Collective Investment Trusts on the Nasdaq Fund Network  
February 13, 2020

Nasdaq Fund Network (“NFN”) has expanded its services to include collective investment trusts (“CITs”) on its network to make them searchable on market data platforms and financial web portals. CITs are bank-sponsored pooled investment vehicles offered to qualified retirement plans. They are not available for investment by the general retail public. This paper has been prepared for NFN and addresses (i) whether the registration of CITs on the NFN network would run afoul of any specific marketing restrictions under applicable federal securities and banking regulations; and (ii) whether the production of performance and valuation data presented in the form of a fact sheet primarily for use with retirement plan sponsors and participants runs afoul of the same marketing restrictions.

I. Executive Summary

This paper provides a background of the Nasdaq Fund Network’s proposal, explores the regulatory framework for CITs, considers the Securities Exchange Commission’s (“SEC”) staff views in relation to marketing related to CITs, and concludes that there are sound arguments that may be advanced to establish that (i) supporting CITs on the NFN network and (ii) producing fact sheets, would not run afoul of the marketing restrictions noted.1

II. Background

A. The Nasdaq Fund Network Proposal

The Nasdaq Fund Network (NFN) service facilitates the collection and dissemination of performance, net asset value (NAV), valuation data, and static reference data2 for investment products to investors. More specifically, the NFN is a registering, pricing, and distribution service that covers thousands of investment products across a variety of asset classes, countries, and currencies. Members of the service register their products on the network and receive a unique symbol, also referred to as a Nasdaq “ticker.” The service then disseminates the ticker and associated data, making it searchable on the NFN distribution channels, which pipes into major institutional market data vendors, online brokerages, and other media service providers.

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1 This memorandum is limited to whether the proposal would be inconsistent with any restrictions on marketing imposed on CITs under the federal securities laws or applicable banking regulation. We have not been asked to address and do not address herein any other issue or legal requirement with respect to the proposal. With respect to banking regulation our analysis focuses on applicable OCC regulation, and we have not been asked to and have not looked into any specific state banking regulatory requirement with respect to marketing.

2 Static reference data refers to data which will be non-evaluative in nature, presented in its raw state and will include such things as investment type and style, performance benchmark, and portfolio top holdings.
According to material provided by NFN, we understand that the registration of a product on the NFN network helps to increase discoverability of registered products on market data platforms and financial web portals to make searching investment products easier for investors – amplifying the reach of registered products to millions of institutional and retail investors. The NFN service also increases transparency of products through performance and valuation data.

The NFN currently supports a variety of investment products, including: (1) NextShares exchange traded managed funds, (2) annuities, (3) structured products, (4) unit investment trusts, (5) alternative investment products, (6) mutual funds, and (7) money market funds. As part of a recent expansion of the platform, the NFN service added, among other products, CITs to its supported products. We have been advised that there are already various investment products registered on the NFN that are only available to institutional investors.

The data associated with CIT tickers will provide price information and respective reference data of the CIT but will not provide any information on how an investor can purchase the CIT. Accordingly, the NFN service provides a means for a CIT to obtain a NASDAQ ticker and disseminate Reference Data. Obtaining a ticker and sharing reference data is distinguishable from a security listing on NASDAQ. In other words, NFN is not a “listing venue.” Rather, NFN is a registration service where the outbound message is standardized with a “ticker” aligned to price and reference data. NFN is not a mandatory process or service for any financial product. Typically, NASDAQ ticker symbols contain one to five characters. The tickers issued to CITs contain six characters.\(^3\) Where CITs are registered on the NFN and the data is pushed out, the general public will be able to identify where that ticker relates to a CIT because the ticker name will have “CIT” appended and the symbology set of the CIT ticker will contain six characters, as opposed to five or fewer, making it distinct from mutual funds and other common offerings. In addition, in practice, we have been advised that vendors displaying CIT information generally include a disclaimer to make it clear that the CIT is not available for sale to the general retail public.\(^4\)

NFN is also proposing to collect certain information from CIT sponsors, to produce fact sheets for particular CITs. The fact sheets will be made available to CIT sponsors, asset managers, and market participants. It is intended that these fact sheets would be available to, but not limited to, (i) plan sponsors for use in distributing to retirement plan participants who have the particular CIT available as an investment option in their retirement plan and (ii) interested parties requesting a copy of a particular fact sheet, such as a retirement plan participant’s financial adviser to provide

\(^3\) NFN assigns six characters for tickers issued to CITs and Unit Investment Trusts (UITs).

