



1100 North Market Street, Wilmington, DE 19890

January 6, 2020

**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”) previously filed a comment letter in connection with the referenced release urging that the “qualified institutional buyer” definition under Rule 144A be modernized 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. We appreciate the Commission’s consideration of our comment and related proposal to include a new category within the Rule’s definition of qualified institutional buyer under Rule 144A(a)(1)(i)(J) which would encompass CITs with Keoghs as participants, subject to satisfying the Rule’s \$100 million threshold.<sup>1</sup> This supplemental letter provides additional comments on a different securities law restriction – this one under Rule 180 – that also involves CITs and retirement plans that, like Keoghs, cover self-employed individuals.

A key Administration retirement policy initiative has been to encourage the formation of multiple employer plans (“MEPs”) and to thereby expand the retirement savings opportunities available to individuals who are either self-employed or who work for small employers. The MEP initiative seeks to allow small employers to associate for purposes of achieving scale and making a single defined contribution retirement plan available to their joint workforces. In turn, the employees and self-employed individuals participating in a MEP could benefit from the investment and administrative efficiencies typically available to participants in plans offered by large employers. Last month, the MEP initiative received further impetus from Congress’ passage of the *Setting Every Community Up for Retirement Enhancement Act of 2019* (“SECURE”), which was signed into law on December 20, 2019 as part of the *Further Consolidated Appropriations Act of 2020*. The SECURE Act includes provisions allowing for

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<sup>1</sup> The Commission’s Rule 144A(a)(1)(i)(J) proposal is contained in Release No. 33-10734 (Dec. 18, 2019).

the formation of MEPs served by “Pooled Plan Providers” (such MEPs are referred to as “Pooled Employer Plans” or “PEPs”) beginning on January 1, 2021.

Rule 180 contains certain restrictions that effectively render a MEP ineligible to participate in a CIT, if the MEP includes one or more self-employed individuals. Such MEPs are therefore also ineligible to enjoy the cost-efficient investment opportunities available to plan investors through CIT adoption. These restrictions merit Staff attention and consideration as candidates for modernization. In our view, the retirement plan community would significantly benefit if Rule 180 were modernized to allow MEPs covering self-employed individuals to invest in CITs.<sup>2</sup>

Wilmington Trust is one of the nation’s leading providers of CITs and related investment management services. With more than \$59 billion in CIT assets under management or administration, Wilmington Trust maintains more than 300 distinct CIT funds. CITs available through Wilmington Trust cover 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.

### **Recent MEP/PEP Developments**

Under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), a retirement plan is required to be established and maintained by an “employer.” ERISA section 3(5) defines the term “employer” as –

“any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.”

The statute does not explain the meaning of the phrases acting “directly as an employer” or “indirectly in the interest of an employer, in relation to an employee benefit plan,” nor does it explain the scope of the term “group or association of employers.” Accordingly, a fair degree of legal uncertainty has long prevailed with respect to the circumstances under which employers could come together as a group or otherwise associate for purposes of offering a MEP.

On August 31, 2018, President Trump signed Executive Order 13847 directing the U.S. Department of Labor (“DOL”) to consider issuing regulations or other guidance that would make it easier for small and mid-size businesses, including those with non-traditional employment structures, to participate in MEPs.<sup>3</sup> DOL was further directed to consider policies to expand access to retirement plans for part-time workers, sole proprietors, working owners, and other “entrepreneurial workers with non-traditional employer-employee relationships,” including

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<sup>2</sup> We recognize that the comment period for the Concept Release closed on September 24, 2019. These supplemental comments are furnished on an informational basis. We appreciate the Staff’s consideration of this supplemental letter.

