Simpson
Thacher

Registered Funds Alert

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The latest edition of Simpson Thacher's Registered Funds Alert discusses recent developments in the registered funds industry, including: our views in response to an SEC call for comment on expanding investor access to private company investments; a closer look at a recent development in determining whether a company is subject to the 1940 Act; and a summary and analysis of industry comment letters on the SEC's rule proposal that would modify the registration, communications and offering rules for BDCs and registered closed-end investment companies.

In June 2019, the SEC issued a long-awaited concept release seeking comments "on possible ways to simplify, harmonize, and improve the exempt offering framework to promote capital formation and expand investment opportunities while maintaining appropriate investor protections." Notably, one of the stated goals of the concept release was to "examine whether [the SEC] should take steps to expand issuers' ability to raise capital through pooled investment funds, and whether retail investors should be allowed greater exposure to growth-stage issuers through pooled investment funds in light of the potential advantages of investing through such funds."

As previewed in our January 2019 Alert, we believe that registered investment companies and BDCs may be one of the best ways to increase investor access to investment strategies that invest in private and growth-stage issuers, as significant investor protections are built in to the foundation of the existing regulatory framework for these types of fund structures. We submitted comments on the concept release on September 24, 2019, focusing on what we believe to be the key regulatory barriers that discourage sponsors from offering private equity, private credit and other private markets investment strategies to a broader group of investors. Our comment letter is reproduced below.

* * *

Dear Secretary Countryman:

We welcome the opportunity to comment on the questions raised by the U.S. Securities and Exchange Commission (the "Commission") with respect to ways to simplify, harmonize and improve the exempt offering framework to promote capital formation and expand investment opportunities for retail investors while maintaining appropriate investor protections. Simpson Thacher & Bartlett LLP has significant experience representing investment advisory firms, asset managers and other financial institutions that sponsor and advise pooled investment vehicles, including registered investment companies and business development companies (collectively, "regulated funds") and private funds that operate pursuant to an exemption or exclusion from the definition of investment company under the Investment Company Act of 1940, as amended (the "1940 Act"). We submit the following comments on our own behalf and the views contained herein do not necessarily reflect the views of any of our clients.

Overview

We frequently assist alternative asset managers in their development of regulated fund products, from the initial concept phase to negotiations with investors and intermediaries and the ultimate launch of a fund. Many of these alternative asset managers specialize in the types of investment strategies that the Commission in the Concept Release considers making more widely available to investors. These strategies include private equity, private credit, infrastructure and real estate strategies (generally referred to herein as private markets strategies). While there are a variety of reasons that a regulated fund product ultimately may not launch, in our view restrictions based in the 1940 Act and the Investment Advisers Act of 1940, as amended (the "Advisers Act"), that were not designed with private markets strategies in mind too frequently stifle the efforts of our clients to offer these strategies to a broader range of investors through regulated funds.

As Chairman Jay Clayton has suggested, "appropriately structured funds" are one way to "facilitate Main Street investor access to private investments in a manner that ensures incentive alignment with professional investors—similar to our public markets—and otherwise provides appropriate investor protections."[1] We agree, and in this comment letter we wish to share with the Commission our experience regarding the regulatory hurdles that most frequently prevent managers from offering more investors access to investment strategies that are readily available to institutional investors.

The illiquid nature of the investments inherent to most private markets strategies requires any regulated fund pursuing such a strategy to be structured as a closed-end fund. Accordingly, there are two primary structures for regulated funds to offer more investors access to these types of investment strategies: (a) closed-end funds of funds, which invest indirectly through private funds (i.e., funds of private funds); and (b) closed-end funds, or BDCs, each of which invest directly in private markets. We recommend that the Commission

1. Remarks to the Economic Club of New York, (September 9, 2019), https://www.sec.gov/news/speech/speech-clayton-2019-09-09.

consider six regulatory reforms to remove several key impediments that discourage alternative asset managers from offering their strategies to a broader audience:

With respect to closed-end funds of private funds, we recommend that the Commission:

(i) allow regulated funds to invest in affiliated private funds;

(ii) allow regulated funds of private funds to list on stock exchanges;

With respect to closed-end funds and BDCs that invest directly in private markets strategies, we recommend that the Commission:

(iii) allow regulated funds to incentivize managers to produce strong investment performance for the benefit of investors;

(iv) permit regulated funds to engage in transactions with portfolio companies that may, subsequent to an initial transaction, be deemed to be a portfolio affiliate of an affiliated private fund;

(v) permit regulated funds additional flexibility in publicly reporting the values of investments in private issuers; and

(vi) permit tender offer funds to use the interval fund repurchase process and rely on rules that permit automatic effectiveness of registration statement amendments.

Recommendations to Promote Funds of Private Funds

Allow Regulated Funds to Invest in Affiliated Private Funds

The inability of a regulated fund to invest in affiliated private funds may be the single most significant barrier to offering more investors access to private equity strategies through regulated funds.[2] The restrictions on principal transactions between a regulated fund and its affiliates in Sections 17 and 57 of the 1940 Act generally prohibit a private fund from selling its securities to an affiliated regulated fund. As a result, regulated funds of private equity funds are only permitted to invest in private funds managed by unaffiliated sponsors. Regulated funds of affiliated private funds may offer investors certain benefits unavailable to a fund that invests in unaffiliated private funds, including better alignment of interests between management of the regulated fund and underlying private funds and enhanced visibility into the value of a position in a private fund. Additionally, a regulated fund that can invest in affiliated funds may be better from an investor's perspective compared to a regulated fund that directly pursues a private markets strategy by co-investing alongside affiliated private funds. Investors in private funds frequently negotiate limitations on the ability of a sponsor to allocate opportunities to other funds. Regulated funds that can invest in affiliated private funds would not be disadvantaged by such limitations.

Regulated funds are already permitted to invest in affiliated mutual funds under Section 12(d)(1)(G) of the 1940 Act. We appreciate that the Staff historically may have had different conflict of interest concerns when the underlying funds are private funds. However, we believe the Commission could impose reasonable restrictions on a fund of affiliated private funds structure to mitigate these concerns. For example, below are several potential limitations that would mitigate the risk of overreaching by a manager:[3]

(i) To avoid impermissible layering of fees, the regulated fund's board of directors will only approve fund-level fees for services that are in addition to and not duplicative of services at the underlying affiliated private fund level;

(ii) To avoid the concern that retail investor money will be used to "seed" funds with untested or potentially unattractive strategies, the regulated fund cannot own more than 25% of any affiliated closed-end private funds;

(iii) To address similar seeding concerns, the regulated fund cannot own more than 25% of any affiliated open-end private funds and will be restricted from seeding affiliated open-end private funds;

(iv) To avoid being deemed to be formed for the purpose of investing in a particular private fund, the regulated fund will not invest more than 40% of its assets in a single affiliated private fund;

(v) To avoid complex control structures, the regulated fund will vote its interests in any affiliated private fund in the same proportion as the vote of all other shareholders in a particular affiliated private fund or seek instructions from its shareholders; and

2. *See* Concept Release at 190-191, Question 120.

