, particularly given the proposed changes to open-end funds"). The Financial Stability Oversight Council (FSOC) report also notes that "open-end funds were significant contributors to the financial system disruptions experienced in March 2020" and observes that CITs pose some of the very same risks. *Id.* at 67. Moreover, in March 2020, noting that "[s]udden disruptions in the financial markets have created conditions that may constrain the ability of a national bank's management team to execute certain elements of a STIF's written investment policy," OCC issued an interim final rule to "allow national banks to operate affected STIFs on a limited-time basis with increased maturity limits under these circumstances." Short-Term Investment Funds, 85 Fed. Reg. 16888, 16888 (Mar. 25, 2020) (to be codified at 12 C.F.R. pt. 9). For a discussion of the history and authority of FSOC, see *About FSOC*, U.S. DEP'T TREASURY, https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc/about-fsoc [https://perma.cc/QK4S-AY3Y].

IV. RETIREMENT SECURITY AND COLLECTIVE INVESTMENT TRUSTS

This Part describes several of the implications and tradeoffs stemming from the embrace of CITs in employer-sponsored retirement plans.

Lower fees and flexibility are important, but the savings must be weighed against the additional risks associated with CITs. There is no question that, all else equal, retirement savers are better off when they pay smaller investment-management and administrative fees. Although the fee data for CITs are not publicly available, and one cannot simply compare the fee structures for different CITs across retirement plans, industry reporting suggests that CITs do offer lower fees for certain "similar" investment products.[220] But, for the reasons described below, CITs come with certain costs—particularly, decreased transparency and less substantive regulation—that have to be considered at both the individual-plan level and the macro level for all U.S. retirement savers.

The regulatory framework is based on an outdated premise. Defined-contribution plans alter the regulatory calculus and cast doubt on the merits of relying on banking regulation to protect individual participants. As SEC noted three decades ago, "When the securities laws exceptions for pooled investment vehicles were enacted, pension plans were predominantly 'defined benefit plans' offered by large and generally sophisticated employers."[221] That is, when the decision to allow CITs to operate outside the securities-law requirements was made, the potential "harms" of investing in CITs were borne by employers who, in the context of defined-benefit plans, were ultimately responsible for paying the promised pension benefits to employees, irrespective of how the underlying investments performed. Today, a wide swath of the general public is exposed to CITs and directly affected by their performance. While employers still serve as the intermediaries between CIT sponsors and individual employee participants, the risk is borne by individual participants.

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220. *See, e.g.*, Desai & Dauwen, *supra* note 7, at 18, 21 (suggesting that their "panel of experts was generally confident about a cost savings of 10 to 30 basis points for of CITs over mutual funds" and noting that CITs also provide greater flexibility in the types of investments and investment strategies). Because some CITs adopt investment strategies that would not be permitted for mutual funds, direct comparisons of fees are not possible. In recent years, some "excessive fee" retirement-plan litigation has included the argument that plan administrators breached their fiduciary duties by failing to consider CITs as a cheaper alternative to mutual funds. *See, e.g.*, Complaint at 17, Parker v. Tenneco Inc., No. 23-cv-10816 (E.D. Mich. Aug. 21, 2023) (alleging that the "[d]efendants failed to offer the Plan's participants similar investment options to those in the Plan that were less costly and equally or better-performing, failed to take advantage of savings offered by lower cost share classes of mutual funds already in the Plan, and failed to consider investment vehicles with lower fees than those in the Plan, such as collective trusts (also called 'collective investment trusts' and 'collective trust funds')").

221. Div. of Inv. Mgmt., *supra* note 10, at 119.

The current regulatory structure places significant responsibility on, and trust in, employer intermediaries. Employers may not be up to the task, and ERISA's "fiduciary standards" may not be the right regulatory tool. Employee-benefits scholars have identified the challenge of "fiduciary governance" under ERISA.[222] They have emphasized that the development and drafting of ERISA predated the rise of 401(k) plans, and that the statutory regime was developed for defined-benefit pension plans, which were the norm in the 1960s and 1970s.[223] To address the problems that had plagued defined-benefit plans in the preceding decades, the drafters of ERISA crafted vesting, funding, and insurance requirements to regulate employer conduct in the administration of defined-benefit pension plans.[224] ERISA's fiduciary provisions were "stapled on" at the end as just one element of ERISA's protective regime.[225] With the shift to defined-contribution plans, however, many of ERISA's original substantive provisions are no longer relevant. As a result, the trust-based fiduciary regime has assumed a more prominent role in regulating the provision and administration of retirement benefits.[226] One challenge with this "fiduciary governance" approach, particularly with respect to employers,[227] is that employers generally do not conceive of

