Taft/

Securities & Corporate Governance

Q2 2026 Quarterly Newsletter

Taft Stettinius & Hollister LLP's Securities & Corporate Governance Quarterly Newsletter is designed to update public and private company clients on recent developments in federal securities laws and corporate governance matters. For further information, please contact any member of the firm's Public Company & Securities practice group or any of the contributors to this newsletter.

This edition of the quarterly newsletter addresses the following topics:

- Securities and Exchange Commission (SEC) Small Business Capital Formation Advisory Committee Recommendations on Finder Regulations
- SEC Shortens Minimum Offer Period for Certain Tender Offers
- SEC and Commodity Futures Trading Commission (CFTC) Reverse Course on Form PF Amendments
- SEC Weighing Whether to Approve New Nasdaq Stock Market LLC (Nasdaq) Continued Listing Requirement
- SEC Proposal on Optional Semiannual Reporting for Public Companies
- SEC Proposes New Rules on Public Company Registration and Reporting
- Recent Securities and Exchange Commission SEC Guidance On Pooled Employer Plans (PEPs)

SEC Small Business Capital Formation Advisory Committee Recommendations on Finder Regulations

In an April 14, 2026 letter, the SEC's Small Business Capital Formation Advisory Committee (the Committee) submitted recommendations to SEC Chairman Paul Atkins to improve the regulatory framework governing "finders," in this case, natural persons who engage in certain limited capital-raising activities on behalf of issuers without registering with the SEC as broker-dealers.

In an effort to promote small business capital formation, the Committee explored potential improvements to the rules governing finders. Through its work, the Committee concluded that there is a lack of appropriate intermediaries for small capital raises, in part due to perceived ambiguities in the broker-dealer registration requirements. The Committee strongly endorsed the general concept of a framework to permit certain unregistered finders to engage in capital-raising activities, and set forth the following principles when considering such a framework: (i) finders play an important role in facilitating the flow of capital to small and emerging businesses, and the current regulations discourage finder activity; (ii) there is a strong need for regulatory clarity to distinguish finder activity from broker-dealer services, and accordingly, finder activity should fall under a limited exemption from broker-dealer regulations; (iii) federal preemption of state regulations should be considered when evaluating the effectiveness of any potential regulations or exemptions; (iv) prior SEC proposals with respect to finder activities, especially regarding a finder's ability to contact investors or comment on the terms of investment, were overly restrictive, and any potential proposal should permit finders to communicate with potential investors about the nature of the issuer and the terms of the financing; (v) it may be appropriate to require certain disclosures (e.g., the identity of any finders, fees paid to finders, and any relationships between the finder and the issuer or other investors) so long as such requirements are not overly burdensome; (vi) the registration process for finders, if any, should be minimal and open to non-professional participants to complete without needing assistance from professional advisors; and (vii) it may be appropriate to require oversight of, or responsibility for, finder activity by issuers so long as such requirements are not overly burdensome.

The Committee also reaffirmed its prior recommendations regarding a regulatory framework for finders originally presented in its November 13, 2020 letter to former SEC Chairman Jay Clayton: (i) the framework should be simple; (ii) the framework should keep out bad actors; (iii) the SEC should consider a notice filing requirement for all finders, which would include information on finders' fees; (iv) the SEC should coordinate with state securities regulators on the framework; (v) the framework should provide certainty to both finders and issuers with respect to how finders can assist with capital formation for small businesses; (vi) the SEC should consider a blanket exemption for finders for offerings under a certain size; (vii) the SEC should consider the issue of finders' fees, including reasonableness and/or limits thereto; and (viii) the SEC should provide clarity on prohibited and permissible activities.

It remains to be seen whether the SEC will act on the Committee's recommendations and what form any changes to the rules that currently govern finders will take. Until then, the current broker-dealer rules remain in effect for finders, and unregistered persons seeking to receive compensation for finding investors in securities should consult with counsel to ensure that such compensation complies with all applicable law.

SEC Shortens Minimum Offer Period for Certain Tender Offers

On April 16, 2026, the SEC released an exemptive order, effective immediately, that shortens the minimum offer period for certain equity tender offers from 20 business days to 10 business days.