3. *See* Concept Release at 188, Question 115.

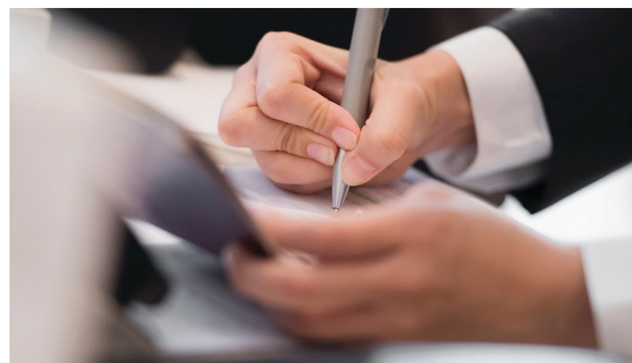
(vi) To ensure that the terms of the affiliated transaction with the affiliated private fund are not disadvantageous to the regulated fund, the regulated fund will receive substantially similar treatment with respect to all investments in affiliated private funds as the treatment received by similar investors.

If the Commission were to permit regulated funds to invest in affiliated private funds, with appropriate limitations, such as those set forth above, it would remove one of the key deterrents that prevents alternative asset managers from making their strategies available to more investors.

Allow Regulated Funds of Private Funds to List on Stock Exchanges

The staff of the Commission's Division of Investment Management (the "Staff") has taken a position in the disclosure review process and related comment letters[4] that a regulated fund that invests a significant portion (more than 15%) of its assets in private funds can only be offered to accredited investors.[5] To our knowledge, the Staff has never fully explained the legal or policy basis for its position, and there is no statute, rule or regulation imposing this limitation.

We understand that initial and continuing listing standards for major national securities exchanges do not restrict regulated funds of private funds from listing and trading on exchanges, as they are generally agnostic as to a listed fund's investment strategy.[6] Therefore, the only reason regulated funds of private funds are unable to list on an exchange is the Staff's position that limits these funds to accredited investors. This deprives shareholders of a regulated fund of private funds of one of the primary liquidity options that would normally exist for a closed-end fund, and readily available, frequent liquidity should be viewed as an enhancement to investor protection.[7] Currently, because funds of private funds are unable to list on a stock exchange, they are forced to find alternative means to provide liquidity to investors, typically through periodic share repurchases. This places artificial constraints on a closed-end fund's ability to pursue an investment strategy focused on less liquid investments, as managers must source liquidity for investors through sales of portfolio holdings, which can disadvantage investors and would be unnecessary for listed funds whose investors can trade shares on an exchange. We urge the Staff to revise its position and permit funds of private funds to be accessible to all investors, and allow such funds to list on national securities exchanges.



Recommendations to Promote Funds That Invest Directly in Private Markets Strategies

Allow Regulated Funds to Incentivize Managers to Produce Strong Investment Performance for the Benefit of Investors

Section 205(a)(1) of the Advisers Act generally prohibits a manager from receiving compensation based on a share of capital gains upon, or capital appreciation of, the assets of a registered closed-end fund unless the offering of the fund is limited to "qualified clients."[8] BDCs, on the other hand, are permitted to pay a manager an incentive fee on capital gains without the qualified client limitation.

The 1940 Act's restrictions on a BDC's investment strategy prevent some funds from using a BDC structure. For example, a BDC must invest at least 70% of its assets in U.S. issuers, so a global private equity strategy would not fit a BDC structure.[9] In addition, that 70% requirement also excludes investments in investment companies (or certain exempt investment companies), and thus indirect equity investments through co-investments offered by third-party sponsors may also be ineligible when made through funds created for the benefit of deal-specific co-investors.

4. *See, e.g.*, Sierra Total Return Fund, SEC Comment Letter (Mar. 11, 2016); Wildermuth Endowment Strategy Fund, SEC Comment Letter (Oct. 11, 2013); Resource Real Estate Diversified Income Fund, SEC Comment Letter (Oct. 19, 2012).

5. *See* Concept Release at 188, Question 114.

6. We note that the Committee on Capital Markets Regulation also has submitted comments agreeing with this analysis.

7. *See* Concept Release at 192-193, Questions 128-129.

8. The qualified client standard is a higher threshold than the accredited investor standard, requiring a natural person to have a net worth of at least $2.1 million (excluding the value of a primary residence).

9. *See* 15 U.S.C. 80a-54.

The Commission should consider adopting an exemptive rule that would permit registered closed-end funds to pay a similar incentive fee on capital gains.[10] In our view, the justification for treating BDCs and closed-end funds differently in this respect has eroded over time. Congress adopted the BDC structure in 1980 to promote investment in private U.S. issuers by facilitating venture capital-type strategies where a fund's gains are based on capital appreciation.[11] However, the BDC structure has not led to widespread investment in equity strategies, for the reasons noted above and others (such as the lack of exemption from state securities laws for unlisted BDCs, unlike for closed-end funds). Closed-end funds, because they are more flexible,

are more likely vehicles for investments in private markets than BDCs. Thus, nearly 40 years later, as policymakers find themselves again looking for ways to facilitate investments in private companies, we suggest that fee parity between registered closed-end funds BDCs is one way to facilitate such investment. The Commission has significant discretion under Section 205(e) of the Advisers Act to adopt exemptions to Section 205(a)(1), and we believe it would be appropriate to permit registered closed-end investment companies that pursue private markets strategies to pay their managers an incentive fee based on capital gains.

Fulcrum fees, permitted for registered investment companies under Section 205(b)(2) of the Advisers Act, provide a poor substitute for traditional incentive fees. The mandated symmetry of fulcrum fees, where a base fee must increase or decrease in equal increments based on performance, results in a manager being paid a relatively high fee for poor performance. A traditional incentive fee provides a more market-tested (and investor friendly) approach and incentivizes a manager to produce strong long-term returns. Decades of market practice in the private fund space have resulted in sophisticated institutional investors negotiating standard concepts that are frequently incorporated into BDC incentive fees. Two features in particular, "hurdles" and "lookbacks," are common devices in BDC performance fee structures that are derived from similar concepts used by private funds to create incentive alignment between a sponsor and investors, and could be implemented for closed-end funds that invest in private markets.

A hurdle helps to ensure that no performance fee is paid unless a fund beats a specified performance threshold for a specific period. Many BDCs have hurdles that are based on longer term lookback periods, sometimes going back to the fund's inception. This essentially means that if the fund fails to achieve strong performance continually, the fund will have to make up for any underperformance during the lookback period before the manager will be entitled to receive additional incentive fees. The hurdle and lookback structure is a significant deterrent to speculative short-term risk taking by a manager, and effectively mitigates the investor protection concerns that a fulcrum fee structure was designed to address. We believe that a traditional incentive fee structure offers benefits to both investors and managers when compared to fulcrum fees, and urge the Commission to allow closed-end investment companies to adopt fee structures similar to BDCs.