\(^4\) When disseminating the date to vendors, the vendor will receive a code, from NFN, that is unique to a CIT in the data specification field.
greater transparency or potential plan sponsors to review and compare various CITs as part of their investment process. Importantly, the fact sheet will be made available behind a secure login on the NFN website and would include a note that the CIT is available exclusively to qualified retirement plans.

B. Collective Investment Trusts

This paper discusses collective investment trusts (CITs), authorized under 12 C.F.R. § 9.18(a)(2), and is not concerned with common trust funds, authorized under 12 C.F.R § 9.18(a)(1), which are different and distinct from CITs. A CIT is a bank-administered fund consisting solely of assets of retirement, pension, profit sharing, stock bonus or other trusts that are exempt from Federal income tax. The bank acts as a fiduciary for the CIT and holds legal title to the fund’s assets. Participants in a CIT are the beneficial owners of the fund’s assets. 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.

The bank will administer the CIT under a trust agreement, typically referred to as a “Declaration of Trust” and must arrange for an audit of the CIT by independent auditors, prepare a financial report based on that audit at least once during each 12 month period, and must account for receipt and distribution of investment income (for example, dividends, interest, and capital gain distributions) and have express provisions for termination.

CITs enhance investment management by combining assets from different accounts into a single fund with a specific investment strategy. By commingling, or pooling, fiduciary assets, a bank may lower the operational and administrative expenses associated with investing fiduciary assets and enhance risk management and investment performance for the participating accounts. Due to its generally lower cost, CITs offer retirement-plan fiduciaries an attractive alternative to mutual funds and have, therefore, increased in popularity over the past few years.

As with other investment vehicles, CITs are subject to a variety of regulations, including those administered by: (1) state and federal bank regulatory agencies, in particular the Office of the Comptroller of Currency (OCC); (2) the U.S. Department of Labor (DOL); (3) the Internal Revenue Service (IRS); (4) the Securities Exchange Commission (SEC); (5) the Financial Industry Regulatory Authority (FINRA), to the extent the collective funds are marketed by a broker-dealer;

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6 See 12 C.F.R. § 9.18(b)(11).
7 See 12 C.F.R. § 9.18(b)(6).
8 See 12 C.F.R. § 9.18(b)(1).
9 This paper does not address state banking laws; however, state banking regulators frequently are guided by the OCC’s framework with respect to CITs.
and (6) the Commodities Futures Trading Commission (CFTC), to the extent the collective funds invest in futures.

C. The Regulation of CITs

1. Federal Securities Laws

Generally, a bank is not required to register the CIT fund under the federal securities laws if the fund qualifies for specific exemptions to the Securities Act of 1933 (1933 Act) and the exclusions provided in the Investment Company Act of 1940 (1940 Act).

In particular, for purposes of the Securities Act, as amended, the establishment and use of a CIT for the investment of funds received by a bank as trustee or agent for exempt trusts would involve the issuance of a security under Section 2(1) of the Securities Act. However, even though such activity may involve the issuance of securities, section 3(a)(2) exempts these securities from registration under the Securities Act if the fund is “maintained by a bank” and participation in the fund is limited to certain investors, such as a pension or profit-sharing plan qualified under Internal Revenue Code (the “IRC”) section 401 or a governmental plan as defined in IRC section 414(d).10 Because CITs are exempt from SEC registrations, CITs do not need a registration statement or prospectus to deliver to prospective purchasers.11 Although CITs are exempt from registration under the Securities Act, the offer and sale of CITs are still subject to the Securities Act’s anti-fraud provisions, which provide, among other things, that it is unlawful for any person in the offer and sale of securities to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.12

