CORPORATE LAW ALERT
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The SEC Weighs in on Pooled Employer Plans: Part I

In 2019, Congress, through its adoption of the Setting Every Community Up for Retirement Enhancement Act of 2019 (the "SECURE Act"), established a new type of multiple employer plan ("MEP") known as a "pooled employer plan," or a "PEP". Unlike an MEP, which requires employers to share a common business element or have the same professional employer organization, a PEP is a type of defined contribution retirement plan that provides benefits to the employees of at least two employers that do not have a common interest other than adopting the plan. As noted by the Department of Labor, it is anticipated that PEPs will "improve retirement savings for some American workers who previously had no access to an employer-sponsored retirement plan."

Through the passing of the SECURE Act, Congress sought to give small businesses an opportunity to simplify retirement plan management, reduce costs associated with maintaining retirement plans and reduce risks associated with maintaining such plans. Using a PEP, fiduciary oversight of the defined contribution retirement plan falls on a pooled plan provider ("PPP"), who acts as the plan sponsor, named fiduciary and plan administrator. Thus, the compliance, filing and oversight burdens that are associated with establishing and maintaining a defined contribution retirement plan shift from the employer to the PPP. Additionally, employers of small businesses can pool their resources with other employers and receive certain tax credits for their participation in a PEP (as set forth in SECURE 2.0 Act, which was enacted in December 2022), the costs of maintaining a defined contribution retirement plan are reduced for individual businesses.

Under section 3(c)(11) of the Investment Company Act of 1940, an "investment company" excludes "[a]ny employee's…profit-sharing trust which meets the requirements for qualification under section 401 of [the Code]…". This provision, commonly referred to as the "single trust exclusion," exempts a single employer's qualified retirement plan trust from the requirement to register as an investment company, distinguishing it from the broader collective trust fund vehicles that pool assets from multiple plans. Separately, Rule 180 under the Securities Act of 1933 provides an exemption from the registration requirements of section 5 of the Securities Act for interests or participations in single trust funds, collective trust funds maintained by a bank, or securities arising out of insurance company contracts, when those interests are issued to employee benefit plans that cover self-employed individuals (so-called "H.R. 10" or "Keogh" plans), provided certain conditions are met regarding the sophistication of the employer or its advisors. Recently, the staff of the Division of Investment Management of the Securities and Exchange Commission shared its views regarding the applicability of (i) the single trust exclusion in section 3(c)(11) of the Investment Company Act to pooled employer plans, and (ii) Rule 180 to interests in collective investment trusts maintained by a bank and issued to those pooled employer plans that cover self-employed individuals. Part II of this Alert will address those views and the potential impact they may have on your business.

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