CORPORATE LAW ALERT
September 8, 2026
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The SEC Weighs in on Pooled Employer Plans: Part II

On May 4, 2026, the staff of the Division of Investment Management (the "Staff") of the Securities and Exchange Commission (the "SEC") released a statement regarding pooled employer plans, or PEPs, providing its views regarding the applicability of (i) the "single trust exclusion" in section 3(c)(11) of the Investment Company Act of 1940 (the "Investment Company Act") to pooled employer plans, and (ii) rule 180 under the Securities Act of 1933 (the "Securities Act") to interests in collective investment trusts ("CITs") maintained by a bank and issued to those pooled employer plans that cover self-employed individuals.

Single Trust Exclusion

Under section 3(c)(11) of the Investment Company Act, 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 of law is commonly referred to as the "single trust exclusion." Pursuant to section 3(a)(2) of the Securities Act, a "single trust" includes a similarly-worded exemption under the Securities Act for interests in what are commonly referred to as "single trusts."

Employee benefit plans generally rely upon the single trust exclusion to avoid regulation as an investment company. Historically, the Staff of the Divisions of Investment Management and Corporation Finance have interpreted the single trust provisions of both section 3(c)(11) and section 3(a)(2) to include:

- a trust fund for employees of a single employer;
- a trust fund for employees of employers so closely related as to be regarded as a single employer (e.g., a parent and its subsidiaries); and
- a trust fund established and controlled by employers and/or a union representing the employees of such employers.

As the Staff points out, a PEP does not fall into any of these categories "because a pooled employer plan is typically structured as a trust fund for employees of multiple, unrelated employers." However, as noted by the Staff, the SECURE Act was enacted, in part, to remove legal barriers preventing the broader use of multiple employer plans and Congress, in amending ERISA and the Internal Revenue Code, sought to treat PEPs as single employer plans. Based upon this reasoning, the Staff indicated that it "would not object if a pooled employer plan treats itself as a single employer plan for purposes of the Investment Company Act and relies on the single trust exclusion in section 3(c)(11) of the Investment Company Act to avoid registration as an investment company; *provided* that the pooled employer plan: (i) is subject to ERISA; and (ii) meets all of the requirements of the relevant section of the Code referenced in section 3(c)(11)."

Applicability of Rule 180

Many PEPs offer collective investment trusts ("CITs") as an investment option to employers participating in the PEP and their employees. However, CITs generally rely on a Securities Act exemption under section 3(a)(2), which exemption does not apply when a plan includes self-employed individuals. In those instances, CITs may rely on rule 180, which exempts certain CIT interests from registration. However, as relevant to a PEP, Rule 180(a)(2) requires that "[t]he plan covers only employees of a single employer or employees of interrelated partnerships." Additionally, rule 180(a)(3), generally requires that the employer is financially sophisticated.

As the Staff noted, it became aware that "sponsors of CITs interpreted rule 180 as being unavailable to interests issued to PEPs that cover self-employed individuals, because such plans cover multiple, unrelated employers." This has led certain PEPs to exclude self-employed individuals to CIT investment options. However, the Staff noted that the SECURE Act was enacted to expand the ability of small employers, including self-employed individuals, to participate in PEPs. Thus, the Staff indicated that it "would not object if a CIT issues interests to a pooled employer plan that covers self-employed persons without registering the offer and sale of the CIT's interests under section 5 of the Securities Act in reliance on rule 180; *provided* that the plan: (i) is subject to ERISA; and (ii) the issuance meets all of the requirements in rule 180(a)(1) and (a)(3)." Additionally, the Staff stated that a CIT may apply the financial sophistication requirement with respect to the plan's pooled plan provider, rather than any employer, to confirm that the provider is able to adequately represent the interests of plan participants.

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