Most CITs also avoid registration as investment companies under the 1940 Act by relying on specific exclusions from the definition of “investment company.” More specifically, section 3(c)(11) excludes from the definition of “investment company,” among other entities, collective trusts maintained by a bank, which consist solely of assets of specific types of retirement plans.13 In order to satisfy each of the exceptions from SEC registration, a CIT must be “maintained by a bank.”14

10 See 17 CFR § 230.132.
CITs are also defined to be “exempt securities” (which do not need to be registered) under Section 3(a)(12)(A)(iv) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”).

2. Federal Banking Laws

As stated above, a CIT is a bank-administered trust that holds commingled assets that meet specific criteria established by the OCC in 12 CFR 9.18(a)(2). National banks are supervised by the OCC and, in connection with administering a CIT, a bank trustee must comply with specific OCC requirements relating to the operation of the fund (in a written plan), management of the fund, valuation fund assets, admission and withdrawal of accounts, audit and financial report, self-dealing and conflicts of interest, expenses, and management fees. CITs at state chartered banks and trust companies are regulated by their respective state authorities.

The OCC has published a handbook that provides guidance for bank examiners and bankers on CITs and common trust funds, outlines the risks associated with such trusts, and establishes a framework for managing those risks (the “OCC Handbook”).

The OCC requires certain information should be provided to CIT investors and may be provided to prospective customers in the form of a financial report. These financial reports include information regarding fund fees and expenses, a list of investments in the fund showing the cost and current market value of each investment, a summary of the purchases, sales, income and disbursements, and notation of investments in default. The OCC prohibits any predictions of future investment performance in these CIT financial reports. The OCC also requires the bank itself to ensure that only eligible investors are admitted to a CIT.

With respect to marketing, the OCC cautions that, “when advertising their [CITs], banks should be particularly wary of making projections of future performance, providing unsubstantiated historical performance data, or using language that suggests the bank will guarantee or ensure a fund’s future performance.” Additionally, the OCC recommends that banks conform any advertisement of their CITs to SEC and FINRA guidance to avoid a potential securities law

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15 See 12 CFR § 9.18(b).
16 This paper does not address state banking laws; however, state banking laws look to the OCC’s framework with respect to CITs.
18 See 12 C.F.R. § 9.18(b)(6)(i), (iv).
19 See 12 C.F.R. § 9.18(b)(6)(ii).
violations. In this regard, “[t]he OCC has cautioned national banks that the antifraud provisions
of the securities laws apply to [CITs and]…recommends that banks conform any advertisement of
their collective investment trusts] to SEC and [FINRA] guidance to avoid a potential securities
law violation.” Therefore, while the CITs are not directly required to follow SEC and FINRA
guidance, CITs should be presented in a manner which is not in contravention of direct SEC and
FINRA guidance, and accurate and complete material information about CITs and their investments
and performance must be provided to the plans that purchase and sell CIT interests.

III. SEC Guidance on the Marketing and Advertising of CITs

The 1940 Act, the Securities Act, or the Exchange Act, do not contain any particular provisions
related to the marketing or dissemination of data of CITs. There is no express statutory restriction
on advertising CITs.

While section 3(c)(3) of the 1940 Act restricts both the advertising and the offering of common
trust funds to the general public, there is no comparable restriction for CITs.

SEC staff guidance has acknowledged that there are no particular restrictions on marketing CITs.
In 1983, then SEC Chairman, John S. R. Shad, acknowledged that bank-sponsored collective funds
are not subject to as stringent disclosure or advertising requirements as mutual funds. While the
statement was made in the context of calling for change, we are not aware of any SEC regulatory
restriction being placed on CITs following the statement by the former SEC Chairman.

