

September 24, 2019

VIA ELECTRONIC MAIL
rule-comments@SEC.gov

Vanessa A. Countryman
Acting Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. S7-08-19; Fed. Reg. 30460 (June 26, 2019)
SEC Concept Release on Harmonization of Securities Offering Exemptions
Release Nos. 33-10649; 34-86129; IA-5256; IC-33512

Dear Ms. Countryman:

Wilmington Trust, National Association (“Wilmington Trust”) is pleased to submit this comment urging the Commission to modernize the “qualified institutional buyer” definition under Rule 144A by removing a restriction that prevents bank-maintained collective investment trusts (“CITs”) from investing in Rule 144A securities where the CIT includes certain H.R. 10 plans (“Keoghs”) as participants. Wilmington Trust is one of the nation’s leading providers of CIT investment management services. With more than \$40 billion in CIT assets under management or administration, Wilmington Trust maintains more than 250 distinct CIT funds. CITs available through Wilmington Trust include a majority of investment style categories, including target-date funds. Wilmington Trust is a subsidiary of M&T Bank Corporation, one of the largest commercial bank holding companies in the United States, with assets totaling more than \$120 billion.

The Keogh Restriction Under Rule 144A(a)(1)(i)(F)

Section 3(a)(2) of the Securities Act of 1933 (the “’33 Act”) provides an exception from registration where a CIT is “maintained by a bank” and where participation in the CIT is limited to certain types of investors including pension or profit sharing plans qualified under Internal Revenue Code section 401(a). Similarly, section 3(c)(11) of the Investment Company Act of 1940 (the “’40 Act”) excludes CITs maintained by a bank, the assets of which are derived from contributions made by investors in the categories identified under section 3(a)(2) of the ’33 Act, from the ’40 Act’s definition of “investment company.” Wilmington Trust limits the categories of investors eligible to participate in the CITs it maintains to those allowed under these ’33 Act and ’40 Act provisions.

Importantly, the admission of certain types of Keoghs to bank-maintained CITs is permissible under the relevant '33 Act and '40 Act registration exemptions. Rule 180 promulgated under the '33 Act permits a bank or trust company to offer and sell securities of a CIT to Keoghs that satisfy a sophistication test (“sophisticated Keoghs”). Fiduciaries of sophisticated Keoghs responsible for plan investment matters frequently seek admission to CITs maintained by Wilmington Trust. The motivating factors for seeking admission frequently include a desire to benefit plan participants and beneficiaries by taking advantage of the reduced cost structures that are typically associated with CITs and to entrust the amounts contributed to the CIT to a discretionary manager with a high degree of expertise in investment matters.

Unfortunately, CITs that admit sophisticated Keoghs as participants operate under a distinct disadvantage. Rule 144A(a)(1)(i)(F) specifies categories of investors that would qualify as “qualified institutional buyers” to the extent they own or invest on a discretionary basis at least \$100 million in securities of unaffiliated issuers. As relevant to CITs, included among these specified categories is –

Any trust fund whose trustee is a bank or trust company and whose participants are exclusively plans of the types identified in paragraph (a)(1)(i)(D) or (E) of this section, *except trust funds that include as participants individual retirement accounts or H.R. 10 plans.* (emphasis added)

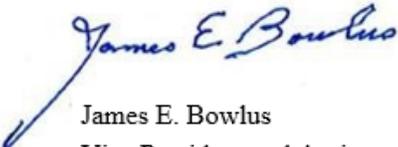
Consequently, a CIT that admits a sophisticated Keogh as a participating plan falls outside of the QIB definition and is generally precluded from investing in Rule 144A securities. This result works a hardship on the CIT as a whole and on the CIT’s other participants by eliminating the fund’s access to the vibrant market in institutionally traded private placements. Without access to that marketplace, the CIT is precluded from taking advantage of investment opportunities that might otherwise further its investment objectives and operate to the advantage of participating plans.

There are no arguments that we can discern that would support a continuation of this restriction. Sophisticated Keoghs are otherwise afforded similar treatment to other qualified plan types under the federal securities laws and are otherwise granted access to similar plan investment vehicles. Moreover, sophisticated Keoghs that seek admission to CITs generally do so precisely because they are seeking access to the investment opportunities available to other qualified plans that entrust the investment of their contributed assets to a bank or trust company acting on a discretionary basis. The current restriction effectively operates as a barrier to CIT access by sophisticated Keoghs. Accordingly, Wilmington Trust urges the Commission to modernize Rule 144A’s QIB definition by removing the sophisticated Keogh restriction.



We appreciate this opportunity to comment on the Concept Release. Please feel free to contact the undersigned with any questions.

Sincerely,



James E. Bowlus
Vice President and Assistant General Counsel
Legal Department