The exemptive order applies only to tender offers for equity securities.

For SEC reporting companies, the order applies only to:

- Negotiated, all cash, fixed-price, third-party tender offers made pursuant to Regulation 14D under the Securities Exchange Act of 1934, as amended (Exchange Act), for 100% of the outstanding securities of the affected class; and
- All cash, fixed-price, issuer tender offers made pursuant to Rule 13e-4 under the Exchange Act for less than 100% of the outstanding securities of the affected class.

The exemptive order is subject to a number of other conditions and procedural requirements, and it is not available for hostile tender offers or going-private transactions (e.g., management buyouts) subject to Rule 13e-3 under the Exchange Act.

For non-reporting issuers, the exemptive order applies only to all cash, fixed-price tender offers made by the issuer or a wholly owned subsidiary (i.e., self-tenders) and is subject to a number of other conditions and procedural requirements.

The value of the exemptive order for traditional public company change-of-control transactions may be limited because the length of such tender offers is frequently driven by practical considerations, including the need to allow enough time to meet a high minimum tender requirement (often taken from the applicable state's short-form merger statute) and the need to avoid the appearance of procedural unfairness or coerciveness when dealing with a substantial number of retail investors.

On the other hand, the exemptive order is potentially more valuable to private companies and growth equity funds, particularly for equity recapitalizations that involve a sale of newly created preferred stock by a private company to a growth equity fund coupled with a tender offer to the company's existing stockholders using proceeds of the preferred stock issuance, with the growth equity fund's investment typically conditioned on a minimum number of shares being tendered in the tender offer and the two transactions closing simultaneously.

SEC and CFTC Reverse Course on Form PF Amendments

On April 20, 2026, the SEC and the Commodity Futures Trading Commission (CTFC and jointly with the SEC, the Commissions) proposed new amendments to Form PF, the confidential reporting form for certain SEC-registered investment advisers to private funds. These new proposed amendments are designed to eliminate certain reporting burdens, and would remove reporting obligations for certain advisers entirely. These proposed amendments would reverse earlier amendments enhancing adviser disclosure that were adopted by the Commissions on February 8, 2024, but that have not yet been implemented. For more information on the previously adopted amendments, see our legal update available here.

The new proposed amendments to Form PF primarily would (i) raise the Form PF filing threshold for all advisers from $150 million in private fund assets under management (AUM) to $1 billion; and (ii) raise the reporting threshold for large hedge fund advisers from $1.5 billion in hedge fund AUM to $10 billion. The new proposed amendments would also eliminate or streamline many current Form PF requirements, significantly reducing advisers' compliance and disclosure burden.

The new proposed amendments follow prolonged concerns with the previously adopted amendments, the compliance date for which was extended three times (from March 12, 2025 to June 12, 2025, from June 12, 2025 to October 1, 2025, and finally from October 1, 2025 to October 1, 2026) and which were described as a "massive burden" by SEC Chairman, Paul Atkins.

Private fund advisers should continue to operate in accordance with the current Form PF because the new proposed amendments are not yet effective and may be not be in their final form.

SEC Weighing Whether to Approve New Nasdaq Continued Listing Requirement

On April 28, 2026, the SEC instituted proceedings to determine whether to approve a Nasdaq proposed rule change that would require listed companies to maintain a minimum Market Value of Listed Securities (MVLS)[1] of at least $5 million.

Under the proposed rule, which was filed by Nasdaq with the SEC on January 13, 2026, listed companies that fail to maintain a MVLS of at least $5 million for 30 consecutive business days would be subject to immediate delisting and suspension from trading (i.e., there would be no cure period to regain compliance). Nasdaq's rationale for the rule is that very low market capitalization companies are unsuitable for trading on an exchange (as opposed to over-the-counter), that companies that fall below $5 million in MVLS are extremely unlikely to recover, and that removing such companies from listing protects investors by, among other things, removing the seal of approval that Nasdaq listing provides. Listed companies may appeal such a de-listing determination, but the companies' securities would be suspended from trading on Nasdaq during the pendency of such appeal, which would likely make the initial delisting effectively fatal for most affected companies.