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222. *See, e.g.*, Langbein, *supra* note 74, at 47-48 (identifying shortcomings of the "clumsily designed" fiduciary regime). *See generally* Dana Muir & Norman Stein, *Two Hats, One Head, No Heart: The Anatomy of the ERISA Settlor/Fiduciary Distinction*, 93 N.C. L. Rev. 459 (2015) (explaining that the settlor/fiduciary doctrine leaves courts with insufficient flexibility); Peter J. Wiedenbeck, *Untrustworthy: ERISA's Eroded Fiduciary Law*, 59 Wm. & Mary L. Rev. 1007 (2018) (describing how ERISA's fiduciary oversight has been diminished by the courts); Brendan S. Maher, *Regulating Employment-Based Anything*, 100 Minn. L. Rev. 1257 (2016) (noting that the regulation of employee benefits is not well theorized in legal scholarship).

223. *See, e.g.*, Langbein, *supra* note 74, at 3-5.

224. *Id.* at 33.

225. Natalya Shnitser, *Fiduciary Governance for 401(k)s*, Regul. Rev. (Apr. 27, 2023), https://www.theregreview.org/2023/04/27/shnitser-fiduciary-governance-for-401ks [https://perma.cc/L9V7-WJSZ]; Dana Muir, Robert Eccles, Peter Stris, Henry Rose, Frank Cummings & Robert Nagle, *Panel 4: ERISA and the Fiduciary*, 6 Drexel L. Rev. 359, 376 (2014) (noting that the fiduciary provisions were effectively stapled on after the drafting of the substantive rules).

226. *See* Shnitser, *supra* note 101, at 646 ("[B]ecause ERISA provides relatively fewer substantive rules for defined contribution plans, trust-based fiduciary obligations now play a far greater governance role."); *see also* Dana M. Muir, *An Agency Costs Theory of Employee Benefit Plan Law*, 43 Berkeley J. Emp. & Lab. L. 361, 367-74 (2022) (discussing the "disconnects between the structure of donative trusts and employee benefit plans"); Wiedenbeck, *supra* note 222, at 1012-24 (describing the "taming [of] ERISA fiduciary law").

227. As discussed in Section II.B.2, *supra*, some CIT trustees themselves may be subject to ERISA. In such cases, the CIT trustees may have exposure to lawsuits alleging a breach of ERISA fiduciary duties. *See, e.g.*, Complaint at 2-3, Nestler v. Sloy, Dahl & Holst, LLC, No. 24-cv-00842 (D. Or. May 23, 2024) (alleging breaches of ERISA fiduciary obligations and naming

themselves as fiduciaries of their employees, may not be aware of the ERISA fiduciary requirements, and, in some cases (and particularly in the case of smaller employers), may not have the resources or expertise to provide effective intermediation between CITs and individual participants. Moreover, the fiduciary *standard* has the benefit of flexibility but does not necessarily provide concrete guidance for employers in their interactions with financial institutions.[228]

Because CITs are subject to fewer disclosure and reporting requirements, it is harder to compare CITs across plans. The lack of data limits oversight and enforcement. Whereas price and performance data for mutual funds are readily available to the public, comparable data for CITs are not. Existing requirements focus on the provision of information to individual plan sponsors[229] but not to the public,[230] and regulatory efforts to expand CIT disclosure requirements have faced significant opposition.[231] While some financial institutions (such as Morningstar)

as defendants Alta Trust Company, the CIT trustee, and Sloy, Dahl & Holst, LLC, the investment manager and co-fiduciary for the CITs); Nelsen v. Principal Glob. Invs. Tr. Co., 362 F. Supp. 3d 627, 630 (S.D. Iowa 2019) (recounting allegations that defendants violated their fiduciary duties).

228. *See* Shnitser, *supra* note 225; Maher, *supra* note 222, at 1270.