There is limited issued guidance by way of SEC no-action letters dating back many years indicating
that any marketing activities of CITs should be limited and any related compensation
arrangements restricted. We note that these letters in referencing marketing activities were
primarily focused on mass marketing communications such as newspaper and television
advertisements. The following letters are illustrative:

22 Id.
23 Id.
24 See 15 U.S.C. § 80a-3 (c)(3) (2019) (Section 3(c)(3) generally provides that a common trust fund is not
an investment company if it is 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, if (1) the fund is employed by the bank solely as an aid to the administration of trusts, estates,
or other accounts created and maintained for a fiduciary purpose; (2) except in connection with the ordinary
advertising of the bank’s fiduciary services, interests in such fund are not (i) advertised; or (ii) offered for
sale to the general public; and (3) fees and expenses charged by such fund are not in contravention of
fiduciary principles established under applicable federal or state law.) ICA § 3(c)(3) (2019).
25 See The Impact of Expanded Banking Activities Upon the Securities Industry, John S. R. Shad, Chairman,
accessed January 14, 2020)).
- On December 31, 1991, SEC staff issued a no-action letter to the American Bar Association Members Retirement Program advising (among other things) that, so long as the administrative services and investment options provider to the American Bar Association Members Retirement Program ("State Street"), “target its marketing activities to a limited audience” and “[n]either State Street nor its employees... receive any brokerage or special compensation for promotional, marketing, or enrollment activities” and “bonuses will not be based upon the number or value of the interests in the collective trust funds an employee sells”, then the SEC would not take enforcement action. The marketing and promotional activities would include direct mail advertising to qualified individuals and employers who are members of the American Bar Association or certain affiliated organizations (Members”), placing print advertisements in various national and state legal publications and providing information at national and state bar association meetings. All such marketing and promotional activities would be targeted only to the limited audience consisting of Members and their beneficiaries, “rather than to the public at large.”

- On March 9, 1988, SEC staff issued a no-action letter to Huntington National Bank who proposed to enter into a marketing and consulting agreement with a financial consulting firm to provide certain services to the Bank in connection with the implementation and operation of funds meeting the requirements for exemption under Section 3(a)(2) of the 1933 Act. These services included the establishment of a network of soliciting and servicing agents. Huntington National Bank gave assurances that “[m]ass marketing of the [CITs]... [would be]... limited in that there will be no television or radio advertising and the [CITs] will primarily be advertised in connection with the Bank’s other fiduciary services and only by the mailing of written material to profit sharing, pension and retirement plan administrators, representatives of various investment publications and persons requesting such materials, and by advertising in selected professional publications and/or investment publications.”

- On February 12, 1988, SEC staff issued a no-action letter to Citytrust, who gave assurances that it would "engage in no widespread advertising of the [CIT and a common trust fund] but will promote the investment vehicles only as part of its general fiduciary services... [and] ...no Bank publication will make performance comparisons to other funds managed by banks or investment companies.”

- On October 16, 1984, SEC staff issued a no-action letter to National Employee Plan Services, Inc., confirming no-action would be taken on the basis that the pension consulting and investment advisory businesses the firm engaged for matters affecting the marketing or marketability of the CIT units would limit the audience of its brochure and
offering memorandum. Initially, the proposal was to “sponsor advertising in various forms of media, ranging from business periodicals to television”. This was subsequently described as “overbroad” and the SEC ultimately issued the no-action statement in reliance of National Employee Plan Services, Inc.’s assurance that “(1) there will be no television advertising of the [CIT] Units; and (2) the [CIT] Units will be advertised only by the mailing of a brochure and an offering memorandum to pension plan administrators, representatives of various investment publications, and persons requesting such materials and by advertising in selected professional publications and/or investment publications, such as Pension World, Financial World, Institutional Investor, and Barron's.”

- On November 14, 1974, the SEC issued a no-action letter to First Huntington National Bank who intended to “publicize not only the availability of its services as trustee...but also the availability of the collective investment fund for use in connection with its services as trustee or agent.” In its request to the SEC, First Huntington National Bank clarified that “all advertisements will be designed to emphasize the bank was seeking new business as trustee or managing agent for such exempt trusts and “not to promote its collective fund.” Based on these facts, the SEC’s Division of Investment Management did not recommend that the SEC take any further action.