The SEC is soliciting additional comments to inform its analysis and has not yet reached any conclusions with respect to the proposed rule. To date, while certain commenters expressed support for the proposed rule, others raised concerns, such as that the proposed rule overlaps with recently adopted Nasdaq rule changes (e.g., limitations on reverse stock splits and minimum bid price requirements) designed to address low market value companies listed on the exchange and that the proposed rule might encourage manipulative trading and market abuse to drive down a listed company's stock and ultimately cause the company to be delisted. Due to these and other concerns that were expressed by commenters, the SEC has indicated that it will take time for additional analysis and consideration of the proposed rule.

---

[1]The terms "Market Value" and "Listed Securities," are defined in Nasdaq Rules 5005(a)(23) and 5005(a)(22), respectively. MLVS is roughly equivalent to market capitalization.

SEC Proposal on Optional Semiannual Reporting for Public Companies

On May 5, 2026, the SEC proposed amendments that would allow domestic public companies to elect optional semiannual reporting in lieu of the current quarterly reporting regime. The proposal would introduce new Form 10-S for interim reporting, which would largely mirror the substantive requirements of Form 10-Q but cover a six-month period rather than a fiscal quarter. The semiannual framework would be optional, and reporting companies that do not elect it would continue filing quarterly reports. Companies would make the election annually by checking a new semiannual box on the cover page of Form 10-K. The election could not be changed until the following year's Form 10-K filing. The proposing release also contemplates conforming amendments to Regulation S-X, including revisions to age-of-financial-statements requirements, to align Securities Act of 1933, as amended, and Securities Exchange Act of 1934, as amended, disclosure rules with a semiannual reporting structure.

Companies considering a shift to semiannual reporting will need to weigh a range of legal and business considerations. While the semiannual reporting system would likely reduce legal, accounting, and compliance costs, it may also present drawbacks, including reduced engagement with investors, more limited access to capital, and potential covenant compliance issues under existing financing arrangements. Seasonality and earnings volatility are also relevant factors, as companies with more variable results may benefit from more frequent disclosure. In addition, capital markets practice remains uncertain: underwriters may be reluctant to market offerings using financial statements that are up to six months old, and auditors may be unwilling to provide customary comfort letters on that basis. Finally, many credit agreements, note indentures and other contracts require companies to make quarterly SEC filings even if they are not legally required to do so, so registrants that are party to such contracts, or may be in the future, may be unable to use Form 10-S.

Pending adoption of final rules, issuers should treat the proposal as an opportunity to assess their legal, accounting, financing, and investor relations frameworks to determine whether a semiannual reporting cadence would be appropriate if the proposal is adopted.

SEC Proposes New Rules on Public Company Registration and Reporting

On May 19, 2026, the SEC released two proposals – a Registered Offering Reform Proposal and a Filer Status Proposal – in furtherance of its stated agenda to incentivize companies to either become or remain public.

Registered Offering Reform Proposal

The Registered Offering Reform Proposal aims to expand eligibility to conduct streamlined registered offerings and reduce the costs associated with conducting registered offerings. Specifically, the proposal would, among other things:

- **Expand Form S-3 Eligibility**: Form S-3 is a short-form registration statement that permits eligible issuers to streamline their offering process, including by conducting shelf offerings (i.e., offerings made on a delayed basis after the filing and effectiveness of the Form S-3) quickly in response to market conditions and the issuer's capital requirements without waiting for further SEC review or action. The proposed amendments would eliminate current requirements that (i) in order to be eligible to use Form S-3, issuers must be subject to Exchange Act reporting requirements for at least 12 months, and (ii) in order to register an unlimited amount of securities on Form S-3, the issuer's public float[2] must be at least $75 million (i.e., this proposal would eliminate the current "baby shelf" requirements). Notably, eligibility to use the form would still be conditioned on the issuer being current and timely with respect to its Exchange Act reports and materials. In its proposing release, the SEC noted that public securities offerings provide investors with protections not available in the private markets, such as more robust disclosures; therefore, in the SEC's view, expanding the population of issuers eligible to use Form S-3 and encouraging such issuers to use Form S-3 in lieu of raising capital in the private markets, would benefit both issuers and investors.

