WILLKIE

CLIENT ALERT

SEC Staff Extends Principles-Based Co-Investment Relief to Open-End Funds

April 30, 2026

AUTHORS

Benjamin B. Allensworth | Michael A. DeNiro | Elliot J. Gluck | Chip Lunde
Margery K. Neale | Jennifer R. Porter | Jay Spinola

The Staff of the Division of Investment Management of the Securities and Exchange Commission issued a no-action letter on April 27, 2026, that expands the types of "Regulated Funds" that may rely on certain existing co-investment exemptive orders to include registered open-end funds, in addition to registered closed-end funds and business development companies, which were already covered by the orders.[1] The letter also permits Regulated Fund boards to delegate certain approval responsibilities under the co-investment orders to a board committee.[2]

[1] Letter from the Staff of the SEC Division of Investment Management to J.P. Morgan Investment Management, Inc. (Apr. 27, 2026), *available here*.

[2] The relief granted in the no-action letter is consistent with recommendations made by the Investment Company Institute in a comment letter submitted to the SEC in January 2026. *See* Letter from ICI to Brian Daly, Director, SEC Division of Investment Management (Jan. 26, 2026), *available here*.

The no-action relief is limited to co-investment exemptive orders that impose conditions substantially identical to those included in the co-investment order granted to FS Credit Opportunities Corp. in April 2025 (the "FS-style conditions") and that have been published for public notice by the SEC prior to May 4, 2026.

1. Background

The SEC has granted numerous co-investment exemptive orders with the FS-style conditions to permit registered closed-end funds and BDCs (generally defined in the orders as "Regulated Funds") to participate in co-investment transactions with certain affiliated entities that would otherwise be prohibited by Sections 17(d) and 57(a)(4) of the Investment Company Act of 1940, as amended, and Rule 17d-1 thereunder. These orders do not extend such relief to registered open-end funds. The orders include a number of conditions designed to ensure that participation by a Regulated Fund in any co-investment transaction would not be on a basis different from or less advantageous than that of other participants.

The orders require that, in connection with certain transactions, when a Regulated Fund seeks to acquire a security in a co-investment transaction where an "Affiliated Entity" (for example, a private fund advised by the Regulated Fund's adviser)[3] has an existing interest, a "Required Majority" of the Regulated Fund[4] must determine that the terms of the transaction are reasonable and fair to shareholders of the Regulated Fund and that the proposed transaction is consistent with the interests of shareholders and the Regulated Fund's policies (Condition 2 of the orders). A similar approval requirement applies to certain dispositions of securities acquired by a Regulated Fund in a co-investment transaction under the orders (Condition 6(b) of the orders).

2. Open-End Fund Reliance on Co-Investment Orders

The no-action letter permits a registered open-end fund whose primary investment adviser or sub-adviser is an "Adviser" (as defined in the relevant order with FS-style conditions) to rely on the adviser's existing co-investment order as a Regulated Fund, subject to compliance with the terms and conditions of the order.

The letter requesting no-action relief asserted that open-end fund participation would not raise novel concerns under Section 17(d) or Rule 17d-1 as compared to Regulated Funds already covered by the orders. While acknowledging that open-end funds, unlike closed-end funds, must redeem shares on demand, the incoming letter noted that open-end funds are subject to Rule 22e-4 under the Investment Company Act, which would prevent an open-end fund from participating in a co-investment transaction involving illiquid securities if doing so would cause the fund to

---

[3] "Affiliated Entity" is defined in the orders to include, among other types of entities, proprietary accounts of a Regulated Fund's adviser and any entity that would be an investment company but for Section 3(c) of the Investment Company Act or Rule 3a-7 thereunder and whose investment adviser is the Regulated Fund's adviser.

[4] A "Required Majority" means both a majority of a Regulated Fund's directors who have no financial interest in the transaction and a majority of such directors who are not "interested persons" of the Regulated Fund. *See* Section 57(o) of the Investment Company Act.

exceed Rule 22e-4's limit on illiquid investments.[5] The Staff cited these and other policy arguments from the request letter in its no-action letter.

3. Board Committee as "Required Majority"

The no-action letter also grants Regulated Fund boards flexibility to delegate Required Majority responsibilities under Conditions 2 and 6(b) of the orders to a board committee. The letter requesting no-action relief noted that many registered open-end and closed-end funds (and some BDCs) have relatively larger boards than a typical BDC and that obtaining Required Majority approval creates logistical challenges given the accelerated timeline of many co-investment transactions.

The no-action relief permitting delegation to a board committee is subject to the following conditions:

- The committee must consist of at least three directors who (i) have no financial interest in the relevant co-investment transaction and (ii) are not "interested persons" of the Regulated Fund;
- A majority of such committee members must vote to approve each proposed co-investment transaction; and
- The committee must report to the full board at its next regular meeting certain information about each co-investment transaction considered by the committee.

4. Conclusion

The expansion of co-investment relief under exemptive orders to include registered open-end funds creates potential opportunities for these funds to participate in their advisers' co-investment programs and gain access to alternative investments, while maintaining the protections of the open-end fund structure, such as daily redemptions and limits on illiquid investments. Advisers considering adding open-end funds to their co-investment programs will need to evaluate the impact on their existing allocation policies and procedures and board governance frameworks. In addition, as noted above, the no-action relief is not available if a fund complex or its adviser does not already have a co-investment order with FS-style conditions (or has not had an application for such exemptive relief noticed by the SEC prior to May 4, 2026). However, based on the Staff's position in the no-action letter, it appears the Staff will consider applications for co-investment orders that include open-end funds going forward.

[5] Rule 22e-4 prohibits registered open-end funds (excluding money market funds) from acquiring any illiquid investment if, immediately after the acquisition, the fund would have invested more than 15% of its net assets in illiquid investments.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Benjamin B. Allensworth	**Michael A. DeNiro**	**Elliot J. Gluck**	**Chip Lunde**
202 303 1273 ballensworth@willkie.com	212 728 8147 mdeniro@willkie.com	212 728 8138 egluck@willkie.com	202 303 1018 clunde@willkie.com
Margery K. Neale	**Jennifer R. Porter**	**Jay Spinola**	
212 728 8297 mneale@willkie.com	202 303 1223 jporter@willkie.com	212 728 8970 jspinola@willkie.com	

WILLKIE

BRUSSELS CHICAGO DALLAS FRANKFURT HAMBURG HOUSTON LONDON LOS ANGELES
MILAN MUNICH NEW YORK PALO ALTO PARIS ROME SAN FRANCISCO WASHINGTON