Taken together these no-action letters caution CIT sponsors to tailor marketing to a limited audience of pension plan sponsors and qualified participants as opposed to mass marketing, particularly by way of television or radio advertising. We note generally that these letters should be viewed in the larger context of Section 3(a)(2) of the 1933 Act and Section 3(c)(11) of the 1940 Act which imposes no restrictions on CIT marketing.

**IV. Analysis**

We are of the view that there are sound arguments that support that the allocation of ticker symbols for CITs and the production of fact sheets and availability of the same to retirement plan sponsors, participants, and interested market participants will not run contrary to the exceptions provided for CITs under the federal securities laws, which are discussed above or the SEC stated staff guidance, which focuses mostly on mass marketing.

**A. Does the registration of CITs on the NFN network and the display of the reference data through major institutional market data vendors, online brokerages, and other media service providers run afoul of any specific marketing restrictions by applicable federal securities and banking regulations?**
There are no express prohibitions under the exceptions provided to CITs under the federal securities laws on the use of a ticker symbol for CITs on publicly available open websites and institutional market data platforms. As part of the NFN proposal, upon registration, each CIT would receive a ticker symbol. The ticker symbol provides a unique identifier by which individual securities can be researched (and traded, if applicable). These ticker symbols also convey related fund reference information to investors.

As long as the ticker symbol and reference data is not associated with any misleading fact, material omission of fact, projections of future performance, unsubstantiated historical performance data, or use language that suggests the guarantee of the CIT’s future performance, we believe that sound arguments may be advanced that the allocation of a ticker symbol to CITs will not run afoul of the applicable provisions we have been asked to review.

B. Would the production and distribution to CIT trustees, asset managers, and market participant of performance and valuation data (in a fact sheet) run afoul of the same marketing restrictions?

The production and distribution of fact sheets as described above should not be viewed as inconsistent with any SEC or banking regulation requirements with respect to marketing of CITs.

The NFN’s fact sheets is intended to be an informational tool to provide interested parties with more background and data on particular CITs and promote transparency. These fact sheets would be made available to, but not limited to, CIT sponsors, asset managers, and market participants for use in distributing to retirement plan participants who have the particular CIT available as an investment option in their retirement plan. The fact sheets would also be made available to interested parties requesting a copy of a particular fact sheet, such as a retirement plan participant’s financial adviser or potential plan sponsors to consider when they review and compare various CITs as part of their investment process. Importantly, the fact sheet would made available behind a secure login on the NFN website. In other words, the fact sheet is intended to be distributed to interested parties who have access to the particular CIT, not the mass general public.

As long as the NFN facts sheet is not associated with any misleading fact, material omission of fact, projections of future performance, unsubstantiated historical performance data, and does not use language that suggests the guarantee of the CIT’s future performance, we believe that sound arguments may be advanced that the controlled distribution of the NFN fact sheet will not run afoul of the applicable provisions we have been asked to review.

26 Trading is not facilitated or connected to any NFN activity.
V. Disclaimer

In writing this memorandum, Eversheds Sutherland has relied on the facts and assumptions provided by NFN, which are stated herein. This memorandum addresses marketing restrictions imposed on CITs by the federal securities and applicable banking regulations, as in effect as of the date of this memorandum. We have not been asked to address other rules and regulations. There can be no assurance that future legislative, judicial, or administrative changes or interpretations, either prospective or retrospective in application, will not affect adversely the accuracy or application of this memorandum.

Registration by a trust fund sponsor on the Nasdaq Fund Network is not legally required, and this memorandum should not be viewed as a statement by Eversheds Sutherland that such registration is required.

This memorandum has been prepared for NFN. Eversheds Sutherland and NFN are not responsible for any third party who is provided a copy of this memorandum and determines to act based on the analysis herein. The sharing of this memorandum does not in any way intend to create or imply any relationship between Eversheds Sutherland and/or NFN and the recipient.

Any recipient of this memorandum is encouraged to seek independent legal counsel regarding the matters discussed herein and any other matters that may be relevant to their specific facts and circumstances.

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