"We believe that a traditional incentive fee structure offers benefits to both investors and managers when compared to fulcrum fees, and urge the Commission to allow closed-end investment companies to adopt fee structures similar to BDCs."

Permit Regulated Funds to Engage in Transactions With Portfolio Companies That May, Subsequent to an Initial Transaction, Be Deemed to Be a Portfolio Affiliate of an Affiliated Private Fund

Regulated funds pursuing a direct private equity strategy face two affiliated transaction issues under Sections 17 and 57 of the 1940 Act. First, these funds often plan to co-invest alongside a manager's affiliated private funds, which generally would be prohibited under the 1940 Act's proscription on an affiliated person of a regulated fund, and affiliated

10. *See* Concept Release at 191, Question 123.

11. *See* H.R. Rep No. 96-1341, at 19 ("[the bill] was designed to provide exemptions . . . for certain qualified venture capital companies in certain circumstances."), and at 27 (1980) (". . . registered investment advisers to business development companies would in certain instances be permitted to receive 'performance fees,' geared to appreciation of the companies' portfolios."); S. Rep No. 96-958, at 42 (1980) (noting that performance fees for BDC managers are subject to scrutiny under Section 36(b) of the 1940 Act).

persons of such persons, acting jointly with the fund. Fortunately, the Commission has streamlined the co-investment exemptive relief application process in recent years, removing co-investments as a major gating item in the product development process. Co-investment exemptive orders still take months to receive, and the conditions historically imposed on managers create a significant administrative burden, but the Commission's flexibility in these exemptive orders has removed what previously was the single largest gating item to pursuing a private markets regulated fund.[12]

A second 1940 Act affiliated transaction restriction, however, will also need to be addressed to encourage investment in private markets by regulated funds. In addition to joint transactions with affiliates, Sections 17 and 57 of the 1940 Act prohibit principal transactions between a regulated fund and its first- and second-tier affiliated persons. While co-investment exemptive relief may permit a regulated fund to initially make a co-investment with affiliated funds, there currently is no explicit relief that allows a regulated fund to engage in subsequent transactions with a portfolio company that (by virtue of the initial co-investment) became an affiliated person of an affiliated private fund. Rule 17a-6 permits two affiliated regulated funds to transact with a jointly-affiliated portfolio company but this exemption may not be available if an affiliated private fund is involved. We recommend that the Commission either amend Rule 17a-6 to fix this disparity, authorize the Staff to incorporate similar relief into co-investment exemptive orders or to issue similar interpretive guidance, or confirm that such relief is implicit in existing co-investment orders.

Permit Regulated Funds Additional Flexibility in Publicly Reporting the Values of Investments in Private Issuers[13]

In addition to representing alternative asset managers, we have significant experience representing private operating companies who have considered accepting capital from regulated funds. From the perspective of private operating companies, the requirement that a regulated fund must publicly report the value of its investment in each portfolio company makes an investment by a regulated fund unattractive.[14] To facilitate regulated fund investment in private issuers, we believe the Commission should consider narrowly tailored exceptions to reporting individual portfolio values in private portfolio companies. For example, we recommend that a regulated fund be permitted to report an aggregate value for small positions in multiple private companies, such as those where the regulated fund and its affiliates hold less than 5% of the issuer's equity securities. This would address a particular concern of private issuers that the public may see a regulated fund report a valuation that differs from the private issuer's own valuation, even though the regulated fund, as a minority investor, may be missing critical information about the issuer's business. Alternatively, the Commission could consider permitting a regulated fund to publish the private issuer's own valuation alongside the fund's reported value, or the ability for the private issuer to note its disagreement with the valuation. In the event a private issuer disagrees with the fund's valuation, this would provide private issuers with a mechanism to attempt to correct the public record regarding the issuer's valuation. We encourage the Commission to seek public comment on potential other solutions to this limitation on the attractiveness of regulated fund investment in private markets, from the perspective of the private operating companies.

Permit Tender Offer Funds to Use the Interval Fund Repurchase Process and Rely on Rules That Permit Automatic Effectiveness of Registration Statement Amendments

Tender offer funds have more flexibility than interval funds to determine the timing and extent of repurchases, but must adhere to tender offer rules under the Securities Exchange Act of 1934 while interval funds have a streamlined process under Rule 23c-3 of the 1940 Act.[15] This added flexibility has led funds that pursue a private markets strategy to choose the tender offer fund structure, but the inefficiencies of this structure create unnecessary costs for shareholders. The Commission should allow tender offer funds to utilize the same streamlined repurchase process that interval funds can use, thereby reducing costs for tender offer funds without sacrificing investor protections.[16] We recommend that the Commission allowing tender offer funds to rely on Rule 486 under the Securities Act of 1933, which allows interval funds to file certain updates to their registration statements that become effective automatically. Providing this parity with interval funds may also make a wholesale revision of Rule

12. We urge the Commission and its Staff to grant the new form of co-investment exemptive relief sought by FS Global Advisors, LLC (File No. 812-15016), as it would further significantly reduce unnecessary burdens on managers while retaining the core investor protections of previously granted co-investment orders.

13. *See* Concept Release at 187, Question 111.

14. *See generally*, Article 6 of Regulation S-X.

15. *See* Concept Release at 177.

16. *See* Concept Release at 191, Question 121.

23c-3 under the 1940 Act, applicable to interval funds, unnecessary.[17]

Conclusion

The Commission's openness to consider these important issues has the potential to lead to significant innovation in the regulated funds space and provide corresponding benefits to retail investors. We appreciate the opportunity to submit, and the Commission's consideration of, our comments.

Lyfting Our Spirits: The SEC's Reengagement With Section 3(b)(2) of the 1940 Act May Provide an Avenue for Non-Investment Companies to Obtain Clarity About Investment Company Act Status and Reduce Compliance Costs

The 1940 Act contains at least one conceptual oddity—a corporate issuer that clearly does not operate an investment company business can find itself unable to avoid falling within the 1940 Act's definition of an investment company. The result for that company is harsh. It would be subject to the full panoply of regulations imposed by the 1940 Act, including requirements and restrictions related to capital structure, corporate governance, borrowing, and transactions with affiliates. Also harsh are some of the steps such a company must take to avoid being deemed an investment company. Many companies are forced to go so far as restructuring and committing to significant restrictions on how they manage their business to avoid inadvertently being deemed an investment company subject to the 1940 Act.