229. In its 2024 report on 401(k) retirement plans, the Government Accountability Office (GAO) noted that "[u]nlike [mutual fund] prospectuses, which are required to be written in plain language using a consistent format, asset management firms can provide collective investment trust disclosures in different formats. DOL officials said these different formats can be difficult to understand." U.S. Gov't Accountability Off., GAO-24-105364, 401(k) Retirement Plans: Department of Labor Should Update Guidance on Target Date Funds 51-52 (2024). GAO reported that without additional guidance, "plan sponsors may not understand the applicable collective investment trust disclosures they should use as part of their TDF selection and monitoring process." *Id.* at 52.

230. T. Rowe Price notes in its literature on CITs:

> CITs do not trade on an exchange, and they may be less transparent than mutual funds since daily prices aren't publicly available. Investment information and historical return data can be limited to an individual (or specific) trust's inception. Like any new investment option, performance evaluations may be limited due to the lack of long-term data. However, CIT providers are required to furnish data to plan fiduciaries and may also provide fact sheets or data from third parties that can facilitate research.

The Advantages of T. Rowe Price Collective Investment Trusts, *supra* note 156, at [5].

231. DOL efforts to amend reporting requirements for CITs—such as in the proposed SECURE Act and Related Revisions to the Form 5500—have faced industry pushback. Annual Reporting and Disclosure, 86 Fed. Reg. 51284, 51294-306 (Sept. 2, 2021) (to be codified at 29 C.F.R. pt. 2520). The Coalition of Collective Investment Trusts had argued that the proposal to require certain CITs that are "invested primarily in hard-to-value assets to, themselves, be identified as hard-to-value assets" would "fail[] to take into account the significant evolution of [those CITs] over the past 15 years," including the improved disclosure requirements over that period. Coal. of Collective Inv. Trs., Comment Letter on Proposed Changes to the Form 5500

may collect relevant data, they do not make the data publicly available. Notably, Morningstar itself has acknowledged the relative lack of transparency in CITs as compared to mutual funds,[232] and others have likewise recognized the need to improve transparency with respect to the disclosure of "all-in" costs,[233] which may include different types of expenses and fee structures, particularly in CITs that offer short-term investment funds.[234] In the absence of robust, publicly

Annual Return/Report (RIN 1210-AB97) 2 (Nov. 1, 2021), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB97/00109.pdf [https://perma.cc/7MLK-6LES]. The Coalition also emphasized that certain CITs "are regulated by state banking regulators and are subject to a robust examination cycle," that "trustees or sponsors of [these CITs] generally are ERISA fiduciaries to the plan assets invested in their vehicles and manage them in accordance with an ERISA fiduciary standard," and that therefore, "singling out [these CITs] in the manner proposed is unwarranted and does not serve any underlying policy rationale." *Id.*

232. In advocating for 403(b) plan access to CITs, Morningstar acknowledged the "limited data availability" of CITs. *See* Sethi et al., *supra* note 39, at 6. Morningstar has also noted that unlike mutual funds, CITs "don't have to disclose their managers, their experience, if they've joined or left the strategies recently, or if they invest in the portfolios." Pacholok, *supra* note 33. Furthermore, in its reporting on CIT trends, Morningstar noted that its calculations are limited by the inconsistent reporting of fees by CITs. *See* Mitchell, *supra* note 4, at 40 ("Our CIT data is collected from CIT providers and covers more than 7,500 tiers of CITs. Some of the tiers reported to our database are 'gross of fee' share classes, meaning they do not report net-of-fee performance, as the fee is negotiable and/or the tier is only available to a restricted group of investors. When we compare CIT and mutual fund costs, we exclude these share classes so as not to distort the data.").

233. Jackson, *supra* note 41, at 147 & n.69 (observing that "legal protections at the collective investment trust level are not fully comparable to mutual fund regulation," and "[e]ven proponents of CITs recognize the need to improve product transparency, including more comprehensive disclosure of all in-costs," and citing survey results "that less than a quarter of CIT providers publicly report 'all-in' costs"); *see also* Lee Barney, *Education and Transparency Two Issues for CIT Use in DC Plans*, PLANSPONSOR (Aug. 22, 2019), https://www.plansponsor.com/education-transparency-two-issues-cit-use-dc-plans [https://perma.cc/H4JN-GQMN] (reporting that CITs' "lack of transparency" threatens their adoption and noting employers' concern about consistent, public reporting).