[2]The SEC defines "public float" as the aggregate value of the issuer's voting and non-voting common equity held by non-affiliates.

- **Revise Form S-1 to Expand Incorporation by Reference Accommodations**: Form S-1 is a long-form registration statement often used for initial public offerings of securities or by issuers ineligible to use Form S-3. The proposed amendments would eliminate the requirement that in order to use backward incorporation by reference in Form S-1, an issuer must have filed an Annual Report on Form 10-K for its most recently completed fiscal year. This change is designed to reduce compliance and disclosure costs associated with preparing a Form S-1 by eliminating the need to repeat disclosures that have already been publicly filed (such as in a Form 10 for an issuer that has not yet filed a Form 10-K for its most recently completed fiscal year). The proposed amendments would also provide that any issuer that is permitted to backward incorporate by reference in Form S-1 would be permitted to forward incorporate by reference in Form S-1 – an accommodation currently available only for smaller reporting companies. This change is designed to reduce issuer costs by eliminating the need to file duplicative Form S-1 updates through post-effective amendments or prospectus supplements, while maintaining investor access to the relevant substantive disclosure, because such forward-incorporated filings would be easily accessible through the SEC's EDGAR system.
- **Preempt State Securities Registration and Qualification for Any Registered Offering**: Section 18(a) of the Securities Act of 1933, as amended (Securities Act), provides that states may not require registration or qualification of "covered securities," and Section 18(b)(3) of the Securities Act provides that covered securities include those securities offered and sold to "qualified purchasers." The SEC is proposing to add a new definition of "qualified purchasers" to preempt state securities law registration and qualification requirements for any registered offering. Currently, preemption only applies to registered offerings of securities that are listed on a national securities exchange – it does not apply to registered offerings of unlisted securities. Notably, many real estate investment trusts (REITs) conduct registered offerings of unlisted securities on Form S-11. These non-traded REITs are currently subject to state securities law requirements and the Statement of Policy Regarding Real Estate Investment Trusts (REIT Guidelines) developed by the North American Securities Administrators Association (NASAA). Recent amendments to the NASAA REIT Guidelines impose certain limitations on non-traded REITs including (i) limiting a non-accredited investor's aggregate investments in non-traded REITs to 10% of such investor's liquid net worth, and (ii) requiring minimum annual gross income or net worth standards of non-traded REIT investors. The SEC's proposal would preempt and therefore render ineffective these and any other state registration or qualification requirements for registered offerings of non-listed securities. The SEC's proposal aims to enhance efficiency, reduce compliance costs and promote capital formation by reducing redundant regulatory oversight and, therefore, simplify the process for conducting registered offerings of unlisted securities. In the SEC's view, this proposal is consistent with the public interest and protection of investors as investors will have the benefit of the Federal securities laws requirements applicable to registered offerings of unlisted securities, including registration statement disclosures (e.g., risk factors, audited financial statements, and management's discussion and analysis of financial condition and results of operations), SEC review of registration statements, and post-registration periodic reporting requirements.

Issuers should continue to operate in accordance with current Form S-3, Form S-1 and state registration and qualification requirements because the proposed rule and form changes are not yet effective and may be not be in their final form. The SEC is soliciting comments on the proposed amendments until July 27, 2026.

Filer Status Proposal

The Filer Status Proposal would streamline the existing public company filer status framework in an effort to provide simplified compliance and reduced costs for a majority of existing registrants and encourage other companies to go public by reducing the current regulatory impediment. Currently, a public company is categorized as one or potentially more than one of the following filer statuses: (i) large accelerated filer, (ii) accelerated filer, (iii) non-accelerated filer, (iv) smaller reporting company, or (v) emerging growth company. Periodic reporting deadlines vary depending on the filer status of the public company. For example, a large accelerated filer must file its Annual Report on Form 10-K within 60 days after its fiscal year end and its Quarterly Reports on Form 10-Q within 40 days after its fiscal quarter end. In contrast, a non-accelerated filer must file its Annual Report on Form 10-K within 90 days after its fiscal year end and its Quarterly Reports on Form 10-Q within 45 days after its fiscal quarter end. Disclosure requirements and accommodations also vary depending on the filer status of the public company. For example, smaller reporting companies and emerging growth companies are only required to provide two years (instead of three years) of audited financial statements in Forms 10-K, and emerging growth companies are not required to provide pay versus performance disclosure in proxy statements or to solicit shareholder say-on-pay or say-on-pay frequency advisory votes.