We are happy to report that the SEC and its staff have recently reengaged with an existing provision in the 1940 Act that can provide some relief by allowing the SEC to affirmatively declare that a corporate issuer is not an investment company. Simpson Thacher recently assisted Lyft, Inc. in obtaining such exemptive relief in connection with its initial public offering earlier in 2019. The relief effectively provides Lyft with a permanent exemption from the 1940 Act and the restrictions it would impose on Lyft's business operations and cash management strategy. We think this underutilized tool could help more businesses put the 1940 Act behind them for good.

This Alert discusses issues that arise under the 1940 Act definition of the term "investment company," how the exemptive relief obtained by Lyft works and the prospects and potential benefits for other businesses that might seek similar relief. The SEC's recent renewed openness to these types of exemptive applications signals that there may be an opportunity for other interested applicants to resolve potential investment company status issues through the exemptive process, thereby removing artificial constraints on their businesses and clearing any doubt regarding its investment company status going forward.

The Definition of "Investment Company" Under the 1940 Act

The 1940 Act's regulations and restrictions generally only apply to a company that meets the definition of the term "investment company." The restrictions around investment companies are onerous and any business that does not purposefully intend to operate as a registered investment company should stridently seek to avoid falling within the term's definition.

Several common scenarios exemplify the problem.

Asset-Lite Operating Companies and the Objective Test

Section 3 of the 1940 Act contains a multi-part definition of the term "investment company," but the most relevant prong of that definition is often referred to as the "objective test." Conceptually, the objective test is most easily discussed by referring to "good assets," which do not count toward the limit of the investment company test, and "bad assets," which do count toward that limit. Certain intangible assets are discarded as not assets at all for these purposes.[18] If, on an unconsolidated basis, more than 40 percent of the value of a business's total assets (exclusive of any U.S. government securities and cash items) are bad assets, then the company is said to be a "*prima facie* investment company."

"Bad assets" under the objective test is a broad category and essentially includes every kind of security other than U.S. government securities and

17. *See* Concept Release at 188-191, Questions 116-120.

18. Under U.S. Generally Accepted Accounting Principles ("GAAP"), intangible assets, such as internally developed intellectual property and goodwill, generally are not treated as "assets" unless obtained through an acquisition, and therefore often do not appear on a company's financial statements.

securities issued by majority-owned subsidiaries. Investments commonly associated with investment funds, such as long-term debt investments and non-controlling equity stakes, would be considered bad assets. But so too are common cash management investments such as commercial paper and commercial bonds, even if they are only short-term investments, in many circumstances.

The objective test is meant to be an easy-to-apply, bright-line test, but it struggles to categorize many businesses appropriately today. The objective test presumes that more than 60% of a non-investment company's value will be made up of its property, equipment, inventories, receivables and other good assets. This presumption about a business' asset mix may have been an easy and effective way to distinguish investment companies from operating companies when the 1940 Act was written, but today the methodology presents significant challenges.

Increasingly, companies find that they are *prima facie* investment companies because the bulk of their value is actually intangible and intertwined with their internally developed intellectual property, or such other value that is intangible and therefore has no value as an "asset" for purposes of the 1940 Act test, even though the real-world value may be substantial (for example to a potential acquirer of the business).

The problem is further compounded when an asset-lite company has substantial cash on hand from a capital raise and that cash cannot be immediately deployed into the operations of the business. Cash is a "neutral asset" under the objective test. A company that holds substantial amounts of cash may find that a relatively small amount of bad asset investments may cause the company to fail the objective test.

Example: Imagine that a technology company with $60 million in tangible good assets raises $1 billion from investors to fund future operations. To simplify the exercise, assume this company has no debt. Under the objective test, if the company were then to invest more than $40 million into short-term corporate bonds, the company would exceed the 40% threshold for bad assets and inadvertently become an investment company. This is because all of the cash it raised would be excluded from the objective test calculations. The total value of the business, as per the 1940 Act, would be just the $60 million in good assets plus whatever bad assets it acquires after the fundraise, even though investors and management rationally perceive the value of the business to be much higher.

By investing just 4% of the $1 billion it raised into bad assets, the business would become subject to regulation as though it were a mutual fund. No reasonable investor would think that an investment in such a company is akin to investing in a mutual fund, but nevertheless the business would be a *prima facie* investment company in the eyes of the 1940 Act and need an exemption to avoid burdensome regulation.

Intercompany Loans Under the Objective Test

A company with a complicated structure that involves internal lending may also find the objective test challenging. Under the objective test, an intercompany loan is generally considered a bad asset for the entity that makes the loan and holds the note. Two notable exceptions include where the loan is made by a parent company to its direct or indirect majority-owned subsidiary (in which case the parent company may treat the intercompany loan as a good asset) or where the entity that makes the loan qualifies for the "finance subsidiary" exception under Rule 3a-5 of the 1940 Act.

For many businesses, parent, subsidiary and sister entities make and receive loans to and from one another regularly for cash flow, tax and other important business purposes, and the finance subsidiary exception is not nearly broad enough to capture this common practice. The finance subsidiary exception was created to ensure a very specific type of subsidiary that borrows money and relends it internally would not itself be, and would not cause its parent to be, deemed an investment company. On the one hand, the existence of the exception demonstrates that the Commission is aware of the challenge in applying the objective test. On the other, the exception is too narrow to capture

the vast majority of corporate subsidiaries. The result is that the general practice of intercompany lending, when not performed by one of these purpose-created finance subsidiaries, can very easily result in the lending entity being deemed an investment company. We can think of no policy rationale why the internal management of cash within an enterprise should result in a company being an investment company under the 1940 Act. Nevertheless, if more than 40% of a subsidiaries' assets are intercompany loans, it would be a *prima facie* investment company and need an exemption, because without one the entire value of that subsidiary would be a "bad asset" for purposes of applying the objective test to the parent.

"We can think of no policy rationale why the internal management of cash within an enterprise should result in a company being an investment company under the 1940 Act."

Businesses That Operate Through Certain Joint Ventures

Businesses that seek to operate through joint ventures also expose the objective test's limitations. Under the objective test, securities issued by majority-owned subsidiaries are treated as good assets, but the 1940 Act's definition of majority-owned subsidiaries is rigid and can be strained with respect to many joint ventures. The definition of majority-owned subsidiaries includes only those subsidiaries of which the parent owns 50% or more of the outstanding voting securities.

Many businesses do not need to consider the 1940 Act implications of entering a joint venture, but for some the joint venture will represent such a substantial part of their business that 1940 Act considerations become paramount. Joint ventures can be majority-owned subsidiaries with careful structuring and only two participants, but an unequal distribution of voting rights or more than two participants arguably prevents any joint venture from being treated as a majority-owned subsidiary. While there are still potential arguments to avoid treating such a joint venture as a bad asset, they are uncertain, and there is no good reason why a business that legitimately intends to enter into a joint venture should have to worry about potential regulation under the 1940 Act because of how the joint venture is structured.