234. Fees for CITs can include trustee fees, management fees, and fees for recordkeeping, custody, accounting, legal, and tax services. *See, e.g.*, Craig Keim, *Considerations for Plan Sponsors: Collective Investment Trusts as Investment Options in Qualified Plans*, T. ROWE PRICE 3 (Jan. 2021), https://www.troweprice.com/content/dam/retirement-plan-services/pdfs/insights/investment-insights/Collective_Investment_Trusts_Whitepaper.pdf [https://perma.cc/H6KN-FAS8]. CIT governing documents, such as the Declaration of Trust, may set out separate fee provisions for short-term investment funds. *See, e.g.*, *Declaration of Trust for the Sloy, Dahl & Holst Collective Investment Trust, Amended and Restated as of April 1, 2024*, ALTA TR., at A-2 (Apr. 1, 2024), https://trustalta.com/wp-content/uploads/2024/04/2024-04-01-Sloy-Dahl-Holst-Declaration-of-Trust.pdf [https://perma.cc/73NC-3BL8] ("The Trustee shall receive compensation . . . equal to the difference (the 'Spread') between the Crediting Rate . . . and the earnings received by the STIF on such assets, but not including any CIT Interest . . . . The Spread shall not exceed 2.5% (250 basis points), and the Trustee anticipates that the Spread will generally be less than such percentage.").

available information, the ability of analysts, scholars, and private plaintiffs to provide oversight and enforcement is necessarily limited.

Existing litigation concerning CITs has shown that some asset managers and other service providers may be incentivized to push retirement-plan participants into newly formed, affiliated CITs. In recent years, several cases brought by plan participants have accused plan service providers of pushing plan assets into CITs newly established by affiliated entities.[235] Such cases raise the possibility of conflicts of interest that can arise when asset managers are rushing to enter the CIT market.[236]

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235. A search of ERISA cases in the Lex Machina database reveals that between 2009 and 2024, there have been 214 ERISA cases referencing collective investment trusts, a statistic that reflects generally the growing popularity of CITs in retirement-plan investment menus.

236. For example, in a recent case, plaintiffs alleged that

> instead of acting in the exclusive best interest of participants, Aon Hewitt [Investment Consulting, Inc. ("Aon Hewitt"), which served as the plan's discretionary investment manager] acted in its own interest by causing the Plan to invest in Aon Hewitt's proprietary collective investment trusts, which benefitted Aon Hewitt at the expense of Plan participants' retirement savings.

Complaint at 2, Miller v. Astellas US LLC, No. 20-CV-03882 (N.D. Ill. July 1, 2020). Also notable in that case was a description of the CIT organization and fee structure:

> As a non-depository bank, Aon Trust Company LLC maintains the Aon Hewitt collective investment trusts and is the trustee of the funds. Both Aon Trust Company and Aon Hewitt are wholly owned subsidiaries of Aon Consulting, Inc. Aon Trust Company hired [Aon Hewitt Investment Consulting, Inc. ("Aon Hewitt")] — effectively hired itself — as the investment adviser to perform investment advisory and investment management services with respect to each fund. . . . Aon Hewitt does not actually manage the assets of the Aon Hewitt collective investment trusts. Aon Hewitt hires one or more unaffiliated investment managers (or sub-advisors) to do the actual investing. . . . Aon Hewitt collects an investment "advisory" fee charged to fund investors for its services in hiring the manager or sub-advisor, and Aon Trust Company charges an additional trustee fee. This structure results in investors paying multiple layers of fees, including an investment "advisory" fee to Aon Hewitt even though Aon Hewitt is not doing the actual selection of securities.

Id. at 18-19. In June 2023, the parties agreed to settle for $9.5 million and certain plan-governance changes. *See* Robert Steyer, *Astellas, Aon Settle 401(k) Lawsuit for $9.5 Million*, PENSIONS & INVS. (June 26, 2023, 3:46 PM), https://www.pionline.com/courts/astellas-aon-settle-401k-lawsuit-95-million [https://perma.cc/5L4T-HTCS]. Another case involving Aon CITs settled in February 2024 for $7.5 million. *See* Jacklyn Wille, *Aon, Centerra Sign $7.5 Million Settlement in 401(k) Class Suit*, BLOOMBERG L. (Feb. 5, 2024, 9:54 AM EST), https://news.bloomberglaw.com/employee-benefits/aon-centerra-sign-7-5-million-settlement-in-401k-class-suit [https://perma.cc/8QG7-HMNU]. In 2022, Wells Fargo agreed to pay $32.5 million to settle an ERISA lawsuit challenging the inclusion of several newly launched proprietary CITs in the 401(k) plan for its own employees. *Wells Fargo Agrees to Pay $32.5 Million to Settle 401(K) Lawsuit*, INVESTMENTNEWS (Apr. 5, 2022), https://www.investmentnews.com/regulation-and-legislation/news/wells-fargo-agrees-to-pay-32-5-million-to-settle-401k-lawsuit-219600 [https://perma.cc/3TXP-NBNA].