The SEC's proposal would do the following:

- Raise the public float threshold for becoming a large accelerated filer from $700 million to $2 billion.
- Require the determination of public float to be based on the average stock price over the last 10 trading days of the second fiscal quarter. Currently, the determination of public float is based on the stock price on the last trading day of the second fiscal quarter. This proposed change is designed to protect against a single day of stock price volatility resulting in a change in filer status.
- Establish that a registrant will only transition into or out of a filer status after the registrant has been above or below the public float threshold for two consecutive years.
- Require that a registrant cannot become a large accelerated filer until such registrant has been subject to the Exchange Act reporting requirements for 60 consecutive calendar months. Currently, a registrant must be subject to Exchange Act reporting requirements for just 12 months before it can be classified as a large accelerated filer.
- Eliminate the accelerated filer and smaller reporting company filer statuses so any registrant that is not a large accelerated filer would become a non-accelerated filer.
- Apply to non-accelerated filers the current disclosure accommodations applicable to smaller reporting companies and emerging growth companies.
- Create a new category of small non-accelerated filers for companies with total assets of $35 million or less for the two most recent fiscal years. These companies would have until 120 days after their fiscal year end to file Forms 10-K and until 50 days after their fiscal quarter end to file Forms 10-Q.

The SEC estimates that these proposed changes would decrease the percentage of large accelerated filers from 35.4% to 19.2% and increase the percentage of registrants permitted to provide smaller reporting company scaled back disclosures from approximately 44% to approximately 81%.

If this proposal is ultimately adopted in its current form, registrants that fit the new definition of non-accelerated filer would benefit from significantly scaled back disclosure requirements, particularly as they relate to executive compensation. In addition to those accommodations discussed in the lead-in paragraph, these registrants would no longer be required to provide CEO pay ratio disclosure, would be required to provide only two years (instead of three years) of summary compensation table information, and would be required to provide executive compensation disclosure for only three (instead of five) named executive officers, among other accommodations. The SEC acknowledges that this proposal would result in reduced disclosure for investors; however, it notes that investors may benefit from more companies choosing to become or remain public as a result of the proposal, thereby providing more public market investment opportunities for investors and greater transparency as compared to private markets.

Registrants should continue to operate in accordance with their current filer status requirements because the proposed rule is not yet effective and may be not be in its final form. The SEC is soliciting comments on the proposal until July 20, 2026.

Recent SEC Guidance on PEPs

Established under the Setting Every Community Up for Retirement Enhancement Act of 2019 (the SECURE Act), PEPs are a type of defined contribution plan that allows multiple unrelated employers to participate in a single retirement plan – and thereby offer retirement benefits to their employees – under a designated Pooled Plan Provider (PPP), which serves as a named fiduciary, the plan administrator, and the person responsible for the performance of all reasonably necessary administrative duties. PEPs are seen as a way for small businesses to join together on a single retirement plan and reduce the related financial and administrative burdens. However, given that a PEP is typically structured as a trust fund for employees of multiple unrelated employers, until now, it has been unclear whether PEPs could take advantage of certain exemptions and exclusions that employee benefit plans typically rely on to avoid the registration requirements of the Securities Act of 1933 (the Securities Act) and the Investment Company Act of 1940 (the Investment Company Act).