This particular difficulty also impacts certain investment vehicles that should fall completely outside of the 1940 Act because they do not invest in securities. Many real estate investment trusts (**"REITs"**) invest only in interests in real property, and interests in real property are not securities under the 1940 Act. There is even a specific exemption for businesses that primarily invest in real estate in Section 3(c)(5)(C). The operation of the 1940 Act, however, also means that an issuer that wishes to make real estate investments through the use of a joint venture would potentially be unable to meet the requirements of that exception or otherwise pass the objective test. These results are counterintuitive. The same issuer could invest in the real estate directly (such as by jointly taking title to the property with other investors) and avoid being deemed an investment company, but cannot freely do so indirectly using a corporate structure (even if structuring the investment in this way is more beneficial from a business perspective) without falling under the scope of the 1940 Act. Accordingly, managers of REITs spend an inordinate amount of time structuring solutions to satisfy 1940 Act requirements and/or forego certain beneficial investment opportunities for the sole purpose of avoiding being deemed an investment company.

The Usual Approaches to Investment Company Status Issues

Many businesses currently work around or mitigate the investment company status problems described above without approaching the SEC directly, but those approaches come with drawbacks. In many instances, businesses choose to do nothing other than carefully monitor their balance sheets and limit their investments to avoid inadvertently becoming an investment company under the objective test. That solution is inefficient because it can dramatically limit the business' investment flexibility. The decision to have a conservative corporate treasury investment program or avoid a joint venture should be motivated by legitimate operational concerns, not fear of an overreaching regulation that was never intended to constrain non-investment company businesses.

Alternatively, a business may choose to take certain interpretive positions with respect to key portions of the 1940 Act to reason their way out of compliance issues. A *prima facie* investment company might may rely on Section 3(b)(1) of the 1940 Act, which allows the entity to self-determine that it is primarily engaged in a non-investment company business and therefore excluded from the definition of an investment company. There is, however, only a limited amount of applicable guidance available on Section 3(b)(1) and not every issue has been explored fully.

The inherent uncertainty of self-determination can pose some practical barriers to operations and expansion. When accessing capital markets or engaging in other significant corporate transactions such as mergers and acquisitions, businesses are usually required to represent that they are not required to register as an investment company under the 1940 Act. When a business chooses to rely on self-determination, it must also accept that counterparties may not accept its reasoned determination that it is not an investment company.

Lyft and Section 3(b)(2) of the 1940 Act

Section 3(b)(2) allows the SEC to unambiguously declare that an individual applicant is not an investment company, full stop. An applicant interested in that relief provides the SEC with relevant information about its business, activities and assets, and asks that the SEC declare that it is not an investment company. If the SEC agrees, it publicly issues an order finding that the applicant is primarily engaged in a business other than that of an investment company (a **"3(b)(2) Order"**).

In theory, obtaining a 3(b)(2) Order is an attractive alternative to the approaches discussed above, but in practice it has been rarely used. Despite the clear advantages of having a formal and permanent decision regarding investment company status, applying for a 3(b)(2) Order has been a rarely utilized option in recent years. Before 2011, dozens of 3(b)(2) Orders had been granted, including to household names such as Microsoft and Yahoo!. Since 2011, and until Lyft's 3(b)(2) Order, the SEC only issued four such Orders. Moreover, several well-known operating companies have applied for a 3(b)(2) Order without success. We believe that trend may be coming to an end.

Lyft successfully applied for and received a 3(b)(2) Order in a very short timeframe. Like many other technology companies with high valuations, the cash-heavy and asset-lite nature of Lyft's business left uncertainty about whether it should technically be subject to regulation under the 1940 Act, especially if only its GAAP balance sheet is considered. As discussed in Lyft's application, using only the company's GAAP balance sheet, Lyft's bad assets represented 78% of the company's assets. But under Lyft's own calculations, which account for intangible assets, bad assets represented just 26.5% of the company's assets. Lyft argued that the exemptive relief was needed to clarify its 1940 Act status to counterparties, and so that it would not have uncertainty regarding its status after the influx of cash from its IPO.

An application for a 3(b)(2) Order is a public filing that details the reasons the applicant believes it is primarily engaged in a business other than owning or trading in securities. The argument in a 3(b)(2) Order application is primarily driven by the factors outlined in *In re Tonopah Mining*,[19] the formative case distinguishing operating companies from investment companies for purposes of the 1940 Act. The five-factor *Tonopah* test looks to:

(i) a company's historical development;

(ii) its public representations of policy;

(iii) the activity of its officers and directors;

(iv) the nature of its present assets; and

(v) the sources of its present income.

Lyft argued that each of the five *Tonopah* factors demonstrates that it is an operating company and not an investment company. Notably, in discussing the nature of the company's assets, Lyft's application represented that it currently held no bad assets other than Capital Preservation Investments (**"CPI"**), which are short-term investment-grade and liquid fixed income and money market investments that earn competitive market returns and provide a low level of credit risk. CPI is not a concept unique to Lyft's application, but Lyft's circumstances were particularly clean in that all of its bad assets could be characterized as CPI. Even though CPI are bad assets under the objective test, the discretionary nature of 3(b)(2) Orders allows the SEC to make a determination about whether the company's CPI investments truly should be deemed to make it an investment company.

Overall, the SEC concluded that Lyft is not primarily engaged in an investment company business. Lyft's application for a 3(b)(2) Order contains certain representations about how Lyft will manage its assets going forward, including that no more than 10% of its total assets will be bad assets other than CPI and that Lyft will refrain from engaging in speculative investing practices. So long as it maintains compliance with those two representations, the SEC has declared that Lyft is not an investment company and will not be in the future.

Lessons From Lyft's Success

We believe that Lyft's success will allow others to follow suit. For a long time most of the significant

19. 26 S.E.C. 426 (1947).

developments with respect to investment company status questions have been delivered through no-action positions and staff commentary on offering documents. A few months before the SEC considered Lyft's request, however, Chair Clayton reemphasized the SEC's view that staff commentary and no-action positions are not binding on the Commission and create no legally enforceable rights. If the SEC wants to evaluate and opine on the applicability of the 1940 Act and the rules thereunder more directly, 3(b)(2) Orders are one clear path forward. Increased use of this type of exemptive relief would have substantial benefits in clarifying the scope of regulation and reducing ongoing compliance burden without the need for amending any parts of the 1940 Act or the rules and regulations thereunder.

From the perspective of businesses, 3(b)(2) Orders provide certainty and virtually maintenance-free compliance with the 1940 Act. Unlike alternative approaches to resolving 1940 Act status issues, a 3(b)(2) Order addresses the issue conclusively and would require far less ongoing 1940 Act-specific monitoring and compliance. Unlike the self-determination approach, the board of the company does not need to refresh its internal basis for deciding the company is not an investment company continually.