<sup>3</sup> 83 Fed. Reg. 45321 (Sept. 6, 2018)

potentially allowing them to participate in MEPs. In response to the President's order, on October 22, 2018, DOL issued a proposed regulation that would supersede prior guidance generally limiting MEP participation to employers who share a common nexus unrelated to the provision of employee benefits and to clarify the circumstances under which when a group or association of employers would be acting for an "employer" in relation to a MEP, as required by ERISA.<sup>4</sup>

On July 29, 2019, DOL released a final regulation ("Final Regulation") clarifying the circumstances under which "bona fide" groups or associations of employers and professional employer organizations may be permitted to sponsor single defined contribution MEPs.<sup>5</sup> The Final Regulation became effective on September 30, 2019. The SECURE Act includes provisions that amend ERISA and the Code to enable the formation of PEPs on and after January 1, 2021. That legislation facilitates the expansion of the MEP model beyond the limits of the Final Regulation.

### **SEC Rule 180**

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). CITs typically limit the categories of investors eligible to participate in the arrangement to the categories permitted under section 3(a)(2).

When Congress amended section 3(a)(2) of the '33 Act in 1970 to include an exemption for interests in CITs, it specifically carved out of the exemption plans covering self-employed individuals under Code section 401(c)(1) except to the extent the SEC, acting by rule and regulations or by order, should determine it would be necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the '33 Act to extend the scope of the exemption to include plans covering employees some or all of whom are employees within the meaning of section Code section 401(c)(1).

The SEC exercised its rulemaking authority in 1981 by adopting Rule 180. Rule 180 was intentionally drafted to limit the scope of its allowances for self-employed individuals to –

- plans covering employees of a "single employer" or of "interrelated partnerships," (as provided paragraph (a)(2) of the Rule) where
- such single employer or group of interrelated partnerships either meets a sophistication test (i.e., is a law firm, accounting firm, investment banking firm, or investment advisory firm that is engaged in business matters demonstrating that the employer is capable of adequately representing its own interest and those of its employees) or, in all other cases,

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<sup>4</sup> 83 Fed. Reg. 53534 (Oct. 23, 2018)

<sup>5</sup> 84 Fed. Reg. 37508 (July 31, 2019)

has received independent advice, prior to the adoption of the plan, from a person who is able to adequately represent the interests of the employer and its employees (as provided by paragraph (a)(3) of the Rule).

### **Need for Modernization**

MEPs, by definition, cover employees of multiple employers. MEPs may also cover self-employed individuals within the meaning of Code section 401(c)(1). Unfortunately, the restrictions of Rule 180, as detailed above, effectively foreclose the availability of the '33 Act's section 3(a)(2) exception to any such MEP.

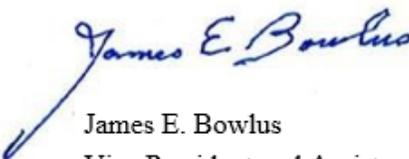
The history of Rule 180 suggests that the SEC included these restrictions to protect classes of self-employed retirement plan investors considered likely to be unsophisticated from the risks associated with investing in unregistered securities. Under the Final Regulation, formal governance rules apply to the operation of a bona fide group or association MEP and all other retirement MEPs would be sponsored by a PEO. Both types of MEPs are be as capable of evaluating the risks and opportunities associated with investing in CITs as other retirement plan types covered by the section 3(a)(2) exception that do not include self-employed individuals. Moreover, both types of MEPs frequently engage and rely upon the advice or management skill of professional investment advisers for purposes of selecting and monitoring MEP investments.

Similarly, a PEP requires the services of a Pooled Plan Provider (e.g., a bank, insurance company or other financial institution) that will be required to register with both DOL and the Treasury Department and that will be subject to regulation by both agencies.

When applied to such MEPs and PEPs, the restrictions of Rule 180 operate in a manner that does not protect persons who are self-employed, but interfere with and impede their eligibility to participate in MEP/PEP arrangements that invest in CITs. For these reasons, we urge the Commission to adopt amendments to Rule 180 clarifying that the restrictions of paragraphs (a)(2) and (3) are inapplicable to MEPs and PEPs.

We appreciate this opportunity to offer these comments. Please feel free to contact the undersigned with any questions.

Sincerely,



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