The lack of substantive limits on underlying investments, together with the risks from "herding" and "network interconnectedness," present risks to U.S. retirement savers. As noted recently by then-SEC Chair Gensler, the different liquidity and pricing rules for mutual funds and CITs raise concerns that "financial fires can spread from regulatory gaps."[237] Such risks are unlikely to be addressed solely through the imposition of fiduciary standards on plan sponsors and bank trustees.

CONCLUSION

In May 2023, the head of Vanguard's institutional-investor group praised the House Financial Services Committee after it passed a bill that would expand access to CITs.[238] The statement of support argued that as a matter of parity, "[e]ducators, and other employees of nonprofits and schools, should have access to the same low-cost investment vehicles, such as collective investment trusts, as their counterparts in other retirement plans."[239] Notwithstanding the industry and congressional support for the bill and for similar bills in 2024,[240] the congressional record reveals limited recent discussion of CITs and minimal consideration of their potential downsides.[241]

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237. Gensler, *supra* note 3. A 2013 report by the Office of Financial Research identified redemption risk in collective investment vehicles as one of "the key factors that make the [asset management industry] industry vulnerable to shocks." *Asset Management and Financial Stability*, OFF. OF FIN. RSCH. 1-2 (Sept. 2013), https://www.financialresearch.gov/reports/files/ofr_asset_management_and_financial_stability.pdf [https://perma.cc/9QZ8-DJ9V].

238. Croce, *supra* note 40.

239. *Id.*

240. Robert Steyer, *American Retirement Association Presses Senators to OK 403(b) Plans Using CITs*, PENSIONS & INVS. (Nov. 22, 2024), https://www.pionline.com/defined-contribution/american-retirement-association-presses-senators-ok-403b-plans-using-cits [https://perma.cc/2VEN-CF3E] (describing "a publicity and lobbying campaign" by the American Retirement Association "asking senators to approve . . . a bill allowing 403(b) plans to offer collective investment trusts to participants"); Alex Ortolani, *Measure Allowing CIT Use in 403(b) Plans Advances in the House*, PLANSPONSOR (Mar. 8, 2024), https://www.plansponsor.com/measure-allowing-cit-use-in-403b-plans-advances [https://perma.cc/NCT7-R92T] (describing the passage in the House of Representatives of the Retirement Fairness for Charities and Education Institutions Act, which would permit 403(b) plans to invest in collective investment trusts).

241. In November 2024, a coalition of consumer groups sent a letter to senators expressing concern about proposed legislation to expand access to CITs. *See* Letter from Consumer Fed'n of Am. et al., Re: Empowering Main Street in America Act of 2024, at 2 (Nov. 13, 2024), https://consumerfed.org/wp-content/uploads/2024/11/Sign-On-Letter-in-Opposition-to-the-Empowering-Main-Street-in-America-Act_.pdf [https://perma.cc/XT28-9VW6] (expressing

As this Essay has shown, such downsides *do* exist. To ensure that the embrace of (and potential expansion of) CITs in U.S. retirement plans promotes, rather than endangers, retirement security, regulators and analysts must carefully consider these downsides alongside the benefits. Furthermore, closer agency coordination and analysis are necessary to evaluate the impact of unreported proxy votes on U.S. corporate governance and the impact of differing liquidity and valuation rules on the stability of U.S. financial markets. Nearly a century ago, the banks' foray into retail investment products contributed to the 1929 crash. Although much has changed since then, the lessons from the past should inform proactive regulatory responses to promote the soundness of the financial system, preserve the integrity of the U.S. capital markets, and provide retirement security for U.S. workers.

concern that the Empowering Main Street in America Act of 2024 "would allow unregistered securities to be sold to 403(b) retirement plans, including those used by public school teachers" and that "[b]y 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 savers").