Lyft's 3(b)(2) Order was somewhat of an ideal case for quick action, but Lyft is not the only business that is well-situated to receive relief. The SEC should embrace the opportunity to remove unnecessary burdens on businesses seeking to access capital markets by making it an ongoing priority to evaluate applications for 3(b)(2) Orders in all appropriate circumstances.

Key Themes From Comments on SEC Proposals Regarding Securities Offering Reforms for Business Development Companies and Closed-End Investment Companies

Earlier this year, the SEC proposed rules that would modify the registration, communication, and offering processes for business development companies (**"BDCs"**) and registered closed-end investment companies (**"CEFs"**) to align more closely with the rules that apply to traditional operating companies. In our previous Alert, we outlined the five main reforms that would benefit BDCs and CEFs and suggested ways that the SEC could clarify certain aspects of the proposed rules. In this Alert, we summarize the key themes in industry comment letters submitted to the SEC with respect to the proposed rules. In total, the SEC received 20 comment letters regarding the offering reforms.

Comment Letters Expressed General Support for the Rules as Proposed, but Identified Two Critical Areas for Improvement

In 2018, Congress passed legislation that directly requires most elements of the proposed rules, and that legislation was the result of sustained advocacy efforts by the industry. Unsurprisingly, industry comment letters were supportive of the proposed rules in general, especially those portions that were derived from the prompting legislation. Notwithstanding the general support, the prevailing weight of industry opinions did suggest modifications to the proposals around two issues of note: (i) the criteria that would permit a CEF or BDC to qualify as a Well-Known Seasoned Issuer (**"WKSI"**); and (ii) the circumstances that could disqualify a CEF or BDC from qualifying as a WKSI.

The Misplaced Emphasis on Public Float

The Proposed Reliance on Using Public Float to Classify a WKSI Frustrates the Intent Behind the Offering Reforms by Disqualifying the Majority of CEFs and BDCs

As highlighted in our previous Alert, the proposal would amend the WKSI definition to include qualifying CEFs and BDCs and therefore allow those qualifying funds to take advantage of the offering flexibility (i.e., automatic effectiveness of registration statements) that comes with a WKSI status. In order to qualify for WKSI status, the SEC proposed that a BDC or CEF must have at least $700 million in public float. The SEC also proposed a $75 million public float requirements for a BDC or CEF to qualify as a "seasoned issuer," which allows filing

of short-form registration statements. The public float standard was proposed by the SEC because it believed this standard was an appropriate proxy for investor awareness. Specifically, the SEC noted that tailoring the definition to public float "is meant to capture issuers . . . whose disclosures and other communications are subject to market scrutiny by investors, the financial press, analysts, and others." The SEC concluded that it was appropriate to offer WKSI flexibility to entities that are widely followed and closely examined in the marketplace.

"The public float standard would effectively eliminate a majority of BDCs and CEFs from qualifying as a WKSI."

The public float standard would effectively eliminate a majority of BDCs and CEFs from qualifying as a WKSI. As one commenter noted, as of June 30, 2018, only 14% of BDCs and 12% of CEFs out of the universe of funds outlined in the proposal could meet the $700 million public float requirement. Furthermore, interval funds would rarely qualify as a WKSI since their shares are almost never listed on an exchange (the proposing release noted that "only one interval fund is currently exchange-traded"). Several commenters, including the Investment Company Institute (**the "ICI"**), highlighted the fundamental inconsistencies between that the strict public float requirement and Congressional intent. The legislation mandating the proposed rules was meant to alleviate some of the regulatory burdens that were impeding capital growth for CEFs and BDCs. In this respect, the ICI noted that Congress even discussed creating legislation that would require the SEC to adopt rules that would allow certain funds, including interval funds, to be treated as WKSIs. In sum, most commenters mostly argued that the insistence on using a public float requirement goes directly against the motivations behind the proposed offering reforms.

Tying WKSI Status to Public Float Ignores the Operational and Regulatory Differences Between Operating Companies and BDCs and CEFs

While market scrutiny may be necessary for operating companies, numerous commenters noted that BDCs and CEFs *already* have regulations in place that serve as an appropriate proxy for investor awareness and institutional due diligence. Unlike operating companies, BDCs (through election) and CEFs are subject to the strict oversight and governance requirements of the 1940 Act. While the valuation of operating companies can be complex and often times subjective in certain respects, the 1940 Act imposes general valuation guidelines for all BDCs and CEFs. This is an important distinction between BDCs/CEFs and operating companies, as one commenter indicated, "because, as all funds are subject to the same requirements and guidelines, it gives fund shareholders, and the market, comfort that the valuations are appropriate and comparable." Furthermore, as other commenters pointed out, BDC and CEF valuations and holdings are more transparent compared to standard operating companies. BDCs, CEFs and interval funds are required to disclose their net asset value periodically—sometimes daily—and provide routine public reports regarding their fund holdings. This type of transparency allows investors to monitor their investment on their own, without needing to rely exclusively on institutional scrutiny in the form of research and analysis provided by brokerage firms and underwriters.

Moreover, the governance and oversight required by the 1940 Act further reduces dependence on market reports or institutional scrutiny. Commenters conceded that BDCs and CEFs may not receive the same level of coverage from the financial media as operating companies, but pointed to the responsibilities of independent directors under the 1940 Act in mitigation of the coverage discrepancy. Independent directors are required for approval of fundamental agreements including contracts with the investment adviser and underwriters. The 1940 Act also imposes certain requirements on BDCs and CEFs such as adoption of compliance programs, restrictions on certain share classes, and restrictions on leverage. This combination of internal governance oversight and strict regulatory guardrails provides investors in BDCs and CEFs with a similar level of protection as investors in large operating companies.

The WKSI Criteria Should be Modified to Allow More Traded and Non-traded BDCs and CEFs to Benefit Fully From the Offering Reforms

The majority of commenters urged the SEC to expand the definition of a WKSI to include NAV. For example, one commenter suggested defining a WKSI to have "either a NAV or a public float of $700 million or more." The ICI suggested that the SEC should not use public float in any instance to classify BDCs or CEFs as WKSIs. That comment letter stressed that the rules and regulations that guide BDCs and CEFs already serve as an appropriate proxy for institutional scrutiny and investor protection. Instead of imposing any public float requirement, the ICI suggested that a BDC or CEF could qualify as a WKSI if it meets the other registrant and transaction requirements of Form S-3. This includes

being subject to the requirements of Exchange Act Sections 12 or 15(d) or the 1940 Act Section 30 for at least one year and the timely filing of all reports and subsequent materials required to be filed under the Exchange Act during the previous year. Regardless of the alternative proposed, the widespread industry belief was that public float should not be a strict requirement for WKSI status.

