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Kirkland Alert

SEC Staff Expands Co-Investment Relief to Registered Open-End Funds

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On April 27, 2026, the staff of the SEC's Division of Investment Management issued a [no-action letter](#) (Letter), in response to a [request](#) by a registered investment adviser (the Adviser), confirming that it would not recommend enforcement action if a mutual fund or ETF (open-end fund) relies on an existing co-investment exemptive order (Order) subject to compliance with the Order's terms and conditions.¹

In the Letter, the SEC staff also confirmed that it would not recommend enforcement action if a registered fund or BDC relying on the Order satisfies the "required majority" standard under the relevant conditions of the Order through a committee of its board of directors.

The SEC staff's expansion of co-investment relief to open-end funds is the latest in a series of steps by the SEC to facilitate the retailization of private markets. This *Alert* summarizes the SEC staff's positions and practical considerations for advisers of open-end funds, and their boards, in assessing reliance on the conditions of the Letter.

Expansion of Relief to Open-End Funds

For over a decade, the SEC has granted numerous and varied co-investment exemptive orders to permit registered closed-end funds and BDCs to participate in co-investment transactions with certain affiliated entities that otherwise would be prohibited by Sections 17(d) and 57(a)(4) of the 1940 Act and Rule 17d-1 thereunder. Prior orders, however, did not extend such relief to open-end funds.

In the incoming request, the Adviser argued that extending its Order to open-end funds would expand investment opportunities for those funds and their shareholders without raising new concerns, because the Order's protective conditions (e.g., the

same-terms requirements, allocation policies and board oversight) would apply to open-end funds in the same manner applied to registered closed-end fund and BDC applicants. The Adviser also noted a built-in constraint: open-end funds are subject to Rule 22e-4 under the 1940 Act, which restricts illiquid investments to 15% of a fund's net assets, effectively limiting the extent to which an open-end fund could participate in co-investment transactions necessitating exemptive relief.

In the Letter, the SEC staff stated that it would not recommend enforcement action to the SEC under Section 17(d) and Rule 17d-1 of the 1940 Act if an open-end fund with a primary investment adviser or sub-adviser that is an "Adviser" relies on an Order as a "Regulated Fund" (as those terms are defined in the Order), subject to compliance with the terms and conditions thereof.

Importantly, the SEC staff's no-action position is limited to co-investment exemptive orders that impose conditions substantially identical to those in *FS Credit Opportunities Corp., et al.* (Investment Company Act Release Nos. 35520 and 35561) and were published for public notice by the SEC before May 4, 2026.

Board Committee as "Required Majority"

Co-investment exemptive orders include a number of conditions designed to ensure that participation by a registered closed-end fund or BDC in any co-investment transaction is not on a basis different from or less advantageous than that of other participants. In particular, Conditions 2 and 6(b) impose certain board-approval requirements: before a registered closed-end fund or BDC may acquire a security in a company where an affiliated fund already holds a position, or dispose of a security acquired through a co-investment, a regulated fund's "required majority" must approve the transaction unless the regulated fund's participation is in approximate proportion to its then-current holdings or the disposition is a sale of a tradable security.² The Adviser represented that this full-board approval requirement is particularly burdensome for registered funds (both closed-end and open-end) and BDCs that have comparatively larger boards, as the timing for transactions may not reasonably align with seeking and obtaining approval of a "required majority" of the full board.

In the Letter, the SEC staff agreed that a registered fund or BDC may satisfy the "required majority" standard through a board committee rather than the full board, subject to three requirements. First, the committee must consist of at least three directors who satisfy the "required majority" definition. Second, a majority of the committee members must approve each proposed co-investment transaction. Third,

the committee must report to the full board at its next regular meeting on all co-investment transactions it considered – including its decision on each transaction – and certain records detailing the committee’s findings and the materials on which those findings must be maintained.

Practical Implications

As an initial matter, open-end funds considering reliance on the Letter will need to confirm that the applicable existing co-investment exemptive relief meets the standards outlined by the SEC staff. For complexes that either (i) have older versions of co-investment exemptive relief or (ii) do not yet have co-investment exemptive relief, new co-investment applications and amendments to applications filed on or after May 4, 2026, seeking to include open-end funds should expressly include those funds in the application, both as applicants and within the definition of “Regulated Fund.”

Open-end funds with qualifying co-investment exemptive relief will need to satisfy all existing terms and conditions of the applicable order, including those designed for registered closed-end funds and BDCs. As such, prior to an open-end fund’s participation in a co-investment program, the fund’s board, including a “required majority” of directors, must (i) review the adviser’s co-investment policies to ensure that they are reasonably designed to prevent the fund from being disadvantaged by participation in the co-investment program, and (ii) approve fund-level policies and procedures that are reasonably designed to ensure compliance with the terms of the applicable order.

Advisers to open-end funds also should review trade allocation procedures and valuation procedures to consider possible changes to facilitate reliance on the Letter. For fund boards looking to rely on the committee framework, those boards will need to establish properly constituted committees with committee charters that satisfy the composition, voting and reporting standards described above.

Finally, fund offering documents should be updated to disclose the fund’s participation in the co-investment program, along with potential benefits and associated conflicts and risks, and any changes to the board governance framework.

Overall, for fund complexes with qualifying orders, the Letter opens a practical path for open-end funds to participate in the complex’s co-investment program and for boards to delegate approvals to qualifying committees.

Please contact the investment funds attorneys with whom you regularly work with any questions regarding this matter.

1. The relief granted in the Letter with respect to open-end funds is consistent with recommendations made by the Investment Company Institute in a [comment letter](#) submitted to the SEC in January 2026. ↪

2. "Required Majority" is defined in Section 57(o) of the 1940 Act to mean a majority of directors who (a) have no financial interest in the transaction and (b) are not "interested persons" of the fund. Although Section 57(o) applies by its terms only to BDCs, the Order extends the same standard to registered closed-end funds as if they were BDCs. ↪

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