On May 4, 2026, the SEC Division of Corporation Finance released an update to its Corporation Finance Interpretations (CFIs) of the Securities Act Sections and Securities Act Forms, in each case, with respect to PEPs. Later that day, the SEC Division of Investment Management also released a statement clarifying the Staff's views regarding the treatment of PEPs under certain Federal securities laws. However, as always, the Staff qualified such guidance with a caveat that its views, as represented in the Staff statement, have no legal force or effect and may be superseded by future changes in rules, regulations and/or no-action and interpretive positions.

Updated CFIs

New Question 118.01: Section 3(a)(2) of the Securities Act

This question addresses whether PEPs are eligible to claim the Securities Act Section 3(a)(2) exemption for any interest or participation in a "single trust fund." Section 3(a)(2) of the Securities Act exempts interests in certain employee benefit plans from the registration requirements under the Securities Act, including any interest or participation in a single trust fund.

The Staff responded that, although multiple unrelated employers participate in a PEP, it will not object if the PEP claims the Section 3(a)(2) exemption so long as the PEP meets the qualification requirements of the Employee Retirement Income Security Act of 1974 ("ERISA") and Section 401 of the Internal Revenue Code of 1986 (the Code) and otherwise meets the conditions of Section 3(a)(2). However, the offers and sales of any securities in connection with such exempted PEPs will still be subject to the anti-fraud provisions of the Securities Act.

New Question 126.45: Form S-8

This question addresses whether an employer participant in a PEP may use the registration statement on Form S-8 to register the offers and sales of its own securities to its employees as an investment option in the PEP, and if so, whether the PEP must also register the offer and sale of plan interests on the same Form S-8.

In response, the Staff noted that it will not object if an employer participant in a PEP does in fact register offers and sales of its own securities to eligible employees on a Form S-8. In addition, the PEP may either (i) register the offer and sale of plan interests to the employees of that employer on the same Form S-8, or (ii) file a separate Form S-8 to register plan interests offered and sold to the employees of that employer.

However, the Staff has flagged for consideration a number of additional variables if the PEP opts to separately file its own Form S-8: (i) the employer, in addition to incorporating its own periodic reports, must incorporate the PEP's periodic reports by reference into its Form S-8; (ii) in accordance with Rule 416(c), the PEP should register an indeterminate amount of plan interests; (iii) the PEP may also apply Rule 457(h)(2) by analogy and thereby not pay a fee for the registration, so long as the employer's related Form S-8 is referenced and hyperlinked in the PEP's Form S-8; (iv) the PEP's Form S-8 need only incorporate the documents related to the plan in order to comply with Item 3; (v) the employer and the PEP must ensure ongoing compliance with Rule

428 and General Instruction G of Form S-8, i.e., that investors receive all information constituting a Section 10(a) prospectus and that such information is updated on an ongoing basis, as needed; and (vi) the PEP may register plan interests offered and sold to employees of multiple employers on a single Form S-8; provided, that each employer's separate From S-8 is referenced and hyperlinked in the PEP's Form S-8.

<u>SEC Division of Investment Management Staff Statement</u>

In its May 4, 2026 statement, the Staff of the SEC Division of Investment Management delineated its views regarding the applicability of (i) Section 3(c)(11) of the Investment Company Act, an exclusion that is frequently relied upon by employee benefit plans, to PEPs specifically, and (ii) Rule 180 under the Securities Act to interests in collective investment trusts (CITs) maintained by a bank and issued to PEPs that cover self-employed individuals, in each case, noting that it would not object to the PEP relying on the foregoing exclusion or rule, subject to certain requirements also being met.

Applicability of the "Single Trust Exclusion" in Section 3(c)(11) of the Investment Company Act to PEPs

An employee benefit plan that meets the definition of an "investment company" under Section 3(a)(1) of the Investment Company Act must register as an investment company unless an exclusion or exemption applies. Employee benefit plans typically rely on the "single trust exclusion" from the definition of "investment company" under Section 3(c)(11) of the Investment Company Act for "[a]ny employee's… profit-sharing trust which meets the requirements for qualification under section 401 of [the Code]." As discussed above, Section 3(a)(2) of the Securities Act includes a similar exemption for "single trusts."