The Negative Impact of the Proposed "Ineligible Issuer" Definition

The proposal also includes certain provisions that would disqualify an otherwise eligible BDC or CEF from WKSI status. In particular, one of these provisions states that a BDC or CEF would be ineligible for WKSI status if, "within the past three years any person or entity that at the time was an investment adviser to the issuer, including any sub-adviser, was made the subject of any judicial or administrative decree or order arising out of a governmental action that determines that the investment adviser aided or abetted or caused the issuer to have violated the anti-fraud provisions of the federal securities laws."

This disqualification provision would appear to go beyond the scope of the standards applicable to traditional operating companies by factoring in whether external advisers caused a BDC or a CEF to violate the anti-fraud provisions of the federal securities laws. One commenter noted that the new definition could lead to unintended consequences for BDCs. For example, the SEC has viewed Section 206(4) of the Advisers Act as an anti-fraud provision, and a violation of the rules adopted pursuant to Section 206(4) could result in disqualification under the proposed rules. The commenter pointed out, that in reality, many of the rules adopted under Section 206(4) were designed to prevent anti-fraud violations (e.g., Rule 206(4)(7), which requires adoption of a written compliance program). As a result, a BDC could become an "ineligible issuer" and lose WKSI status because an adviser or sub-adviser violated a technical requirement that did not involve any actual fraud. The commenter proposed carving out exceptions for certain rules adopted under Section 206(4). While those rules are undoubtedly important, violations should not lead to an immediate loss of WKSI status for affiliated BDCs.

Additionally, a BDC or CEF would be disqualified so long as its investment adviser "at the time" it was found to have violated anti-fraud provisions of federal securities laws. This clause of the proposed ineligible issuer definition could lead to a scenario in which a BDC or CEF is deemed an ineligible issuer due to the actions of an adviser that is no longer managing the BDC or CEF (e.g., if the fund subsequently terminated its relationship with the adviser). The commenter asked the SEC to clarify this element of the definition so that there is a logical nexus between the violation and the time period in which the BDC or CEF seeks to take advantage of WKSI status. These suggestions exemplify the general concern among commenters that the proposed rules would obstruct BDCs and CEFs from realizing the full benefits of the offering reforms.

Comment Letters Expressed General Support for Additional Proposals

The SEC did not limit the scope of the rule proposal to the four corners of the prompting legislation. The proposed rules also included additional initiatives related to offering reform that were not mandated by Congress, and therefore were not a product of industry lobbying efforts. Still, industry commenters generally supported the additional proposals. Those proposals included:

1. Allowing interval funds to pay registration fees on an annual net basis (no later than 90 days after the fund's fiscal year) by amending Rules 23c-3 and 24f-2. These amendments would allow interval funds to use the same registration fee payment method as mutual funds and ETFs. Numerous commenters supported this proposal, and also asked the SEC to extend this privilege to other types of entities such as tender offer funds and exchange traded products (**"ETPs"**).
2. Adding a Management's Discussion of Fund Performance (**"MDFP"**) section in CEF periodic reports. The proposed section was derived from the Management Discussion and Analysis (**"MD&A"**) section found in public filings for operating companies. The ICI supported this proposal, noting that narrative disclosure through the lens of management provides investors with another perspective to aid their understanding of fund performance and the relevant markets.

M&A Transactions

Acquiror	Acquired or Target Company	Type of Transaction and Status
Affiliated Managers Group, Inc., an asset management company with approximately $778 billion in AUM	**Garda Capital Partners, LP (“Garda”)**, an investment manager with approximately $4 billion in AUM	Acquisition of equity interest under which the senior partners of Garda will continue to hold a majority of the equity of Garda and direct day-to-day operations (further terms not disclosed)
Assured Guaranty US Holdings, Inc., a subsidiary of Assured Guaranty Ltd. (“Assured Guaranty”), a financial guaranty insurance company	**BlueMountain Capital Management, LLC (“BlueMountain”)**, an asset management firm with approximately $19.3 billion in AUM	Acquisition for approximately $160 million, with at least $114.8 million payable in cash and the rest payable ether in cash, common shares, one-year promissory note or a combination of the foregoing, at Assured Guaranty’s election. Also, Assured Guaranty will contribute $60 million in working capital to BlueMountain at closing, another $30 million within a year of closing, and plans to allocate $500 million of its financial guaranty subsidiaries’ portfolios to BlueMountain funds, CLOs and separately managed accounts over a three-year period.
Blackstone Alternative Asset Management L.P., Blackstone’s hedge fund solutions group, with approximately $81 billion in AUM	**BC Partners LLP**, an international investment firm with over €22 billion in AUM	Acquisition of minority interest (terms not disclosed)
Blackstone Alternative Asset Management L.P.	**Marlin Equity Partners, LLC**, a private equity investment firm with approximately $6.7 billion of AUM	Acquisition of minority interest (terms not disclosed)
CenterSquare Investment Management, global investment manager with approximately $10 billion in AUM	**RGC Longview**, a real estate investment manager managing approximately $1.8 billion of private real estate debt and equity investments	Acquisition (terms not disclosed)
Charles Schwab Corporation, a financial services company with approximately $3.7 trillion in client assets	**United Services Automobile Association (“USSA”) Investment Management Company**, a financial services company	Acquisition for $1.8 billion in cash (further terms not disclosed)
Colony Capital, Inc., (“Colony”) an investment management firm with approximately $40 billion in AUM	**Digital Bridge Holdings LLC, (“Digital”)** an operator of companies with nearly $20 billion in assets under management	Acquisition for $325 million that is comprised of 2/3 cash and 1/3 units of limited partnership interest in Colony’s Operating Partnership, with the equity subject to a lock-up burning off ratably on the 1st, 2nd and 3rd anniversaries of the deal. Payment of approximately 10% of the consideration is deferred until after the expiration of certain seller indemnification obligations following completion of the Digital 2019 audited financial statements.

