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SEC Staff Expands Co-Investment Relief to Open-End Funds and Permits Board Committee Approval Framework

May 20, 2026

On April 27, 2026, the staff of the SEC's Division of Investment Management (the "Staff") issued a no-action letter (the "Letter") that expands the availability of co-investment relief under the Investment Company Act of 1940 (the "1940 Act") and potentially benefits sponsors seeking to offer investors private markets exposure through mutual funds and ETFs. The letter permits registered open-end funds ("Open-End Funds") to participate in negotiated co-investment transactions with affiliates pursuant to certain existing co-investment exemptive orders and allows regulated funds to satisfy certain "Required Majority" approval obligations through a committee of at least three independent directors rather than the full board.

Background

Sections 17(d) and 57(a)(4) of the 1940 Act, together with Rule 17d-1, generally prohibit affiliated investment vehicles from participating in joint transactions absent exemptive relief from the SEC. In April 2025, the SEC issued a "simplified" co-investment exemptive order (each a "Simplified Order") permitting business development companies ("BDCs") and registered closed-end funds ("Closed-End Funds") to participate in negotiated co-investment transactions alongside affiliated private funds and accounts, subject to conditions designed to mitigate conflicts of interest. Multiple BDCs and Closed-End Funds have been granted co-investment orders based on the Simplified Order model, which has improved the co-investment process for BDCs and Closed-End funds. However, the Simplified Order model did not include Open-End Funds, such as mutual funds and ETFs.

Relief for Open-End Funds

The Staff indicated in the Letter that it would not recommend enforcement action if an Open-End Fund whose primary investment adviser or sub-adviser is an "Adviser" under a Simplified Order, co-invests as if it were a "Regulated Fund" under the Simplified Order, provided the Open-End Fund complies with the applicable terms and conditions of the Simplified Order.

Since shareholders of Open-End Funds may redeem their shares upon demand, Open-End Funds participating in a co-investment under the Simplified Order would still need to comply with liquidity rule (Rule 22e-4) under the 1940 Act applicable to Open-End Funds. Thus, an Open-End Fund would not be able to participate in co-investment transactions involving illiquid securities if such participation would cause the Open-End Fund to exceed the 15% illiquid investment threshold in such rule.

Committee-Based "Required Majority" Approvals

The Letter also addresses operational challenges associated with obtaining full board approvals for time-sensitive co-investment transactions. Under the Simplified Order model, certain transactions require approval by a "Required Majority," as defined in Section 57(o) of the 1940 Act, which can create logistical difficulties, particularly for "Regulated Funds" with larger boards.

The Staff concurred in the Letter that a "Regulated Fund" may satisfy the "Required Majority" requirement through a committee:

- consisting of at least three directors;
- each of whom is disinterested and has no financial interest in the transaction; and
- a majority of whom approve the proposed co-investment transaction.

The committee must also report its determinations to the full board at the next regular board meeting. This aspect of the relief may significantly streamline transaction execution timelines for sponsors managing multiple BDCs, Closed-End Funds, and Open-End Funds with varying board sizes.

Importantly, the relief in the Letter is limited to managers relying on the Simplified Order model or that has a notice for a Simplified Order that was issued before May 4, 2026. Therefore, a manager with an older co-investment exemptive order would not be able to incorporate the benefits of the Letter into its platform. Moreover, applicants who are in the process of applying for a Simplified Order should include language in the application to address the changes provided in the Letter.

Practical Implications

The Letter is likely to accelerate the continued expansion of availability to retail investors of private market strategies through registered fund structures.

For asset managers, the relief may:

- expand flexibility in allocating private investment opportunities across affiliated platforms;
- facilitate the launch of semi-liquid and open-end private markets products;
- enhance retail investor access to private assets; and
- reduce governance friction associated with co-investment approvals.

At the same time, sponsors should continue to evaluate:

- liquidity risk management considerations for open-end funds;
- valuation and operational complexities associated with private investments;
- board governance procedures and committee composition; and
- whether existing co-investment orders fall within the scope of the Letter.

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