The Staff has historically interpreted a "single trust" to refer to the following type of trust, which PEPs do not neatly fall into: (i) a trust fund for employees of a single employer; (ii) 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 (iii) a trust fund established and controlled by employers and/or a union representing the employees of such employers.

In response to this uncertainty with respect to PEPs, recognizing that Congress enacted the SECURE Act to remove legal barriers preventing the broader use of multiple employer plans and amended ERISA and the Code to treat PEPs as single employer plans thereunder, the Staff clarified that it will not object if a PEP 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 (and therefore regulation) as an investment company under the Investment Company Act. However, the Staff highlighted two prerequisites to such treatment: the PEP must (i) be subject to ERISA and (ii) meet all of the requirements for qualification under Section 401 of the Code.

Applicability of Rule 180 to Interests in CITs Issued to Certain PEPs

CITs typically rely on the exemption in Section 3(a)(2) of the Securities Act to avoid the registration requirement with respect to the offer and sale of their interests. However, Section 3(a)(2) does not apply to interests in plans covering self-employed individuals (as defined in Section 401(c) of the Code) or to interests in CITs and separate accounts that fund such plans. CITs that accept such assets may seek to rely instead on the exemption under Rule 180 of the Securities Act, which, among other criteria, requires that (i) under Rule 180(a)(2), the plan covers only employees of a single employer or of interrelated partnerships and (ii) pursuant to Rule 180(a)(3), the issuer have reasonable grounds to believe that such employer has the requisite sophistication, i.e., knowledge and experience in financial and business matters, so that the interests of the employer and its employees are adequately represented.

Sponsors of CITs have generally interpreted the Rule 180 exemption as being unavailable to interests issued to PEPs that cover self-employed individuals, given that such plans cover multiple unrelated employers and there has been substantial uncertainty as to how PEPs would satisfy the sophistication requirement.

However, for similar reasons as stated above (i.e., in light of the spirit of Congress's adoption of the SECURE Act), the Staff declared it would be reasonable to treat PEPs as single employer plans for purposes of Rule

180(a)(2). As such, the Staff will not object if a CIT relies on Rule 180 and issues interests to a PEP that covers self-employed persons without registering the offer and sale of such interests under Section 5 of the Securities Act; provided that the plan satisfies two conditions: (i) the plan must be subject to ERISA, and (ii) the issuance must meet all of the requirements in Rule 180(a)(1) and (a)(3). That said, because the PPP provides most of the administrative and fiduciary responsibilities with respect to a PEP and thereby effectively assumes the role of the employer, a CIT may apply the sophistication requirement to the PPP instead of any employer to confirm that the PPP is able to adequately represent the interests of plan participants.

Implications for Small Businesses

The SEC indicated that it intends to propose rules and release guidance to reduce regulations that it believes are unduly burdensome on small businesses and facilitate access to capital markets. Although informal, these recent developments are in line with such efforts. The SEC's recent guidance on PEPs helps clarify how employer participants and PPPs can navigate prior uncertainties with respect to the registration obligations of PEPs and rely on exemptions and exclusions thereto to avoid undue burdens, thereby making retirement savings options more accessible.

Legal disclaimer: This newsletter is intended to provide general information and should not be used or taken as legal advice. Readers should not act upon this information before seeking advice from counsel.

Contributors

Art McMahon
Partner / Cincinnati
amcmahon@taftlaw.com
T: 513.357.9607
View Full Bio

Lauren Prevost
Partner-in-charge / Atlanta
lprevost@taftlaw.com
T: 404.504.7744
View Full Bio

Seth Weiner
Partner / Atlanta
sweiner@taftlaw.com
T: 404.504.7664
View Full Bio

Mark Stern
Partner / Atlanta
mstern@taftlaw.com
T: 404.504.7739
View Full Bio

Jeffrey Kesselman
Partner / Denver
jkesselman@taftlaw.com
T: 303.299.8348
View Full Bio

David Washbush
Senior Associate / Columbus
dwashbush@taftlaw.com
T: 614.220.0213
View Full Bio

Eunice Lee
Associate / Cincinnati
eunicelee@taftlaw.com
T: 513.357.8740
View Full Bio