M&A Transactions *(continued)*

Acquiror	Acquired or Target Company	Type of Transaction and Status
Dyal, a division of the investment management firm, Neuberger Berman that has approximately $15.4 billion in AUM	**HGGC**, a private equity with approximately $4.3 billion in cumulative capital commitments	Acquisition of passive minority stake (terms not disclosed)
Federated Investors Inc. ("Federated"), an investment manager with approximately $494.9 billion in AUM	**PNC Capital Advisors LLC ("PCA")**, an indirect subsidiary of PNC Financial Services Group, Inc. ("PNC"), with approximately $54.6 billion in AUM	Acquisition under which approximately $9 billion in assets from three PNC government and treasury money market funds will be transitioned through mutual fund reorganizations. Approximately $2.7 billion in equity mutual fund assets and $700 million in fixed-income mutual fund assets will be reorganized from 15 PNC funds into ten existing and three new Federated funds. After the deal closes, PCA will manage approximately $21 billion of custom liquidity and fixed-income solutions and PNC's Institutional Advisory Business will continue to manage $26 billion in outsourced chief investment officer services. Federated Investors will pay PNC a total purchase price of $52 million.
First Busey Corporation, a financial holding company with approximately $9.54 billion in assets	**Investors' Security Trust Company**, a wealth management company	Acquisition (terms not disclosed)
FWM Holdings, parent company of Forbes Family Trust, a RIA with more than $5 billion in AUM	**Optima Fund Management**, a private investment firm with approximately $2 billion in AUM	Acquisition (terms not disclosed)
Goldman Sachs Group, Inc., an investment banking, investment management and securities firm with approximately $500 billion assets under supervision	**United Capital financial Partners, Inc.**, a RIA with approximately $25 billion of AUM	Acquisition for $750 million in cash (further terms not disclosed)
iM Global Partner, an investment and development platform with approximately $8.6 billion in AUM	**Scharf Investments, LLC**, an equity value firm that has approximately $3.4 billion in AUM	Acquisition of 40% interest (terms not disclosed)
Investcorp, an alternative investments manager with approximately $22.5 billion in AUM	**Mercuary Capital Advisors Group, L.P.**, an investment advisory and institutional capital raising firm that has raised more than $170 billion	Acquisition (terms not disclosed)
Kudu Investment Management, LLC, an investment advisor with approximately $19 billion in AUM	**EJF Capital LLC**, an asset management firm with approximately $7.6 billion in AUM and approximately $3 billion in structured products	Acquisition of minority interest (terms not disclosed)

M&A Transactions *(continued)*

Acquiror	Acquired or Target Company	Type of Transaction and Status
Kudu Investment Management, LLC, an investment advisor with approximately $19 billion in AUM	**First Long Island Investors**, a wealth management company that oversees approximately $1.6 billion in assets	Acquisition of minority interest
LPL Financial Holdings Inc. (“LPL”), a broker-dealer in the retail financial advice market	**Allen & Company (“Allen”)**, a broker-dealer and RIA with approximately $3 billion in client assets	Acquisition under which the purchase agreement provides for an initial purchase price and a potential contingent payment based on the portion of Allen’s client assets that are onboarded to LPL’s platform above a specified threshold; estimated transaction multiple of ~7x post-synergy EBITDA (further terms not disclosed)
Macquarie Investment Management (“Macquarie”), a global asset manager with more than $374.8 billion in AUM and Cetera Financial Group (“Cetera”), a financial advisory network	**Foresters Financial**, a financial services organization	Acquisition by Macquarie of assets related to the U.S. asset management business (terms not disclosed) Acquisition by Cetera of the U.S. broker dealer and advisory business
Mariner Wealth Advisors, a wealth advisory firm with approximately $22 billion in AUM.	**Singer Xenos Schechter Sosler Wealth Management**, a wealth management firm with more than $1.3 billion in AUM	Acquisition (terms not disclosed)
Portman Ridge Finance Corporation (“PTMN”), a publicly traded BDC managed by Sierra Crest Investment Management, an affiliate of BC Partners Advisors L.P. and LibreMax Capital LLC	OHA Investment Corporation (“OHAI”), a publicly traded BDC managed by Oak Hill Advisors, L.P.	In connection with the transaction, OHAI stockholders will receive a combination of (i) a minimum of $8 million in cash from PTMN (as may be adjusted as described below); (ii) PTMN shares valued at 100% of PTMN’s net asset value per share at the time of closing of the transaction in an aggregate number equal to OHAI’s net asset value at closing minus the $8 million PTMN cash merger consideration (as may be adjusted as described below); and (iii) an additional cash payment from Sierra Crest, the external adviser to PTMN, of $3 million in the aggregate. If the aggregate number of shares of PTMN stock to be issued in connection with the merger would exceed 19.9% of the issued and outstanding shares of PTMN common stock immediately prior to the transaction closing, then the cash consideration payable by PTMN will be increased to the minimum extent necessary such that the aggregate number of shares of PTMN common stock to be issued in connection with the merger does not exceed such threshold.
Principal Financial Group, an investment management and insurance company	**Wells Fargo & Company Institutional Retirement & Trust**, a financial services company with approximately $827 billion in assets	Acquisition with a purchase price of $1.2 billion and an earnout of up to $150 million tied to better than expected revenue retention, payable two years post-closing.

M&A Transactions *(continued)*

Acquiror	Acquired or Target Company	Type of Transaction and Status
RegentAtlantic Capital, LLC, a wealth based management firm with nearly $3.8 billion in AUM	**Hillview Capital Advisors, LLC**, a wealth management firm with approximately $890 million in AUM	Acquisition (terms not disclosed)
Resolute Investment Managers, Inc. ("Resolute"), an asset management platform with approximately $70 billion in AUM	**Green Harvest Asset Management ("Green Harvest")**, an asset management with approximately $40.5 million in AUM and $116 million in assets under advisement	Acquisition of minority interest under which Resolute will provide additional distribution resources and operational support to Green Harvest, which will continue to operate independently
Reverence Capital Partners, a private investment firm	**Advisor Group**, an independent wealth management platform with approximately $268 billion in client assets	Acquisition of 75% (terms not disclosed)
Silvercrest Asset Management Group Inc., a RIA with approximately $19 billion in AUM	**Cortina Asset Management, LLC**, an asset management firm with approximately $1.7 billion in AUM	Acquisition (terms not disclosed)
Wafra Inc., an investment firm with more than $23 billion in AUM and **Landmark Partners, LLC**, a private equity and real estate company with approximately $27 billion in committed capital	**Siris Capital Group, LLC**, a private equity firm	Acquisition of passive, non-voting minority positions (terms not disclosed)

2nd Quarter and 3rd Quarter 2019 Closed-End Fund Public Offerings

Angel Oak Financial Strategies Income Term Trust

Structure:	Non-diversified, limited term, closed-end management company
Investment Objectives/Policies:	The Fund seeks current income with a secondary objective of total return. The Fund invests primarily in debt issued by financial institutions, including subordinated debt, unrated debt, senior debt and high yield securities, focusing on those in the U.S. community bank sector. The Fund may also invest in common equity, preferred equity, convertible securities, warrants, and trust-preferred securities of those institutions. The Fund will, under normal circumstances, invest at least a majority of its net assets plus the amount of any borrowings for investment purposes in debt securities issued by U.S. community banks. To a lesser extent, but up to 50% of the Fund's net assets plus the amount of any borrowings for investment purposes, under normal circumstances, the Fund may also invest in similar securities of other U.S. and foreign financial services companies that are not U.S. community banks and may be of any size. The Fund will, under normal circumstances, invest at least 80% of the value of its net assets plus the amount of any borrowings for investment purposes in the securities of financial institutions. The Fund will, under normal circumstances, invest no more than 30% of its net assets plus the amount of any borrowings for investment purposes in securities issued by non-U.S. issuers.
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Distributor:	U.S. Bancorp Fund Services, LLC, d/b/a U.S. Bank Global Fund Services

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